



Kibe v Policy Holders Compensation Fund (Civil Miscellaneous Application E039 of 2024) [2024] KEHC 9400 (KLR) (8 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9400 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL MISCELLANEOUS APPLICATION E039 OF 2024**

DKN MAGARE, J

JULY 8, 2024

**A. THE APPLICATION DATED 20/5/2023 LACKS
MERIT AND IS ACCORDINGLY DISMISSED.**

**B. THE DR TO TRANSMIT THIS ORDER FOR FILING IN OTHAYA PMCC
E039 OF 2023 - XPLICO INSURANCE COMPANY LIMITED & OTHERS.**

C. THERE WILL BE NO ORDER AS TO COSTS.

BETWEEN

MICHAEL MUCHEMI KIBE APPLICANT

AND

POLICY HOLDERS COMPENSATION FUND RESPONDENT

RULING

1. This matter relates to an application dated 20/5/2024. It seeks the following orders:
 - a. That this Honourable Court be pleased to grant leave to the Applicant to proceed and continue with the suit Othaya MCC No. E039 of 2023 Michael Muchemi Kibe vs Insurance Company Limited & Insurance Regulatory Authority.
 - b. That the costs of this application be provided for.
2. The application was brought on the following grounds: -
 - a. That the applicant lodged his pleadings with the Othaya Magistrate Court's registry for assessment of the filing fees on 7th December, 2023.
 - b. That the Applicant paid the requisite filing fees on 11th December, 2023 and the suit Othaya MCCC No. E039 of 2023; Muchemi Kibe Vs Xplico Insurance Company Limited & Insurance Regulatory Authority was registered.



- c. That the Applicant has lately learnt that on 8th December, 2023 the 2nd Defendant in the Othaya Magistrate Court's suit placed the 1st Defendant XPLICO Insurance Company Limited under statutory management and the Policyholders Compensation Fund (PCF), the Respondent herein, was appointed as its Statutory Manager under Section 76C (2) (i) of the [Insurance Act](#).
 - d. That as such and pursuant to the provisions of the insolvent Act, the Applicant is unable to proceed with any legal proceedings or pursue his claim against the 1st Respondent while it is under statutory management unless leave is granted by this court.
 - e. That this court is clothed with jurisdiction to grant such leave which if so granted will not prejudice the Respondent in this suit.
 - f. That the exercise of its discretion in this suit, the court will be furthering its Constitutional mandate to foresee justice being administered without undue regard to procedural technicalities and that justice is not delayed.
3. The application was filed while Xplico Insurance Company Limited was under Statutory Management. They seek to salvage the suit. However, no special reasons have been given for salvation.
 4. The powers of the IRA are provided under section 67C(2)(i) as follows: -
 - (2) The Commissioner may, with the approval of the Board–
 - (i) appoint any person (in this Act referred to as “a manager”) to assume the management, control and conduct of the affairs and business of an insurer to exercise all the powers of the insurer to the exclusion of its board of directors, including the use of its corporate seal;
 5. The powers given to the statutory manager are: -
 - (5) The responsibilities of a manager shall include–
 - (a) tracing, preserving and securing all the assets and property of the insurer;
 - (b) recovering all debts and other sums of money due to and owing to the insurer;
 - (c) evaluating the solvency and liquidity of the insurer;
 - (d) assessing the insurer's compliance with the provisions of this Act and regulations made or directions issued thereunder;
 - (e) determining the adequacy of the capital and reserves and the management of the insurer and recommending to the Commissioner any restructuring or reorganization which he considers necessary and which, subject to the provisions of any other written law, may be implemented by him on behalf of the insurer; and
 - (f) obtaining from any former principal officer, director, secretary, officer or employee of the insurer any documents, records, accounts, statements, correspondence or information relating to its business;
 - (6) The Manager shall, within a period of twelve months from the date of his appointment, prepare and submit to the Commissioner a report on the financial position and the management of the insurer with recommendations as to whether–
 - (i) the insurer is capable of being revived; or



(ii) the insurer should be liquidated.

6. The main reason the insurance was placed under statutory management was inability to pay. The respondent has a duty to manage the claims in a way that they can answer whether the insurance is viable. In this connection, one party cannot make a superior claim and steal a match from other creditors.
7. The proper cause is to make a claim to the respondent for compensation. The claim will be considered alongside others.
8. There are no special circumstances for allowing the Notice of Motion.
9. Further, the suit as filed is already a nullity. In *Macfoy vs. United Africa Co. Ltd* [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”
10. The suit against Xplico Insurance Company Limited & Others, being Othaya, MCC E039 of 2023 is thus a nullity. There is nothing that can be built on it. Consequently, it cannot be salvaged. The Application is dismissed in limine for lack of merit.
11. Further the suit against Xplico Insurance Company Limited cannot be salvaged without leave being obtained prior to filing. Even if the suit had not been filed, the Applicant has not laid basis for special treatment or prioritization of the debtors, most of whom rank pari passu.
12. The application dated 20/5/2023 lacks merit and is accordingly dismissed. The Deputy Registrar to transmit this order for filing in Othaya PMCC E039 of 2023 - Xplico Insurance Company Limited & Others.
13. The Application was not opposed hence there shall be no order as to costs.

Determination

- a. The application dated 20/5/2023 lacks merit and is accordingly dismissed.
- b. The DR to transmit this order for filing in Othaya PMCC E039 of 2023 - Xplico Insurance Company Limited & Others.
- c. There will be no order as to costs.

DATED, SIGNED, AND DELIVERED AT NYERI ON THIS 8TH DAY OF JULY, 2024.

RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Baragu for the Applicant

Court Assistant – Jedidah



M. D. KIZITO, J.

