



Musyoka v Xplico Insurance Company Limited (Under Statutory Management) & another; Kavutha & 9 others (Interested Parties) (Civil Case 1 of 2024) [2024] KEHC 11028 (KLR) (18 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11028 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL CASE 1 OF 2024
GMA DULU, J
SEPTEMBER 18, 2024**

BETWEEN

FELIX MALAWA MUSYOKA PLAINTIFF

AND

XPLICO INSURANCE COMPANY LIMITED (UNDER STATUTORY MANAGEMENT) 1ST DEFENDANT

INSURANCE REGULATORY AUTHORITY 2ND DEFENDANT

AND

FLORENCE KAVUTHA INTERESTED PARTY

JACKLINE KAMOTE INTERESTED PARTY

JACINTA KOKI PAUL INTERESTED PARTY

PETER KANUI INTERESTED PARTY

KAINDI JOHN INTERESTED PARTY

BWP (MINOR SUING THROUGH MOTHER AND NEXT FRIEND JMN) INTERESTED PARTY

BM (MINOR SUING THROUGH NEXT FRIEND AM) INTERESTED PARTY

LOICE KOMU INTERESTED PARTY

NN (MINOR SUING THROUGH NEXT FRIEND KJ) INTERESTED PARTY

PAUL MULI DAVID INTERESTED PARTY



RULING

1. This ruling relates to a Preliminary Objection filed by the 2nd defendant Insurance Regulatory Authority. This matter was commenced by way of plaint dated 19th February 2024 through counsel Ameli Inyangu & Partners Advocates in which, the plaintiff seeks for a declaration that the 1st defendant (XPLICO Insurance Company Limited) breached the insurance policy cover in respect of several Magistrates civil cases filed at Voi Magistrate’s court, as well as order compelling both defendants, to indemnify him or settle all the decretal sums.
2. In the said suit, filed on behalf of Felix Malawa Musyoka as plaintiff, against two defendants XPLICO Insurance Company Limited (1st defendant), and Insurance Regulatory Authority the plaintiff also lists ten (10) interested parties.
3. Though the 1st defendant XPLICO Insurance Company Ltd (said to be under statutory management) did not file a response to the plaint, the 2nd defendant Insurance Regulatory Authority, filed a Notice of Preliminary Objection, which is the subject of this present ruling.
4. The said Notice of Preliminary Objection filed by the 2nd defendant through counsel Lydia Ndirangu Advocate, is in the following terms:-
 1. The suit offends Section 7 of the Magistrate’s Court Act as the value of the subject dispute is Kshs. 9,465,000/= which does not exceed Kenya Shillings Twenty Million to warrant pecuniary jurisdiction of the High Court.
 2. The suit offends Section 67(c) 11 of the *Insurance Act* which protects policy holders such as the plaintiff herein from liability to pay claims owed by the insurer (1st defendant). The interested parties are statutorily barred from executing against the policy holder as the 1st defendant was placed under statutory management on 8th December 2023 and a moratorium declared by the Statutory Manager thus:

“For the purpose of this section, where a moratorium is declared under sub section (10), a policy holder shall not be liable to pay any claim not payable by the insurer due to the moratorium.”
 3. The suit is statute barred by dint of Section 168 of the *Insurance Act*, which precludes institution of the suit against the 2nd defendant without leave of the court.
 4. The suit against the 2nd defendant for breach of statutory duty is pre-mature and offends Section 204A of the *Insurance Act* as the plaintiff did not trigger the administrative intervention and dispute resolution powers of the 2nd defendant by lodging a complaint against the 1st defendant.
 5. The suit offends the provisions of Section 9(2) of the Fair Administrative Actions Act which requires that available statutory remedies must be exhausted prior to institution of a suit for review of an administrative action or decision of the court. The court lacks the jurisdiction to hear the case against the 2nd defendant in view of the doctrine of exhaustion of dispute resolution mechanisms.
 6. The suit is res judicata as the issues raised in the instant suit were by the plaintiff’s own admission, already adjudicated upon in Voi PMCC No. 124 of 2019, Voi CMCC No. 324 of



2018, Voi CMCC No. 284 of 2018, Voi CMCC No. 289 of 2018, Voi CMCC No. 291 of 2018, Voi CMCC No. 280 of 2018, Voi CMCC No. 278 of 2018, Voi CMCC No. 279 of 2018, Voi CMCC No. 274 of 2018, Voi CMCC No. 276 of 2018, Voi CMCC No. 281 of 2018 and judgments entered on diverse dates.

5. This Notice of Preliminary Objection was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Lydia W. Ndirangu Advocate for the 2nd respondent (the objector) who filed the preliminary objection, as well as the submissions filed by Ameli Inyangu & Partners Advocates for the plaintiff. Both sides relied upon decided court cases.
6. I have to start by reminding myself that a proper Preliminary Objection should be on a pure point of law and satisfy the requirements explained in the case of Mukisa Biscuit Manufacturing Company Ltd v West End Distributors Ltd [1969] EA 696, relied upon by counsel on both sides a decision of the defunct East African Court of Appeal, wherein it was stated as follows:-

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submissions that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
7. Coming now to the objections raised herein, the first is a contention that this present suit should have been filed in the Magistrate’s court, because of its low monetary value, and thus this court has no jurisdiction to entertain the suit.
8. In my view, that objection cannot stand the test of a valid legal objection to the jurisdiction of this court as its meaning is that both this court and the Magistrate’s court have jurisdictions to handle or hear this case, but that the first preference should be the Magistrate’s court. In those circumstances, I find and hold that this court has requisite jurisdiction, to handle and adjudicate the case, though this court may transfer the suit to the Magistrate’s court for hearing, if it so wishes.
9. I thus dismiss the objection of lack of jurisdictions of this court. The objector (2nd defendant), may however hereafter, be at liberty to ask that costs be on the Magistrate’s court scale, if costs are ultimately awarded against them.
10. The second preliminary objection is on the validity of the suit filed herein against the 1st defendant herein, and the law limiting enforceability of a decree directly against a defendant, in an insurance matter.
11. In my view, this objection also does not hold water. First of all such objection should have been raised by the 1st defendant or their statutory manager, which has not been done herein. Secondly, this court is not aware of any law in this country and none has been cited by counsel, wherein it is specifically provided that enforcement of judgments in insured claims be effected directly against the insurer or underwriter.
12. In my view, the day the statute law allows court decrees in insured claims to be enforced directly against the insurance company or underwriter, the kind of enforcement suits like the present suit, will cease to be filed or if filed will be summarily dismissed. Maybe, the 2nd defendant herein as the regulator of the insurance industry in Kenya, should propose such laws to be enacted, so that enforcement of court decrees in insured claims should be effected directly on the insurer or underwriter.



13. The third preliminary objection is that the suit is statute barred against the 2nd respondent in terms of Section 168 of the *Insurance Act*, as no prior leave was sought and obtained from the court before filing suit herein against the 2nd defendant.
14. This objection hangs on technicalities, not the substance of the suit. Such technicalities are frowned upon by the provisions of Article 159(2)(d) of *the Constitution*. In my view, an award of costs to the 2nd defendant can address this issue, after the suit is heard. This issue can however still be raised for determination of the court by the 2nd defendant, during its defence, as it is a mixture of legal and factual considerations. In any event my reading of Section 168 of the *Insurance Act*, indicates that the requirement for leave of court relates to the Cabinet Secretary or Tribunal, and not the statutory body herein, which is Insurance Regulatory Authority (2nd defendant) the regulator of the insurance industry.
15. The 4th objection is that the suit against 2nd defendant is premature and offends Section 204A of the *Insurance Act*, as the plaintiff did not trigger administrative action first. Again, in my view, such default, even if true cannot be a basis to defeat a suit filed in court against a party, especially the statutory regulatory entity, as no prejudice will be suffered by the 2nd defendant, nor has that prejudice been demonstrated.
16. I further note that Section 204A of the *Insurance Act*, cited by the counsel for the 2nd defendant, provides as follows:-
 - a. Any insurance customer may lodge a written complaint with the commissioner against a regulated entity in relation to the provision of its services.
 - b. Subject to sub section (3) where the commissioner determines a dispute, such dispute shall be binding on the parties to the dispute.
 - c. A party that is dissatisfied with the determination of the dispute by the commissioner may within thirty days appeal the decision to the Tribunal.
17. In the present case, there is no dispute arising from provision of services by the insurer, but failure to honour a court award by the insurer. Secondly, the objection raised does not apply herein, as from the wording of the above section, it is not mandatory to lodge a dispute with the Commissioner, before escalating the matter, further. This is because, the permissive word “may” was used. The objection is thus dismissed.
18. As for the objection brought under the provisions of Section 9(2) of the Fair Administrative Actions Act, again this matter is already in this court, and each party will be given a fair and adequate chance to be heard and present their side of the case. It cannot thus be said that any party will be denied fair administrative action by being brought to court herein. The objection is also for dismissal.
19. As for the objection grounded on the doctrine of res-judicata in my view, the res-judicata legal principle only applies in matters relating to the same parties, in the respective suits. This position is clear from the provisions of Section 7 of the *Civil Procedure Act* (Cap.21). In the present case, neither the 1st defendant herein, nor the 2nd defendant were parties in the suits already determined in the Magistrate’s. Thus, between the parties herein, the legal principle of res-judicata, does not apply.
20. For the above reasons, I find no sustainable preliminary objection raised herein. I dismiss all the preliminary objection raised herein. Costs of the objection will be in the cause.

DATED, SIGNED AND DELIVERED THIS 18TH DAY OF SEPTEMBER 2024 IN OPEN COURT AT VOI VIRTUALLY.



GEORGE DULU

JUDGE

In the presence of:-

Alfred/Trizah – Court Assistants

Mr. Furaha holding brief for Mr. Adhoch for plaintiff

Ms. Lagat holding brief for Ms. Ndirangu for 2nd defendant

