



**Atabachi v Statutory Manager for Xplico Insurance Ltd; Juma (Sued as the
adminstrix of the Estate of Stephen Iyadi Juma – Deceased) (Interested Party)
(Civil Case E002 of 2024) [2024] KEHC 12192 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12192 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL CASE E002 OF 2024
S MBUNGI, J
OCTOBER 11, 2024**

BETWEEN

OSCAR MAKATIANI ATABACHI PLAINTIFF

AND

STATUTORY MANAGER FOR XPLICCO INSURANCE LTD DEFENDANT

AND

**DINA AHODA JUMA (SUED AS THE ADMINSTRIX OF THE ESTATE OF
STEPHEN IYADI JUMA – DECEASED) INTERESTED PARTY**

RULING

1. The plaintiff filed a suit via a plaint dated 22nd February 2024. The suit was accompanied by a notice of motion dated 22nd February 2024 brought under Certificate of Urgency, seeking the following orders: -
 - a. That this application be dispensed with the first instance.
 - b. That there be a stay in the execution of the judgment in Butali PMCC No. 140 of 2020 – Dina Ahodi Juma (Suing as the Administratrix of the estate of Stephen Iyadi Juma – Deceased vs Oscar Makatiani Atabachi) against the plaintiff pending the hearing of this application in the first instance and thereafter pending the hearing and determination of this suit on the following grounds: -
 - i. The plaintiff and the defendant have an insurance policy in respect of third party risks that is meant to satisfy the judgment in issue.
 - ii. The defendant acknowledged the validity and existence of the policy in issue by instructing advocate to defend the said suit arising from third party risks under the policy in issue.



- iii. The plaintiff is entitled to legal protection against policy breached by the defendant, having been validly insured.
 - iv. That the plaintiff runs the risk of execution of by attachment and being committed to civil jail over a judgment that is subject to the policy.
 - c. That the costs of this application be borne by the defendant.
2. The application was supported by an affidavit sworn on the 22nd February by the plaintiff.

Plaintiff's Case.

3. The plaintiff states that the interested party is the decree holder in Butali PMCC No. 140 of 2020 – Dina Ahodi Juma (Suing as the Administratrix of the estate of Stephen Iyadi Juma - Deceased) v Oscar Makatiani Atabachi and had obtained warrants of arrest against him.
4. The plaintiff mentions that the judgment debt which is subject to proclamation arose out of a road accident involving the plaintiff's vehicle registration No. KBP 307U Toyota NZE on the 1st June 2019.
5. The plaintiff avers that at the time of the accident, he had taken out a third party risks insurance cover as was compulsory for any motor vehicle to be used on the road in Kenya as provided under the *Insurance (Motor Vehicles Third Party Risks) Act*, cap. 405 of the Laws of Kenya with the defendant under Certificate Insurance No. C. 19017679.
6. The plaintiff avers that he entered into a contract of insurance with the defendant for the motor vehicle registration no. KBP 307U Toyota NZE under policy no. 070/GLTTR/ELD/19/04291, which commenced on the 30th June 2018 and was to remain validly in force until 29th June 2019.
7. The plaintiff further states that the insured motor vehicle was involved in an accident on the 1st June 2019 while being used for private purposes by the plaintiff, and the deceased herein sustained fatal injuries as a consequence of the said accident.
8. The plaintiff avers that pursuant to his duties under the policy, the plaintiff duly notified the insurer of the suit motor vehicle of the accident, paid the required policy excess and abided by the policy conditions.
9. The plaintiff states that he was impleaded by the administrator of the estate of the deceased who passed on as a result of the accident, and upon receipt of the aforesaid pleadings and summons, he submitted the same to the defendant.
10. The plaintiff avers that the defendant through the law firm of Mose, Mose & Millimo Advocates undertook the defence of the said actions and the court entered judgment against the plaintiff on liability at 100% and in favor of the interested party at a sum of Kshs. 2,710,000/-.
11. The defendant's insurance commenced satisfaction of the judgment and paid Kshs. 100,000/- to the interested party's advocate in partial settlement of the decretal sum.
12. The plaintiff states that the defendant insurance has failed to satisfy the decree as awarded in the said Butali PMCC No. 140 of 2020 in full, and consequently the interested party herein commenced execution proceedings against the plaintiff.
13. Furthermore, the plaintiff was forced to pay Kshs. 300,000 out of his pocket to the interested party's advocate in further partial settlement of the decretal sum following a warrant of arrest that was issued



against him and the interested party has continued to pursue the plaintiff for the balance of the decretal sum plus accrued interest.

14. It is the plaintiff's case that the defendant is legally bound to pay the decretal sum in full and satisfy the claims arising from the accident, and also be compelled to refund the plaintiff the sum of Kshs. 300,000 paid to the interested party on account of partially settling the decretal sum, plus costs of the suit and interest in accordance with the applicable law.

Interested Party's Case.

15. The interested party filed a preliminary objection to the entire suit vide an application dated 4th March 2024 on the following grounds: -
 - i. That the suit herein is incompetent as no leave has been sought and/or granted to commence proceedings against the defendant as required by law.
 - ii. The suit is premature as there is already in existence a moratorium barring payments by the said insurer to allow policy holders and all other creditors.
 - iii. That the interested party is not privy to the existence of an insurance contract between the plaintiff and defendant and cannot derive any benefits or obligations from the same.
 - iv. The suit is oppressive and seeks to deny or frustrate the interested party from enjoying the fruits of her judgment in Butali PMCC 140 of 2020.
 - v. The suit is frivolous, vexatious and an abuse to the court process.
16. The parties agreed to dispose off the preliminary objection by way of written submissions, which they did.

Claimant's Submissions

17. On whether or not the suit can be maintained against the defendant without leave of the court, the plaintiff submitted that section 67C of the Insurance Company Act provides for suits against an Insurance Company which is under insolvency/receivership and that the defendant is neither under receivership or insolvency, but only under statutory management.
18. On whether or not the grounds of the preliminary objection constitute pure points of law, the plaintiff submitted that the notice of preliminary objection ought to have been raised as grounds of opposition and in the statement for defence for consideration by the court.
19. The plaintiff submitted that the preliminary objection should be dismissed with costs to the plaintiff.

Interested Party's Submissions.

20. The interested party submitted that the Explico insurance company was placed under Statutory management on 08.12.2023 by the Insurance Regulatory Authority pursuant to section 67C(2)(i) of the *Insurance Act* and consequently the Policyholders Compensation Fund(PCF) were appointed as statutory managers.
21. The interested party further submitted that the PCF declared a moratorium on payment of all claims and proceedings against the defendant.
22. The interested party submitted that the PCF issued a notice where all policyholders and claimants of Explico Insurance Company Ltd were invited to submit their claims for consideration within 2 years



pursuant to section 179 of the *insurance act* and the policyholders Compensation Regulation 2010 in which compensation is capped at Kshs. 250,000/-.

23. The interested party further submitted that a contract cannot bind a party that is not privy to it, and that the insurance contract in contention herein is an alleged insurance contract between the plaintiff and Explico Insurance. (*Kamakya v Resolution Insurance Co. Ltd* [2021] eKLR).
24. After perusal of the preliminary objection, the application and submissions by the plaintiff and the interested party, the issue of determination is: -
 - i. Whether the application dated 22nd February 2024 and the suit raised by the interested party are tenable in view of the preliminary objection raised by the interested party that no leave was sought from or granted by the court to commence the proceedings against the defendant.
 - ii. What is the effect of the moratorium on payment of all claims and proceedings against Explico Insurance Co. Ltd following its placement under statutory management on 08.12.2023 by the Insurance Regulatory Authority pursuant to section 67C(2)(i) of the *Insurance Act*?
 - iii. Can an insurance contract between the plaintiff/applicant and the defendant bind the interested party?

Analysis

25. The meaning of what is a Preliminary Objection was defined by The Supreme Court in *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others* when it cited the leading decision on Preliminary Objections, *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd*. [1969] EA 696, where the Court held as follows:

“...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 submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”

26. The Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others* [2015] eKLR made the following observation as relates to Preliminary Objections:

“... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits...”

Determination

27. On issue 1, I have read section 67(c) of the *Insurance Act*. This section provides for suits which are brought against insurance companies which are under receivership/insolvency. The defendant herein is under statutory management. I have also read section 523 of the *Insurance Act*, which provides insurance companies under administration. The defendant is not an administration for no



administrator has been appointed. Therefore, the plaintiff needed no leave of the court to file the suit against the defendant.

28. On Issue 2, a moratorium declared under section 67(c) 10 of the *Insurance Act* is only meant to protect the insurer against its policy holders and creditors against proceedings from 3rd parties. In the case of Blue shield Insurance CO. Ltd[2017]eKLR, it was held that: -

“...A moratorium declared under section 67(c) 10 of the *insurance Act* is meant to protect the insurer in this case against its policy holder and its creditors against proceedings for 3rd parties...”.

29. In the said matter Justice Olel, quoted with approval the sentiments of Justice Odunga as follows: -

“...It is common ground that the applicant/respondent in this appeal is not a policy holder of Xplico Insurance, and except to the extent that he may become a judgment-creditor under Section 10(2) of the Insurance (Motor Vehicle Party Risks) Act cap 405 following a declaratory suit he is not a creditor of Xplico. This suit is against a tort-feasor in negligence. He has no direct connections as a policy holder or creditor of Xplico...”

30. A moratorium does not protect policy holders from a claim from a 3rd party like the interested party herein.

31. On Issue 3, the insurance contract was between the plaintiff and the defendant. The interested party was not a party to the insurance contract. So the interested party was not privy to the terms of the contract and cannot be bound by the terms of the contract. In the case of Kamakya v Resolution Insurance Co. Ltd[2021] eklr it was held that : - "...the issues between an insurance company and its policy holder/creditor should not affect the policy holder tort-feasor as there is no privity of contract between them. What happens between this appellant and Xplico insurance should not affect the rights of the applicant/respondent herein to be compensated for the fatal injuries occasioned to the deceased..."

32. The above analysis makes me find that the interested party has successfully sustained the primary objection in that the orders sought in the application dated 22.02.2024 cannot bind her for she was not privy to the insurance contract between the plaintiff and the defendant.

33. It is a point of law contrary to the assertion of the plaintiff's counsel that the points of the preliminary objection as pleaded by the interested party should have been premised as grounds of opposition in the application.

34. The upshot above is that I find the application dated 22.02.2024 unsustainable. The same is struck off.

35. Costs to the interested party.

36. The plaintiff is at liberty to proceed with his case against the defendant.

37. Right of appeal 30 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 11TH DAY OF OCTOBER, 2024.

S.N MBUNGI

JUDGE

Ruling delivered in the absence of the advocates though they had been notified by the court assistant of the date and time of delivery.



Court Assistant – Elizabeth Angong’a

