



REPUBLIC OF KENYA



Inyangala v Njuguna (Suing as the administrator of the Estate of Moses Njuguna Ngugi - Deceased) (Civil Appeal E015 of 2024) [2024] KEHC 12188 (KLR) (11 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12188 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E015 OF 2024
S MBUNGI, J
OCTOBER 11, 2024**

BETWEEN

GODFREY OMENDA INYANGALA APPELLANT

AND

JOHN NGUGI NJUGUNA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF MOSES NJUGUNA NGUGI - DECEASED) RESPONDENT

RULING

1. The appellant filed an application under Certificate of Urgency and notice of motion dated 19th February 2024, seeking the following orders: -
 - a. The application be certified as urgent, and the same be heard ex parte in the first instance.
 - b. Pending the hearing of this application interpartes there be stay of execution of the decree in Kakamega CMCC NO. 437 OF 2015.
 - c. There be stay of execution of the decree in Kakamega CMCC NO. 437 OF 2015 pending the hearing and determination of this appeal on the following grounds: -
 - i. The appellant was the defendant in Kakamega CMCC NO. 437 of 2015, a claim arising out of a road traffic accident involving motor vehicle registration Mark KBB 457M Toyota Saloon which was at the material time insured by Xplico Insurance Co. Ltd.
 - ii. That after the determination of Kakamega CMCC NO. 437 of 2015, the appellant filed a declaratory suit against his insurer vide Kakamega CMCC NO. 235 of 2023 seeking orders compelling the said insurer to pay the decretal sum vide Kakamega CMCC NO. 437 of 2015 which declaratory suit is still pending hearing and determination.



- iii. That the above said declaratory suit is basically a mode of execution of the decree in Kakamega CMCC NO. 437 of 2015 and while the same is still pending, the respondent commenced execution proceedings against the appellant resulting in two separate modes of execution going on simultaneously in respect of the same decree.
 - iv. That when the appellant applied for stay of execution against him of the decree in Kakamega CMCC NO. 437 of 2015 pending the declaratory suit his application was dismissed and sub-ordinate court in effect okayed two separate execution proceedings to go on simultaneously which is irregular and improper in law and which provoked the present appeal and this application.
 - v. The appellant is a man of straw who insured his motor vehicle in order that his insurer settles claims such as the decree in Kakamega CMCC NO. 437 of 2015 and it would be extremely unfair, punitive and oppressive for execution to be allowed to proceed against him during the pendency of the declaratory suit being Kakamega CMCC NO. 235 of 2023.
- d. Costs of this application be in the cause.
2. The application was supported by an affidavit sworn on the 19th February by the appellant.
 3. The respondent herein, through his learned counsel, filed a notice of preliminary objection dated 11th March 2024 on the following grounds: -
 - i. That this appeal emanates from a decision of the lower court in Kakamega CMCC NO. 437 of 2015 denying the applicant stay of execution on account of Kakamega CMCC NO. 235 of 2023.
 - ii. That the substratum of this application, appeal and the Kakamega CMCC NO. 235 of 2023 is a declaratory suit against Xplico Insurance Co. Ltd.
 - iii. That Xplico Insurance Co. Ltd was on 08.12.2023 placed under statutory management altering its legal personality and therefore no action can be maintained against it.
 - iv. That therefore this appeal, the application and Kakamega CMCC NO. 235 of 2023 are incompetent, frivolous, vexatious and an abuse to the due process of this court.
 4. By consent of the parties, this court issued a stay of the decree in Kakamega CMCC NO. 434 of 2015 pending the hearing and determination of the application inter-partes.
 5. The Notice of Preliminary Objection was canvassed by way of written submissions.

Appellant's case.

6. On issue (3) raised in the preliminary objection, the appellant submitted that Explico Insurance Co. Ltd was placed under statutory management which is akin to Receivership by the Insurance Regulatory Authority.
7. The appellant further submitted that there is no difference in principle between the appointment of a receiver or a manager and the placement of a company under Statutory management in so far as the general power of the directions of a company are concerned.
8. The appellant submitted that the provisions of Section 43 to 53 of the *Kenya Deposit Insurance Act* and section 54 to 61 of the said *Act* are not meant to be read conjunctively as they apply to institutions



under receivership and liquidation respectively, citing the case of *Asbok L. Dashi & another v Central Bank of Kenya & another* (2016) eKLR.

Respondent's case.

9. The respondent submitted that the insurance company was placed under statutory management through a gazette notice dated 08.12.2023 and the statutory manager announced a moratorium on payments of all policyholders and creditors.
10. The respondent submitted that the above placement and declared moratorium against all policy holders and creditors clearly removes the substratum upon which the Kakamega CMCC NO. 235 of 2023 and this appeal is based, citing *Jane Wanjiru Vs Xplico Insurance Co. Ltd* (2021) eKLR where it was held that a person seeking to execute in a parent suit is neither, a policy holder/ creditor of the insurance company. And therefore there is no privity of contracts. Justice Msaga Mbogholi stated;

“... am convinced that even after the applicant herein satisfies the decretal sum in the primary suit, she can still pursue the present declaratory suit against the defendant and seek compensation thereof. In my view it will not be in the interest of justice to hinder the respondent from realigning the fruits of judgment...”
11. After perusal of the preliminary objection, the application and submissions by both parties, the issue of determination is whether the application dated 19th February 2024 is tenable in law in that: -
 - i. Does it mean that the fact that the appellant has sued Xplico Insurance Co. Ltd in Kakamega CMCC NO. 235 of 2023, the respondent cannot execute against the appellant in Kakamega CMCC NO. 437 of 2015?
 - ii. Can an action be maintained against Xplico Insurance Co. Ltd following its placement under statutory management on 08.12.2023?
 - iii. Is the application dated 19th February 2024, the appeal dated 12th February 2024 and Kakamega CMCC NO. 235 of 2023 incompetent, frivolous, vexatious and an abuse of the due process of this court?

Analysis

12. The meaning of what is a Preliminary Objection was defined by The Supreme Court in *Hassan Ali Jobo & Another v Suleiman Said Shabbal & 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...”.



13. 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

14. The respondent is not a party to the declaratory suit Kakamega CMCC NO. 235 of 2023. The suit is between the appellant and Xplico insurance Co. Ltd. Similarly, the respondent is not a party to the contract between the appellant and the insurance company thus the suit between the appellant and the insurance company cannot prevent the respondent from executing against the appellant. There are enough authorities in support of this position. In the case of *Geoffrey Gichomo Mwangi v Xplico Insurance Ltd & another* (2021) eKLR, it was held that: -

“... Having considered the material placed before this court over the plaintiff’s application, it is clear first, that the judgment obtained by the 2nd defendant vide C.M.C.C no. 4610 of 2019 has not been challenged on appeal. Secondly, it is also not in dispute that the 1st defendant is not a party to the suit where the 2nd defendant obtained judgment against the plaintiff. Thirdly, that the 2nd defendant is not privy to the insurance contract between the plaintiff and the 1st defendant...”

15. Also in the case of *Kamakya V Resolution Insurance Co. Ltd & Another* Machakos CC E0555/2022 it was opined 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...”

16. On the issue of whether a suit can be maintained against Xplico Co. Ltd, when it is already under statutory management is neither here nor there for the respondent has not sued Xplico Insurance Co. Ltd. It is the appellant who has sued Xplico Insurance Co. Ltd in Kakamega CMCC No 235 of 2023.

17. 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, but not to protect the policy holders or creditors from 3rd parties. Just like in our case, the respondent cannot be restrained by the moratorium from executing against the appellant. 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...”



18. 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...”

19. The above finding makes me agree with the respondent that the application and the appeal is incompetent, frivolous, vexatious and an abuse of the due process of this court. I do hereby strike out the application and the appeal with costs to the respondent, but the appellant is at liberty to prosecute his case in the lower court Kakamega CMCC NO. 235 of 2023. If the appellant pays the respondent the decretal amount in CMCC NO. 437 of 2015, he can as well follow Xplico Insurance Co. Ltd for a refund / compensation.

20. The upshot of this, I find the respondent’s preliminary objection meets the threshold as set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd.* (1969) EA 696. Therefore, the preliminary objection is sustained.

21. Right of appeal 30 days.

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

S.N MBUNGI

JUDGE

Ruling delivered in the absence of the parties and advocates though the advocates had been notified by the Court Assistant of the delivery date and time.

Court Assistant – Elizabeth Angong’a

