



**Karari (as a Legal Representative of the Estate of Stanley Mwangi Muthiru Njambi) & 2 others v Statutory Manager (Commercial Case E168 of 2022) [2023] KEHC 2325 (KLR) (Commercial and Tax) (10 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2325 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**COMMERCIAL AND TAX**  
**COMMERCIAL CASE E168 OF 2022**  
**DAS MAJANJA, J**  
**MARCH 10, 2023**

**BETWEEN**

**ELIZABETH MUTHONI KARARI (AS A LEGAL REPRESENTATIVE OF THE ESTATE OF STANLEY MWANGI MUTHIRU NJAMBI) ..... 1<sup>ST</sup> APPLICANT**

**JAMES NJERU SALIM ..... 2<sup>ND</sup> APPLICANT**

**JAMES MUCHANGI ..... 3<sup>RD</sup> APPLICANT**

**AND**

**THE STATUTORY MANAGER ..... RESPONDENT**

**All creditors and including creditors of the policy holders must be treated equally**

*The applicants sought the review of the court's orders of stay of proceedings subsisting against the Company and/or its policyholders during the currency of a moratorium. The court found that as a result of legislative fiat, the insured as a judgment debtor was protected by the same moratorium. The court noted that all the creditors and in the instant case creditors of the insureds/policy holders must be treated equally thus to discharge the order in their favour would undermine that principle. The court thus held that there was no basis to review the order as the statutory provisions supported the extension of the moratorium to policy holders of the Company.*

Reported by Kakai Toili

***Insolvency Law*** – companies under statutory management - statutory manager – role of a statutory manager - declaration of a moratorium on payments to the company's policy holders - whether a statutory manager of a company under statutory management could declare a moratorium on payments to the company's policy holders – Insurance Act, Cap 487, sections 67C(10) and 67C(11).

**Brief facts**

Resolution Insurance Company Limited (the Company) was under statutory management. The respondent was appointed as the Company's Statutory Manager by the Policy Holders Compensation Fund. The



respondent filed an *ex parte* originating summons seeking, *inter alia*, orders of stay of proceedings of whatever nature or form subsisting against the company and/or its policyholders during the currency of a moratorium declared by the respondent effective from April 5, 2022. On May 22, 2022, the court issued interim orders allowing the application and issued an order that any party wishing to object to the application and orders shall lodge its objection within 7 days of the advertisement. There being no objection filed by any party, the court granted the orders as sought (the order).

The applicants filed the instant application seeking to be joined to the proceedings and for the court to review the order by removing from its ambit, proceedings instituted against policyholders of the Company. The applicants averred that they held decrees against some policyholders of the Company. They were aggrieved that the order extended its scope to affect the relationship between policyholders and persons who had claims against the policyholders yet such persons as the applicants were not privy to the relationship between the policyholders and the Company and should not be affected by the order.

### **Issues**

Whether a statutory manager of a company under statutory management could declare a moratorium on payments to the company's policy holders.

### **Held**

1. By reason of the order made on July 22, 2022, any party wishing to object to the application was entitled to lodge its objection. As a corollary to the order, any party adversely affected by the order was entitled to move the discharge, vary or set it aside as a matter of law since it was made *ex-parte*. It was therefore not necessary for a party to be joined to the matter before the matter was heard.
2. A clear reading of section 67C(10) of the Insurance Act was that the respondent could only declare a moratorium on payments to the Company's policy holders and other creditors. That meant that judgment creditors of the Company's policy holders or insureds such as the applicants were not affected by the moratorium and may proceed to execute or realise any decrees in their favour. Thus, the order extending the moratorium to the applicants should be discharged to that extent.
3. The statutory position had since changed since the enactment of section 67C(11) of the Insurance Act which was enacted through the section 5(c) of the Insurance (Amendment) Act 2019. The plain and obvious meaning of section 67C(11) was that the policy holder or insured of a company under statutory management was placed in the same position as the company in so far as the moratorium was concerned. In the instant case, the insureds were judgment debtors and were entitled to indemnity from the Company, but the Company could not settle their claims as a result of the declared moratorium. As a result of legislative fiat, the insured as judgment debtor was protected by the same moratorium.
4. It was a general principle in matters of insolvency expressed in section 67C(10)(a) of the Insurance Act that all the creditors and in the instant case creditors of the insureds/policy holders must be treated equally thus to discharge the order in their favour would undermine that principle. There was no basis to review the order as the statutory provisions supported the extension of the moratorium to policy holders of the Company.

*Application dismissed with no order as to costs.*

### **Citations**

#### **Cases**

#### **Kenya**

1. *Concord Insurance Company Ltd v H Young & Company Ltd* Civil Case 4122 of 1991; [2001] KEHC 744 (KLR) - (Mentioned)
2. *Ndeto, Nzioka Isavi (Suing as the Legal Representative of the Estate of Kyuma Ndeto Singi (Deceased) v Abednego Muiwa Juma & another* Civil Suit 354 of 2011; [2017] KEHC 7001 (KLR) - (Mentioned)
3. *Oruta & another v Nyamato* [1988] KLR 590 - (Mentioned)

#### **United Kingdom**



1. *Isaac v Robertson* [1984] 3 All ER 140 - (Applied)

## Statutes

### Kenya

1. Civil Procedure Act (cap 21) section 80 - (Interpreted)
2. Civil Procedure Rules (cap 21 Sub Leg) order 45 rules 1, 2; order 51 rule 1 - (Interpreted)
3. Insurance (Amendment) Act, 2019 (Act No 28 of 2019) section 5(c) - (Interpreted)
4. Insurance Act (cap 487) section 67(C)(2)(i)(10)(b) - (Interpreted)

## Advocates

1. *Mr Maina instructed by Chege Kibathi and Company Advocates LLP* for the Applicants
2. *Mr Wafula instructed by Milimo, Muthomi and Company Advocates* for the Statutory Manager

## RULING

1. Resolution Insurance Company Limited (“the company”) is currently under Statutory Management having been placed on April 5, 2022 by the Commissioner of Insurance as stipulated by section 67 of the *Insurance Act* (Chapter 487 Laws of Kenya) for a period of 12 Months commencing April 5, 2022. The respondent, was also appointed as the company’s statutory manager by the policy holders compensation fund pursuant to section 67C(2)(i) of the *Insurance Act* with effect from April 5, 2022 to assume the management, control and conduct of the affairs and business of the company and to exercise all the powers of the company to the of the board of directors, including the use of the company seal.
2. On May 19, 2022, the respondent filed an *ex parte* originating summons seeking, *inter alia*, orders of stay of proceedings of whatever nature or form subsisting against the company and/or its policyholders during the currency of a moratorium declared by the respondent effective from April 5, 2022. On May 22, 2022, the court issued interim orders allowing the application and granting the aforementioned prayer together with the order that “...any party wishing to object to the application and orders shall lodge its objection within 7 days of the advertisement”. On June 14, 2022, when the matter was scheduled for directions and further orders and there being no objection filed by any party, the court granted the orders as sought in the originating summons, which orders were advertised on the Standard Newspaper on June 24, 2022 as directed by the court (“the order”).
3. The applicants have now approached the court by way of the notice of motion dated October 5, 2022 made, *inter alia*, under section 80 of the *Civil Procedure Act* (chapter 21 of the Laws of Kenya), order 45 rules 1 and 2 and order 51 rule 1 of the *Civil Procedure Rules* and section 67(2)(10) of the *Insurance Act* seeking to be joined to these proceedings and that the court review the Order by removing from its ambit, proceedings instituted against policyholders of the Company. The application is supported by the affidavit of Dennis Juma, an advocate who is in conduct of the matter on behalf of the intended applicants, sworn on October 25, 2022. The application is opposed by the respondent through the replying affidavit of William Masita sworn on May 18, 2022. The parties have also filed written submissions to further supplement their positions and arguments.
4. The applicants aver that they hold decrees against James Gitau Mburu, Full Gospel Churches of Kenya and Jamleck Muraya Gatindi who are policyholders of the Company. They are aggrieved that the order extends its scope to affect the relationship between policyholders and persons who have claims against the policyholders yet such persons such as the applicants are not privy to the relationship between the policyholders and the company and should not be affected by the order.



5. The applicants state that the extension of the scope of the order to protect policyholders was therefore on apparent error on the part of the court as such orders should not have been extended to protect policyholders as that would serve to prejudice third parties who are not privy to the arrangements between the policyholders and the company. That unless the orders are varied as sought in this application, the applicants, who are part of a large, affected group will continue to suffer extreme injustice as they will be unable to execute the decrees they justly hold and that it is in the interests of justice that the prayers sought herein are granted.
6. The respondent opposes the application. it urges that the applicants are guilty of inordinate delay and the court should not condone this delay. It argues that the applicants do not have the locus standi to agitate their grievance since they have neither applied nor been joined to these proceedings. The respondent submits that the applicants have failed to meet the threshold for grant of the orders of review stipulated by the law.
7. The respondent contends that that order issued by the court are intended to protect the company and its policy holders during the period of statutory management from unrestrained litigation which might lead to its possible collapse in line with spirit and intent of section 67C of the *Insurance Act* as the company would be required to expend money in defending litigation proceedings on behalf of policy holders instead of expending its efforts in reviving the company.
8. the Respondent advances the position that the order acts as a protective shield for the company to enable it trace and preserve the company's assets and determine the extent of its liabilities. That if the court were to allow the instant application, there is a real and present likelihood that the default and or ex parte judgements, orders and decrees shall be entered and executed against the company in various suits across the country, especially in cases where, but for the moratorium, the company would be in a position to defend the proceedings.
9. The respondent states that section 67C(10) of the *Insurance Act* requires the statutory manager to apply the moratorium equally to all classes of policyholders and creditors of the company, including advocates representing the company in various suits across the company and judgement debtors who have decrees against the company or its policyholders. That section 67C(11) of the *Insurance Act* as amended by section 5(c) of the *Insurance (Amendment) Act* 2019 expressly prohibits proceedings against an insured or a policyholder, whose insurer has been placed under statutory management such as in the case of the company. The respondent therefore supports the order as it includes policyholders in accordance with the express provisions of the law which are necessary and have enabled the statutory manager carry out its statutory duties without the threat of litigation and being distracted in defending suits against the company.
10. The respondent further avers that the order is fair to policy holders and creditors of the company because section 67(C)(10)(b) of the *Insurance Act* stops the running of time for purposes of any law of limitation of actions that may affect the creditor's or policyholder's claims against the company hence the order will not jeopardize the rights of any policyholder or creditor of the company and will promote the general public interest by ensuring that funds for honouring valid claims against the company are not depleted by for instance decrees in undefended but otherwise untenable suits and or claims.

### **Analysis and Determination**

11. The main issues for determination in the application are whether the applicants ought to be joined to these proceedings and whether the order ought to be varied. I do not intend to dwell on the issue of joinder of the applicants to this matter for reasons that will become apparent.



12. By reason of the order made on July 22, 2022, any party wishing to object to the application was entitled to lodge its objection. As a corollary to the said order, any party adversely affected by the order is entitled to move the discharge, vary or set it aside as a matter of law since it is made *ex-parte* (see *Oruta and another v Nyamato* NRB CA Civil Appeal No 96 of 1984 [1988] eKLR and *Isaac v Robertson* [1984] 3 All ER 140). It is therefore not necessary for a party to be joined to the matter before the matter is heard.
13. I now turn to whether the order ought to be reviewed and varied to exclude policyholders. In my view this a matter of statutory interpretation. The applicants rely on the provision of section 67C(10) of the *Insurance Act* which provides as follows:
- (10) For the purpose of discharging his responsibilities, a manager shall have power to declare a moratorium on the payment by the insurer of its policy holders and other creditors and the declaration of a moratorium shall –
- (a) Be applied equally to all cases of policy holders and creditors, subject to such exceptions in respect of any class of insurance as the manager may, by notice in the gazette, specify;
- (b) Suspend the running of time for the purposes of any law of limitation in respect of any claim by any policy holder or creditor of the insurer;
- (c) Cease to apply upon the termination of the manager’s appointment whereupon the rights and obligations of the insurer, its policy holders and creditors shall, save to the extent provided in paragraph (b), be the same as if there had been no declaration under the provisions of this subsection.
14. A clear reading of the aforesaid provision is that respondent can only declare a moratorium on payments to the company’s policy holders and other creditors. This means that judgment creditors of the company’s policy holders or insureds such as the applicants herein are not affected by the moratorium and may proceed to execute or realise any decrees in their favour. thus, as the applicants urge, the order extending the moratorium to them should be discharged to that extent (see for example Re: *Concord Insurance Company ML* HCCC No 88 of 2013 [2014]eKLR). In *Ndeto Nzioka Isavi v Abednego Mulwa Juma and Another MKS* HCCC No 354 of 2011 [2017] eKLR, the court explained this position as follows:
- [I] find that section 67C(10) of the *Insurance Act* was not intended to deny legitimate suitors of their right to institute proceedings for relief against an insured of an insurance company under receivership for tortious acts of or breaches by the insured. The moratorium is only intended to aid the Statutory Manager to discharge his duties in relation to revivals of the insurance company and to handle policy holders or creditor and not third parties like the Plaintiff herein.
15. The statutory position has since changed since the enactment of section 67C(11) of the *Insurance Act* which was enacted through the section 5(c) of the *Insurance (Amendment) Act* 2019 and which provides as follows:
- (11) For the purpose of this section, where a moratorium is declared under subsection (10), a policyholder shall not be liable to pay any claim not payable by the insurer due to the moratorium. [Emphasis mine]
16. The plain and obvious meaning of section 67C(11) aforesaid is that the policy holder or insured of a company under statutory management is placed in the same position as the company in so far as the



moratorium is concerned. In this case, the insureds are judgment debtors and are entitled to indemnity from the company, but the company cannot settle their claims as a result of the declared moratorium. As result of legislative fiat, the insured as judgment debtor is now protected by the same moratorium.

17. Further, it is a general principle in matters of insolvency expressed in section 67C(10)(a) that all the creditors and in this case creditors of the insureds/policy holders must be treated equally thus to discharge the order in their favour would undermine this principle. From the foregoing, it is clear that there is no basis to review the order as the statutory provisions support the extension of the moratorium to policy holders of the company.

### **Disposition**

18. As I have declined to review the orders made on June 14, 2022, there is nothing further to be tried in the matter hence the issue of joinder of the applicants is now moot. Consequently, the applicants' application dated October 25, 2022 is now dismissed. I make no order as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 10<sup>TH</sup> DAY OF MARCH 2023.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango

Mr Maina instructed by Chege Kibathi and Company Advocates LLP for the Applicants.

Mr Wafula instructed by Milimo, Muthomi and Company Advocates for the Statutory Manager.

