



REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CONSTITUTIONAL PETITION NO. 8 OF 2019

IN THE MATTER OF ALLEGED CONTRAVENTION

OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER

ARTICLES 19, 20, 21, 22, 23, 25(c), 40(I), 40(3), 50(I)(II), 48,

159, 258 AND 259 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF CONSTITUTIONAL PETITION BY

WYCLIFFE ONYANGO OTIENO AGAINST VIOLATIONS

OF HIS RIGHTS AND FUNDAMENTAL FREEDOMS AS

ENSHRINED UNDER THE CONSTITUTION BY THE RESPONDENTS

VIDE THEIR DECISION TO STAY ALL PROCEEDINGS (UNDER

STATUTORY MANAGEMENT) DURING THE CURRENCY OF

MORATORIUM DECLARED BY THE STATUTORY MANAGER ON 16/9/2011

AND

IN THE MATTER OF CONSTITUTION OF KENYA

(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS AND

ENFORCEMENT OF CONSTITUTION) PRACTICE AND PROCEDURE RULES 2013

BETWEEN

WYCLIFFE OTIENO ONYANGO.....PETITIONER/APPLICANT

AND

STATUTORY MANAGER BLUESHIELD

INSURANCE CO. LTD.....1ST RESPONDENT

INSURANCE REGULATORY AUTHORITY.....2ND RESPONDENT

CHRISTINE ESHIKUMO OLANDO.....3RD RESPONDENT

JUDGMENT

Together with his petition dated 17th September, 2019, the petitioner filed an application of even date expressed to be brought under the provisions of Rule 3, 21 and 22 of the constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of Constitution) Practice and Procedure Rules 2013. The application seeks;-

1. Spent
2. THAT pending the hearing and determination of the application/petition herein *inter partes*, there be *ex parte* temporary conservatory orders staying the execution by 3rd and 4th respondents in Bungoma CMCC No. 98/2009.
3. THAT costs of this Application be provided for.

The application is supported by grounds on the face of the motion and the applicant's affidavit annexed to the application.

The applicant depones that he was the owner of Motor Vehicle Registration Number KAP 756T which was involved in an accident on 21/7/2007 with the 3rd respondents deceased husband who was driving Motor Vehicle Registration Number KAM 634D.

That the petitioner's Motor Vehicle was insured by Blueshield Insurance Company Limited (hereinafter Blueshield). Consequently, the petitioner was sued by the 3rd respondent in Bungoma CMCC No. 98/2009 and 180/2010 where she was awarded Kshs 2,011, 808/= and Kshs 488,650/=respectively. The petitioner was represented by an advocate appointed by Blueshield.

That during the pendency of that suit, Blueshield went into liquidation and obtained a moratorium which is still in force up to date making it difficult to proceed against them to satisfy the decretal sum.

He accuses the 3rd respondent and another party; Dominion Yard Auctioneers, which was subsequently removed in the course of these proceedings of preferring execution against him by way of attachment of movable property which he depones belongs to his wife. That he is a small-scale trader and farmer without a serious source of income.

The application is opposed, the 1st and the 3rd respondents filed replying affidavits while the 2nd did not enter appearance. The 1st respondent filed their affidavit through John Kea on 12/11/2019 and the 3rd respondent filed her replying affidavit on 22nd October 2019.

The 1st respondent depones that Blueshield was put under statutory management on 16/9/2011 vide Gazette Notice Number 11934, that later on, in compliance with section 67 of the Insurance Act, Policyholders Compensation Fund was appointed to manage the affairs of Blueshield, that there is pending litigation touching on the winding up at the court of appeal, that the Statutory Manager's term has been extended from time to time pending all the winding up cause leading to contemporaneous extension of moratorium on matters of Blueshield.

The deponent further depones that the petitioner is entitled to protection from execution pursuant to the Court Orders in Nairobi High court Civil Suit No. 465 of 2011(O.S) which are still in force, that it is a misconception for the petitioner to allege that the 1st respondent has failed to discharge its statutory obligations and that the prosecution of this petition is contemptuous of the existing orders.

The 3rd respondent on her part depones that she was the plaintiff in Bungoma CMCC No. 98/2009 and 180/2010 where she was awarded Kshs 2,011, 808/= and Kshs 488,650/= respectively, that the instant petition and application are aimed at delaying the conclusion of the lower court cases which have been in the corridors of justice for over 10 years and that orders are not grantable since they are not direct appeal from the lower court decrees and that there is no appeal against the judgment.

She depones that the allegations of the petitioner being insolvent and broke cannot arise at this stage, that the allegations of being a man of straw have not been supported, that the issues raised in the petition ought to have been raised in the lower court during the proceedings, that the applicant is seeking to review the judgments through the backdoor and that the applicant has not suffered or shown any prejudice she is likely to suffer should the decrees be executed.

Directions were given for parties to dispose of the application and petition by way of written submissions.

The petitioner submits that the 3rd respondent's actions are threatening to deprive him of his property, he argues that rights to own property is constitutionally protected under the provisions of Article 19 of the Constitution. That, liability unless dispelled lies squarely on the 1st and 2nd respondents. He argues that his rights under Article 25 are at stake of being violated.

He also submits that Article 27 provides for equality before the law. That the 2nd respondent is mandated to settle creditor's liabilities. That there were properties that were frozen with a view of settling the creditors and it would be discriminatory to let the petitioner offset liability directly.

Counsel has made reference and submitted on the petitioner's rights under Articles 20, 28, 47, 48,50, 159, 160(1), 165 and 22 of the Constitution. He states that the petitioner's earnings cannot satisfy the decretal sum and the proclaimed items belongs to his wife who is a small-scale trader. It is submitted that the Motor Vehicle subject of the accident was acquired through a bank loan. The petitioner admits that there is a moratorium issued by Justice Mwera J. which suspended the obligations of the 1st respondent. He submits that the execution before the suspension is lifted is illegal and unconstitutional.

Counsel has cited the cases of *Commissioner for Insurance and others vs Kensilver Express Ltd and 3 Others (2008)eKLR, A.P.A Insurance Co. Ltd vs Zainabu Ali Ruwa Civ.Appeal No. 82/2008 CA (Mombasa), Peter Chege Vs United Insurance Co. Ltd.*

The 1st respondent filed his submissions urging this court to dismiss the petition. He submits that the appointment of the statutory manager is a statutory obligation under section 67C of the Insurance Act and is of a temporary nature vested upon the Commissioner for Insurance.

He submits that the statutory manager merely takes over the management of the company in place of the Board of Directors. He submits that there is pending litigation in the Court of appeal against the winding of Blueshield.

He further submits that there is a moratorium and Court Order staying all proceedings against Blueshield or its policyholders. Counsel cited the cases of *Phylis Wangui Njau v heritage Contractors Ltd (2019)eKLR, Econet Wireless Kenya Ltd V The Minister of information and Communication of Kenya & Another HC Misc No. 1640/2003, Johnstone Ogechi Mose V National Police commission ELRC Suit No. 6/2016* and *Anarita karimi Mwangi v R HC Misc Application 54/79.*

The 3rd respondent submits that this court cannot grant the orders sought since the petition is not a direct appeal from the decree of the lower court, that the allegations that the petitioner is a man of straw is not true, that the petition is an afterthought meant to delay payment in the decree. She urges this court to dismiss both the application and the petition.

From the petition and the submissions; the issue arising for determination is whether by their actions; the respondents have infringed on the petitioner's constitutional rights necessitating an intervention by this court.

It is common ground that the petitioner was the defendant in Bungoma CMCC Suits Number 98 of 2009 and 180 of 2010 where judgement was entered against him for the sum of Kshs 2, 011, 808/= and Kshs 488,650/= respectively.

On 20/8/2019, Dominion yard Auctioneers acting for the 3rd respondent proclaimed the petitioner's goods which triggered this petition. The petitioner seeks to have the execution process stayed as he terms it unconstitutional and violates his constitutional rights.

The 1st respondent supports the petitioner's argument to the extent that the petitioner is shielded from execution by the moratorium declared by the Statutory Manager, BlueShield insurance company Limited on 16/9/2011 and that there is a subsisting Court Order in Milimani High Court Miscellaneous Application Number 547 of 2012 issued on 3rd November, 2017. I have looked at the said order annexed to the 1st respondents replying affidavit. Paragraph 2 thereof reads;

THAT the term of the Statutory Manager of Blueshield Insurance Company Limited be and is hereby extended pending the hearing and determination of all that winding up cause, being Milimani High Court Miscellaneous Cause Number 238 of 2017 or until otherwise termination by this court.

The petitioner has annexed an order in Civil suit Number 465 of 2011(O.S), Milimani Law Courts relating to Blueshield Insurance Company Ltd. The order in paragraphs 5 and 6 states;

THAT no statutory notices, demands or claims of whatever nature of form shall be effective against Blueshield Insurance Company (under statutory management), its property or its policyholders during the currency of the moratorium.

THAT the running time for the purposes of any law or limitation in respect of any notice, demand or claim by any policyholders or creditors of blueshield insurance company Ltd (under statutory management) is suspended during the currency of the moratorium declared by the statutory manager.

If this be the case, there is no difficulty in finding that the moratorium protects the petitioner from execution. The difficulty that may have arose here is that the petitioner did not inform the trial court that there is a moratorium in force.

If there is a moratorium in force as well as subsisting court orders barring the levying of any execution against the policyholders of Blueshield, that should be placed before the trial court.

The court does not find any of the petitioner's constitutional rights that have been infringed or threatened to be infringed by the respondents' actions. He has recourse in the lower court that heard the civil suit; all he has to do is inform the court on the existence of the orders and his rights will be protected by that court.

For the reasons given, both the application and the petition are dismissed. Each party to bear their own costs.

DATED AT BUNGOMA THIS 9TH DAY OF MARCH, 2021

S. N RIECHI

JUDGE