

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

HIGH COURT CIVIL APPEAL NO. E077 OF 2023

JAMES

OUMA

OGUNDA.....

APPELLANT

VERSUS

BENARD KHASIANI.....

1ST RESPONDENT

BONIFACE TENDWA CHIMWANI.....2ND

RESPONDENT

RULING

1. By a statement of claim dated 30th May 2023, the claimant (herein “the appellant”) sued the respondents herein seeking for judgment against the respondents for:

(a) Special damages for medical treatment, medical report and transport costs

(b) General damages for pain and suffering as determined by the court.

(c) Interest on (a) and (b) above.

(d) Costs of the suit.

(e) Any further relief as the Honourable court shall deem fit to grant.

2. The appellant avers that on 24th December 2021, he was travelling as a lawful fare paying passenger in motor vehicle registration KCW 892K Noah, driven by the 1st respondent and owned by the 2nd respondent. That the vehicle was being driven along the Nairobi - Naivasha Highway.

3. That the 1st respondent drove the vehicle negligently and/or carelessly that it to collide with two motor vehicles being; Mercedes Benz registration number KDC 711T and a Toyota Hilux registration number KCK 036H and subsequently crashed into the barriers on the side of the road.

4. That as a result of the accident, he sustained serious personal injuries, loss and damage. Notably, the statement of the claim does not tabulate the injuries, loss or damage sustained.
5. However, the appellant's claim was opposed by the respondents vide a statement of response dated 20th June 2023. In particular, but save for the admission that the 2nd respondent is the owner of the subject vehicle, the facts that; the appellant was a lawful fare paying passenger in the subject vehicle, the occurrence of the accident as alleged by the appellant, and the alleged serious personal injuries, loss and damage sustained was denied.
6. However, the respondents pleaded in the alternative and without prejudice basis that, if the accident occurred at all, then the same was solely caused or overwhelmingly occasioned by the recklessness and negligence of the claimant and the

driver(s) of motor vehicle registration number KDC 711T and KCK 036H.

7. The respondents tabulated the particulars of negligence attributed to the other drivers at paragraph 16 of the response to statement of claim to wit that; they were driving without due care and attention, failed to heed the presence of motor vehicle registration No. KCW 892K that was in its rightful lane, tried to and/or were overtaking dangerously knowing it was unsafe to do so, failed to brake, slow down, stop, swerve or avoid the occurrence of the accident.
8. The respondents further averred that, motor vehicle registration No. KCW 892K was insured by Resolution Insurance Company Limited under policy number P000035492, however, pursuant to the provisions of section 67 of the Insurance Act (Cap 487) Laws of Kenya, the Commissioner of Insurance

placed the company under statutory management for a period of twelve (12) months with effect from 5th April 2022,

9. That as a result, the Statutory Manager declared a moratorium on payments to the policy holders and creditors for the stated period. That on 5th April 2023, the moratorium was extended for a further period of six (6) months from 5th April 2023.

10. That the 2nd respondent's Insurer is mandated under common law, the policy of insurance and doctrine of subrogation to defend, settle and/or prosecute any claims against the 2nd respondent. But, during the pendency of the moratorium, the Insurer cannot defray any debts including legal fees and settlement of decrees or defend existing or future suits.

11. That in the circumstances the appellant was barred from proceeding with the suit herein as it will be

contrary to the moratorium and to the detriment of the respondents.

12. At the close of the pleadings, the respondents filed a notice of motion application dated 20th June 2023, seeking that the suit be stayed during the pendency of the moratorium. The application was heard and by a ruling dated 13th July 2023, the trial court dismissed it for lack of merit.

13. Be that as it may, the claim proceeded to full hearing with the appellant's case being supported by his evidence and the evidence of (CW2) Dr, Cyprian Okere while the respondents closed their case without calling any witnesses.

14. The parties subsequently filed their respective submissions and by a judgment dated 8th August 2023, the trial court held that the appellant had failed to discharge the burden of proof of his claim on a balance of probability and dismissed the claim

on liability but stated that had the appellant been successful, which would have awarded Kshs. 750,000 as general damages.

15. On special damages, the trial court held that the appellant had failed to produce any receipts in proof of the claim and dismissed it and stated that it was not making any orders as to costs.

16. However, the appellant is aggrieved by the decision of the trial court and appeals against it on the following grounds:

(a) The Learned Magistrate erred in law and in fact in finding that the police abstract was not adduced as evidence when it was in fact admitted into evidence during the pre-trial conference.

(b) The Learned Magistrate erred in law and in fact in finding that there was no evidence attributing negligence on the part of the 1st

respondent despite the evidence adduced in the police abstract dated 24th December 2021.

- (c) That learned Magistrate erred in law and in fact in finding the 2nd respondent was not vicariously liable for negligence despite the evidence to that effect in the police abstract.*
- (d) The learned Magistrate erred in law and in fact in finding that the claimant did not assist the court to prove the occurrence of the accident despite holding that the claimant's evidence that an accident occurred was not challenged by the respondent.*
- (e) The learned Magistrate erred in law and in fact by finding that the police abstract adduced in court as evidence needed to be corroborated by the investigating officer despite the fact that there was no requirement of calling maker of the police abstract during the pre-trial conference.*

(f) The learned Magistrate erred in law and in fact by finding that there was no proof of injuries pleaded by the claimant despite the evidence adduced to that effect both by the doctor, medical report and medical receipts.

(g) The learned Magistrate erred in law and in fact by failing to award special damages and general damages to the claimant despite the medical report and medical receipts adduced as evidence on record.

(h) The learned Magistrate erred in law and in fact by failing to appreciate that the claimant had proved his case on balance of probabilities which was not controverted by the respondents.

17. The court directed the appeal to be disposed of vide of filing of submissions. The appellant filed submissions dated 3rd April 2024. However, before highlighting of submissions, the respondents filed a

notice of preliminary objection dated 19th September 2024. The respondent objection is based on the following the grounds that: -

- a) *The appeal ought to be struck out for failure to seek leave of the court to file and/or continue with these proceedings after the appointment of the interim liquidator for Resolution Insurance Company Limited which insured the defendant at the time of the alleged accident.*
- b) *Pursuant to section 432(2) of the Insolvency Act, 2015, a moratorium is placed over all legal proceedings against the company and if a party wishes to institute or continue with legal proceedings against such company under liquidation, they must obtain approval of the Insolvency Court.*
- c) *The appeal is incurably defective and ought to be struck out with costs to the respondent.*

18. However, the appellant opposed the preliminary objection vide a response to preliminary objection dated 27th November 2024, on the following grounds: -

a) That this appeal was lodged in this Honourable court on 23rd October 2023 against the respondent.

b) That this suit is against the respondents who are natural persons and not Resolution Insurance Company Limited.

c) That section 432 (2) of the Insolvency Act provides that “When a liquidation order has been made or a provisional liquidator has been appointed, legal proceedings against the company may be begun or continued only with the approval of the court and subject to such conditions as the court considers appropriate.”

d) That the above provision envisages a suit against a company under liquidation which is not the case in the present suit and as such Resolution Insurance Company Limited cannot be an implied party.

e) That therefore the preliminary objection by the respondent is unmerited and should be dismissed as such.

f) That it is in the interest of justice that this Honourable court should allow the suit against the respondents to continue to its full determination.

19. The court directed that the preliminary objection be canvassed by filing written submissions. The respondents filed submissions dated 17th February 2025, and argued that it is not in dispute that the subject vehicle was insured by Resolution Insurance Company Limited as evidenced by the notice of

intention to sue served upon the Insurer by the appellant.

20. That under the terms of the insurance policy, the insurer has a contractual obligation to offer legal representation to the respondents in respect to any suit arising from a claim against the subject vehicle. Further under section 10 of the Insurance (Motor Vehicles Third Party Risks) Act, (Cap 405), Laws of Kenya, an Insurer is required to satisfy any court judgments against insured parties.

21. That in light of the afore, the Insurer entered appearance for the respondents and was representing them before it was placed under interim liquidation. That while the suit was against them, it was only in name as the suit is effectively against the Insurer.

22. Furthermore, there is no privity of contract in insurance law as the ultimate beneficiary is the

injured party. The respondents relied on the case of; *Maingi v Insurance Regulatory Authority & 3 others; Nguli & another (Interested Parties) [2023] KEHC 20819 (KLR)* where the High Court held that a contract of insurance is exempted from the doctrine of privity of contract as its essence is to protect 3rd parties.

23. The respondents further cited section 432 (2) of the Insolvency Act 2015 and submitted that, Resolution Insurance Company Limited was placed under interim liquidation and a provisional liquidator appointed by the High Court in *High Court Commercial Insolvency Petition No. E077 of 2023 Insurance Regulatory Authority vs Resolution Insurance Company Limited*, and therefore the appellant is required to seek leave from the Insolvency Court before proceeding with the suit,

and that failure of which the proceedings are a nullity.

24. The respondents relied on the case of; *Alex Ngugi Mwaura & another v Gikumba Investments Ltd & 3 others [2021] eKLR* where the Environmental and Land Court held that failure to obtain leave before initiating proceedings against a company under liquidation renders such proceedings untenable.

25. Similarly, reliance was placed on the case of *Mbaru & 12 others v Wangui; Muhiri & 4 others (Third Party) [2023] KEELC 19298 (KLR)* where the Environmental and Land Court upheld a preliminary objection and struck out the suit for failure to comply with section 432 (2) of the Insolvency Act 2015.

26. However, the appellant filed response submissions dated 5th May 2025, and argued that the characteristics of a preliminary objection was

discussed in the case of; *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 where the Court of Appeal stated that it consists of a pure point of law raised in pleadings and argued on the assumption that all facts pleaded are correct and has the ability to dispose of the suit.

27. That the preliminary objection herein is founded on section 432 (2) of the Insolvency Act and reiterated the subject provision applies to a company under liquidation and not a natural person. Further, the preliminary objection raises factual issues that require the court to exercise its discretion and therefore does not meet the threshold of a preliminary objection.

28. The appellant relied on the case of; *Oraro v Mbaja* [2005] eKLR where Ojwang J (as he then was) stated that a preliminary objection must not be mixed with

factual details that may be contested and requires proof or evidence to be adduced.

29. The appellant further submitted that the instant suit is founded on the tort of negligence against the respondents as the tortfeasors and not their Insurer.

30. That in the circumstances the respondents' Insurer is not a party to the suit nor can it be implied to be a party and that a moratorium under the impugned section cannot bar proceedings against the respondents.

31. That the respondents have the responsibility to defend themselves against the appellant's suit and that it is only after liability has been established and judgment entered does the obligations of the Insurer under Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act arise.

32. However, in the instant suit liability is yet to be established and neither has any of the parties filed

a declaratory suit against Resolution Insurance Company Limited.

33. The appellant thus submitted that in light of the afore, he did not require leave of the court to institute and/or continue any legal proceedings against the respondents and urged the court to dismiss the preliminary objection with costs, and allow the appeal to proceed to full determination.

34. At the conclusion of the arguments by the respective parties, I note that it is settled law that, a preliminary objection is based on points of law as stated by D-F Law JA, in the case of; *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* (*supra*) 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.”

35. In the present case, the respondents contend that the appellant failed to seek the leave of court to institute the suit in accordance to section 432 (2) of the Insolvency Act. The said section states: -

“When a liquidation order has been made or a provisional liquidator has been appointed, legal proceedings against the company may be begun or continued only with the approval of the Court and subject to such conditions as the Court considers appropriate”.

36. Be that as it may, it is noteworthy that, it is well settled that a liquidation order or the appointment of a provisional liquidator and/or moratorium only shields an Insurance company from suits by its

creditors or policyholders but does not shield policyholders from claims against them by third parties.

37. In that regard, in the case of; *In the Matter of Concord Insurance Company [2014] eKLR* the court stated as follows:

“As a good beginning point, I can pronounce with ease that the interested parties herein are not policy-holders of or creditors to Concord Insurance Company. They do not even come closer to being judgment-holder because their cases are yet to be concluded. Even those cases are not against Concord Insurance Company. The only possibility of Concord being drawn into those cases is if judgment is entered against the insured and a declaratory suit is accordingly obtained against Concord. 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 said section is intended to allow the manager to discharge his duties in relation to the revival of the insurance company. In my own view, I think, the protection offered by the moratorium and court orders attendant thereto is to the company from payments by the insurer (company) of its policy-holders and other creditors, and not necessarily to the policy-holders or other creditors against liability from third parties. Therefore, in so far as the interested parties have cases against the insured, there is nothing to stop them from pursuing the claims to logical conclusion. The Respondent is apprehensive that the pursuit of the cases may result into the policy-holders dragging the Company into those proceedings through the doctrine of subrogation. As long as the

moratorium is in place and the orders of the court staying any proceedings against the Company, there is no such danger. In the face of the orders of the court in force in this case, there is no proceeding, even by way of subrogation that can be conducted against the company.”

38. Similarly, in the cases of; Kiptum (Acting Commissioner Of Insurance Regulatory Authority) v Blueshield Insurance Company Limited (Under Statutory Management); Muigai & another (Interested Parties); Mogeni (Applicant) [2023] KEHC 2816 (KLR) and In the matter of Blue Shield Insurance Company Limited (Under Statutory Management) [2017] eKLR the court(s) have clearly concurred stated that section 67C (10) seeks to protect the Insurers against claims from its policyholders and creditors thereby excluding claims against the policy holders from third parties.

39. That there is no privity of contracts between the Insurer and the third parties for a moratorium to extend to the third parties. Further, if Insurers are allowed to issue moratoriums to third parties then the third parties will be prejudiced as they will not be in a position to enforce claims against negligent policyholders. That Interested Parties are not parties to the initial proceedings declaring the moratorium.

40. It is also trite that, while an Insurer has an obligation to settle claims of an insured under an insurance policy, a decree holder is entitled to execute any such decree against the Insured in his personal capacity. In the case of; *Martin Kamakya v Resolution Insurance Company Ltd; Peter Ngumbi (Interested Party) [2021] KEHC 8920 (KLR)* the court stated as follows: -

“32. However, whereas an insured may well be entitled to seek a declaration that its insurer is entitled to settle the claims covered under the

insurance policy, that statutory right of action does not bar a person who is injured from executing the decree issued in his favour against the insured directly.”

41. The appellant in the instant matter filed its claim against the respondents in their personal capacity and not against their Insurer, as such all the argument in relation to leave under section 432 (2) of the Insolvency Act 2015, has no merit and is dismissed.

42. Furthermore, the provisions of Section 67C (10) of the Insurance Act 1985, empowers a statutory manager appointed under Section 67C (2) to declare a moratorium on payments by an Insurer. The moratorium is intended to protect the Insurer from its policyholders and creditors and does not shield policyholders from their own liabilities to third parties.

43. Pursuant to the decision afore, the Courts have confirmed that a moratorium under this section is meant to preserve the Insurer's assets by pausing claims from its immediate creditors and policyholders, not to protect policyholders from legal actions by third parties.

44. Furthermore, the moratorium does not prevent third parties from taking legal action against policyholders, especially if the policyholder has a liability to that third party. Consequently, the respondents' reliance on Section 67C (10) of the Insurance Act 1985, holds no water and is untenable.

45. As a result, the preliminary objection is dismissed with costs to the appellant.

Dated, delivered and signed on this 17th day of September 2025.

GRACE L. NZIOKA
JUDGE

In the presence of:

Mr. Kairu H/B for Mr. Waithaka for the
applicant/respondents

Mr. Wangalwa for the respondent/appellant

Ms. Hannah: court assistant