



Ndungu v EW (Minor Suing through Next Friend MM (Civil Appeal E037 of 2023) [2025] KEHC 18222 (KLR) (5 December 2025) (Judgment)

Neutral citation: [2025] KEHC 18222 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL APPEAL E037 OF 2023
PJO OTIENO, J
DECEMBER 5, 2025**

BETWEEN

ALICE WANGUI NDUNGU APPELLANT

AND

EW (MINOR SUING THROUGH NEXT FRIEND MM RESPONDENT

*(Being an appeal against the Ruling and orders of the Hon. S. K. Mutai
Kitale CMCC No. 188 of 2009 (SPM) delivered on 12th June 2023)*

JUDGMENT

Background Of the Appeal

1. This appeal principally seeks to set aside a consent order entered into by the Appellant and counsel for the Respondent, on the basis that the said consent is illegal for having violated mandatory provisions of the *Insurance Act*. The dispute emanates from a road traffic accident that occurred on 28th January 2009 involving Motor Vehicle Registration No. KBC 548Z, owned by the Appellant. The Respondent, suing through his next friend, instituted the original suit against the Appellant and obtained judgment on 19th February 2019, for Kshs. 402,000/= together with costs and interest.
2. At the time of the accident and institution of the suit, the Appellant's motor vehicle was insured by Blue Shield Insurance Company Ltd, which was subsequently placed under statutory management on 16th September 2011. The Court further notes that Winding Up Cause No. 238 of 2017 remains pending before the High Court concerning the said insurer. Pursuant to the regulatory proceedings, the Statutory Manager, acting under Section 67C (10) of the *Insurance Act*, declared a moratorium on payments by the insurer. This moratorium was extended on 3rd November 2017 and remains in force, effectively suspending all payments by Blue Shield Insurance Company Ltd to its policyholders and other creditors until the winding-up cause is determined or the moratorium is lifted by the High Court.



3. Notwithstanding the subsisting moratorium, the Respondent, as the decree holder, commenced execution proceedings against the Appellant, the judgment debtor. Warrants of attachment were issued and M/s Lifewood Auctioneers proclaimed the Appellant's property, including the motor vehicle in question. The Appellant stated that she was driven into a corner by the impending attachment and threats of arrest. She further asserted that she was not represented by counsel at the time and therefore lacked proper advice regarding the legal protection afforded by the statutory moratorium, under the Insurance (Amendment) Act, 2019.
4. As a result, the Appellant entered into a consent with counsel for the Respondent. The consent was dated 12th January 2023 and subsequently adopted as an order of the Court on 23rd January 2023. Its key terms were as follows:
 - i. The decretal sum was agreed at Kshs. 641,293/=;
 - ii. The Appellant was required to personally pay the sum in monthly instalments of Kshs. 25,000/ = commencing 28th February 2023;
 - iii. A stay of execution was granted and the attached motor vehicle released; and
 - iv. In default of any one instalment, execution would issue immediately.
5. Following entry of the consent, the Appellant instructed a new counsel and filed a Notice of Motion dated 21st March 2023 seeking review and setting aside of the consent order. The application was brought under, among other provisions, Section 5(c)(ii) of the Insurance (Amendment) Act, 2019, seeking to set aside the consent and obtain a general stay of execution pending the conclusion of the winding-up proceedings against Blue Shield Insurance Company Ltd.
6. The Learned Senior Principal Magistrate, Hon. S. K. Mutai, delivered a ruling on 12th June 2023 dismissing the application. The Court held that the consent was voluntarily executed, was not tainted by fraud, collusion or illegality, and therefore remained binding and enforceable. The Court further held that the Appellant had failed to prove that she was a policyholder of Blue Shield Insurance Company Ltd and that the statutory moratorium applied only to policyholders and creditors with a contractual relationship with the insurer.
7. The Court additionally found that the Respondent is neither a policyholder nor a creditor of the insurer and therefore has no contractual nexus with Blue Shield Co. Ltd. Accordingly, his claim could not lawfully be subjected to the moratorium. The Court concluded that liability lay against the Appellant personally, and not the insurer, thereby requiring the Appellant to satisfy the decree. Ultimately, the Court held that the Appellant had failed to demonstrate grounds warranting a stay of execution and setting aside the consent.

The Appeal

8. Being dissatisfied with the entire ruling, the Appellant lodged the present appeal by the Memorandum of Appeal dated 16th June 2023. The Memorandum of Appeal sets out five grounds for determination, namely; THAT:
 - a. The learned Trial Magistrate erred in law when he held that there was no evidence that the appellant was a policy holder.
 - b. The learned Trial Magistrate erred in law and fact in holding that the consent recorded was not done contrary to law and policy of the court.



- c. The learned Trial Magistrate erred in law and fact in holding that the claim only lies against the appellant and not the insurance company.
 - d. The decision of the learned Trial Magistrate was against the weight of the available law and evidence.
 - e. The learned Trial Magistrate failed to appreciate the applicable law to the matter, and further failed to appreciate the legal principles in the authorities quoted.
9. The Court directed that the appeal be canvassed by way of written submissions. Both parties complied with the directions, and their respective submissions may be summarized as follows:

Appellant's Submissions

10. The Appellant, in her submissions, maintains that the appeal is highly meritorious and ought to be allowed. She argues that the Learned Trial Magistrate erred in holding that there is no evidence of her status as a policyholder. She refers to the supporting affidavit to the application dated 21st March 2023, which annexes "AWN1", a cover note that clearly identifies Alice W. Ndungu as the policyholder, indicating both the policy number and the issuing insurer.
11. She further relies on Section 2(1) of the *Insurance Act*, which defines a policyholder as "the person who for the time being is the legal holder of the policy securing the contract with the insurer." She submits that this documentary evidence remains uncontroverted; thus, the Trial Court's finding is contrary to the weight of the evidence and amounts to an error in both law and fact.
12. On the illegality of the consent, the Appellant submits that the consent order dated 12th January 2023 is illegal, null, and void as it directly contravenes mandatory statutory provisions. She cites Section 67C(11) of the *Insurance Act*, introduced by the Insurance (Amendment) Act, 2019, which provides:

"For the purpose of the moratorium declared under subsection (10), a policyholder shall not be liable to pay any claim not payable by the insurer due to the moratorium."
13. The Appellant stresses that the phrase "shall not be liable" is mandatory, and therefore the law prohibits policyholders from personally settling claims that are the insurer's responsibility, particularly where payment is suspended by a moratorium. She submits that the mischief addressed by the 2019 amendment is the historical practice of decree holders executing against policyholders when insurers go into receivership. The legislative intent, she argues, is clearly to protect policyholders from bearing liabilities already covered by an insurance contract. By committing herself to personally pay the decretal amount as provided in the consent, the Appellant enters into an arrangement that the statute expressly forbids, rendering the consent illegal.
14. In support of this argument, she cites the Court of Appeal decision in *Five Forty Aviation Limited v Erwan Lanoe* [2019] KECA 763 (KLR) which reiterates the principle in *Kenya Airways Limited v Satwant Singh Flora* [2013] eKLR that a court must decline to enforce a contract once it becomes aware of its illegality. Even where illegality is not pleaded or where a party participates in it, the Court is under a duty not to sanction a transaction that violates statute.

Respondent's Submissions

15. The Respondent maintains that the appeal lacks merit and submits that the Trial Magistrate is correct in dismissing the application. He argues that the consent was lawfully recorded and fully enforceable. The Respondent submits that the threshold for setting aside a consent order, namely proof of fraud, collusion, or a transaction contrary to court policy, is not met. He relies on the long-standing authority



of Brooke Bond Liebig (T) Ltd v. Mallya [1975] EA 266, asserting that the Appellant provides no evidence to show that the consent is procured illegally or through fraud.

16. The central pillar of the Respondent’s case is the interpretation of Section 67C(11) of the *Insurance Act*. He argues that the moratorium applies exclusively to claims brought directly against Blue Shield by its policyholders or creditors who have a contractual relationship with the insurer.
17. The Respondent interprets the phrase “claim not payable by the insurer due to the moratorium” in Section 67C (11) as referring only to claims that policyholders or creditors have against the insurer. He supports this restrictive interpretation by citing the judicial precedent in Stephen Kilonzo Matiliku v Premier Industries Limited [2019] KEHC 781 (KLR), where the Court held that the moratorium protects the insurer from making payments to its policyholders and creditors, but does not shield policyholders or creditors from liability owed to third parties. The Respondent therefore concludes that his claim lies personally against the Appellant, entitling him to pursue execution to its logical conclusion irrespective of the moratorium.

Issues, Analysis and Determination

18. Having considered the Memorandum of Appeal and the parties’ submissions, this Court identifies the following primary issues for determination:
 - a. Whether the Learned Trial Magistrate erred in law and fact by holding that the Appellant failed to prove her status as a policyholder of Blue Shield Insurance Company Ltd;
 - b. Whether Section 67C(11) of the *Insurance Act* operates to shield the Appellant from execution by a third-party Respondent during the subsistence of a statutory moratorium on the insurer; and
 - c. Whether the consent dated 12th January 2023 is illegal, null, and void for being contrary to express statutory provisions.

Whether the Trial Court erred by holding that the Appellant failed to prove her status as a policyholder of Blue Shield Insurance Company Ltd

19. From the records, the Court observes that the evidence presented in the Notice of Motion dated 21st March 2023 directly contradicts the Trial Court’s finding that the Appellant failed to prove her status as a policyholder. Annexure “AWN1,” of the supporting affidavit to the motion was a copy of the cover note. This cover note explicitly identifies Alice W. Ndungu as the policyholder, provides the policy number, and confirms the issuer as Blue Shield Insurance Co. It further indicates that the policy was valid from 14th January 2009 to 13th February 2009. In accordance with Section 2(1) of the *Insurance Act*, the Appellant qualifies as the legal holder of the policy securing the contract with the insurer.
20. The Court holds that, since this documentary evidence was placed before the Trial Magistrate and was not meaningfully disputed by the Respondent, the Trial Court committed a palpable error of fact in concluding otherwise.



Whether Section 67C (11) of the Insurance Act shields the Appellant from execution by a third-party Respondent during a statutory moratorium on the insurer

21. The resolution of this appeal hinges on the interpretation and legislative intent of Section 67C (11) of the Insurance Act, particularly in relation to the consent agreement. Section 67C (11) provides:

“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.”
22. The Court interprets the auxiliary verb shall in this provision as creating a mandatory prohibition. It confers statutory immunity upon the policyholder, shielding them from personal liability for claims properly falling under the insurer’s responsibility. The critical question is what constitutes a “claim not payable by the insurer due to the moratorium.” The primary debt in this case arises from a liability covered under the Appellant’s policy with Blue Shield Insurance. Undoubtedly, this constitutes a claim that the insurer is contractually obliged to satisfy. Given that the insurer is unable to make payment by reason of the moratorium declared under Section 67C (10), this debt falls squarely within the statutory definition. It’s plain and literal meaning therefore releases the policyholder temporarily from personal liability to a third-party decree holder.
23. The Respondent urges a restrictive interpretation, relying on pre-2019 case law such as Stephen Kilonzo Matiliku v. Premier Industries Limited (supra). In the case, the Court held that the moratorium protects the insurer from payments to policyholders and creditors, but does not extend to policyholders’ liability to third parties. While this interpretation may have been correct under the law as it stood prior to the 2019 amendment, Section 67C (11) explicitly addresses the anomaly created when third parties execute against policyholders notwithstanding the insurer’s moratorium. Were Parliament’s intent merely to restate the protection already afforded to insurers under Section 67C (10), the enactment of Section 67C (11), directly addressing policyholders’ liability, would have been redundant.
24. The Court emphasizes that statutory provisions must be construed to give effect to the legislature’s clear purpose. Here, the objective is to correct the mischief whereby policyholders are unfairly exposed to debts they have already insured. The legislative intent is twofold: first, to preserve the orderly statutory management of the insurer by preventing a rush of claims that might deplete its assets; and second, to protect insured consumers from bearing the burden of the insurer’s financial distress, a risk they specifically transferred through the insurance contract.
25. By enacting Section 67C(11), Parliament shifts the burden from the policyholder to the regulatory system, requiring decree holders to pursue their claims through the Statutory Manager or the Policyholders Compensation Fund. To uphold the Trial Court’s ruling, which essentially applies the pre-2019 interpretation in the Matiliku Case without fully accounting for the statutory amendment would frustrate the remedial purpose intended by Parliament.
26. Accordingly, this Court finds and holds that Section 67C (11) of the Insurance Act constitutes a mandatory and remedial provision specifically designed to protect policyholders from personal liability for insured claims while the insurer remains under a statutory moratorium. The Court aligns itself with



the reasoning in *Maingi v Insurance Regulatory Authority & 3 others; Nguli & another (Interested Parties)* (Constitutional Petition 18 of 2022) [2023] KEHC 20819 (KLR), which affirmed that:

“But protection cannot in all fairness be to the Insurance Company alone but to all before the law be they the Insurance Companies, Policy Holders who are left exposed to liability whilst they undertook the contract of insurance to be indemnified on occurrence of any loss, damage or injury, victims, interested 3rd parties and the Insurance sector as a whole.”

27. The Respondent’s decree against the Appellant represents a claim that would ordinarily be payable by Blue Shield Insurance but is rendered unenforceable against the insurer due to the moratorium. Consequently, the Appellant is statutorily shielded from personal execution of this decree for the duration of the moratorium.

Whether the Consent dated 12th January 2023 is illegal, null, and void for being contrary to express statute?

28. The Trial Court confined its scrutiny of the consent order to procedural vitiating factors, finding that the consent was willingly executed and not obtained through fraud or collusion. The Court of Appeal articulated the circumstances in which a consent order may be set aside in *Samson Munikah, practicing as Munikah & Company Advocates v Wedube Estates Limited* [2007] eKLR, where it stated:

“This appeal raises the vexed question: (of) what are the circumstances in which a consent judgment may be set aside? In *Brook Bond Liebig (T) Ltd v. Mallya* [1975] EA 266, the then Court of Appeal for East Africa set out the circumstances in which a consent judgment freely entered into by the parties to a dispute in court would be set aside by the court. Delivering the leading judgment of the court, Law Ag. P expressed himself thus: ‘The circumstances in which a consent judgment may be interfered with were considered by this Court in *Hirani v. Kasam* [1952] (19 EACA 131), where the following passage from *Senton on Judgments and Orders* 7th Edition Vol 1 P 124 was approved: prima facie any order made in the presence and with the consent of the counsel is binding on all parties to the proceedings or action and those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court, or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.’”

29. The Court is of the view that the consent order was entered into under a misapprehension of the law, and the review was dismissed on the ground that the Appellant was not a policyholder of Blue Shield Insurance Co. Ltd. Section 67C (11) of the *Insurance Act* expressly prohibits a policyholder from assuming such liability during the moratorium. Consequently, the consent, regardless of how willingly it was signed, constitutes an unenforceable transaction. As held in *Five Forty Aviation Limited v. Erwan Lanoe* (supra), the Court has a mandatory duty to refuse enforcement of any contract once it becomes aware that the contract is illegal, even if the illegality was not formally pleaded by the opposing party.
30. In light of the affirmative findings on Issues 1 and 2 above, the Appellant was legally immune from assuming personal liability for the decretal sum as a policyholder under Section 67C (11). The Consent Order dated 12th January 2023, which compels the Appellant to personally satisfy the decretal sum and associated execution charges, is therefore contrary to the express mandatory provisions of the *Insurance Act*.



31. This Court finds that the Learned Trial Magistrate erred in law and fact by upholding an agreement contrary to statute. The appeal is allowed in entirety. The Ruling of the trial court delivered on 12th June 2023 is hereby set aside. The Consent Order dated 12th January 2023 and adopted on 23rd January 2023, is also set aside. The costs of this appeal, together with the costs of the application dated 21st March 2023 in the lower court, shall be borne by the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 5TH DAY OF DECEMBER, 2025.

PATRICK J O OTIENO

JUDGE

