Rono & another v Wanyama (Civil Appeal E054 of 2024)
[2025] KEHC 18212 (KLR) (3 December 2025) (Judgment)

Neutral citation: [2025] KEHC 18212 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CIVIL APPEAL E054 OF 2024

PJO OTIENO, J

DECEMBER 3, 2025

BETWEEN

FAITH RONO ..... 1ST APPELLANT

JOSHUA OKIRU OKUMU ..... 2ND APPELLANT

AND

STEVEN WAFULA WANYAMA ..... RESPONDENT

(Being an Appeal Against the Ruling of the Hon. Tobias O. Omono (RM) delivered on 2nd September 2024 at the Kitale Chief Magistrate's Court MCCC No. 17 of 2020)

JUDGMENT

Background

1. This is an appeal against the trial court's ruling dated 2/9/2024 that dismissed the Appellants' Notice of Motion dated 9/8/2024. The Appellants had sought substantive orders vacating the ex parte judgment of 3rd April 2023, reopening the Plaintiff's case for cross-examination, and granting the 1st Appellant leave to present her defence. The application further sought a declaration that the execution was unlawful, irregular, and illegal due to the statutory moratorium under Section 67C (11) of the Insurance (Amendment) Act 2019.

2. The Appellants' case was anchored on the primary claims that her failure to attend court was not deliberate; that she had delivered the court summons to her insurer, Xplico Insurance Co. Ltd, in 2020 and was assured that the matter would be handled and settled with finality only to discover upon perusing the file in August 2024 that the insurer-appointed counsel, Mr. Omariba Advocate, who was a stranger to her, who dealt with the matter but failed to inform her of the hearing dates of 5th December 2022, 27th February 2023, and 1st July 2024. The appointed counsel informed her that he had not been availed of her contacts by the insurer due to a communication breakdown.

3. Secondly and on prejudice, the 1st Appellant asserted that the attached Piaggio Tuk Tuk was her only source of livelihood, and its sale would cause her irreparable loss and damage. She contended that she possessed a genuine and strong defence raising serious triable issues, including the issue of liability. The third ground of the application was the statutory moratorium under the *insurance Act*. She explained that Xplico Insurance Co. Ltd was placed under Statutory Management on 8th December 2023, and a 12-month moratorium was declared, hence, by operation of Section 67C (11) of the Insurance (Amendment) Act 2019, she was not liable to pay any claim that the insurer could not pay due to the moratorium.

4. In response, the Respondent opposed the application primarily on the grounds that the appellant was indolence and was procedurally abusing the court process. It was his case that the 1st Appellant's conduct since the inception of the suit in 2020 depicted a very indolent litigant who did not deserve the court's discretion. The Respondent highlighted that the Appellant filed her defence one year after filing the Memorandum of Appearance and failed to file required documents like witness statements. That the Appellant merely dumped the summons with the insurer in 2020 and made no diligent follow-up until August 2024, when execution commenced. The lack of diligence amounted to trampling upon the provisions of Section 1A and 1B of the *Civil Procedure Act*, which mandate expeditious disposal of cases.

5. The Respondent further contended that the delay of one year and four months between the judgment, April 2023, and the application, August 2024 was inordinate and unexplained. Finally, the Respondent argued that the moratorium under Section 67C (11) of the *Insurance Act* did not apply to him as he had no privity of contract with the insurer; the decree was against the Appellant in a negligence claim.

6. The trial court, by the Ruling delivered on 2nd September 2024 dismissed the application with findings that the 1st Appellant was indolent, that the delay of over one year and four months was unexplained, that the moratorium was inapplicable, and that the defence comprised mere denials lacking triable issues.

The Appeal

7. The ruling aggrieved the 1st Appellant who then filed the Memorandum of Appeal dated 12th September 2024, challenging the entire Ruling of 2nd September 2024 on six grounds. The appellant faults the ruling on grounds that: -

    a. The learned trial Magistrate erred in dismissing the Application on the ground of inordinate delay despite an adequate explanation having been made.

    b. The Learned Magistrate failed to appreciate that the mistake of counsel cannot be visited upon an innocent party.

    c. The learned trial Magistrate erred in law and in fact in failing to exercise his jurisdiction to set aside the ex parte judgment.

    d. The crucial error: The learned trial Magistrate failed to appreciate that a moratorium had been declared under Section 67C(10) and (11) which provides that a policy holder shall not be liable to pay any claim not payable by the Insurer due to the moratorium.

    e. The learned trial Magistrate failed to consider the submissions made by Counsel on record for the Appellant.

f. The learned trial Magistrate ignored submissions made, existing legislation, precedents, and authorities supplied.

8. The Appeal was canvassed by way of written submissions and the court file shows that both parties filed their respective submissions. The court on its part has had the benefit of reading such submissions and given same due regard.

Appellant's Submissions

9. The Appellant submitted that the trial court failed to exercise its discretion judiciously but incorrectly applied the relevant legal principles. On the issue of delay and indolence, the Appellant conceded the passage of time but argued that the delay arose primarily from the insurer and the appointed counsel's omission, which should not be interpreted as intentional or contumelious conduct on her part. The Appellant relied on Philip Kipto Chemwolo & another v Augustine Kubende [1986] KECA 87 (KLR)and Mwangi S. Kimenyi v Attorney General & another [2014] KEHC 4220 (KLR), arguing that blunders occur and should not result in the denial of a determination on merits, especially where the Respondent failed to demonstrate any prejudice that could not be compensated by an award of costs.

10. Regarding the mistake of counsel, the Appellant reiterated that she diligently forwarded the summons to the insurer, and subsequent failure was the lapse of counsel excusable under Article 159(2)(d) of *the Constitution* which has been held in several cases including the case of Belinda Murai & 9 others v Amos Wainaina [1981] KECA 34 (KLR), should not be visited upon the innocent client.

11. On statutory moratorium, the Appellant submitted that the trial magistrate erred by relying on outdated legal principles. The Appellant emphasized that Section 67C (11), enacted through the Insurance (Amendment) Act 2019, explicitly provides that a policy holder shall not be liable to pay any claim not payable by the insurer due to the moratorium. The Appellant cited the High Court decision in Karari (as a Legal Representative of the Estate of Stanley Mwangi Muthiru Njambi) & 2 others v Statutory Manager KEHC 2325 (KLR), which confirmed that the 2019 amendment was legislative fiat intended to protect the insured judgment debtor from execution where the insurer is under a moratorium. The Appellant therefore argued that the attachment of her movable property directly contravened this statute, rendering the execution irregular and illegal.

Respondent's Submissions

12. The Respondent maintained its opposition to the Appeal, affirming the correctness of the trial court's Ruling. He asserted that the trial magistrate exercised his discretion judiciously, finding the application lacking in merit due to the Appellants' conduct. That the Appellants offered insufficient reasons for setting aside the judgment, engaging merely in a "blame game" against their previous advocates.

13. The Respondent stressed that the Appellants failed to demonstrate why it took them one year and four months to file the application to set aside the ex parte judgment. The conduct since 2020 depicted very indolent litigants who did not deserve the court's favour.

14. Regarding the moratorium, the Respondent firmly supported the trial court's finding that the moratorium under Section 67C (10) does not stop the decree holder from executing against the insured tortfeasor. The Respondent relied on pre-amendment precedents like the 2017 Blueshield Insurance CO. Ld case, confirming that the Respondent, as a third-party decree holder, has no privity of contract with the insurer, and the moratorium does not affect his decree against the insured. In summary, the Respondent argued that the Appeal lacked merit and prayed for its dismissal with costs.

Issues, Analysis and Determination

15. The court has considered the grounds in the Memorandum of Appeal and the rival submissions filed and identifies only one issue for its determination. The issue is whether the trial court e committed any indiscretion in the exercise of its discretion in setting aside and interpretation of the law regarding the moratorium.

16. Before delving into the substance of the appeal, the court wish to first address the issue raised by the Respondent regarding the inclusion of the 2nd Appellant in the appeal. The Respondent submitted that the 2nd Defendant in the lower court suit did not apply to set aside the judgment dated 3rd April 2023, and that the judgment against him remains intact and unchallenged.

17. The court notes that even though the Notice of Motion dated 9th August 2024, which led to the impugned Ruling of 2nd September 2024, was filed by the 1st Defendant/Applicant/Appellant alone, the truth of the matter is that the 2nd respondent was always a party before the trial court hence a decision in this appeal affecting the status of the lower court file in any way is potential capable of affecting the 2nd respondent hence, he is a necessary party who had to be joined. The court holds that the 2nd respondent was procedurally and lawfully joined.

18. The remedy for setting aside is intended to cure hardship occasioned by mistake or inadvertence but never intended to benefit a party who has by design or evasion set out to delay the court process. Here it is not in contest that it took the appellant some 16 months to challenge the judgment. That period cannot escape the description and face of an inordinate delay.

19. The only reason advanced for that delay is that the advocate did not keep her abreast of the ongoings in the court for which she blames the advocate appointed by the insurer. While the law used to be that mistakes of counsel should generally not be visited upon a client, that position has since changed in Kenya with the introduction of mandatory indemnity cover by advocates before they acquire practising certificate every year. Today every litigant who is let down by counsel has a safety net of seeking compensation for such let down. It is no longer enough to merely flush the card of mistake of counsel.

20. Whenever that card is flashed, the court is now duty-bound to assess the litigant's own conduct. As emphasized by the trial court, citing Savings and Loans Limited v Susan Wanjiru. Muritu, Nairobi (Milimani) HCCC No. 397 of 2002, a litigant has a primary duty to constantly check on the progress of their case, and an application to set aside cannot be granted on the sole ground of counsel's error if the litigant has demonstrated indolence. Even the defence filed and which was on record is the kind that cannot pass the test of raising a triable issue.

21. The court finds no merit in the challenge against the trial court in its determination that the application for setting aside was bereft of merits. That decision is upheld.

22. However, there was a complaint by the appellant in the application challenging the process of execution initiated after the appellants insurer had been placed under statutory management. That challenge is mounted upon the provisions of section 67C, *Insurance Act*. That provision, provides for the appointment of a statutory manager by the commissioner and regulates the powers of the manager and effects of exercise of such powers. It stipulates: -

> " Sec 67C
>
> (2) The Commissioner may, with the approval of the Board—

(i) appoint a competent person familiar with the business of the insurer (in this Act referred to as "a manager") to assume the management, control and conduct of the affairs and business of an insurer to exercise all the powers of the insurer to the exclusion of its Board of Directors, including the use of its corporate seal...

(10) For the purposes 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...

(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."

23. The record shows that the declaration of a moratorium was on 8th December 2023, coupled with the protection under Section 67C (11) of the Act. It is to be remembered that the provision was invoked not as a defence to the suit but a challenge to the execution levied against appellant. The court views the provision cited above to be an imposing and undoubted complete immunity against execution against a policy holder while the moratorium lasts. It leaves no room for explanation otherwise than that no execution process issues to override the moratorium.

24. In rejecting the appellants' application and arguments, the trial court erroneously relied on the decision in In the matter of Blue shield Insurance Company limited (2017) eKLR. A cursory reading of the decision discloses that it correctly applied the law as at that time, establishing that a moratorium protected the insurer but did not shield the insured (policyholder) from execution by third parties.

25. However, that legal landscape shifted with the enactment of the Insurance (Amendment) Act, 2019, which introduced Section 67C (11) into the *Insurance Act* (Cap 487). That development has attracted a judicial pronouncement in Karari (as a Legal Representative of the Estate of Stanley Mwangi Muthiru Njambi) & 2 others v Statutory Manager KEHC 2325 (KLR), where the Court discerned the plain meaning of Section 67C (11) to be that the policy holder is placed in the same protected position as the company insofar as the moratorium is concerned. The court termed the provision a legislative fiat and remarked: -

> " 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."

26. The appellant's insurer, Xplico Insurance Co. Ltd, was placed under Statutory Management, and a moratorium was declared on 8th December 2023. That preceded the commencement of execution proceedings on 23.07. 2024. It is thus clear that when the execution was initiated, the moratorium was in force and the warrants of attachment and sale ought not to have been issued. Now that it is plain that the same were issued in violation of the law, the violation must be remedied by those warrants being recalled and set aside. The court recalls and sets aside the warrants of attachment and sale issued on the 24.09.2024 and directs that any property seized pursuant thereto be released to the appellant forthwith and unconditionally.

27. Having held as above, the court holds that because the trial magistrate's findings on the 1st Appellant's indolence was sound in principle the application for setting aside and opening the case for the appellant to lead evidence cannot succeed but is dismissed. However, the warrants of attachment and sale issued in contravention of the express provisions of the *Insurance Act* cannot be left to stand but are set aside.

28. In upshot, the Appeal partially succeeds in that the prayer for setting aside is dismissed but the execution undertaken in violation of the law is set aside on the basis that section 67C (11), *insurance act* is a complete protection over the appellant once her underwriter was placed under statutory management.

29. The consequence is that the judgement of the lower court is maintained and upheld but the warrants of attachment and sale issued against the appellant are recalled and set aside pending the termination of the statutory management.

30. Because the application for setting aside was brought after undue and inordinate delay, it would be unjust to award to the appellant the costs of the appeal. No orders as to costs

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 3RD DAY OF DECEMBER, 2025

PATRICK J O OTIENO

JUDGE

In the presence of;

Mr. Onyancha for the Respondent

No appearance for the Appellant.

Ms. Hanna – Court Assistant