



**Chepkwony & another v Gaturu (Civil Appeal 038 of 2019)
[2025] KEHC 3665 (KLR) (Commercial and Tax) (24 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3665 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL 038 OF 2019
H NAMISI, J
MARCH 24, 2025**

BETWEEN

SIMON KIMUTAI CHEPKWONY 1ST APPELLANT

CHARLES MUTHOKA MUTUA 2ND APPELLANT

AND

EVANS THIGA GATURU RESPONDENT

*(Being an Appeal from the Judgement of Hon. T.W.C Wamae, Chief Magistrate
delivered on 20 January 2012 in Milimani Civil Suit No. 13416 of 2005)*

JUDGMENT

1. The appeal arises from a judgement in the lower court entered in favour of the Respondent against the Appellants as follows:
 - i. Special damages of Kshs 400,000/=
 - ii. Motor vehicle repairs plus assessors' fee of Kshs 361,650/=
 - iii. Medical expenses of Kshs 125,716/=
 - iv. Loss of user of kshs 50,000/=
 - v. Costs and interest at court rates
2. The suit arises from a road traffic accident that occurred on 15 December 2002 at 8.45pm along University Way, Nairobi, involving the Respondent's motor vehicle registration number XXX XXXX and the 1st Appellant's motor vehicle registration number XXX XXXX which was driven by the 2nd



- Appellant. As a result of the accident, the Respondent sustained injuries and incurred expenses in repairing the motor vehicle.
3. The Appellants entered appearance. It is not clear whether or not the Appellants filed a Statement of Defence because the same is not contained in the Record of Appeal, neither is it mentioned in the judgement. The matter proceeded to hearing, and judgement was entered as stated above.
 4. What followed then was an application by the Appellants seeking to stay execution and to stay proceedings herein pending the lifting of the moratorium by the Commissioner of Insurance against United Insurance Company Ltd. Once again, I am unable to discern whether or not a ruling on the application was made because the proceedings before me are incomplete.
 5. Aggrieved by the judgement, the Appellants lodged this appeal on the following grounds:
 - i. That the Honourable Magistrate erred in law and in fact by finding the Appellants liable to pay the sum of Kshs 1,763,388.17 and interest thereon to the Respondent despite the Appellant being insured by United Insurance Company;
 - ii. That on 2 October 2019, the Honourable Magistrate issued a notice to show cause why the warrants of arrest and committal to civil jail against the Appellants in execution of a decree to recover the sum of Kshs 1,763,388.17 and the interest thereon in favour of the Respondent/ Decree Holder herein despite the Appellants being insured by United Insurance Company which is under statutory management and enjoys moratorium;
 - iii. That the Court in the said proceedings has now issued Summons ordering the Appellants/ Judgement Debtors to appear before it on 25 November 2019 to explain why he has not settled the claim despite the Appellants being insured and the insurer enjoying moratorium;
 6. Parties canvassed the Appeal by way of written submissions.

Analysis and Determination

7. I have read the Record of Appeal, Memorandum of Appeal and respective submissions. It is the duty of a first appellate court to re- appraise and re-analyse the evidence on record and arrive at its own conclusion and give reasons either way – see *Sumaria & Another vs Allied Industries Limited* [2007] 2 KLR. The Court has also to appreciate that in the discharge of its aforesaid mandate the Court should be slow in moving to interfere with a finding of fact by a trial court unless it was based on no evidence, it was based on a misapprehension of the evidence or the Magistrate had been shown demonstrably to have acted on wrong principle in reaching the finding he did –see *Musera vs Mwechelesi & another* [2007] 2 KLR 159.
8. Having said that, the issue for determination herein is whether the Respondent should be allowed to recover the decretal sum from the Appellants while the moratorium against United Insurance Company Ltd is still in effect.
9. From the evidence provided, it is not disputed that the Appellants’ motor vehicle was insured by United Insurance Company Ltd.
10. The Insurer was placed under statutory management and on 15 July 2005, in the exercise of his statutory powers under Section 67 (c) (10) of the Insurance Act, the Statutory Manager declared a moratorium of any payment to its policy holders and all creditors for a period of 12 months. On 23 October 2009, Justice Kimaru issued an order which, inter alia, stayed all proceedings of whatever nature or form against the insurer or its policy holders during the currency of the moratorium declared by the Insurer’s Statutory manager. Further, pursuant to notice dated 28 May 2019 and



Court Order made on the same day in Cause No. 22 of 2006, the period of statutory management of United Insurance Company Ltd was extended pending the hearing and determination of a preliminary objection filed in the cause. However, other than the notice of 28 May 2019, neither the first order of 15 July 2005 nor the one of 23 October 2009 was placed before the trial court. Presumably, the Appellants expected the trial court to take judicial notice of the existence of the various Orders. The first two Orders were researched by this Court in a bid to understand the wording and import thereof.

11. In reference to section 67C (11) of the Insurance Act, the Appellants submitted that the insured (Appellants) should not be made to suffer the shortcomings of the Insurer as they stand to suffer irreparable harm should the Respondent be allowed to pursue the Appellants directly. They argued that this would defeat the whole purpose of subscribing to insurance covers. The Appellants relied on the cases of *Re: Concord Insurance Company* [2014], HCC No. 18 of 2013 and *Kensilver Express Ltd & 3 Others -vs- Commissioner of Insurance & 4 Others* [2007] eKLR.
12. The Respondent argued that while the Appellants relied on the provisions of section 67C (11) of the Act, the same came into effect on 31 December 2019, after the Court had pronounced itself on this matter. The provision, therefore, cannot apply retrospectively. The Respondent relied on the provisions of section 23(3) of the Interpretation and General Provisions Act and the cases of *Commissioner of Income Tax -vs- Pan African Paper Mills Ltd* [2018] eKLR and *Samuel Kamau Macharia & Anor vs KCB & 2 Others* [2012] eKLR.
13. It was the Respondent's position that section 67(c) 10 of the Act is meant to protect the insurer against its policy holders and creditors and not policy holders against proceedings by third parties. The Respondent contended that neither the Appellants nor Respondent had filed a declaratory suit against the Insurer, therefore, the appeal lacked merit.
14. In reading the moratorium of 15 July 2005, the same sought to protect the Insurer, which was under statutory management, from claims of payment made by either its policy holders or other creditors. In the orders made on 23 October 2009, the protection was extended to claims by third parties against the policy holders. Specifically, Order No 3 stayed all proceedings of whatever nature or form against United Insurance Company Ltd or its policy holders during the currency of the moratorium declared by the Statutory Manager in 2005. However, none of this information was placed before the trial court, thus the trial court proceeded to hear and determine the suit. It is only in the Appellants' application of 22 October 2019 that the extension notice of May 2019 was presented to the trial Court, which extended the moratorium pending the hearing and determination of the preliminary objection.
15. I note that it is not clear from the material placed before me whether the said orders were ever subsequently varied, set aside or discharged. It would seem that, just like in the trial court, the Appellants expect this Honourable Court to have knowledge and/or take judicial notice of the existence of orders and did not concern themselves to present the same to the Court. The trial court could not be said to have erred in issuing warrants of arrest and committal to civil jail because the court was unaware of the Order of 23 October 2009 that applied to the proceedings before it. Be that as it may, the said Order applied to all proceedings of whatever nature, which included execution proceedings. The import of this is that the execution proceedings in the trial court were/are subsequently stayed until the said orders are varied, reviewed and/or set aside.
16. In the case of *Republic V Chairman , Political Parties Disputes Tribunal & Others Ex Parte Susan Kihika Wakarura* [2017] e KLR, Justice Odunga opined thus:

“The High Court orders must be obeyed by subordinate courts whether they agree with them or not; whether pleasant or unpleasant. To blatantly ignore High Court orders and expect



that the court would turn its eye away, is to underestimate and belittle the purpose for which the High Court is established...”

17. It is my finding that the proceedings in the notice to show cause and the ruling of the learned trial magistrate contravened the orders of 23rd October 2009 and they were thus in law a nullity. In effect this means that they amounted to nothing.
18. The upshot is that the appeal is meritorious. I hereby order that the proceedings in civil suit no. 13416 of 2005 are stayed pending the lifting of the moratorium by the Statutory Manager against United Insurance Company Ltd.
19. Considering the outcome of the appeal, I make no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 24 DAY OF MARCH 2025.

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

Keranda..... for the Appellants

Ms. Ondimu..... for the Respondent

Ms. Libertine Achieng..... Court Assistant

