REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

PETITION NO. 1 OF 2010 (FORMERLY 705 OF 2009 NAIROBI

JAMES NG'ANG'A NJENGA.....*PETITIONER*

VERSUS

THE COMMISSIONER OF INSURANCE.....1ST RESPONDENT

THE MINISTER OF FINANCE .....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

THE STATUTORY MANAGER UNITED INSURANCE CO. LTD. .....4TH RESPONDENT

AND

ELIZABETH WANJA .....THIRD PARTY

R U L I N G

The genesis of this petition is Civil Suit Embu SPMCC No. 90 of 2005. The petitioner herein was the defendant in that suit which was a running down matter. Judgment was entered against him to the tune of KShs.495, 000/= in the suit that was undefended. His motor vehicle which is said to have caused the accident that gave rise to the cause of action in that suit was insured by United Insurance Co. Ltd. Although notified of the accident, the said Insurance Company failed to participate in the suit or settle the amount of money in question in satisfaction of the court's decree. The plaintiff in that suit who is named as the Third party in this petition threatened to execute the decree. Attempts to obtain orders of stay of the execution did not bear fruit and so the petitioner decided to move this court by way of this petition against The Commissioner of Insurance (1st Respondent), The Minister of Finance (2nd Respondent), The Attorney General (3rd Respondent), The Statutory Manager United Insurance Co. Ltd. (4th Respondent) and Elizabeth Wanja (Third Party). It is important to note that there were several other similar cases filed at the High Court in Nairobi against the same parties as herein. All those petitions were consolidated and heard together by Hon. Lady Justice Mary Ang'awa. She rendered her sixty four (64) page ruling on 18th December, 2007. Her ruling has since been appealed against but I have not been informed if the Appeal has been determined or not.

The petitioner has petitioned this court for the following declarations which I find imperative to quote verbatim:-

(a) That a declaration to issue that the 1st Respondent, the Commissioner of Insurance failed to take remedial measures in time to forestall a situation whereby the petitioner (sic) hold policies but are unable to have paid and victims hold judgment decree which they are unable to execute.

(b) That a declaration that there be an injunction to issue and duly extended on all cases for execution by decree/creditors until a report of the intended new Statutory Manager is tabled on claims touching on United Insurance.

(c) That a declaration that the Minister is under a duty to implement the policy holder's compensation fund forth with.

(d) That the petitioner should be subjected to civil jail as this contravenes the United Nations Conventions on the subject.(sic)

(e) That the Commissioner of Insurance and the Minister be held liable for not acting with expediency and that the court declares that the Government of Kenya is duty bound to pay the claims under the compensation fund.

(f) That a declaration that the insurer be held liable and responsible according to law.

I must say I find prayer (d) quite perplexing and I cannot understand why a petitioner should seek for orders to subject him to civil jail. Prayer (e) does not make sense either. I am of the impression that counsel for the petitioner did not take this petition seriously enough for him to see the need to proof read the petition and correct the many careless typographical and grammar mistakes that run through the body of the petition itself and the supporting Affidavit.

The petition is premised on Section 84(1), 70, 72, 75 and 77 of the Constitution and Rule 12 and 13 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms *(since repealed).* I shall later on in this ruling analyze each of these provisions *vis a vis* the cause of action herein and come to a conclusion as to whether any of them has been infringed or violated by any of the parties herein.

The petition was opposed by the 1st Respondent and the 3rd Party. The other Respondents did not file any replying affidavits. The petition proceeded by way of written submissions which were duly filed by the three counsels herein. Several authorities were also attached. I have read and carefully considered the contents of all the said documents and I have been informed by the same accordingly.

According to the 1st Respondent, the petitioner has not disclosed any cause of action against him. The 1st Respondent has deposed that the settling of claims that are shown to be *bona fide* rests upon the policy holder and the insurer with whom the policy holder enjoys privity of contract and not with the 1st Respondent. He further deposes that his role as the Commissioner of Insurance is to supervise insurance companies and take necessary action in the event of insolvency. In this case, on being convinced that the insurance company in question was unable to pay up its claims, the 1st Respondent had appointed a Statutory Manager on 15th July, 2005 and the Statutory Manager had proceeded to declare a moratorium over all payments by the insurer as mandated by law. A winding up petition was also filed in court but I have not been informed of its outcome. It is the 1st Respondent's contention therefore, that he performed his supervisory duty as mandated by law and he cannot therefore be said to have failed to act with expediency. In his submissions, the 1st Respondent has also submitted that under Section 179(1) of the Insurance Act, the responsibility of meeting claims by policy holders lies with the

"Policyholders Compensation Fund" which is a body corporate and not with the 1st Respondent or indeed the 2nd Respondent. To that extent therefore, the 1st Respondent has been wrongly sued. Indeed, according to the 1st Respondent, the petitioner has failed to demonstrate to the court that he has made any effort to involve the Policyholders' Compensation Fund in this matter. It is actually noted that even in his submission, the petitioner has not explained why he has not sought recourse from the Policyholders Compensation Fund before asking this court to declare that the "*Government of Kenya are duty bound to pay claims under the Compensation Fund under Section 179(1) of the Insurance Act "* (sic).

Further, although it is clear that the Policyholders Compensation Fund was established in 2004 vide Legal Notice No. 015 of 24th September, 2004. The petitioner herein does not seem to have an inkling about that development and he has not endeavored to find out if the same is operational and the extent to which it can settle he claim against him hence his prayers (2) and (3). He ought to have done his research properly and prepared well before filing his petition. He has not therefore shown how the Minister and the 1st Respondent have failed to protect his rights in practice. He has just made a rhetorical and theoretical claim against these two Respondents which he has not even attempted to support with factual evidence.

On the issue of non-joinder of the 1st Respondent, I must also agree with the 1st Respondent. Whereas the 1st Respondent was the right party to enjoin as a party in Misc. Civil Suit No. 1345/2005 which the petitioner seems to heavily rely on,this petition was filed in year 2009. The law was amended vide Act No. 11 of 2006 which created the "Insurance Regulatory Authority" which is now the body charged with responsibility to regulate and supervise Insurance Companies in place of the 1st Respondent who is now the Chief Executive Officer of the said body.

The Insurance Regulatory Authority is a body corporate with perpetual succession and capable of suing and being sued. It should have been sued in It's own capacity and not through It's Chief executive officer. To that extent therefore, the 1st Respondent has been wrongly sued and there is therefore no cause of action against him. In the circumstances, I uphold his submission to that effect.

I therefore, make a finding at this stage to the effect that the petitioner has failed to establish any of his claims against the 1st Respondent.

This then brings me to the rest of the petition as against the other parties. No culpability has been proved against the Minister for Finance either. As demonstrated earlier on, the Minister had established the Policyholders Compensation Fund even before this suit was filed. Besides, it was not demonstrated by the petitioner that he had attempted to get compensation from that Fund but he failed. There is nothing that the Minister was enjoined by law to do that he failed or neglected to do which can be said to have resulted in the predicament the petitioner now finds himself in.

I will now deal with the Statutory Manager who is named as the 4th Respondent. The 4th Respondent was appointed pursuant to Section 67 c (2) (i) of the Insurance Act Cap. 487 of the Laws of Kenya which provides:-

"The Commissioner may, with approval of the Minister appoint any person to assume the management, control and conduct of the affairs and business of an Insurer to the exclusion of the Board of Directors, including the use of the company seal."

The 4th Respondent was therefore appointed in strict compliance with the law on 15th July, 2005. Upon appointment, the 4th Respondent declared a moratorium on the payment by the insurer of its policy holders and other creditors. A moratorium is a legally authorized suspension of an on-going activity.

By declaring a moratorium on the Insurance Company, no debts could therefore, be paid to policy holders or other creditors while pending the outcome of the winding up cause. This moratorium therefore lawfully suspended the operation of section 10(2) of Cap 405 which provides the instances when an insurer shall pay money in respect of a judgment. The 4th Respondent was not therefore in breach of the law when he/she failed to satisfy the court decree against the petitioner. That debt could not be paid until the moratorium was lifted. In that case, it would still be up to the Statutory Manager to determine the ratios of the payment to be paid *vis a vis* the unsettled claims. I reiterate the finding by the Court of Appeal in Civil Application No. NA14 of 2008 where it stated in a matter similar to this one that:

"The Statutory Manager's duty is to ensure a rateable distribution of the Company's assets to all known creditors of the Company".

If for instance the Statutory Manager decided to settle only a certain percentage of the claims, that percentage is applied across the Board *pro rata* and the petitioner cannot demand to be given any preferential treatment in respect of his claim as opposed to the other policy holders. My finding therefore is that the Statutory Manager (4th Respondent) did not in any way contravene any law in failing to settle the decree obtained against the petitioner herein.

This brings me to the 3rd Respondent i.e. the Hon. Attorney General. This is where I address the issue as to whether any of the fundamental constitutional rights expressed by the petitioner have been violated.

As a starting point in this aspect, it is important to note that the root of this petition is a lawfully obtained court decree by the 3rd party against the petitioner. In pursuing settlement or execution of the said decree, the 3rd party was actually exercising her right. She was not seeking to unlawfully dispossess the petitioner of his property. Just like the petitioner, she too has fundamental and inherent rights under the Constitution which need to be protected and respected including her right to the protection of the law under S.70(c) of the now repealed Constitution. Indeed the proviso to that article provides categorically that the said rights are

"subject to such limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest"

By trying to invoke the provisions of Section 70 of the constitution in this matter to avoid settlement of a court decree, the petitioner is actually seeking to trample on the same rights belonging to the 3rd party.

As succinctly expressed by Justice Nyamu in Kenya Bus Services Ltd. And 2 others *versus* A.G. & 2 others (2005) EKLR.

"Fundamental rights cannot be enjoyed in isolation and by a selected few while they trample on others or tread upon their rights. The enjoyment of fundamental rights and freedoms contemplates mutuality and an atmosphere of respect for law and order including the rights of others and the upholding of the public interest rights and freedoms can only thrive alongside those of others and the society at large……The function of the court when faced with the task of establishing or determining the rights on the one hand and determining the limitation and restrictions on the other hand is to do a balancing act. In this balancing act are the principle values, objectives to be attained, a sense of proportionality and public interest and public policy considerations just to mention a few. All these must be put on the scales with the fundamental rights on the left and the limitation on the right".

Would this court therefore allow the petitioner's rights to trump those of the 3rd party" Absolutely not. Both of them are protected by the same law and Constitution and neither of them should be accorded a more superior place than the other. They are both entitled to equal protection of the law.

It is instructive to note that the 3rd party herein has a judgment and decree which has not been challenged. It therefore forms a judgment *in rem* and she is legally at liberty to execute or enforce it. Execution of a valid court decree cannot amount to a violation of the judgment /debtor's property rights. Section 75(6) on which the petitioner also relies expressly states that;

"nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) or (2) while; (iv) In the execution of judgments or orders of a court in proceedings for the determination of civil rights or obligations".

Execution of a decree cannot be a violation of the judgment/debtor's rights to property. It is not unconstitutional.

It is my considered finding therefore that none of the constitutional rights of the petitioner have been infringed by the state – (represented here by 3rd Respondent).

As stated above, the 3rd party's act of seeking execution as against the petitioner is lawful and strictly within her rights under the Constitution. In any event, the claim between the petitioner and the 3rd party has no constitutional dimensions at all. The same rests within the domain of private law and seeking to bring it under the Constitution is an abuse of this court's process.

On Section 77 of the Constitution, if in the petitioner's opinion he did not receive a fair hearing before the trial court that gave judgment against him, his recourse was to have the ex-parte judgment set aside or to move to this court by way of Appeal. He has not done so and so the said judgment remains lawful and enforceable. It cannot be quashed or set aside by way of this petition.

In sum therefore, in view of the foregoing, I conclude by making a finding that this petition is misplaced. It is incompetent. I find no violation or breach of any of the constitutional or fundamental rights of the petitioner as claimed. This petition is therefore dismissed with costs to the 1st respondent and the 3rd party. It is noted that the other listed respondents did not respond to the petition and so they cannot be awarded costs. Orders accordingly.

W. KARANJA

JUDGE

Signed by the above but delivered and dated at Embu this 11th day of May, 2011 by the undersigned.

GEORGE DULU

JUDGE

In the presence of:- Mr. Munene holding brief for Okwaro Advocate for 3rd party and Ojienda Advocate for petitioner.