



Maundu & another v Okoth (Suing as the Legal Representative of the Estate of the Late Billy Nyongesa Ogutu) (Civil Appeal E039 of 2025) [2025] KEHC 11603 (KLR) (31 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11603 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E039 OF 2025
EN MAINA, J
JULY 31, 2025**

BETWEEN

NELSON TAMBETE MAUNDU 1ST APPELLANT

RACHAEL NJOKI KAHARA 2ND APPELLANT

AND

**LAMBERT OGUTU OKOTH (SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF THE LATE BILLY NYONGESA OGUTU) RESPONDENT**

RULING

1. The Appellants/Applicants were aggrieved by the ruling of the court below which dismissed their preliminary objection to the Respondent's suit against them on the ground that no leave of the court was required by the Respondents to sue them, even though their Insurer had been placed under receivership and a moratorium issued.

2. Their preliminary objection in the court below and in this appeal is premised on Section 432(2) of the [Insolvency Act](#) which states:

“432. Consequences of liquidation order

.....

(2) 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.”



3. Simultaneously, with this appeal against the ruling, the Appellants/Applicants filed an application by which they seek to stay the hearing of the impugned suit pending the hearing and determination of the appeal. The grounds for the application are that:-

- “(1) That the Respondent filed Mavoko MCCC NO. E475 of 2022 against the Applicants in relation to a road traffic accident.
2. The Applicant is a policyholder at Resolution Insurance Company Limited (under liquidation) thereafter referred to as ‘the insurance Company’.
3. The Insurance Company was placed under liquidation on 21st December 2023 by which time the suit had not been set down for hearing. Once the Insurance Company was placed on liquidation, it triggered a statutory moratorium under Section 432(2) of the Insolvency Act, 2015 which prohibits the continuation of proceedings against a company under liquidation without leave of the insolvency court.
4. The Applicants filed a notice of preliminary objection in the subordinate court seeking to strike out the suit for failure to obtain leave from the insolvency court before proceeding with matter as set out under Section 432(2) of the Insolvency Act No. 18 of 2015.
5. Upon hearing the parties on the preliminary objection, the learned Magistrate dismissed the said objection on 30th January 2025.
6. The Applicants, aggrieved by the Ruling, lodged the present appeal by filing a Memorandum of Appeal in this court dated 20th February, 2025 but the same has not been set down for directions.
7. The learned Magistrate erred gravely in law for among other grounds :-
 - a. Failure to appreciate that a claim against an insured is a liability against the insurance company as the company has the obligation to indemnify the insured in accordance with Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act.
 - b. Making an error in law by finding that the suit had been filed against the Defendants in their personal capacity and not against the Insurance Company thereby ignoring the law that there is no privity of contract in an insurance claim as a suit against an insured is essentially a suit against the insurance company.
 - c. Failure to consider the fundamental and mandatory nature of Section 432(2) of the Insolvency Act No.18 of 2015.
9. The appeal filed by the Applicants herein raises substantial legal issues, with extremely high chances of success as the learned magistrate totally ignored and misapprehended the mandatory provisions of Section 432(2) of the Insolvency Act that require a suit on matters touching on companies under liquidation be instituted or continued with the leave of the insolvency court failing which the court hearing such a case shall be proceeding without jurisdiction.



10. Unless an order of stay of proceedings herein is granted while pending the hearing and determination of this application and the appeal, the appeal which raises succinct arguable points of law shall be rendered nugatory as the suit at the lower court shall proceed unhinged and judicial time shall have been spent on proceedings at the lower court which proceedings may eventually be set aside at the end of the Appeal.
 11. This matter is scheduled for mention on 5th May 2025 to take a hearing date thus the need to grant the stay of proceedings as prayed to safeguard the rule of law and conserve the substratum of the suit.
 12. It is in the interest of justice to grant the orders sought to preserve the subject matter of the appeal and prevent the Applicant from suffering undue prejudice.”
4. On 29th April 2025 this court granted an interim stay of the proceedings in the court below pending the hearing and determination of this application. To date no response has been filed to the application.
 5. The application was to be canvassed through written submissions, but only the Appellants/Applicants filed submissions. Learned Counsel for the Appellants submitted that the appeal herein raises arguable and weighty questions on jurisdiction and should the suit against them, be allowed to proceed, the appeal will be rendered nugatory; that the statutory context of liquidation constitutes exceptional circumstances that warrant the exercise of this court’s discretion in favour of the Applicant; that a hearing of the suit would violate the moratorium contemplated under Section 432(2) of the *Insolvency Act*, thereby defeating the very purpose of the pending appeal and accordingly the suit in the court below, being Mavoko MCCC No. E475 of 2022, should be stayed pending the hearing of this appeal and further that the costs of this application should be provided for. Reliance was placed on the cases of William Odhiambo Ramogi & 2 Others v Attorney General and 3 Others [2019] eKLR; Turbo Highway Eldoret limited v Muniu (Civil Appeal E040 of 2021) [2022] KEHC 10197 (KLR); the case of Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR and the case of Maingi v Insurance Regulatory Authority & 3 Others [2023] KEHC 20819 (KLR).
 6. I have carefully considered the application, the grounds on its face, the facts deposed to in the supporting affidavit, the submissions on record, the cases cited and the law. Section 432(2) of the *Insolvency Act* is categorical that no legal proceedings can be instituted without the leave of the court, against a company which has been placed under liquidation and a liquidator appointed. However, and I do this at the risk of being seen as determining the appeal herein before it is heard, the current relationship between the Applicants and their Insurer and the Applicants and third parties is not governed by the *Insolvency Act* but by the Insurance (Motor Vehicle Third Party Risks) Act which at Section 15 contains Special provisions on contracts of insurers against liabilities to third parties. Learned counsel would do well to read Sections 15(1) (a) and (b) which define an insolvency event and sub sections (2) an (4) which state:-

- “ 15. 15. Contracts of insurance against liabilities to third parties.
- (2) If an insured person, either before after the occurrence of an insolvency event, incurs liability to a third party, the person's rights against the insurer under the contract are transferred to and vest in the third party.

.....



- 4) In so far as a contract of insurance made in respect of any liability of the insured to third parties purports (either directly or indirectly) to avoid the contract, or to alter the rights of the parties under it—
- (a) on the happening of an insolvency event involving the insured; or
 - (b) on the making of an order under Part V of the *Insolvency Act* (Cap. 53) in respect of the insured's estate, the contract is void.”
7. Subsection 4 expressly states that an insurer cannot avoid a contract of insurance made in respect of any liability of the insured to third parties, merely because of the happening of an insolvency event involving the insured. The sub-section states that such a contract is void. My reading of Section 15 above is that the suit against the Appellants must proceed in order for liability of the insured to be determined first before a determination can then be made whether such liability would be transferred to or vest in the Respondents vis a vis the insurer. To stay the proceedings in the lower court would be prejudicial to the Respondents in view of the provisions. It is instructive that the insurer is not a party either in this appeal or in the suit in the court below.
8. The upshot is that this application is not merited. It is dismissed save that there shall be no order as to costs given that it was not opposed.

It is so ordered.

RULING SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 31ST DAY OF JULY, 2025.

E. N. MAINA

JUDGE

In the presence of:

Mr. Kairu for the Appellants/Applicants

Ms Waigara for Wangila - for the Respondent

Geoffrey - Court Assistant

