



Occidental Insurance Company Limited v Mutuku & another; Mutua & 2 others (Interested Parties) (Civil Case E004 of 2023) [2024] KEHC 11772 (KLR) (30 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11772 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL CASE E004 OF 2023
RK LIMO, J
SEPTEMBER 30, 2024**

BETWEEN

OCCIDENTAL INSURANCE COMPANY LIMITED PLAINTIFF

AND

TERESIA SYOKAU MUTUKU 1ST RESPONDENT

MUTUKU DOMINIC 2ND RESPONDENT

AND

JOHN KYALO MUTUA INTERESTED PARTY

MULWA MAKAU INTERESTED PARTY

JOYCE MARY NGUTE INTERESTED PARTY

RULING

1. By Notice of Motion dated 21st February 2024, Occidental Insurance Co. Ltd, the Plaintiff herein is seeking the following order namely;
 - a. ..Spent
 - b. That there be a stay of proceedings in any suit arising out of or claiming to arise out of an accident involving motor vehicle registration No. KAE 409 H insured by the Plaintiff under policy No. TP/08/519372/09 and concerning the accident of 04.07.2022 along Mwingi-Garissa road and the named claimants named and other unknown persons and any suit to be filed so stand stayed pending hearing of this application inter-partes and thereafter pending the hearing and determination of this case.
 - c. That the order in (2) above do apply to all suits filed and to be filed in respect of the said accident of 04.09.2022 involving motor vehicle registration No. KAE 409 H including;



- i. Mwingi MCCC NO. E60 of 2023 John Kyalo Mutie v Teresia Sokau Mutuku
 - ii. Mwingi MCCC NO. E146 of 2022 Mulwa Makau & Joyce Mary Ngute v Teresia Syokau Mutuku
- d. That consequent upon the orders above, the court to certify this matter to be heard on priority basis.
- e. That costs of this application be provided for.
2. The application is premised on the following grounds;
 - a. That the plaintiff/applicant was at all material times the insurer of the Defendant's motor vehicle registration No. KAE 409 H under policy No. TP/08/519372/09 for a period the period between 23.09.2021 and 22.09.2022 and the said motor vehicle was involved in an accident on 04.07.2022 when the said policy was in force
 - b. That the plaintiff received summons to enter appearance in Mwingi MCCC No. E 60 of 2023- John Kyalo Mutie v Teresia Syokau Mutuku and Mwingi MCCC NO. E146 of 2022 Mulwa Makau & Joyce Mary Ngute v Teresia Syokau Mutuku which suits are coming up for hearing and pre-trial on 26.06.2024 and 21.03.2024 respectively.
 - c. That the plaintiff/applicant/insurer is seeking to avoid liability for the accident for non-disclosure of material facts and breach of the insurance policy terms and conditions
 - d. That this application has been made without unreasonable delay.
3. The application is also supported by the supporting affidavit of Jeniffer Solovea sworn on 22nd February 2024 where she majorly reiterates the grounds adduced on the face of the application and further avers as follows; that the applicant/plaintiff has filed this suit to avoid liability for non-disclosure of material facts and breach of the insurance policy terms and conditions pursuant to Section 10 (4) of the *Insurance (Motor Vehicle Third Party Risks) Act*. The applicant contends that the defendant breached the terms of the insurance policy by carrying unauthorized passengers and goods for hire and reward. The deponent also avers that the suit ought to be heard first on priority basis before the primary suits to determine liability of the plaintiff to defend and /or pay any judgment arising out of the accident.
4. In its written submissions dated 24th July 2024 done through counsel, the applicant contends that all the primary suits in Mwingi CMs Court arose from an accident in which it is seeking to avoid liability owing to non-disclosure of material facts by the Respondent and breach of policy terms of the Insurance cover it provided. It submits that the said suits should be stayed first so that the question of liability to defend the suits and pay the claims can be determined.
5. It is their contention that a stay of proceedings will save Judicial time it relies on the case of *Britam General Insurance Co. Ltd -v- Stephen Wambua Masila & 11 others* [2020] eKLR.
6. It further contends that the Interested Parties are not going to suffer any prejudice if the question of liability of the Applicant is determined first.
7. It is its case that unless stay is granted the suit filed herein as framed will be an academic exercise.
8. This application has been opposed by the 1st Interested Party – John Kyalo Mutua. He avers that he is the Plaintiff in Mwingi CM's Court Civil Case No. E060 of 2023. He claims that the counsel for Applicant herein has been appearing for the same Respondents herein and that M/s Naututu Advocates even applied for adjournment when the matter came up in the trial court the fast time.



9. He contends that if the Applicant wants to avoid liability in the primary suit, the suit herein should proceed independently because it involves different parties.
10. He faults the Applicant's counsel for trying to use the proceedings herein to delay the proceedings in the primary suits.
11. This court has considered this application and the response by the 1st Interested Party. For the record the Respondents and the other Interested Parties have not responded to this application.
12. The Applicant is seeking stay of proceedings in three suits pending the determination of this suit and a declaration has been sought by the applicant to avoid liability under the Policy No. TP/08/519372/09 that is claimed to have been taken by the respondent on the ground that there was a breach of the terms of the said policy. The main issue for determination is therefore;

Whether the applicant has met the threshold for grant of stay of proceedings in;

- a. Mwingi CMCC NO. E060 of 2023 John Kyalo Mutie v Teresia Sokau Mutuku.
 - b. Mwingi MCCC NO. E146 of 2022 Mulwa Makau & Joyce Mary Ngute v Teresia Syokau Mutuku.
13. A stay of proceedings as a relief is a serious matter because of its ramifications. It interrupts the right of a party in accessing justice and as such can only be granted where there is real danger of miscarriage of justice. The author in *Halsbury's Laws of England* 4th Edition Vol. 37 at PP 330 captured this issue when its stated;

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the Court's general practice is that a stay of proceedings should not be imposed unless the proceedings, beyond reasonable doubt, ought not to be allowed to continue....This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases...It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of this case.”

14. In the case of *Kenya Power & Lighting Company Limited v. Esther Wanjiru Wokabi* [2014] eKLR, the court held that;

“.....the courts discretion in deciding whether or not to grant stay of proceedings as sought in this application must be guided by any of the following three main principles

- a. Whether the applicant has established that he/she has a prima facie arguable case
- b. Whether the application was filed expeditiously; and
- c. Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.”



15. The Applicant's main thrust in seeking a stay of proceedings is that the Respondents breached certain terms in the policy of Insurance Policy and is seeking to avoid the obligation to settle the claims in the event that Judgments are entered in favour of the Interested Parties in the primary suits.
16. The applicant has inter alia invoked the provisions of Order 42 Rule 6(1) of the Civil Procedure Rules which deals with a stay pending appeal. The cited provisions to that extent do not apply in this instance. It has also invoked Sections 1A, 1B and 3A of the *Civil Procedure Act* which deals with expedition in determination of cases and the inherent powers of this court to make such orders that meets the ends of justice and prevent abuse of court process.
17. The singular issue before this court therefore is whether a stay of proceedings is necessary for the ends of justice and to prevent abuse of court process.
18. The Applicant has not faulted the Respondents or the Interested Parties for trying to abuse court processes in the primary suits or in any other forum. It has also not demonstrated that the proceedings in the primary suits are likely to lead to miscarriage of justice in any way.
19. It is apparent therefore that this application is a bit lacking in law because the legal basis is not very clear.
20. Secondly, the Applicant appears to be operating under the assumption that the primary suits will automatically succeed and it will automatically be required to settle the judgement sum in the suits. The application therefore is speculative to that extent.
21. Thirdly, there is no Judgment yet against the insured or the Respondent herein. He certainly has a window of relief if and when Judgment is entered. Section 10(4) of the *Insurance (Motor Vehicle Third Party Risk) Act* provides as follows;

“No sum shall be payable by an insurer under the foregoing provisions of this section if in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto.”

22. It is therefore clear from the above that the Applicant has other avenues to seek redress against its insured without unnecessarily affecting parties to pursue their respective rights.

In the premises this court finds no merit in the application dated 21st February 2024. The same is dismissed with costs to the 1st Interested Party.

DATED, SIGNED AND DELIVERED AT KITUI THIS 30TH DAY OF SEPTEMBER, 2024

HON. JUSTICE R. K. LIMO

JUDGE

