



REPUBLIC OF KENYA



**KENYA LAW**  
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**Madison Insurance Company v Kirikua (Civil Suit 6 of 2016)  
[2023] KEHC 22866 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22866 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
CIVIL SUIT 6 OF 2016  
RL KORIR, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**MADISON INSURANCE COMPANY ..... PLAINTIFF**

**AND**

**KAILIKIA JASON KIRIKUA ..... DEFENDANT**

**RULING**

1. The Plaintiff/Applicant filed a Notice of Motion Application dated October 21, 2021 which sought the following Orders:
  - i. Spent.
  - ii. THAT this Honourable Court be pleased to stay all proceedings before Bomet Principal Magistrate's Court in Bomet PMCC No 109 of 2021 or any other suit pending the hearing and determination of the instant application.
  - iii. THAT there be a stay of proceedings in respect to Bomet PMCC No 109 of 2021 pending the hearing and determination of the declaratory suit filed by the Applicant in Bomet HCC No 6 of 2016 Madison Insurance Company Limited vs Kailikia Jason Kirikua
  - iv. THAT costs of this Application be provided for.
2. The Application was brought under Order 51 Rule 1 of the *Civil Procedure Rules* & Sections 1A, 1B and 3A of the *Civil Procedure Act*. It was premised on the grounds on the face of the Application and further by the Supporting Affidavit sworn by Charles Gathu on October 21, 2021.

**The Applicant's Case.**

3. It was the Applicants' case that it had insured the Respondent's Motor Vehicle Registration Number Kxx 5xx via Insurance Policy Cover No MCK/709/094/154/15. That the Respondent's Motor



Vehicle was involved in an accident on December 24, 2015 with Motorcycle Registration Number KMxx xx6F.

4. The Applicant stated that in the event of an accident, it would indemnify the Respondent against any 3<sup>rd</sup> Party claims according to the terms contained in the Insurance Policy. That the motor vehicle was supposed to be used for private hire on chauffer driven basis and not for hire on self-drive basis.
5. It was the Applicant's case that at the time of the accident, it was discovered that the Respondent's vehicle was being used on a self-drive basis contrary to the requirements of the Insurance Policy. That the Respondent knowingly breached the terms of the insurance policy thereby entitling it to repudiate its liability to pay any 3<sup>rd</sup> Party claims.
6. It was the Applicant's case it filed the present declaratory suit which sought a declaration that it was not bound to pay or indemnify the Respondent against any claim that arose out of the accident.
7. The Applicant stated that pursuant to the accident, several claims have been filed including a suit against it being Bomet PMCC No 109 of 2021- Sheila Chepngeno and Lilian Chepkemoi Kirui (suing as legal representatives of Vincent Kipkorir Ngeno- Deceased) vs Madison Insurance Co Ltd. That it was apprehensive that similar suits would be filed against it in relation the same cause of action which was the accident.
8. It was the Applicant's case that if the suit in the subordinate court or other similar suits are determined in the Plaintiffs' favour, then the Plaintiffs would expect payment of the decretal sum awarded from the Respondent and by virtue of the insurance cover, the Respondent would have legitimate expectation to be indemnified by the Applicant.
9. The Applicant stated that in the circumstances of the case, it would be prudent to stay the proceedings in Bomet PMCC No 109 of 2021 pending the hearing and determination of the present declaratory suit. That if the orders sought are not granted, it would render the instant suit nugatory and a mere academic exercise.
10. Despite service of the Application to the Respondent, the Application was not opposed.
11. Having gone through and considered the Notice of Motion Application dated October 21, 2021 and the Supporting Affidavit sworn by Charles Gathu on even date, the only issue for my determination is whether the Applicant should be granted the order for stay of proceedings in Bomet PMCC No 109 of 2021 pending the outcome of the instant declaratory suit.
12. In the case of [\*Turbo Highway Eldoret Ltd vs Muniu \(Civil Appeal E040 of 2021\) \[2022\] KEHC 10197 \(KLR\) \(30 June 2022\) \(Ruling\)\*](#), Ngugi J (as he then was) held that:-

' All these factors must be considered, in a given case, in the spirit concisely expressed in Halsbury's Laws of England, 4th Edition, Vol 37 at p 330:

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.

In short, a stay of proceedings is a radical remedy which is only granted in very exceptional circumstances.'

13. In an application to stay proceedings, the court is required to exercise judicial discretion in the interest of justice. In the case of *Christopher Ndolo Mutuku & Another vs Cfc Stanbic Bank Limited (2015) EKLR* Gikonyo J observed that:-

' What matters in an application for stay of proceedings pending appeal is the overall impression the Court makes out of the total sum of the circumstances of each, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice.'

14. Further in the persuasive case of *Port Florence Community Health Care vs Crown Health Care Limited (2022) eKLR*, Kamau J held that:-

' The question of whether or not to grant an order for stay of proceedings is a discretionary one. This discretionary power must be exercised judiciously. The court has to consider if it will be in the interests of justice to grant the same. The underlying interest ought to be that the appeal should not be rendered nugatory.'

15. The Applicant bore the burden of convincing this court that it merited the grant of the order that would stay the proceedings in Bomet PMCC No 109 of 2021. The Applicant stated that it wanted the declaratory suit in the subordinate court stayed pending the hearing and determination of its declaratory suit that it had filed in this court. Its reason was that the Respondent had breached a term of the Insurance Cover and therefore it was not entitled to satisfy any third party claims that arose from the accident.

16. The Plaintiffs in Bomet PMCC No 109 of 2021 are Sheila Chepngeno Ngeno and Lilian Chepkemioi Kirui. The two Plaintiffs are not parties to the instant declaratory suit which was between the Applicant and the Respondent. As has been correctly stated by the Applicant, several suits arose from the accident that occurred on December 24, 2015 between the Respondent's Motor Vehicle Registration Number KCxx 5xxV and Motorcycle Registration Number KxxU 0xxF. The Applicant filed two applications dated October 11, 2016 and July 23, 2020 seeking stay of proceedings in Bomet PMCC 14 and 16 of 2020 and Bomet PMCC No 4 of 2016. It is salient to note that at all times, the Applicant relied on the allegation that the Respondent breached a term of the Insurance Cover.

17. In determining whether the proceedings in Bomet PMCC No. 14 and 16 of 2020 should be stayed, this court (also differently constituted) in a Ruling dated April 13, 2018 held that:-

' There is no contractual obligation between the interested parties and the applicant and the defendant.

I do not think that it would be fair and just to draw the Interested Parties into dispute between the insurer and the insured. It would be fair and prudent that they solve their issues without involving the interested parties.

I find no good reason to grant the orders sought.....'

18. In determining whether Bomet PMCC No 4 of 2017 should be stayed, this court (differently constituted) held that the Applicant's Application dated July 23, 2020 was res judicata as the



declaratory suit was between the Applicant and the Respondent and that it was not fair to draw 3rd parties into their dispute.

19. In the present case, the Applicant has gone forth and drawn Sheila Chepngeno Ngeno and Lilian Chepkemoi Kirui in its dispute with the Respondent. The Ruling delivered by this court on April 13, 2018 has not been appealed, reviewed or set aside which means it remains a valid and enforceable order. The issue of drawing third parties into their dispute had already been determined and as such I find the present Application res judicata.
20. Section 7 of the Civil Procedure Act stated that:-

'No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.'

21. The Court of Appeal held in The *Independent Electoral And Boundaries Commission vs Maina Kiai & 5 Others (2017) eKLR* that:-

' The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.'

22. In the end, it is my finding that the Applicant was trying to have a bite of the cherry for the third time and that cannot be allowed any further. I have gone through the record and I have noted that the Applicant had obtained an interlocutory judgement which it never set down for formal proof hearing.
23. In the end, the Notice of Motion Application dated October 21, 2021 is dismissed with costs to the Respondent.
24. Orders accordingly

**RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2023**

**R. LAGAT-KORIR**

**JUDGE**

**Ruling delivered in the presence of Mr. Ogola holding brief for Ms. Bett for Plaintiff, N/A for the Defendant and Siele (Court Assistant).**

