



Heritage Insurance Company Limited v Ascoda General Contractors Limited; Owuor (Interested Party) (Civil Case E002 of 2023) [2023] KEHC 25944 (KLR) (22 November 2023) (Ruling)

Neutral citation: [2023] KEHC 25944 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CIVIL CASE E002 OF 2023
AK NDUNG’U, J
NOVEMBER 22, 2023**

BETWEEN

HERITAGE INSURANCE COMPANY LIMITED PLAINTIFF

AND

ASCODA GENERAL CONTRACTORS LIMITED RESPONDENT

AND

MITCHELLE AKINYI OWUOR INTERESTED PARTY

RULING

1. This ruling resolves the application by way of Notice of Motion dated 13/04/2023 and filed on 18/04/2023. The same is premised on section 1A, 1B & 3A of the *Civil Procedure Act*, Order 51 Rule 1 of the *Civil Procedure Rules* seeking stay of the proceedings and execution of any subsequent decree in Nanyuki CMCC No. E035 of 2023 Mitchellle Akinyi Owuor vs Ascoda General Contractors Limited.
2. The application is supported by an affidavit of Gibson Kamau and based on the grounds that Respondent herein failed to pay insurance premiums necessitating the Applicant to cancel the policy effective 29/06/2022. That the proceedings in CMCC No. E035 of 2023 arose out of an accident that occurred on 22/12/2022 and at that time, the Respondent’s motor vehicle had no valid insurance cover. Therefore, that by dint of cancellation of the insurance policy on 02/08/2022, the Applicant is not liable to settle any claim arising after the cancellation of the policy.
3. It is urged that it is in the interest of justice to stay proceedings in Nanyuki CMCC E035 of 2023 to enable this court determine if the Applicant is liable to settle the claim and that this suit be determined first to enable the Applicant know whether there is need to defend the insured in the declaratory suit. That no prejudice will be suffered by the Respondent if the stay orders are granted since it is the Applicant who stands to suffer irreparable damage because it will be compelled to settle any judgment issued by the lower court.



4. The Respondent did not file a replying affidavit. The Interested Party filed a replying affidavit dated 02/05/2023 opposing the application on account that the application is unmerited and has been brought in bad faith and seeks to delay quick determination of Nanyuki CMCC E035 of 2023. That the Interested Party had a legitimate expectation that the Defendant had a valid insurance cover and the Applicant did not issue a notice required under section 10(4) of the *Insurance (Motor Vehicles Third Party Risks) Act* that requires the Applicant to issue a 14 days' notice after filing of the primary suit indicating that it was not liable. That the Applicant is bound by the doctrine of subrogation since there was a contract of insurance and therefore, it is entitled to settle all outstanding amount.
5. Further, the Applicant has not demonstrated any prejudice that will be visited on it or substantial loss if the suit in CMCC E035 of 2023 proceeds. That the Interested party stands to suffer as she needs further treatment and allowing the application will deny her an opportunity for her suit to be determined timely as she awaits the outcome of a suit that she is not part of.
6. The application was canvassed by way of written submissions. Applicant's counsel submitted that the factors to consider while determining whether to grant stay of proceedings were enunciated in the case of *Kenya Power & Lighting Company Limited vs Esther Wanjiru Wokabi* (2014)eKLR which includes, whether the applicant has established that he/she has a *prima facie* arguable case; whether the application was filed expeditiously and 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.
7. Counsel submitted that the Applicant has demonstrated that they have a *prima facie* case deserving the relief sought in that the Respondent's insurance policy was cancelled on 29/07/2022 for reasons that the Respondent had not paid the insurance premiums. The road accident founding Nanyuki CMCC No. E035 of 2023 occurred on 22/12/2022 after policy cancellation. Therefore, at the time of the accident, the Respondent was operating an uninsured motor vehicle and must therefore bear all the liability for the material accident and the Applicant is well grounded to seek stay of the proceedings so as to avoid liability. Further, the application and the suit were filed without undue delay in that the lower court suit was filed on 14/03/2023 whilst the Applicant instituted this suit on 13/04/2023, roughly a month later.
8. On whether a sufficient cause has been established, it was the Applicant's contention that the application was brought to mitigate potential detriment and further, to enable the court to determine the enforceability of the insurance contract between the Applicant and the Respondent in that if the court finds in favour of the Respondent, the Applicant can take over the defence in Nanyuki CMCC E035 of 2023 to avoid or lessen the liability.
9. In rejoinder, the Interested party submitted that if the order for stay is granted, she will not be able to prosecute her case pending determination of this suit, a suit that she has no control over. That she will continue to suffer from the injuries sustained due to lack of treatment owing to lack of funds. Further, her right to be heard without delay will be curtailed. That no reason has been advanced why both suits should not proceed simultaneously. Further, the Applicant has not advanced any reasons why the suit should not proceed since courts have to be convinced that the suit is frivolous, vexatious, intended to harass a litigant, manifestly groundless or that there was no cause of action in law. It is urged that the applicant has not demonstrated any of those factors.
10. Further, should the Applicant lose interest in the case, she will be forced to wait until conclusion of the suit before she can prosecute her case. Further, she was not part of the agreement between the Applicant and the Respondent and the Applicant has not advanced a sufficient reason for the grant of the orders sought and therefore, there is no sufficient cause to warrant the exercise of this court's



discretion. It is at the Respondent's disposal to defend the suit and to settle the judgment whether he was insured or not and therefore, the Applicant is not entitled to the orders sought.

11. I have considered the application, the response by the Interested Party, the submissions on record and the case law cited. A decision on whether or not to grant stay of proceedings is discretionary. Gikonyo J while expressing the seriousness of an order for stay of proceedings in *Saham Assurance Compnay Limited v Lameck Okari Mairura* [2021] eKLR quoted the passage in *Halsbury's Law of England*, 4th Edition. Vol. 37 page 330 and 332, that:

“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 proceeding beyond all 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 the case.”

12. The Learned judge further quoted Ringera J (as he then was) in *Daniel Walter Rasugu Nbi Hccc No 15 of 2006; Global Tours & Travel Limited*; Nairobi HC Winding Up Cause No.43 of 2000 where the judge set some considerations to be considered as follows: -

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice...the sole question is whether it is in the interest of justice to order a stay of proceedings. And in deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. It will also consider such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

13. The Learned judge concluded by stating that;

“Be that as it may, the greater constitutional concern in an application for stay of proceedings is for the court to zealously guard against impediment of the right to fair hearing, access to justice and the need for expeditious disposal of cases. Therefore, the test for stay of proceedings is quite stringent for it interferes with a person's right to litigate his grievances in court expeditiously and without unnecessary interruption. Thus, although the decision by Ringera J (as he then was) was determined before the Constitution of Kenya, 2010, the statement that “...the sole question is whether it is in the interest of justice to order a stay of proceedings” is an indication that right to litigate a suit before a court of law should not be interrupted easily except in the interest of justice.”



14. No doubt from the facts presented the Applicant has a prima facie case. The question that needs interrogation is whether it is in the interest of justice to grant a stay of proceedings before the lower court as prayed. This court is disadvantaged in that the proceedings before the lower court were not exhibited and this court cannot tell the stage reached in those proceedings.
15. That said, the Applicant has the opportunity to fastrack the hearing of its substantive suit before this court without unnecessarily impeding the right of the interested party to be heard before the lower court. The Interested party is a stranger to the relationship between the Applicant and the Respondent and any order that would curtail the Interested Party's right to be heard must be well founded.
16. My considered view is that a stay of proceedings in the circumstances of this case would greatly prejudice the Interested Party who has no control over the conduct of the Applicant's suit and who would be adversely affected by any delay that may result from the pace this suit would take. Further, it is not lost that the Applicant is not devoid of remedy if the lower court suit is heard and determined before the conclusion of this suit.
17. To the contrary, no prejudice would be visited on the Applicant since should the lower court proceedings conclude before this matter is heard and determined. This suit would be a reliable basis upon which an application for stay of execution by the Applicant would be based were any execution proceedings to be taken out against them.
18. On the whole, it is not in the interest of justice to grant a stay of proceedings. With the result that the application has no merit and is dismissed with costs to the Interested Party.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 22ND DAY OF NOVEMBER 2023

A.K. NDUNG'U

JUDGE

