



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CIVIL SUIT NO. E 022 OF 2021**

**APA INSURANCE LIMITED.....PLAINTIFF**

**VERSUS**

**PAUL KITHINJI KIRIMI.....DEFENDANT**

**VERONICA KINYA KITHINJI & NEWTON MURITHI GATOBU...INTERESTED PARTIES**

**RULING**

1. This is a ruling of an application for stay of execution of Judgment in a declaratory suit CMCC 265 OF 2019 pending the hearing of this suit which seeks avoidance of a policy of insurance between the plaintiff insurer and the defendant insured. The Interested Parties are the decree-holders in the declaratory suit following the award of damages for fatal accident subject of an earlier suit between the Interested Parties and the Defendant insured herein CMCC 279 of 2015, where general and special damages of Ksh 1,595,076 plus interest and costs were awarded.

2. Although styled as an application for stay of execution of the judgment in Meru CMCC NO. 265 of 2019, it is in substance an application for interlocutory injunction pending hearing and determination of this suit. The orders of the injunction is to prevent the recovery of the decretal sum in the said suit pending determination by this suit whether the plaintiff is liable to make any further payments, on the Policy of insurance whose limit it consider has been exhausted, upon partial payment of the decretal sum.

3. The plaintiff's case is encapsulated in paragraphs 2, 4 and 5 of its Submissions dated 22/11/2021 as follows:-

*"2. The basis of the application is that the Insurance Policy, the basis of which the Plaintiff/Applicant was sued in Meru CMCC No. 265 of 2019 had a limit of Kshs 20 Million and that the Limit has since been exhausted after a sum of Kshs. 1,582,584 was paid to the interested parties on 30/7/2021. The Applicant now contends that the intended execution for the balance that remains outstanding after the settlement of the sum of Kshs.1,585,584, amounts to compelling the Applicant to settle decretal sums beyond its contractual obligation under the policy.*

3. ....

*4. Your Lordship, it is also not in dispute that the Defendant/Respondent's Motor Vehicle was involved in a road traffic accident on 19/3/2015 in which 9 people perished and 14 others were injured. Several compensation claims were filed in court and the Plaintiff/Applicant was called upon to satisfy the decrees that arose. The Plaintiff/Applicant has exhibited claim payment vouchers as annexure "RCK2". The Plaintiff/ Applicant has satisfied various decrees to the extent of Kshs. 20 million.*

*5. The Plaintiff/ Applicant has approached this court seeking to enforce the contract of Insurance entered between Plaintiff and the Defendant. The provision that the contract of Insurance was subject to a limit of Kshs. 20 million is in black and white and therefore expressly provided for in the contract. Therefore, the Applicant has established a prima facie basis for seeking a stay of execution of the decree in MERU CMCC NO.265 of 2019.*

4 The Interested parties to whom the stay of execution prayer is directed primarily rely on Section 10 (4) of the motor vehicles (Third Party Risks) Act to submit that the plaintiff suit seeking to avoid liability has not been brought within the times of the provision, that is before the commencement of proceedings in which judgment the satisfaction of which it is sought to avoid or within three months thereafter. The Interested Party's further contended that amount claimed from the plaintiff is within the policy limit under Section 5 (b) (iv) of the Act of Ksh.3,000,000/= and they have been improperly joined as parties to the suit as there is no privity of contract between them and the plaintiff. Noting that the Judgment in the primary suit CMCC No. 279 of 2015 and the declaratory suit CMCC 265 of 2019 have not been appealed from, the Interested Party's consider the present suit a belated attempt to frustrate the lawful court judgment by reviving already concluded suit and seek the dismissal of the application and the entire suit.

5 In opposing the application, the defendant insured sets a defence based on the contract of insurance that “the insurance Proposal Form being the basis of the contract between the plaintiff and the defendant did not state that the plaintiff had insured the defendant to the extent of Ksh.20,000,000/=”. The defendant further raises a defence of estopped in that “having failed to obtain a declaration that it is not liable to satisfy the decree in Meru CMCC No. 265 of 2019 before the determination of the said case [the plaintiff] as now estopped from purporting to deny liability at this stage [and] the plaintiff having made a representation to the defendant that it had insured the defendant’s motor vehicle and the defendant having acted on the representation, the plaintiff is prevented by doctrine of estopped from raising and bringing the issue of the alleged exhaustion of the sum of Kshs.20,000,000/=.” It was submitted that the plaintiff having failed to file a declaratory suit under Section 10 (4) of Cap. 405, it was liable to satisfy the decree in Meru CMCC 265 of 2019.

### **Determination**

6 I have considered the pleadings the submissions of the parties and the authorities relied on in urging their respective positions. I consider the issue to be delivered to be simply one whether the applicant has established a *prima facie* or *arguable case* and whether damages are suitable compensation in the circumstances, as well as the balance of convenience as required under **Giella v. Cassman Brown** [1973] EA 358 and moderated by **American Cyanamid Co. v Ethicon Ltd** [1975] A E.R, 504; without attempting a finalized determination of the disputed matters of fact and law, as held by Platt, **JA in Banana Hill Investment Ltd v Panafrica Bank Ltd & 2 others** [1987] KLR 351 and **Mbuthia v. Jimba Credit Corporation** [1988] KLR 1.

7 As I understand this matter from the material before the court, the inquiry is not whether as urged by the Interested Parties the statutory limit of policy cover of Ksh.3,000,000/= under Section 5 (b) (iv) of Cap 405 has been breached or whether as argued by both Interested Parties and the defendant, the plaintiff has complied with the statutory provisions on the antecedent for avoidance of liability under a policy for the reasons set out in the Section 10(4) of cap 405. Estopped on account of failure to file the declaratory suit within the time lines set out in Section 10(4), therefore, does not arise.

8 The only relevant estopped which may arise but which is a matter for the determination upon full trial on the merit is promissory estoppel alleged to arise by the defendant on account of the representation contained in the terms of the policy document between the plaintiff and the defendant. The court defers this question to the hearing.

9 The plaintiff has demonstrated a *prima facie* case, much stronger than an *arguable case* required in **American Cyanamid**, that its claim is based on discharge of contract by satisfaction or performance of its obligation in full. In urging this position, the plaintiff submits as follows:-

“9. The argument by the Defendant/Respondent that the Plaintiff/Applicant is seeking to repudiate liability is also without any merit. The applicant has neither repudiated liability nor seeking to repudiate liability. The applicant’s case simply put is that it has discharged its obligations under the contract of Insurance by satisfying various claims to the extent of the policy limit and therefore cannot be compelled to pay any further sums.

10. The Interested Parties on their part contend that the issue of policy limit ought to have been raised in earlier suits (primary suit and declaratory suit) and not in this suit. That contention has no merit. Firstly, the exhaustion of the policy limit arose after the determination of the declaratory. Secondly, none of the earlier suits was between the parties to the contract so that this issue could have been raised.”

10. There is clearly an arguable case whether the plaintiff may be compelled by the court to pay in excess of the policy limit of Kshs.20,000,000 if this is established upon full trial to be valid. No issue of *res judicata* or estoppel arising as the question of exhaustion of the policy limit was not before the courts that determined in two other suits in which Judgment was entered from the Interested parties.

11. There was no material upon which the court could find that the payment of the balance of the decretal sum under the declaratory suit CMCC 265 of 2019 is a loss that could be suitably remedied to the plaintiff by an award of damages as no evidence of the means of the Interested Parties to refund such money was availed.

12. The balance of convenience lies in the preservation of the *status quo* where the Interested Parties have already been paid the bulk of the decretal sum at 1,582,584 leaving only, according to counsel for Interested Parties, the sum of Ksh.677, 980/=. So that the liability of the plaintiff to pay any amounts above what it has already paid to the Interested Parties is established. The Interested parties are, needless to say, entitled to recover their balance of the decretal sum from the defendant insured person in accordance with the Judgment in CMCC No. 279 of 2015.

### **ORDERS**

13. Accordingly, for the reasons set out above the court grants an interlocutory injunction in terms as prayed by the Plaintiff that there shall be a stay of execution of the Judgment and Decree in Meru CMCC No. 265 of 2019 **Veronica Kinya Kithinji and another v. APA Insurance Limited** pending the hearing and determination of this suit.

14. Costs in the cause.

Order accordingly.

**DATED AND DELIVERED THIS 31<sup>ST</sup> DAY OF JANUARY 2022.**

**EDWARD M. MURIITHI**

**JUDGE**

**APPEARANCES:**

M/S Mithega & Kariuki Advocates for the Plaintiff.

M/S Kiogora Arithi & Associates, Advocates for the Defendant.

M/S Basilio Gitonga, Muriithi & Associates Advocates for Interested parties..