



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. E008 OF 2020

DOCWIDE BUSINESS CENTRE (KE) LTD.....PLAINTIFF/APPLICANT

VERSUS

1. APA INSURANCE

2. JUBILEE INSURANCE.....DEFENDANTS/RESPONDENTS

AND

1. BWANA ADI ABDALLA

2. INTERPEL INVESTMENTS LIMITED

3. AMOS MYNYOKI

4. HARSAM GUYO KUTARA

5. JAMES OCHIENG ONYANGO.....INTERESTED PARTIES

R U L I N G

1. The Plaintiff brought the suit herein seeking a declaration that it is entitled to full indemnity from the Defendants who are bound by **Section 5 and 10 of the Insurance (Motor Vehicle Third Party Risks) Act** to satisfy the Judgment that may or are likely to be entered against its insured in suits in the Magistrate's court. It also seeks an order to compel the 1st and 2nd Defendants to settle the accident claims by the Interested Parties before or after entry of Judgment. It also prays for costs and interest.

2. Simultaneously filed with the **Plaint** is a **Notice of Motion** application dated **6th October, 2020**. By that application, the Plaintiff seeks for the following orders: -

1. Spent;

2. Spent;

3. Spent;

4. THAT pending hearing and determination of this suit an order staying all the proceedings and the consequential orders be and is hereby issued in Mombasa,

a) SRMCC No. 1107 of 2017: Bwana Adi Abdall vs Docwide Business Centre Ltd

b) SRMCC No. 403 of 2020: Interpel Investments Ltd vs Docwide Business Centre

c) SRMCC No. 733 of 2016: Amos Munyoki vs Docwide Business Centre

d) SRMCC No. 2187 of 2019: Harsam Guyo Kutara vs Docwide Business Centre Ltd

e) SRMCC No. 1480 of 2019: James Ochieng Onyango vs Docwide Business Centre Ltd and Anor

f) THAT the costs of this application be provided for.

3. The grounds relied on by the Plaintiff in support of the application are on its face and in the **affidavit** of **Michael Mwakio** its director. It is the Plaintiff's case that there is a covert scheme by the 1st and 2nd Defendants to avoid liability for accidents that were caused by the Plaintiff's Motor Vehicles Registration Numbers **KTCB288L/ZE 5691**, **KTCB 107N**, **KTCB 722 W/ZE 5685** and **KTCB 291L ZE 5689**.

4. The Plaintiff avers that the Motor Vehicle **KTCB 291L ZE 5689** was at all material times insured by the 1st Defendant for which premiums were faithfully and diligently paid and a certificate of insurance issued. That further Motor Vehicles Registration Numbers **KTCB 288L/ZE 5691**, **KTCB 107N** and **KTCB 722 W/ZE 5685** were at all material times insured by the 2nd Defendant.

5. It is the Plaintiff's contention that Motor Vehicle Registration Number **KTCB 291L ZE 5689** was insured by the 1st Defendant between **24th July, 2015** and **23rd July, 2016** under policy No.**AB807/0003417/TPO** while the subject accident occurred on **28th July, 2015** when the policy was in force.

6. The Plaintiff further stated that he took insurance covers which were valid during the occurrence of the accidents from the 2nd Defendant for his other Motor Vehicles in the following order: -

i. KTCB 288L/ZE 5691- the period between 24th July, 2016 to 23rd July, 2017 under Policy No. P/MSA/2065/2016/17093.

ii. KTCB 107N- the period between 28th January, 2016 to 27th January, 2017 under Policy No. P/MSA/2040/2016/17093 and further between 31/3/2017 to 30/3/2018 under Policy No. MSA/2065/17099-TPO.

iii. KTCB 722 W/ZE 5685 - the period between 9th January, 2019 to 8th January, 2020 under Policy No. P/104/1001/2018/000055 TPO.

7. It is the Plaintiff's case that the Motor Vehicles were involved in a road traffic accident on various dates and after investigations, police abstracts were issued to the Interested Parties who then filed various claims before the **Chief Magistrates' Court in Mombasa** as are listed hereunder: -

a) SRMCC No.1107 of 2017

Bwana Adi Abdall –vs- Docwide Business Centre Ltd.

b) SRMCC No.403 of 2020

Interpel Investments Ltd –vs- Docwide Business Centre.

c) SRMCC No.733 of 2016

Amos Munyoki –vs- Docwide Business Centre.

d) SRMCC No.2187 of 2019

Harsam Guyo Kutara–vs-Docwide Business Centre Ltd.

e) SRMCC No.1480 of 2019

James Ochieng Onyango –vs- Docwide Business Centre Ltd & Anor.

8. The Plaintiff avers that once he was served with the pleadings of the aforementioned suits, he forwarded the same to the 1st and 2nd Defendants, his chosen insurers, but they declined to receive the pleadings and protect its interest. It is the Plaintiff's contention thus, that the 1st and 2nd Defendants are obligated to protect its interests as against the said suits and the failure to do so violates the law.

9. According to the Plaintiff, there is a high likelihood that the Interested Parties will be successful and Judgment entered against it. The Plaintiff is therefore apprehensive that it shall bear the burden of satisfying the Judgment and if unable to pay the same, there will be looming executions.

10. It is also the Plaintiff's contention that under **Section 5** and **10** of the

Insurance (Motor Vehicles Third Party Risks) Act, the Defendants are liable to satisfy the intended judgments in the suits before the lower court.

11. The Plaintiff states that the actions of the Defendants are in breach of the law and insurance practice as they seek to divert liability to the Plaintiff by their failure to take responsibility having received premiums for the stated policies within the accident periods.

12. The Plaintiff has urged this court to issue stay of proceedings as their continued litigation before the Chief Magistrates' Court shall render the suit herein an academic exercise.

THE RESPONSE

THE 1ST DEFENDANT

13. The 1st Defendant filed **Grounds of Opposition** dated the **25th November, 2020** and a **Replying Affidavit** sworn by **Rina Welemba** the 1st Defendant's Legal Officer on even date.

14. The 1st Defendant does not contest that the Plaintiff took out insurance covers for Motor Vehicle Registration Number **KTCB 291L/ZE 5689** and that there existed a binding policy cover.

15. It is the 1st Defendant's contention that the Plaintiff has not informed them of the accident that involved the said Motor Vehicle nor brought the same to their attention as required under **Clause 4(a) and (b)** of the **Insurance Policy**. The 1st Defendant states that it has not been served with any notices of the intention to sue the Plaintiff by the Interested Parties, and still maintains that the duty to do so was on the Plaintiff to inform them of the accident.

16. The 1st Defendant avers that they are not a party to the primary suit and that no Judgment has been awarded, but if the same is delivered it will not be as against them but the Plaintiff. The 1st Defendant has added that if the Plaintiff in the primary suit succeeds, it has an option of filing declaratory suits as against the 1st and 2nd Defendants. The 1st Defendant has urged the court to dismiss the Plaintiff's application for being anticipatory.

THE 2ND DEFENDANT

17. The 2nd Defendant did not file any response to the Application.

THE 1ST INTERESTED PARTY

18. The 1st Interested Party filed a **Replying Affidavit** sworn on **29th January, 2021** by **Bwana Adi Abdalla**, the Plaintiff in **Mombasa SRMCC Civil Suit No.1107 of 2017**. He deponed that he has sued the Plaintiff for compensation as a result of an accident caused by the Plaintiff's authorized driver who negligently drove Motor Vehicle Registration **KTCB 107N**.

19. The 1st Interested Party affirmed that the Motor Vehicle Registration Number **KTCB 107N** as at the time of the accident was insured by the 2nd Defendant under the **Policy No.P/No. P/MSA/2040/2016/17093**.

20. He further deponed that through his appointed advocates, he served the 2nd Defendant with a notice to institute a suit as required under **Cap 405 Laws of Kenya**.

21. It is the 1st Interested Party's contention that the 2nd Defendant is liable to compensate him for the accident having received premiums with regards to a third-party insurance.

22. The 1st Interested Party has thus urged this court to dismiss the Plaintiff's application for stay of proceedings as there is no eminent danger since the matters have not been concluded and thus cannot execute.

THE 2ND INTERESTED PARTY

23. The 2nd Interested Party filed **Grounds of Opposition** dated the **5th February, 2021** and in summary stated that the Plaintiff lacks requisite *locus standi* to maintain these proceedings as against them as their claim in **Mombasa SRMCC No.403 of 2020** is founded on material damage and does not fall under the **Insurance (Motor Vehicles Third Party Risks) Act CAP 405**. There is no existing actionable cause of action against the 2nd Interested Party for which the Plaintiff can seek legal redress.

THE 3RD Interested Party

24. The 3rd Interested Party also filed **Ground of Opposition** dated the **20th January, 2021** and stated that the Plaintiff is guilty of laches for being aware of proceedings before the lower suit and ought to have filed this application promptly.

25. Further, that the 3rd Interested Party urges that he should not be drawn into the war between the Plaintiff and the insurers which will only have the effect of delaying this matter and asked this court to dismiss this application.

THE 4TH INTERESTED PARTY

26. **Mr. Randolph M. Tindika**, Counsel for the 4th Interested Party swore a **Replying Affidavit** on behalf of his client. He has deponed that the 4th Interested Party was involved in a road accident on the **5th December, 2016** which involved the Plaintiff's Motor Vehicle Registration **No.KTCB 288L ZE 5691**. The 4th Interested Party hence filed **Mombasa SRMCC No.2187 of 2019**.

27. The 4th Interested Party affirms that the Motor Vehicle Registration Number **KTCB 288L ZE 5691** as at the time of the accident was insured by the 2nd Defendant under the **Policy No. P/MSA/2065/2016/17628**, as indicated on the copy of the police abstract dated **27th March, 2017**.

28. It is the 4th Interested Party's contention that the 2nd Defendant is liable to compensate him for the accident as per the provisions of **Section 4(1) of the Insurance (Motor Vehicle Third Party Risks) Act**.

29. The 4th Interested Party has urged this Court to dismiss the Plaintiff's application for stay of proceedings as there is no Judgment that has been entered. According to the 4th Interested Party, Judgment must be entered and only then can a declaratory suit be commenced against the 2nd Defendant.

The 5th Interested Party

30. The 5th Interested Party also filed a **Replying Affidavit** sworn on **26th February, 2020** by **Mr. Joseph Karanja Kanyi**, his Counsel on record. He has deponed that the 5th Interested Party filed **Mombasa SRMCC No.1480 of 2019** where it is stated that the cause of action arose from a road accident involving Motor Vehicle registration **No. KTCB 722 W/ZE 5685** that belongs to the Plaintiff.

31. The 5th Interested Party has affirmed that the Motor Vehicle **KTCB 722 W/ZE 5685** as at the time of the accident was insured by the 2nd Defendant under the **Policy No.P/104/1001/2018/000055 TPO**.

32. According to the 5th Interested Party, he is neither a policy holder nor a creditor of either the 1st or 2nd Defendants and thus should not be affected by the squabbles between the Plaintiff and his insurer.

33. The 5th Interested Party has urged this court to dismiss the Plaintiff's application as it is a delaying tactic and intended on denying the 5th Interested Party the right to institute and continue with proceedings. Further, Judgment has not been entered to attract an Application under **Sections 4 and 10 of the Insurance (Motor Vehicles Third Party Risks) Act**.

DIRECTIONS OF THE COURT

34. The parties took directions on disposing the application by way of written submissions. The Plaintiff filed submissions on the **15th February, 2021** while the 1st, 2nd, 4th and 5th Interested Parties filed submissions on the **2nd March, 2021, 5th March, 2021, 16th March, 2021 and 19th February, 2021** respectively.

35. Parties relied on their written submissions in their entirety. I have read through the submissions by all parties and found that they replicate much on the grounds in support and opposition of the application as captured above. There is therefore no need to duplicate the same.

ANALYSIS AND DETERMINATION

36. Having considered all the pleadings and written submissions by the parties for and against the application dated 6th October, 2020, the issue that arises for determination is *whether this Court can grant stay of proceeding of the suits before the lower court mentioned herein*.

37. As noted above, the Plaintiff seeks a stay of proceedings in all the suits filed against it and for which it is entitled to indemnify under the contract of insurance it had with the Defendants.

38. The instant case is not an Appeal and thus the principles of stay of proceedings pending appeal may not be strictly speaking applicable. However, I have no doubt in my mind that the same principles are applicable to some extent. The Plaintiff herein is required to prove an arguable case as against the Defendants with a probability of success.

39. The court in this case has to determine whether the Plaintiff has an arguable case against the Defendants and whether it will suffer any prejudice if such stay of proceedings is not granted.

40. The Applicant has stated that it had duly paid insurance premiums for the Motor Vehicles that are subject of the suits before the lower court with the 1st and 2nd Defendants respectively.

41. In this case the Plaintiff is apprehensive that the 1st and 2nd Defendants refusal to accept the notices from the Interested Party. The Plaintiff claims it will suffer irreparable harm if the 1st and 2nd Defendants do not indemnify it from the said claims since Judgments may be entered in the favour of the Interested Parties who may execute the same as against the Plaintiff. The Defendants have not denied that the Plaintiff had taken out the respective covers for its Motor Vehicles.

42. On the other hand, the 1st Defendants have stated that the Plaintiff has not shown any prejudice that it will suffer in the event the stay of proceedings is not granted by this court. It has stated that no Judgment has been entered in either of the cases and the Plaintiff should therefore not be presumptive of the outcome of the cases that are before the lower court.

43. The 1st Defendant has severally stated that if any such Judgment is entered, the Plaintiff is personally liable to pay the Interested Parties as they are not a party to the said suits. They have further claimed that the Plaintiff was in breach of the Insurance Policy and should not be allowed to claim indemnity.

44. It was the 1st Defendant's position that the suit herein was not necessary as the Plaintiffs in the suits before the lower court, as a matter of procedure, have the option to file declaratory suits against it once Judgment has been entered.

45. As for all the Interested Parties they have stated that a stay of proceedings will only result in a delay in the matters before the lower court and hence cause them an injustice. They have also stated that the Defendants were the Insurers of the Plaintiff and had duly served them with the requisite notices.

46. The 1st, 3rd, 4th and 5th Interested Parties have further stated that they are aware that under the law, once Judgment is entered, they have an option to institute declaratory suits as against the Defendants for compensation. They have added that the suit is premature as there is yet no Judgment that has been entered in the matters, thus no impending harm on the Plaintiff. Finally, they have stated that the Plaintiff has not brought any evidence that the Defendants have refused to indemnify it against the suits before the trial court.

47. The 2nd Interested Party sought to be removed from the proceedings as he was not covered under the **Insurance (Motor Vehicle Third Party Risks) Act**.

48. The court in the case of **Kenya Wildlife Service –vs- James Mutembei [2019] eKLR** held that: -

“...Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent...”

49. From the above decision, it is clear that the court's discretion in issuance of a stay of proceedings should be done with caution in consideration of the right of a litigant to access to justice as enshrined under **Article 48 of the Constitution**.

50. In this instant case, I find that the Defendants have not denied that they had a contract with the Plaintiff. What is in contention is whether the Plaintiff is entitled to be indemnified. I am in agreement with the contention by the 1st Defendant, 1st, 3rd, 4th and 5th Interested Parties that no Judgment has been entered in the matters before the lower court to establish liability, thus making this application premature.

51. Also, the 1st, 3rd, 4th and 5th Interested Parties have stated they are aware that the Defendants were the insurers of the Plaintiff's Motor Vehicles and in case any such Judgment is entered, they have an option to file declaratory suits against the Defendants as provided under **Section 10** of the **Insurance (Motor Vehicle Third Party Risks) Act**.

52. In view of the above, I find the issuance of an order for stay of proceedings will only cause a delay in the prosecution of the suits before the trial court. Furthermore, it has not been shown what harm will be occasioned to the Plaintiff since the said Judgments have not been entered. In any case, the Interested Parties have assured the court that they are aware of the procedures to follow if Judgment is entered in their favour.

53. The upshot is that the application dated **6th October, 2020** is unmerited and therefore dismissed.

54. Costs shall be in the cause.

It is hereby so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 26TH DAY OF MAY, 2021.

D. CHEPKWONY

JUDGE

In the presence of:

No appearance for the Applicant

M/S Azeri for 1st Interested Party

Mr. Achoka Counsel holding brief for Mr. Indika & Mr. Ondego for 3rd & 4th Interested Parties respectively

5th Interested Party in person

Court Assistant - Winnie