



**REPUBLIC OF KENYA**

**AT THE HIGH COURT OF KENYA AT NAIVASHA**

**(CORAM: R MWONGO, J.)**

**MISC CIVIL CASE 133 OF 2019**

**UAP INSURANCE.....APPLICANT**

**VERSUS**

**JOHN MWAITA MWENDANDU.....RESPONDENT**

**EDWARD KIIHIKO WAGURU.....INTERESTED PARTY**

**RULING**

1. The applicant was the insurer of the respondent's vehicle No KBZ 599T Tata Lorry which was involved in an accident with another motor vehicle registration number KBK 399K, Matatu, on 20<sup>th</sup> May, 2017. The insurance policy was number 120/080/01/00547/2107. As a result of the accident, the following suits were brought in the lower court in Naivasha:

CMCC NO. 516 OF 2017-EDWARD KIIHIKO WAGURU VS PAUL WARUINGI MUTHINJI & JOHN WAITA;

CMCC NO. 515 OF 2017 JOEL KAGIRI MUKA BI VS PAUL WARUINGI MUTHINJI & JOHN WAITA; and

CMCC NO.519 OF 2017 DAVID NGUGI WACHU VS PAUL WARUINGI MUTHINJI & JOHN WAITA

2. By a motion under urgent certificate dated 9<sup>th</sup> May 2019, but filed on 16<sup>th</sup> May, 2019, the Applicant sought to stay the proceedings in the above suits, citing eleven grounds. The core grounds may be expressed as follows: That after the filing of the suits the applicant instructed its advocates to defend the said suits; In the process, an investigation report was prepared which yielded information that the Respondent's conduct as relates to the alleged accident was in breach of the insurance policy/contract; Further, that the said investigation had just come to the attention of the Applicant and thus a declaratory suit could not have been filed within the time provided by law; that the filing of a declaratory suit was not delayed by an act of the applicant and is justified and has been explained.

3. The Applicant further contends: that the investigation report was received outside the statutory timelines specified in **Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405**; that the report reveals the respondent acted in breach of the insurance policy, and hence the need to file a declaratory suit with court's leave.

4. The respondent did not file a Replying affidavit to the application. However, the court allowed the interested party to be enjoined in the suit, as the party whose suit in CMCC No 516 of 2017 is sought to be stayed. The interested party filed a replying affidavit opposing the application.

5. In his replying affidavit, the interested party contends that: That the instant application is an abuse of the court process; That the Applicant shall suffer no prejudice if the orders sought in the R.A. are granted; That the Applicant ought to have acted within the statutory period and serve the its application within 3 months of being served with the Plaintiff; That the applicant offers no explanation why the application was served close to year since the investigations were concluded.

**Issue for determination**

6. The core issue to be determined is whether the applicant has proffered sufficient reasons: first to justify stay of the proceedings in the lower court; and second to justify grant of leave to file out of time the declaratory suit against the lower court's proceedings.

7. The threshold for stay of proceedings is captured in the following passages in **Halsbury's Law of England, 4th Edition. Vol. 37** page 330 and 332, elucidate 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.” (Emphasis added)*

8. It is absolutely essential, before this court can interrupt the lower court’s proceedings, to definitively establish and be satisfied as to the exceptional circumstances the applicant has placed before the court to enable the proceedings to be stayed. From the application, supporting affidavit and other documents supplied, the circumstances disclosed are that:

- a) The Plaints in CMCC No. 516 of 2017, CMCC No. 515 of 2017, CMCC No.519 of 2017 were filed on 4<sup>th</sup> August 2017;
- b) Nine months later, on 25<sup>th</sup> May 2018, and before the defence was filed, the investigations report was delivered to the Legal manager of the Applicant as shown in the correspondence availed;
- c) The Defence by the Applicant was filed one month later, on 28<sup>th</sup> June 2018, with the report being available to the applicant;
- d) The present Miscellaneous Application No.133 of 2019, was filed on 16<sup>th</sup> May 2019, a year after the defence.

9. No satisfactory explanation has been given by the applicant for the long one year delay (356 days to be exact) between the date when the investigation report was availed to it on 28<sup>th</sup> June 2018 and the date of filing the application on 16<sup>th</sup> May, 2019. The applicant’s contention that the investigation report was delivered late or had only just come to the applicant’s attention clearly does not fly.

10. The applicant relied on **Xplico Insurance Company v Simon Mkalla Ndegwa & 2 Others [2014] eKLR** where the court granted leave to file out of time. There the time-lapse between when the accident took place till the time the investigation took place was 307 days. In this case should the court grant leave to file out of time, the time between the accident taking place and the filing of the application would be 720 days. That case is therefore clearly distinguishable on its facts.

11. In the case of **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000** Ringera J (as he then was) persuasively stated thus;

*“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 if it is, on what terms it should be granted.*

*In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind 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”* (Emphasis added).

12. The provisions of **Section 10(4) of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405**, upon which the applicant’s application for stay is premised provides:

*“(4) 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.*

13. The applicant contends that it could not bring the application for a declaration within three months after the proceedings in the lower court were commenced, because it did not have the investigation report. However, the applicant has not explained why at the time of filing the defence it could not have filed the application for a declaration. If it had been alleged by the applicant that they did not have notice of the institution of proceedings, this court would have been sympathetic to their application,; but that is not what is contended here.

14. The Applicant also cited the authority of **Jubilee Insurance company of Kenya Ltd vs Nelson Njenga Munene and 9 others** where Kasango, J allowed an application for stay of proceedings stating:

***“6. Section 10 of Cap 405 obligates an Insurer to settle judgment amount decreed against its insured unless, amongst other things, the Insurer gave, fourteen days notice, after commencement of action against its insured, repudiating liability. In this case the Applicant did not give that notice within that period.***

***7. The reason given for failing to give that notice within that period is that the Applicant did not realize the 1<sup>st</sup> Respondent was using the vehicle contrary to provisions of the Insurance Policy until their investigator concluded its investigation which was after the fourteen (14) days provided under Cap 405.”***

15. I have perused the brief ruling in that case. There, the court excused the applicant’s failure for not giving fourteen days’ notice of intention to repudiate upon the filing of the suit. The circumstances of the failure are not detailed at all. However, from the ruling it is clear that whilst the accident occurred on 2<sup>nd</sup> February 2014,, the application for leave to file a declaratory suit out of time was filed expeditiously on 14<sup>th</sup> July 2014, and the court’s ruling rendered on 4<sup>th</sup> December, 2014. Clearly, there the applicant acted expeditiously and immediately upon receipt of their investigation report. Here the applicant sat on the investigation report for almost a full year, without explanation.

16. Ultimately, this is not a case in which the court is satisfied that the ends of justice require that the court exercise its discretion in favour of the applicant.

17. The application is therefore dismissed with costs.

#### **Administrative directions**

18. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

19. A printout of the parties’ written consent to the delivery of this judgment shall be retained as part of the record of the Court.

20. Orders accordingly.

**DATED AND DELIVERED IN NAIVASHA BY TELECONFERENCE THIS 24TH DAY OF SEPTEMBER, 2021.**

**R. MWONGO**

**JUDGE**

Attendance list at video/teleconference:

1. Mwangi for the Applicant
2. No representation for the Respondent
3. Nyasetia holding brief for Mboga for the Interested Party
4. Court Assistant - Quinter Ogutu