



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 16 OF 2019

GICHERE INGRID.....PLAINTIFF

VERSUS

CIC GENERAL INSURANCE LIMITED 1ST DEFENDANT

CIC INSURANCE GROUP LIMITED.....2ND DEFENDANT

RULING

1. In the Notice of Motion dated 22nd January 2019, the plaintiff, *Gichere Ingrid* (the applicant) seeks an order staying proceedings in Milimani Civil Suit No. 923 of 2015 pending hearing and determination of the suit herein.
2. In the suit instituted by way of a plaint dated 22nd January 2019 as amended on 27th September 2019, the applicant sued the defendants (respondents) namely, *CIC General Insurance Limited*; *CIC Insurance Group Limited* and the *Co-operative Insurance Company of Kenya Limited* seeking a declaration that they are under a statutory and contractual obligation to make payments in respect of any judgment that may be delivered in favour of the interested party against the applicant in Milimani Civil Suit No. 923 of 2015.
3. By way of background, in the amended plaint filed on 3rd February 2020, the applicant contends that the respondents issued a comprehensive policy of insurance covering him against third party liability caused or arising from the use of his motor vehicle registration number KBD 908J; that when that policy was in force, the vehicle was involved in a collision with motor vehicle registration number KAC 915G which belonged to *Benson Harrison Karanja* (the interested party). Arising from that accident, the interested party filed CMCC No. 923 of 2015 at the Milimani Chief Magistrate's Court (the primary suit) seeking to recover from the applicant damages and other related costs. As the respondents denied liability to settle any decree that may be issued in favour of the interested party against the applicant in the primary suit, the applicant now prays that hearing in the primary suit be stayed pending conclusion of the declaratory suit filed before this court.
4. The application is supported by grounds stated on its face which are replicated in the depositions made by the applicant in his supporting affidavit sworn on 9th January 2019. In his affidavit, besides narrating the background against which the primary suit and the current suit were filed which I have summarized above, the applicant averred that if the order sought was not granted, he will suffer grave prejudice and substantial loss since the primary suit will proceed for hearing and if judgment is entered against him, the resultant decree will be executed against him personally rendering the current suit nugatory.
5. The application is opposed by the respondents through a replying affidavit sworn on 27th February 2015 by *Mr. Erastus Mbaka*, the 1st respondent's Legal Officer. The interested party though served did not file any response to the application and did not participate in its hearing.
6. In the replying affidavit, the deponent averred that the applicant is not deserving of the orders sought since in the respondent's view, his suit which was premised on the provisions of *The Insurance (Motor Vehicle Third Party Risks) Act (Cap 405 Laws of Kenya)* is misconceived considering that the primary suit was founded on a claim arising out of material damage to a motor vehicle which is not one of the risks that requires compulsory insurance under *Cap 405 Laws of Kenya*; that the relationship between the applicant and the respondents is contractual and that the applicant cannot purport to enforce terms of a contract which he is guilty of breaching; that consequently, the applicant has not established sufficient cause to justify grant of the orders sought.
7. By consent of the applicant and the respondents, the application was prosecuted by way of written submissions which both parties duly filed. The applicant's submissions are dated 9th July 2020 while those of the respondents are dated 25th July 2020.
8. In his submissions, the applicant in a nutshell contended that he has an arguable case with high chances of success; that the comprehensive

insurance policy issued to him by the respondents incorporates mandatory insurance required to be issued for motor vehicles under the *Insurance (Motor Vehicle Third Party Risks) Act* (Cap 405) and that consequently, the respondents were under statutory duty to satisfy any judgment that may be issued against the applicant in the primary suit; that the fact that the applicant delayed in notifying the respondents about occurrence of the accident in question cannot absolve the respondents from fulfilling their obligations under the insurance contract. For this proposition, the applicant relied on the persuasive authority of **Joseph Mwangi Gitundu V Gateway Insurance Company Limited, [2015] eKLR.**

9. The applicant also urged the court to find that the primary suit is at an advanced stage and if the orders sought are not granted, it may be concluded ahead of this suit and if that happens and the interested party is successful, he will suffer substantial loss as the interested party will execute judgment against him directly.

10. In countering the applicant's submissions, the respondents asserted that the applicant had failed to establish that he has a *prima facie* arguable case in the current suit given that he was in breach of the terms of the insurance contract executed by the parties owing to her failure to notify the insurer of occurrence of the accident on 22nd August 2012; that the primary suit involved a claim of material damage to a motor vehicle which was not covered under the provisions of *Cap 405*; that allowing the application will prejudice the interested party's right to expeditious disposal of his suit; that the application lacks merit and should be dismissed with costs.

11. Having considered the application, the affidavits on record and the parties' rival submissions, I find that it is not disputed that at the time the accident subject matter of the primary suit occurred, there was an insurance contract in force between the parties in which the respondents bound themselves to indemnify the applicant against claims made by third parties arising from the use of the applicant's vehicle. Whether the respondents are statutorily and contractually obligated to satisfy the judgment that may be issued against the applicant in the primary suit is the fundamental issue which arises for determination in the current suit and it would be inappropriate for me at this interlocutory stage to make any finding on the issue as doing so may prejudice hearing of the suit.

12. Given the foregoing and the fact that the respondents have denied liability to indemnify the applicant against the claim made by the interested party in the primary suit and bearing in mind the relief sought in this case, I find that good order and the interests of justice requires that this suit be determined first before the primary suit. I say so because if the primary suit is concluded first, the applicant will be forced to settle the decree that may be issued in favour of the interested party before the suit filed before this court is determined on merit and such an eventuality may render this suit nugatory.

13. I am alive to the fact that staying proceedings in the primary suit will no doubt result in a measure of delay in the finalization of the suit but the delay can be mitigated by the expeditious disposal of the suit filed in this court. Besides, both the applicant and the interested party have an equal right to have their respective suits heard and determined on merit. In my view, if the stay sought is not granted, the prejudice the applicant stands to suffer is grave and cannot be compared to the inconvenience the interested party may suffer because of delay in the conclusion of his case if the application is allowed. In any event, the interested party stands to benefit from having this suit determined first since its outcome will establish the correct party to pursue for settlement of the decree if he is successful in the primary suit.

14. Given the foregoing, I am satisfied that the applicant has established sufficient cause to justify the exercise of this court's discretion in granting the orders sought. It is thus my finding that the application is merited and it is hereby allowed in terms of prayer 3 with no order as to costs.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 26th day of November 2020.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Mwangi for the plaintiff/applicant

Ms Atieno holding brief for Mr. Kiugu for the defendant

Ms Carol: Court Assistant