



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL SUIT NO E 001 OF 2020

DAVID RUHARA KABAYA..... 1ST PLAINTIFF/APPLICANT

GITHIGA TRAVELLERS SACCO LIMITED.....2ND PLAINTIFF/APPLICANT

VERSUS

XPLICO INSURANCE COMPANY LIMITED... DEFENDANT/RESPONDENT

ANN NYARURIRU KAMAU..... INTERESTED PARTY

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL SUIT NO E 002 OF 2020

DAVID RUHARA KABAYA.....1ST PLAINTIFF/APPLICANT

GITHIGA TRAVELLERS SACCO LIMITED.....2ND PLAINTIFF/APPLICANT

VERSUS

XPLICO INSURANCE COMPANY LIMITED.... DEFENDANT/RESPONDENT

PETER GICHERU KARANJA..... INTERESTED PARTY

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL SUIT NO E 003 OF 2020

DAVID RUHARA KABAYA..... 1ST PLAINTIFF/APPLICANT

GITHIGA TRAVELLERS SACCO LIMITED.....2ND PLAINTIFF/APPLICANT

VERSUS

XPLICO INSURANCE COMPANY LIMITED....DEFENDANT/RESPONDENT

RULING

1. As it is obvious from the above titles this Ruling relates to three different files whose common thread is **David Ruhara Kabaya**, the 1st Plaintiff and **Githiga Travellers Sacco**, the 2nd Plaintiff.
2. The back ground of the three matters is that **David Ruhara Kabaya** (hereinafter David) is the registered owner of motor vehicle registration number KBR 7295 Nissan Matatu. That vehicle was on 26th May 2018 involved in an accident. Following that accident David, as the registered owner of the subject vehicle was sued by **Ann Nyaruiru Kamau**, **Peter Gicheru Karanja** and **Geoffrey Wanjala Sitini** for the injuries they suffered following that accident. **Ann Nyaruiru Kamau filed Civil Case No. 75 of 2018**, **Peter Gicheru Karanja filed Civil Case No. 71 of 2018** and **Geoffrey Wanjala Sitini filed Civil Case No. 72 of 2018**. All those cases were filed before the **Githunguri Senior Principal Magistrate's court**. Judgment was entered in all those cases against David and its agent Githiga Travellers Sacco ltd for various amounts as damages and costs.
3. David has filed the above three cases seeking for declaration that **Xplico** insurance Company Ltd (hereafter **Xplico**) is by law obligated to pay the decretal sum in respect to the matter filed before Senior Principal Magistrate's Court at Githunguri.
4. David has sought, by Notice of Motion application dated 10th November 2020, stay of the decrees passed by the Githunguri Magistrate's Court. That prayer is premised on the ground that at the time of the accident the subject motor vehicle was insured by **Xplico**, that **Xplico** was served with the mandatory notice under Section 10 (2) of the Insurance (Motor Vehicles Third Party Risks) Act (Cap 405), that **Xplico** instructed an advocate to represent David before the Githunguri Magistrate's Court, and that despite David having a valid policy of insurance with **Xplico**, **Xplico** has failed to pay the decretal sum of the matters before Githunguri Magistrate's Court. As a consequence of **Xplico's** failure to pay the decretal sum due in those matters David deponed that warrants of attachment were issued against him and the subject motor vehicle was attached.
5. All those parties who obtain judgment before the Githunguri Court opposed the application on the grounds that there is no dispute that judgment was entered; that David failed to exhibit proof to show that **Xplico** had insured the subject vehicle; and that the decree holders are strangers to the dispute between David and **Xplico**.

ANALYSIS AND DETERMINATION

6. David has moved this court under Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21. Those are the Sections which relate to the overriding objectives of the Civil Procedure Act. That objective is to facilitate the just, expeditious, proportional and affordable resolution of civil dispute. Section 1A (1) of Cap 21 provides:

(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

7. How that overriding objective ought to be applied was discussed in the case **Ndathi Mwangi and 5 Others -v- Benson Lumuba Ndivo (2017) e KLR** thus:

“11. In the case of **Nicholas Kiptoo Arap Korir Salat -Vs- Independent Electoral and Boundaries Commission & Others [2013] eKLR** the Court of Appeal in discussing the application of the overriding objective principle had this to say

.....On the applicability of the overriding objective principle in the appellate jurisdiction, we wish to draw guidance from case law. The principle confers on the courts considerable latitude in the exercise of its discretion in the interpretation of the law and rules made thereunder. (See the case of City Chemist (NB1) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli versus Orient Commercial Bank Limited Civil Application No. Nai 302 of 2008 (UR.199/2008); The aim of the overriding objective principle is to enable the Court achieve fair, just, speedy, proportionate, time and cost saving disposal of cases before it. (See the case of Kariuki Network Limited & Another versus Daly & Figgis Advocates Civil Application No. Nai 293 of 2009); that the application of the overriding objective principle does not operate to uproot established principles and procedures but to embolden the court to be guided by a broad sense of justice and fairness (See the case of Kariuki (Supra); that in applying or interpreting the law or rules made thereunder, the Court is under a duty to ensure that the application or interpretation being given to any rule will facilitate the just, expeditious, proportionate and affordable resolution of appeals (See the case of Deepak Manlal Kamani and another versus Kenya Anti-Corruption and 3 others Civil Application No. 152 of 2009);.....”

8. The interested parties hereof oppose the application on the basis that David was aware of the Magistrate's court judgment and that they had no dealings with the contractual obligation of the insurance company.

9. I found the authorities relied upon by the interested parties of no assistance. They are distinguishable to the present matter. The interested parties' reliance of the case **Kensilver Express Ltd -v- John Mwiti Kabira (2010) e KLR** is in error because in that case the court refused to grant stay because the stay was not supported by an appeal. Similarly, the case **Duncan Mogaka Muchira and Another -v- Minister Far Finance and 4 Other (2017) e KLR** is distinguishable from this case because the Applicant was seeking relief under the Constitution in view of the collapse of the insurance company the subject vehicle. The court in the case **Elizabeth Nzisa Muthini and Another -v- Direct Line Insurance Co. Ltd -v- Peter Musau Kimenyi (2019) e KLR** the court found that the Applicant's application failed because the Applicant sought stay on the basis her suit was for subrogation. For that reason, the application for stay of execution, in that case failed.

10. In this case David seeks an order for declaration that **Xplico** is liable to settle the decretal sum. Pending determination of the suit David seeks stay of execution of the judgment before the Magistrate's Court. I will invoke the overriding objective of Cap 21 and exercise my discretion in granting stay of execution as sought to enable David prosecute this suit on declaration against **Xplico**.

11. In balancing the interests of the Applicant and that of the interested parties I will, however, give a stay for a limited time within which this declaratory suit must be heard.

12. I grant **the following orders:**

a. There shall be stay of execution up and until 1st March 2021 of the cases Githunguri PMCC Nos. 75 of 2018, 71 of 2018 and 72 of 2018.

b. An order is hereby made consolidating Kiambu High Court Civil Case Nos. E001, E002 and E003 of 2020. The lead file shall be E001 followed by E002 of 2020 and lastly by E003 of 2020.

SIGNED AND DELIVERED VIRTUALLY THIS 18TH DAY OF DECEMBER 2020.

MARY KASANGO

JUDGE

18th December 2020

Before Justice Mary Kasango

C/A - Kevin

For the Plaintiffs – Ms Gathuthi holding brief for Banda

For the Interested Party – Mr. Ngethe holding brief for Mwaniki

For the Defendant – No appearance

COURT

Ruling virtually delivered in their presence.

MARY KASANGO

JUDGE