REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL CASE NO. 01 OF 2019

THE KENYAN ALLIANCE INSURANCE

COMPANY LIMITED.....PLAINTIFF

=VRS=

1. EUNICE NYABOKE NYARIBARI.....1ST RESPONDENT

2. CLEOPHAS NYAMONGO.....2ND RESPONDENT

RULING

By its Notice of Motion dated 4th February 2019 filed herein on 5th February 2019 the applicant seeks orders for stay of the proceedings in two cases before the Keroka Court – SPMCC 239 of 2017 and SPMCC 107 of 2018 – pending the hearing and determination of this applications well as the hearing and determination of a Declaratory/Disclaimer suit filed by itself in this court.

The thrust of the application is that an exparte judgement was entered in favour of the Interested Party against the respondent in Keroka SPMCC 239 of 2017; that pursuant to that exparte judgement the Interested Party filed a declaratory suit Keroka SPMCC 107 of 2018 and obtained an exparte judgement/decree compelling the applicant to satisfy the judgement arising from the primary suit Keroka SPMCC No. 239 of 2017; that thereafter the Interested Party initiated execution proceedings and obtained warrants of attachment and sale of the applicant's property which will not only destroy the substratum of this application and suit but also occasion substantial loss and irreparable damage to the applicant. Further that the applicant being aggrieved has filed a declaratory/disclaimer suit against the respondent asking this court to find that the insurance policy did not cover the accident that occurred on 25th July 2017 involving motor vehicle Registration No. KCK 263C and that it is neither bound to satisfy the exparte judgement/decree in Keroka SPMCC 239 of 2017 or the judgement in Keroka SPCC 107 of 2018. It is contended that unless the two suits are stayed the declaratory/disclaimer suit shall be rendered nugatory and the applicant shall suffer great loss and irreparable damage as it is not bound by law to satisfy any of those judgements, as at the time of the accident the insured motor vehicle was being used for hire and reward in breach of the insurance policy. That as a result the applicant repudiated the policy and advised the respondent accordingly. At ground (q) this court is reminded that it has a wide and unfettered discretion to stay the exparte proceedings and their execution and to make any declaration in respect thereto or to make any further orders as it deems fit in the wider interest of justice.

The application is supported by an affidavit sworn by Antony Kariuki, the applicant's Legal Officer to which he has annexed several documents including the pleadings in the impugned cases.

The respondent was at the inception represented by the firm of Mainga & Co. Advocates but I see from the record that on 18th February 2019 she filed a Notice to Act in person. A Notice of Change of Advocates was thereafter filed by O. M. Otieno & Company Advocates and she is therefore represented by that firm. Both she and the Interested Party have filed replying affidavits in opposition to the application. They have also filed Notices of Preliminary Objection to the suit.

In her replying affidavit the respondent deposes inter alia, that the applicant was on 20th November 2017 duly served with a Statutory Notice prior to filing of the primary third party claim as is mandatory under Section 10 (2) of the Insurance (Motor Vehicles Third Party Risks) Act Cap 405 but it neither responded nor filed a disclaimer suit; that the applicant's right to avoid, disclaim or repudiate the insurance policy as provided under Section 10 (4) of the Act having been squandered the applicant became obliged to satisfy the decree in the primary suit. Further that the applicant was also duly served with summons to enter appearance and the plaint in the declaratory suit (Keroka SPMCC 107 of 2017) filed by the Interested Party but did not enter appearance following which the court entered interlocutory judgement against it and proceeded to formal proof and subsequently entered judgement for the Interested Party. The respondent and Interested Party contend that the applicant slept throughout and was only jolted into action when it was faced with the imminent attachment of its moveable properties. It was then that it rushed to court to file this application and the disclaimer suit.

In the Interested Parties Notice of Preliminary Objection filed by O. M. Otieno on 11th February 2019, it is contended that this suit is fatally defective, incompetent and bad in law as the same is time barred by dint of Section 10 (4) of the Insurance (Motor Vehicle Third Party Risks)

Act; that the suit is bad in law for non-compliance with the proviso to Section 10 (4) of the Insurance (Motor Vehicle Third Party Risks) Act a Statutory Notice having been issued and the suit herein being statutorily barred and the window for repudiation of the contract closed. It is contended that this court has no jurisdiction to grant the prayers sought as the suit is time barred and it ought to decline the invitation to entertain a suit that is null and void abinitio. It is argued that no amount of amendment or hearing will breath life or redeem the plaintiff's suit and application and the same are for dismissal Ex-Debito Justitiae.

When Counsel came before me on 14th February 2019 I directed them to canvass the application and the preliminary objection by way of written submissions and they have complied. I have considered the rival submissions and indeed all the material placed before me fully.

The duty of an insurer to satisfy judgements against persons insured is provided in **Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act – Cap 405.** Whereas the general rule is couched in mandatory terms it also has exceptions. My reading of that Section and more especially the exceptions is that an insurer would not be liable to pay in the following instances: -

(a)Where she was not served with a Statutory Notice before the commencement of the proceedings – subsection 2 (a); or

(b)Where she has obtained a stay of execution pending an appeal against the judgement – sub-section 2 (b); or

(c)The policy had been cancelled by mutual consent or by virtue of any provision therein before the happening of the event giving rise to the liability and the conditions in (i), (ii), (iii) set out in respect of the certificate of insurance had been satisfied;

(d)If she has obtained a declaration under subsection (4).

The applicant concedes she was served with a Statutory Notice and therefore had notice of bringing of the proceedings giving rise to the judgement against the respondent. There is no stay of execution pending appeal in respect of that judgement and the applicant does not allege that before the accident the policy had been cancelled by mutual consent. The protections in subsection 2 cannot therefore avail to her. Be that as it may, subsection (4) provides that she can avoid liability if she has a declaration obtained in the manner set out in subsection (4). It is indeed for that reason that the applicant has come to this court. For clarity I shall quote subsection (4) verbatim: -

"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 judgement was given, he has obtained a declaration that, a part 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:"

Even then the section has a proviso which states: -

"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 judgement obtained in the 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."

The applicant herein is in simple words asking this court to stay the proceedings in the lower court so that it can obtain a declaration and cloth itself with the protection availed by **Section 10 (2) of the Insurance (Motor Vehicle Third Party Risks) Act.** Counsel for the applicant has urged this court to invoke its supervisory jurisdiction and also give the provisions of subsection (4) a purposive interpretation. However, I am not persuaded that doing either of that would avail the applicant the prayers it craves. To begin with the power to stay proceedings is a discretionary one flowing from the inherent jurisdiction of this court. It is nevertheless a discretion that must be exercised judicially and only for the benefit of deserving parties. I am not persuaded that the applicant is deserving of the exercise of that discretion in its favour. This court is not enjoined to aid an indolent party. It has been more than a year since the judgement in the primary suit was obtained. The applicant has not given any explanation, let alone a plausible one, for waiting until now to bring this application. It can only be interpreted to mean that the applicant is intent only on delaying the proceedings or denying the Interested Party of the fruits of his judgement. Since the introduction of **Sections 1A and 1B of the Civil Procedure Act** it is no longer acceptable that a party can stall proceedings more so in a case like this where the applicant had due notice of the proceedings all along. The reason that the law requires service of a Statutory Notice upon the insurer is so that the insurer can raise the issues being raised at that early stage and to give it an opportunity to commence the action for the declaration in subsection (4). It cannot be that this court can entertain the applicant's request when it had all the time but instead squandered. Moreover, even if I was willing to exercise my discretion in its favour I cannot do so as the time for commencing the action for the declaration has lapsed such time being limited to three months after the commencement of the proceedings, in this case, the primary suit.

The upshot is that this court cannot come to the aid of an indolent party who in any event seeks a stay in order to bring an action that is already time barred. The application and the entire suit are accordingly dismissed with costs to the respondent and the Interested Party.

It is so ordered.

Signed, dated and delivered in Nyamira this 29th day of March 2019.

E. N. MAINA

JUDGE