



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CIVIL APPEAL NO.38 OF 2018

BETWEEN

JOHN MARAMBA OGAM.....APPELLANT

AND

THE MONARCH INSURANCE COMPANY LIMITED.....RESPONDENT

AND

NICHOLAS OKWARO.....FIRST INTERESTED PARTY

ROSELYNE LUMBASI.....SECOND INTERESTED PARTY

(Being an Appeal from the Ruling and Order in Maseno SPMCC No. 186 of 2016 by Hon. B.K.Kiptoo (RM) on 13th March, 2018)

RULING

INTRODUCTION

1. **SAMWEL DANSON WINDA ODERO** (*hereinafter referred to as Appellant*) sued **NICHOLAS OKWARO** and **ROSELYNE LUMBASI** (*hereinafter referred to as first and second Interested Parties respectively*) in the lower court claiming damages for injuries he allegedly suffered on 21st May, 2016 while travelling in the first Interested Party's motor vehicle which collided that of second Interested Party's motor vehicle allegedly due to their negligence or those of their drivers, agents and/or employees.

2. The court record shows that the firm of Mose, Mose Milimo Advocates entered appearance for the Respondents (Defendants) on 18th May, 2017. On 30th June, 2017, the said firm filed an application to enjoin **THE MONARCH INSURANCE COMPANY LIMITED** (*hereinafter referred to as Respondent*) as an Interested Party and for an order staying the hearing of **Maseno SPMCC No. 186 of 2016** pending hearing and determination of **Maseno SPMCC No. 77 of 2017** between the Respondent and the first Interested Party.

3. The application was based on the grounds among others that the first Interested Party had breached the terms of the insurance policy between it and the Respondent entitling the latter to repudiate liability.

4. By a ruling dated **13th March, 2018**, the court allowed the Respondent to be enjoined as an Interested Party and stayed the hearing of **Maseno SPMCC No. 186 of 2016** pending hearing and determination of **Maseno SPMCC No. 77 of 2017** between the Respondent and the first Interested Party.

The Appeal

5. The Appellant being dissatisfied with the lower court's decision on 04th June, 2018 filed the Memorandum of Appeal dated 30th May, 2018 which sets out 9 grounds which I have summarized into two grounds that: -

- 1) The trial magistrate erred in law and in fact by finding and holding that the Interested Party be enjoined as a party to Maseno SPMCC No. 186 of 2016**
- 2) The trial magistrate erred in law and in fact by staying the hearing and determination of Maseno SPMCC No. 186 of**

2016 pending hearing and determination of Maseno SPMCC No. 77 of 2017 between the Respondent and the first Interested Party.

SUBMISSIONS BY THE PARTIES

6. When the appeal came before me for mention for directions on 29th November, 2018, the parties' advocates agreed to I dispose it off by way of written submissions which they dutifully filed.

Appellant's submissions

7. Appellant holds the view that the Respondent seeks to ventilate its interests relating to an alleged breach of the terms of the insurance policy between it and the Interested Party entitling the Respondent to repudiate liability. The Appellant urged the court to find that the Respondent's participation in **Maseno SPMCC No. 186 of 2016** is not pertinent to the issues between the Appellant on one hand and the Interested Parties on the other hand.

8. Reliance was placed on **Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others [2015] eKLR** where the Supreme Court stated as follows regarding an interested party:

“Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. On the other hand, an amicus is only interested in the Court making a decision of professional integrity. An amicus has no interest in the decision being made either way, but seeks that it be legal, well informed, and in the interest of justice and the public expectation. As a ‘friend’ of the Court, his [or her] cause is to ensure that a legal and legitimate decision is achieved.”

9. The Appellant also relied on **Skov Estate Limited & 5 others v Agricultural Development Corporation & another [2017] eKLR** where the court stated that a party seeking to be enjoined as an interested party must first demonstrate that it is a necessary party to the suit.

10. Appellant argued that the declaratory suit was time-barred having been filed 10 months after the Appellant's case was filed. On that ground, the Appellant submitted that the Respondent had not demonstrated that it had a case with a probability of success which would be rendered nugatory if the order of stay was granted. In support thereof, the Appellant relied on **Pacis insurance company Ltd v Mohammed F. Hussein (2017) eKLR** and **Gateway Insurance Co. Ltd v Evans Njenga Gitau & Another (2014) eKLR**.

11. The Appellant similarly relied on **Kenya Shell Ltd v Benjamin Karuga Kibuku and Ruth Wairimu Karuga, Nairobi Civil Application No 97 of 1986** and submitted that the Respondent did not demonstrate that it was likely to suffer substantial loss the order of stay was granted.

Respondent's submissions

12. The respondent submitted that it applied to be enjoined to **Maseno SPMCC No. 186 of 2016** on the ground that it was entitled to avoid liability under Section 10(4) of The Insurance Motor Vehicle (Third Party Risks) Act Cap 405 Laws of Kenya. Respondent placed reliance on **Gateway Insurance Co. Ltd v Thomas Njenga Gitau & Another [2014] eKLR** where the court stated:

“In my understanding of that provision, an insurer would be entitled to avoid its obligation to make payment under a contract of insurance if it had commenced proceedings either before a case had been filed against its insured or within 3 months of the case being instituted against its insured. The claim by the insurer would need to be one in which the insurer sought and obtained a declaration that it was entitled to avoid its obligations under the contract of insurance”

13. The Respondent also relied on **United India Insurance Co. Ltd v M.K.J Corporation [1996] 6SCC India 428** where it was held that **“It is a fundamental principle of insurance law that utmost good faith must be observed by the contracting parties”**.

Analysis and Determination

14. I have considered the appeal in the light of the evidence on record, the submissions and the cited authorities cited by the parties and the issues for determination are whether the Respondent is a necessary party in the determination of the suit between the Appellant and the Interested party.

15. From the pleadings in **Maseno SPMCC No. 186 of 2016**, it is apparent that Appellant's claim against the Interested Parties is based on negligence while the claim in **Maseno SPMCC No. 77 of 2017** by the Respondent against the first Interest Party is a declaratory suit based on breach of contract. As much as the Respondent was the insurer of the Interested Party's motor vehicle that was involved in the accident in issue, its participation in **Maseno SPMCC No. 186 of 2016** is not pertinent to the issues between the Appellant Interested Parties.

16. The Appellant has argued that **Maseno SPMCC No. 77 of 2017** is time-barred having been filed 10 months after the Appellant's case was filed and that has a bearing on the success of that case but that is an issue for the trial court to determine. From the record however, I am convinced that the Respondent has not demonstrated that the proceedings in **Maseno SPMCC No. 186 of 2016** will render nugatory the determination of **Maseno SPMCC No. 77 of 2017**.

Disposition

17. From the foregoing analysis, I have come to the conclusion that the Respondent is not a necessary party to the determination of the issues in **Maseno SPMCC No. 186 of 2016** between the Appellant and the Interested Parties. Enjoining the Respondent to **Maseno SPMCC No. 186 of 2016** will in my considered view do nothing but unnecessarily confuse issues while an order staying the hearing and determination of that suit will have the effect of delaying its conclusion and increase in costs.

18. I also find and hold that **Maseno SPMCC No. 77 of 2017** is a matter exclusively between the Respondent and the first Interest Party and its determination does not have the probability of affecting the Appellant's claim in **Maseno SPMCC No. 186 of 2016**.

19. Consequently, this appeal is found to be meritorious. The trial court's ruling dated **13th March, 2018** allowing the Respondent's application dated 23rd June, 2017 enjoining Respondent as an Interested Party and staying the hearing of **Maseno SPMCC No. 186 of 2016** pending hearing and determination of **Maseno SPMCC No. 77 of 2017** between the Respondent and the first Interested Party is set aside and substituted with an order dismissing the Respondent's application dated 23rd June, 2017 with costs to the Appellant.

20. The Appellant is also awarded the costs of this appeal as against the Respondent. It is so ordered.

DATED AND DATED IN KISUMU THIS 30th DAY OF May 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

For the Appellant - N/A

For the Respondent - N/A