



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 46 OF 2014

GEMINIA INSURANCE

COMPANY LIMITED.....PLAINTIFF/APPLICANT

VERSUS

1. ISMAEL BWANAMKUU OMAR

2. TREASURE AUTOMOBILES

3. AL-FAWAZEIN INSURANCE BROKERS

4. AYUB MUMBA MALANGA

(suing as the Legal Administrator of the

estate of DIANA ATIENO OMONDI AND AYUB

MUMBA MALANGA).....DEFENDANTS/RESPONDENTS

RULING

1. Through an application dated 28th March, 2014 brought under the provisions of Sections 1A, 1B, 3A, 63(h) of the Civil Procedure Act and Order 42 rule 6 of the Civil Procedure Rules, the applicant seeks the following orders:-

(i) (a) Spent;

(ii) (b) That the application herein and the declaratory suit be heard and determined on priority basis;

(c) That all proceedings in Kilifi CMCC No. 310 of 2013 and Kilifi CMCC No. 311 of 2013 respectively, by Ayub Mumba Malanga (Suing as the legal administrator of the estate of Diana Atieno Omondi and Ayub Mumba Malanga, and any other suit arising from the road accident of 8th June, 2013 involving motor vehicle registration No. KBV 907D be and are hereby stayed pending the hearing and determination of the declaratory suit herein; and

(iii) That the costs of this application be in the cause.

2. The application is supported by the grounds on the face of it and the affidavit of Joseph Ogero, the applicant's Assistant Claims Manager, Mombasa, sworn on 28th March, 2014. The 1st respondent, Ismael Bwanamkuu Omar, filed a replying affidavit sworn on 24th June, 2014 to oppose the application.

3. In its written submissions filed on 25th April, 2017 the plaintiff (applicant) stated that it insured the 1st and 2nd defendants (1st and 2nd respondents) through the 3rd defendant (3rd respondent) under insurance policy No. PC/03/1358583. Insurance certificate number C9547521 in respect of motor vehicle registration number KBV 907D was issued. The insurance policy had a commencement date of 7th June, 2013 with an expiry date of 6th July, 2013.

4. It was further stated that it was an express and very strict term and condition of the insurance contract under the said policy that the said insured motor vehicle was for private use and was not to be used to carry fare paying passengers.
5. The applicant contended that during the currency of the policy, unknown to it and in total breach of the said policy condition, the 1st and 2nd respondents herein leased and hired the said motor vehicle to Mackdonald Kitsao Chirao to drive to Kombani Secondary School to visit his sister. It is indicated that he carried Diana Atieno Omondi and Ayub Mumba Malanga as fare paying passengers. It was submitted that the said motor vehicle was involved in a road traffic accident whereby the two passengers and one Janet Mwova sustained fatal injuries.
6. It was argued that proceeding with the cases in Kilifi CMCC No. 310 and 311 of 2013 that were filed pursuant to the accident would render the process of this application nugatory. It was stated that the reason for so saying was that the applicant is not entitled to satisfy any decree that may be issued in the said cases.
7. It was argued that this court has inherent jurisdiction to stay proceedings in circumstances where in a fatal injury action, the insurer files a declaratory suit and it is therefore in the interest of justice that stay of proceedings be granted in the lower court suit until such time that the applicant's declaratory suit will have been heard and determined. In the applicant's Counsel's view, no prejudice will be suffered by any of the parties concerned if the orders sought are granted.
8. The Counsel for the applicant relied on the provisions of Sections 4, 5 and 10 of the Insurance (Motor Vehicle Third Party Risks) Act. In reference to Section 10(4) of the said Act, it was submitted that it gives instances under which the insurer can disclaim liability and avoid paying any sums that may be decreed thus the policy may be avoided if it was obtained by the non-disclosure of a material fact, or the insurer is entitled to avoid on the basis of the provision in the policy that disclaims liability on the happening of a certain event. It was further stated that an insurer can also avoid liability for breach of conditions which are not specifically stated in the terms and conditions of the policy.
9. With regard to the issue of conflict mentioned in the 1st respondent's affidavit, the applicant's Counsel was of the view that none exists. He indicated that the law firm of Mogaka Omwenga & Mabeya Advocates was instructed by the plaintiff to go on record on behalf of the 4th defendant therein (the 1st respondent herein), to enable the plaintiff have the necessary locus to seek the orders prayed for in this application, which they believe was the proper approach as it would avoid a conflict of decisions.
10. The 1st respondent's Counsel in highlighting their submissions filed on 23rd May, 2017 stated that the limitation clause referred to by Counsel for the applicant is non-existent in the policy document. Further, the existence of an investigation report by Smart Race Loss Assessors is subject to legal scrutiny at the hearing of the suits pending before the Kilifi court and depending on the outcome thereof, the applicant herein may then file a declaratory suit to discharge itself from the obligation to pay compensation under the policy. It was thus the Counsel's view that it is premature to ask for the orders sought at this stage before liability has been ascertained through a trial before the lower court.
11. It was submitted that if it shown that the 1st respondent has breached the limitations for use of the motor vehicle and given the conflicting facts outlined in the pleadings by the applicant and the 1st and 2nd respondents, then such a dispute, according to the policy, would be referred to arbitration.
12. Counsel for the 1st respondent stated that the present application is incurably defective for having been brought under the provisions of Order 42 rule 6 of the Civil Procedure Rules which applies to stay of execution pending appeal. In the Counsel's view, the defect cannot be cured by the provisions of Article 159(2)(d) of the Constitution as it goes to the substance of the application and not just the procedure. The 1st respondent's Counsel referred to the case of **Kebirigo Tea Factory Ltd. vs Samuel Nyabicha Ongaga** [2010] eKLR where the Court cited the case of **Wanjau vs Muraya** [1983] KLR 276. He also relied on **Regina Waithira Mwangi Gitau vs Boniface Nthenge** [2015] eKLR cited in the case of **Kenya Commercial Finance Co. Ltd vs Richard Akusera Onditi** CA 329 of 2009, to show that the provisions of Sections 1A and 1B of the Civil Procedure Act should not be cited casually in instances where other provisions are applicable.
13. On the issue of conflict of interest, Counsel for the 1st respondent argued that the fact that the law firm of Mogaka Omwenga & Mabeya Advocates is on record herein for the applicant and represents the 4th defendant in Kilifi CMCC No. 310 and 311 of 2013, who is the 1st respondent herein, is a situation that poses a conflict of interest. It was submitted that as a matter of practice, once an Advocate-Client relationship has been formed, the Advocate is under a duty to maintain his client's confidence and avoid any or all instances that may result in a conflict of interest between his current and future client.
14. It was further submitted that the fiduciary relationship of Advocates and their Clients exists even after conclusion of the matter for which the retainer was created. Counsel referred the case of **King Woolen Mills Ltd vs Kaplan and Straton Advocates** [1990-1994] EA 224 cited in the case of **Serve in Love Africa Trust ((sic) vs David Kipsang Kipyego and 7 Others** [2017] eKLR. It was stated that in such an instance, there must be an informed written consent from all affected clients, but in the instant case there has been no such written consent from the 1st respondent allowing the firm of Mogaka Omwenga and Mabeya Advocates to act for the plaintiff/applicant in the suit herein. It was submitted that an Advocate is duty bound to be guided by the code of ethics and Sections 134 and 137 of the Evidence Act.
15. It was argued that from the relationship that the 1st respondent herein shares with the applicant's Advocates, the applicant is estopped from relying on information it may have obtained from the 1st respondent through the said Advocates and that the applicant's affidavit should be expunged for using facts obtained from the fiduciary relationship of the applicant's Advocates and the 1st respondent. The 1st respondent prayed for the application to be dismissed as it has been filed with the sole aim of unlawfully avoiding obligations bestowed on the insurance company by the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405 Laws of Kenya.
16. The 1st respondent's Counsel concluded his submissions by stating that if the application is allowed and the law firm of Mogaka Omwenga & Mabeya Advocates continues to act for the applicant, the 1st respondent will be greatly prejudiced.

ANALYSIS AND DETERMINATION

17. The issue for determination is if this court should stay the lower court proceedings filed following a road traffic accident involving the 1st respondent's motor vehicle that was insured by the applicant, to pave way for hearing of the declaratory suit herein.

18. In the first instance, the present application is premised on the wrong provisions the Civil Procedure Rules. Order 42 rule 6 of the said rules provide for stay of execution pending appeal. There is no appeal that has been filed herein in respect to this matter. Secondly, there is no Section 63(h) in the Civil Procedure Act. Should I then out rightly dismiss the application for being incompetent as prayed by Counsel for the 1st respondent? I think not. I will regard the anchoring of the application on the wrong provisions of the Civil Procedure Rules as a procedural technicality by invoking the provisions of Article 159(2)(d) of the Constitution and proceed to determine the application on merit.

19. The application raises a pertinent issue of whether this court should stay proceedings filed in Kilifi CMCC No. 310 and 311 of 2013 pending the hearing and determination of the declaratory suit herein. The court notes that the applicant is not a party in the primary suits but had insured the 4th defendant therein Omar Ismael who is now the 1st respondent in this suit. Pleadings in the cases before the lower court were filed with each party advancing their opposing positions. The said cases have not been heard and determined. The applicant by filing the declaratory suit herein put the cart before the horse, as the issue of liability has not been determined in the primary suits.

20. The issue raised by the applicant's Counsel of whether the 1st respondent contravened the limitation clause in the motor vehicle insurance policy is a matter of evidence which will require the calling of the maker of the Accident Investigation report and putting the said person through the rigors of cross examination.

21. After going through the submissions which I have replicated in this ruling and the authorities cited, I am of the considered view that this court is being requested to do an unorthodox thing by denying an aggrieved party, namely Ayub Munga Malanga who has sued as the legal administrator of the estate of Diana Atieno Omondi and Stanley Malanga, the right to be heard. Article 50(1) of the Constitution of Kenya provides as follows:-

"Every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

22. This court being guided by the above provisions of the Constitution declines to be party to denying the litigant in the primary suits filed in Kilifi Chief Magistrate's Court the right to be heard by giving the declaratory suit priority in being heard.

23. In **Corporate Insurance Company Limited vs Charles John Musee** [2014] eKLR, Judge Serگون while dismissing an application similar to this one stated thus:-

"It is my considered view that declaratory suits are an alternative to review proceedings that being the case and as correctly held by Mutava J., in corporate insurance case (supra) which opinion I share, I find that the application herein is premature since the suit from which a declaration as to whether or not the insurer is entitled to avoid liability under the contract of insurance between the plaintiff and the defendant is yet to be determined."

24. I hold a similar view as the Counsel for the 1st respondent that if I grant the orders sought herein, I will greatly prejudice the 1st respondent's case in the primary suits as it was insured by the applicant herein.

25. Another interesting angle in the present application is the deposition made by the 1st respondent in paragraph 5 of his affidavit to the effect that the law firm of Mogaka Omwenga & Mabeya Advocates which acts for the applicant herein is also acting for the 1st respondent in Kilifi CMCC Nos. 310 and 311 of 2013.

26. Although both Counsel submitted on the foregoing, there is no substantive application that has been filed by the 1st respondent seeking the court's intervention in what he sees as conflict of interest. In the said circumstances, this court cannot make any orders on a matter it has not been called to adjudicate upon, through a substantive application.

27. In winding up, I must express my displeasure at the inordinate delay that was occasioned by the applicant to list the application dated 28th March, 2014 for hearing. Exparte orders were obtained under certificate of urgency to stay proceedings in the lower court where three people were fatally injured yet it took the applicant 4 years to prosecute the said application. I need not say more.

28. On the issue of stay of proceedings in Kilifi CMCC No. 310 and 311 of 2013, this court is of the view that the applicant is not deserving of the orders sought, for reasons given in this ruling. The application dated 28th March, 2014 is hereby dismissed. Costs are awarded to the 1st respondent, Ismael Banamkuu Omar.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 10th day of August, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Mango holding brief for Mr. Omwenga for the plaintiff/applicant

Mr. Manguro holding brief for Ms Bakari for the 1st defendant/1st respondent

Mr. Oliver Musundi - Court Assistant