



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL SUIT NO 65 OF 2018**

**FOCUS PUBLISHERS LIMITED.....PLAINTIFF**

**(Formerly Focus Publications Limited)**

**VERSUS**

**AFRICA MERCHANTS ASSURANCE CO.LTD.....1<sup>ST</sup> DEFENDANT**

**AGNES WAHOME T/A EDGEWARE INSURANCE AGENCY.....2<sup>ND</sup> DEFENDANT**

**DANIEL KIOKO MWANGANGI.....1<sup>ST</sup> INTERESTED PARTY**

**S.K MUCHENDU T/A ICON AUCTIONEERS.....2<sup>ND</sup> INTERESTED PARTY**

**JOHN NJUI NYAMU.....3<sup>RD</sup> INTERESTED PARTY**

**RULING**

**INTRODUCTION**

1. The Plaintiff's Notice of Motion application dated and filed on 3<sup>rd</sup> April 2018 was brought pursuant to the provisions of Order 22 Rule 22(1), Order 51 Rule 18 of the Civil Procedure Rules, Section 3A, Section 63(e) of the Civil Procedure Act and all other enabling provisions of Law. Prayer Nos (1) and (2) were spent. It sought the following remaining orders:-

**1. Spent.**

**2. Spent.**

**3. THAT this Honourable court be and is hereby pleased to order for stay of execution proceedings of the Decree and Warrants of Attachment issued in Milimani CMCC No 5318 of 2016 pending the hearing and determination of this suit.**

**4. THAT Honourable court be and is hereby pleased to stay all proceedings in Milimani CMCC No 5318 of 2016 as against the Applicant pending the hearing and determination of this suit.**

**5. THAT the Applicants be at liberty to apply for further orders and/or Directions as the Honourable court may deem fit and just to grant.**

**6. THAT costs of this application be provided for.**

2. Despite having been served with the said application, none of the other parties filed their responses thereto except for the 1<sup>st</sup> Interested Party.

3. The Plaintiff's Written Submissions were dated 28<sup>th</sup> May 2018 and filed on 30<sup>th</sup> May 2018 while those of the 1<sup>st</sup> Respondent were dated 5<sup>th</sup> June 2018 and filed on 6<sup>th</sup> June 2018.

4. When the matter came before the court on 24<sup>th</sup> September 2018, the parties requested it to deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

### **THE PLAINTIFF'S CASE**

5. The Plaintiff's case was that through its broker, the 2<sup>nd</sup> Defendant, the 1<sup>st</sup> Defendant issued him with comprehensive Insurance Cover Policy No AMI/083/1/011189/2013/02 over Motor Vehicle Registration No KBT 150H (hereinafter referred to as "the subject Motor Vehicle"). In 2006, the 1<sup>st</sup> Interested Party filed a suit against it and the 3<sup>rd</sup> Interested Party as the owner of the subject motor vehicle to with **CMCC No 5318 of 2016**.

6. It forwarded Summons to Enter Appearance to the 2<sup>nd</sup> Defendant who in turn forwarded the same to the 1<sup>st</sup> Defendant who then appointed M/S J.W. Wambua & Co Advocates to act for it in court.

7. It stated that it was not notified of the proceedings in the lower court matter but on 21<sup>st</sup> March 2018, the 2<sup>nd</sup> Interested Party, on behalf of the 1<sup>st</sup> Interested Party, proclaimed its goods. This was because the 1<sup>st</sup> Defendant had declined, failed and/or ignored to settle the decretal sum of Kshs 1,111,714/= that was awarded to the 1<sup>st</sup> Interested Party in the said lower court matter.

8. It was emphatic that because there was a valid insurance policy, the 1<sup>st</sup> Defendant was obligated to settle the decretal sum.

9. It urged this court to allow its application because it would suffer prejudice in the event the orders it had sought were not granted.

### **THE 1<sup>ST</sup> INTERESTED PARTY'S CASE**

10. In response to the said application, the 1<sup>st</sup> Interested Party's advocate, Phaniel Roger Omondi swore a Replying Affidavit on 19<sup>th</sup> April 2018. The same was filed on 25<sup>th</sup> April 2018.

11. The 1<sup>st</sup> Interested Party's case was that the present application was incompetent and in bad faith and had been made to rob him. He was categorical that no Appeal had been preferred herein and that there had been no complaint indicating and impropriety in the manner he obtained the judgment in the lower court.

12. He pointed out that he was not privy to the contract between the Plaintiff and the 1<sup>st</sup> Defendant and consequently any breach could only be between them without involving him.

13. He therefore asked this court to dismiss the Plaintiff's present application.

### **LEGAL ANALYSIS**

14. The 1<sup>st</sup> Interested Party submitted that the Plaintiff had failed to demonstrate the relief it was seeking from the 1<sup>st</sup> Defendant and emphasised that the present application was to frustrate him from enjoying the fruits of his judgment.

15. He argued that he was not a necessary party to the proceedings herein and relied on the case of **Wemot and Company Ltd & Others vs Andrew Douglas Gregory & Others [1998] LLR (CCK)** in this regard.

16. He further averred that the Plaintiff had not demonstrated that he had satisfied the conditions for the granting of interlocutory injunction as was held in the case of **Giella vs Cassman Brown** and that it had also not demonstrated a *prima facie* case for the granting of an injunction as damages would suffice if the injunction was not granted. He relied on the case of **Wilfred Oanda Kirochi vs David Pius Mugamba [1995] eKLR** to buttress his argument.

17. On its part, the Plaintiff relied on the provisions of Section 10 (1) of the Insurance (Motor Vehicles Third Party Risks) Act Cap 405 (Laws of Kenya) and asserted that the 1<sup>st</sup> Defendant was obligated to settle the decretal sum that had been entered in the lower court in favour of the 1<sup>st</sup> Interested Party.

18. He also placed reliance on the case of **New Great Insurance Company of India vs Lilian Evelyn Cross & Another** where it was held as follows:-

**"The effect of Section 4 and Section 5 was that a statutory duty was imposed upon, inter alia, the owner of the vehicle to cover by insurance any liability which the owner might incur in respect of injury to third parties arising from the use of the vehicle on the road by such person, persons or classes of persons as may be specified in the policy".**

19. Section 4 (1) of the Insurance (Motor Vehicle Third Party Risks) Act states as follows:-

**"Subject to this Act, no person shall use, or cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Act..."**

20. Section 5 (a) and (b) of the Insurance (Motor Vehicle Third Party Risks) Act stipulates as follows:-

**“In order to comply with the requirements of section 4, the policy of insurance must be a policy which—**

**a. is issued by a company which is required under the Insurance Act, 1984 (Cap. 487) to carry on motor vehicle insurance business; and**

**b. insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road...”**

**Provided that a policy in terms of this section shall not be required to cover—**

**i. liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or**

**ii. except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arose; or**

**iii. any contractual liability;**

**iv. liability of any sum in excess of three million shillings, arising out of a claim by one person. [Act No. 46 of 1960, s. 48, Act No. 10 of 2006, s. 34.]**

21. Section 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act further states that:-

**“If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments...”**

22. It was evident from the aforesaid provisions of the law that no motor vehicle can operate on public roads without insurance which insulates the insured against liability he incurs in respect of death of, or bodily injury to, any person caused by or arising out of the use of such vehicle on the road. Even where the insurer may be entitled to avoid or cancel the policy, the insurer shall subject to provisions of Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act, pay to the person entitled to the benefit of the judgment any sum payable thereunder in respect of the liability.

23. Accordingly, having considered the parties Written Submissions and having due regard to the aforesaid provisions of the law, this court was persuaded that the Plaintiff had demonstrated that his application ought to be allowed to enable the issue of whether or not the 1<sup>st</sup> Defendant was obligated to settle the decretal sum herein be addressed after hearing of evidence in a full trial.

24. The 1<sup>st</sup> Interested Party's assertions that the application was intended to deny him the fruits of judgment did not convince this court in view of the fact that the Plaintiff had raised a triable issue for determination. It was necessary for the Plaintiff to have enjoined him in the proceedings herein so that any orders that would be made herein would be binding on him

### **DISPOSITION**

25. For the foregoing reasons, the Plaintiff's Notice of Motion application dated and filed on 3<sup>rd</sup> April 2018 is hereby allowed in terms of Prayer No (3) therein. Costs of the application shall be in the cause.

26. So as not to prejudice the 1<sup>st</sup> Interested Party's rights to enjoying the judgment that was entered in his favour against the Plaintiff herein, the Plaintiff is hereby directed to take all prerequisite steps for the preparation of trial under Order 11 of Civil Procedure Rules within the next twenty one (21) days from today i.e by 22<sup>nd</sup> January 2019.

27. For the avoidance of doubt, in the event the Plaintiff shall not take the aforesaid steps in Paragraph 26 herein above the 1<sup>st</sup> Interested Party will be at liberty to take all appropriate steps for the prosecution of the matter herein and for the safeguarding of his interests herein.

28. It is so ordered.

**DATED and DELIVERED at NAIROBI this 29<sup>th</sup> day of November 2018**

**J. KAMAU**

**JUDGE**