



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO 227 OF 2017

MADISON INSURANCE COMPANY LIMITED.....PLAINTIFF

VERSUS

ANDREW KARIUKI.....1ST DEFENDANT

NGURE ISAAC.....2ND DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated 3rd November 2017 and filed on 10th November 2017 was brought pursuant to the provisions under Order 51 of the Civil Procedure Rules 2010, Sections 3A and 63 (e) of the Civil Procedure Act and all other enabling provisions of the law. Prayers Nos (1) and (2) were spent. It sought the following remaining prayers:-

1. Spent.

2. Spent

3. THAT there be stay of proceedings in Chief Magistrate's Court at Milimani CMCC No 1349 of 2015 or any other suit arising from the subject accident pending the hearing and determination of this suit.

4. THAT the costs of this application be provided for.

2. The Plaintiff's Written Submissions were dated and filed on 9th July 2018. The Defendants did not file their respective Written Submissions despite having been given ample opportunity to file the same. The 2nd Defendant did not also file any response to the present application.

3. When the matter came before the court on 26th September 2018, the Plaintiff requested that the court deliver its decision based on its Written Submissions which it relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE PLAINTIFF'S CASE

4. The Plaintiff's application was supported by the Affidavit of Betty Mugira that was sworn on 3rd November 2018.

5. It stated that it had covered the 1st Defendant's Motor Vehicle Registration No KAS 292S (hereinafter referred to as "subject Motor Vehicle") vide Insurance Policy Cover Number HQS/701/044283/2011. The said subject Motor Vehicle was involved in an accident on 7th February 2014 by which time, the 1st Defendant had already sold the same to the 2nd Defendant herein.

6. It averred that the 1st Defendant did not notify it of the transfer to the 2nd Defendant contrary to the terms of the policy and that it was on that basis that it filed a declaratory suit to avoid any judgment being enforced against it. It was its contention that it would suffer prejudice because plaintiffs in suits arising out of the said accident could file enforcement suits against it.

7. It therefore urged this court to grant it the orders it had sought in its application.

THE 1ST DEFENDANT'S CASE

8. In response to the said application, the 1st Defendant swore his Replying Affidavit on 12th June 2018. The same was filed on the same date.

9. He stated that he had never been served with any Summons to Enter Appearance and Plea in Milimani CMCC No 1349 of 2015 Alice Kawira Wachira vs Andrew Kariuki & Ngure Isaac and that if there was such a suit, then the same had not proceeded since its purported filing.

10. It was his contention that there was no real urgency in the Plaintiff filing a Declaratory suit and that in any event, this application was simply a parachute deployed to save the subordinate suit from collapsing due to the doctrine of laches as it was now three (3) years since the suit had been fixed for hearing.

11. He therefore asked this court not to be used by the Plaintiff from seeking to sustain a compensatory suit which was on its death bed due to lack and want of prosecution.

LEGAL ANALYSIS

12. It was important to point out right at the outset that it did appear to this court that the Plaintiff herein had no interest in the prosecution of CMCC No 1349 of 2015 and hence the 1st Defendant's arguments that its present application was an attempt to save the lower court matter from collapsing was immaterial and irrelevant. This court also noted that save for arguing that there was no urgency in the present application, the 1st Defendant had not denied the averments by the Plaintiff that he had breached the policy conditions.

13. The court noted that the Plaintiff's present application was premised on Section 63(e) of the Civil Procedure Act. The same provides as follows:-

“In order to prevent the ends of justice from being defeated, the court may, if it is prescribed, make such other interlocutory orders as may appear to the court to be just and expedient”.

14. It sought to have the proceedings in CMCC No 1349 of 2015 Milimani stayed pending the hearing and determination of this application.

15. Notably, the main purpose of staying proceedings is to avoid the mischief of different courts of competent jurisdiction hearing a matter between same parties over the same or similar subject matter due to the likelihood of the different courts coming up with different decisions which could cause embarrassment to them.

16. In this particular case, the parties were different from those in CMCC No 1349 of 2015 Milimani. Indeed, the plaintiff's in that suit were not parties in this suit. This therefore put this court in a difficult position because firstly, it was not clear to this court at what stage the proceedings in the lower court were in.

17. Secondly, as the plaintiff therein was not party to this suit herein, it would be clearly prejudicial for her to be stopped from proceeding with her case merely because a third party, the Plaintiff herein, whose only connection was the subject Motor Vehicle wished to have its case heard first. It is not usual for matters in court to move at the same pace. An order staying proceedings in the lower court merely so that the suit herein can be heard would greatly prejudice the Plaintiff's in CMCC No 1349 of 2015.

18. Thirdly, it is clear from the Insurance (hereinafter referred to as “Motor Vehicle Third Party Risks”) Act Cap 405 (Laws of Kenya) that an insurer can also avoid liability after judgment has been entered. Section 10 (1) and (2) of the Insurance (Third Party Risks) Act provides as follows:-

1. 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.

2. No sum shall be payable by an insurer under the foregoing provisions of this section-

a. In respect of any judgment, unless before or within fourteen days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings; or

b. In respect of any judgment, so long as execution thereon is stayed pending an appeal; or

c. In connexion with any liability if, before the happening of the event which was the cause of the death or bodily injury giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provision contained therein, and either-

- i. before the happening of the event the certificate was surrendered to the insurer, or the person to whom the certificate was issued made a statutory declaration stating that the certificate had been lost or destroyed; or
- ii. after the happening of the event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer, or the person to whom the certificate was issued made such a statutory declaration as aforesaid; or
- iii. either before or after the happening of the event, but within a period of twenty-eight days from the taking effect of the cancellation of the policy, the insurer has notified the Registrar of Motor Vehicles and the Commissioner of Police in writing of the failure to surrender the certificate.

19. The essence of the said Section is that the insurer can avoid making payment:-

- 1. If he had not received any notice of the proceedings before or within fourteen (14) days of the commencement of the proceedings in which judgment had been obtained.
- 2. If there is a stay of execution pending appeal.
- 3. If the policy had been cancelled by mutual consent of the insurer and insured or by virtue of any provisions therein and either:-
 - a. If before the happening of an event, the insured had surrendered back to the insurer the certificate or the insurer had made a statutory declaration that the certificate had been lost or destroyed.
 - b. If after the happening of an event, but before the expiration of a period of fourteen (14) days from taking effect of cancellation of the policy, the certificate was surrendered to the insurer or the insured made a statutory declaration as aforesaid.
 - c. Either before or after the happening of the event but within a period of twenty eight (28) days from the taking effect of the cancellation of the policy, the insurer has notified the Registrar of Motor Vehicles and the Commissioner of Police in writing of the failure to surrender the certificate.

20. It was not clear to this court if the plaintiff's in CMCC No 1349 of 2015 had complied with Section 10 (1) of the Insurance (Third Party Risks) Act as the Plaintiff herein had not attached any Notice under the Section 10 of the Insurance (Third Party Risks) Act. If there was no such notice, then the provisions of Section 10 (2) of the Insurance (Third Party Risks) Act would be applicable.

21. This court deemed it necessary to address its mind to this issue because it would be futile to stay proceedings in the court if the same would not obligate the Plaintiff herein to pay the decretal sum. The court wishes to say no more on this issue to avoid delving into merits or otherwise of the Plaintiff's present suit.

22. Fourthly, an order under Section 63 (e) of the Civil Procedure Act presupposes that the interlocutory order to be issued must be within the suit that is currently before the court. The provision would not be applicable to stay proceedings in which the applicant is not a party. If proceedings could be stayed in such a manner, there is the danger of suits been stopped from proceedings by persons who were not parties to suits thus causing anarchy.

23. In the case of Nyamira F.C.S vs The Chief Land Registrar & Another [2005] eKLR, Wanjiru Karanja J (as she then was) held, and which this court fully associated itself with, that:-

“The word interlocutory refers to something that is intermediate- between the beginning and the end. In a civil suit, it denotes any application between the filing of the suit and the final judgment or decree. The main suit has to be alive for there to be an interlocutory order...”

24. Accordingly, having considered the affidavit evidence, the Written Submissions and the case law the Plaintiff herein relied upon to wit HCCA No 398 of 2006 Concord Insurance Co Ltd vs Hardships Services [2009] eKLR that showed that an insurer could avoid making payment where a vehicle was not in the name of an insured at the time insurance cover was taking effect, it was the view of this court that staying the proceedings in the lower court would be fettering the rights of the plaintiff therein to access justice and/or to have her dispute resolved by a court of competent jurisdiction contrary to Articles 50 of Constitution of Kenya, 2010 because she had absolutely no knowledge of this matter.

25. The importance of a Plaintiff being notified of proceedings by an insurer filing a declaratory suit cannot be over emphasised because even in Section 10 (4) of the Insurance (Third Party Risks) Act, the plaintiff in the proceedings in which the insurer can avoid liability must be notified of such proceedings.

26. Indeed, there was a possibility of the present matter being heard before or after the matter in the lower court. Since the matter in the lower court had not been heard, nothing stopped the Plaintiff herein from proceeding to trial herein.

27. The court's opinion was that not only did the Plaintiff herein have a remedy if the plaintiff in the lower court case were to proceed with her case and obtained judgment, the Plaintiff herein could proceed with the hearing of its case expeditiously and obtain the relief it had

sought in its Plaint, if at all, without fettering the interests and rights of the plaintiff in the lower court.

DISPOSITION

28. For the foregoing reasons, the upshot of this court's decision was that the Plaintiff's Notice of Motion application dated 3rd November 2017 and filed on 10th November 2017 was not merited and the same is hereby dismissed. Costs shall be in the cause.

29. Orders accordingly.

DATED and DELIVERED at NAIROBI this 27th day of November 2018

J. KAMAU

JUDGE