



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R MWONGO, J)

CIVIL CASE NO. 12 OF 2018

GREAT RIFT SHUTTLE SERVICES LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

AFRICAN MERCHANT ASSURANCE CO LTD.....DEFENDANT/ RESPONDENT

AND

FELIX OPWORA ODUOR.....1ST INTERESTED PARTY

NJOROGE NJENGA PATRICK & GRACE WANGUI

(Suing as Administrators of the Estate of the late

OLIVE WAMAITHA NJOROGE (Deceased).....2ND INTERESTED PARTY

PATRICK IRUNGU MUCHIRI & ELIZABETH

WAMBUI NOROGE (Suing as the legal representative

Of the Estate of late JOY WANJIKU (Deceased).....3RD INTERESTED PARTY

R U L I N G

Parties' Cases

1. The applicant's application before me was filed under certificate of urgency on 28th November, 2018. It seeks a stay of the execution of the decrees in **Naivasha CMCC No 418 of 2016; CMCC No 419 of 2016** and **CMCC No 967 of 2016**, and a stay of further proceedings in the foregoing suits pending hearing of this application, and pending hearing and determination of the suit herein.

2. I certified the application urgent and directed that it be served on all parties, and that such parties file responses for hearing within seven days. The parties complied.

3. The application arises from the following situation. The applicant paid for and took out third party insurance cover under Policy Number AM3/085/1/004084/2013 from the defendant for its vehicle registration No KBK 838A. That vehicle was involved in an accident on 31st August, 2015, in which the interested parties suffered injuries or fatalities and filed suits in the lower courts against the applicant. The defendant appointed the firm of Sheth and Wathigo in exercise of its subrogation rights to defend the plaintiff.

4. The said suits resulted in awards of damages against the plaintiff as follows:

- In CMCC No 967 of 2016 the 1st Interested Party was awarded Shs 525,830/= on 15th May, 2018;
- In CMCC No 419 of 2016 the 2nd Interested Party was awarded Shs 210,000/=;
- In CMCC No 418 of 2016 the 3rd Interested Party was awarded Shs 737,600/= on 3rd April 2018.

5. The defendant insurance company appears to have repudiated the insurance contract, but has in any event failed or refused to pay the decretal sums awarded as damages in the suits in the lower court.

6. The gravamen of the applicant's case is that in pursuance of the insurance contract and **sections 5 and 10 of the Insurance (Motor Vehicles Third Party Risks) Act, Cap 405**, the defendant was obliged in law to pay the decretal sums awarded. However in this case, the applicant has been abandoned by the defendant and is on the verge of having execution effected against it.

7. Section 5 of the Act to provide as follows:

“5. 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 liability in respect of the death arising out of and 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.]”

8. Further **section 10** of the aforesaid places a statutory duty on the insurer to satisfy judgments against persons insured and makes provision as follows:

“10 (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.

Provided that the sum payable under a judgment for a liability pursuant to this section shall not exceed the maximum percentage of the sum specified in [section 5\(b\)](#) prescribed in respect thereof in the Schedule.” (emphasis supplied).

9. The applicant cited four authorities in which, it argued, that a stay may be given in similar circumstances as the present case. The authorities are:

- **Joseph Mwangi Gitundu v Gateway Insurance Co Ltd [2015]eKLR**
- **Samuel Githinji Mwangi v Xplico Insurance Co Ltd and Another Nakuru HCCC No 12 of 2017;**
- **Frederick Gathungu Nganga v African Merchant Assurance Co Ltd and Another Nakuru HCCC No 65 of 2015; and**
- **Gerald Wachira T/A achira Saw Mills v Blue Shield Insurance C Ltd Nakuru HCCC No 31 of 1995**

10. The interested parties filed grounds of opposition, but the defendant did not participate in the suit despite being served.

11. The essence of the interested parties' oppositions that: the application is frivolous and vexatious and an abuse of the court process;; that it is made in bad faith and that the application was delayed with the intention to delay the enjoyment of the respondents' judgment, by seeking to circumvent the lower court process..

12. In addition, the 1st interested party asserted that the applicant should pay the claim, and then file a suit for declaration and compensation from the defendant.. The first interested party did not appear at the hearing.

13. The interested parties also asserted that they are not privy to the contract between the applicant and the defendant, and therefore do not understand why they were made parties to the suit.

Determination

14. Having carefully considered the parties submissions I find that, prima facie, the Insurance (Motor Vehicles Third Party Risks) Act statutorily obliges an insurer to pay the decretal sum in respect of an accident covered by its insurance policy.

15. In this application, the applicant exhibited a certificate of insurance in respect of which it is unclear for which vehicle it belongs. The police abstract exhibited is for vehicle registration number KBA 838A Toyota matatu. The claim notification form exhibited is also in respect of vehicle KBA 838A. The relative civil suit in respect of this vehicle is number 418 of 2016 where the third interested party was awarded Kshs 737,600/=. According to the judgment dated 3rd April 2018, the accident occurred on **15th December, 2014**.

16. In respect of Civil Suit No 419/2016, the accident vehicle is registration number KBA 838A, and the accident is stated to have occurred on **15 December 2014** wherein the 2nd interested party was awarded Kshs 210.000/=.

17. In respect of Civil Suit No 967/2016, the accident vehicle registration number is **KCC 895V** Toyota matatu, and the accident is alleged to have occurred on **31st August 2015**, which is a year later than the accident in respect of KBK 838 A. the damages awarded to the 1st interested party in respect of this suit is Kshs 525,830/=. However, in this regard no evidence of any insurance policy has been exhibited by the applicant.

18. I have perused the authorities provided by the applicant. In **Joseph Mwangi Gitundu's case (supra)**, Gikonyo, J awarded damages in the suit and held the insurance company bound by **section 10(1)** of the **Insurance (Third Party Risks) Act Cap 405** to pay third party claims. He asserted that the principle of privity of contract has been relaxed or excepted under modern statutory law as shown in Cap 405.

19. The in **Samuel Githinji's case (supra)** the court granted a stay of execution on the condition that the applicants should deposit Kenya shillings 100,000/= into court within 30 days, and set the suit for hearing within 45 days of the ruling.

20. In **Frederick Gathungu Nganga's case (supra)**, the court granted stay of execution pending the sorting out of the legal issues regarding who between the applicant and the respondent should satisfy the judgment of the lower court. The court took into account the relationship that existed between the parties at the time of the accident. That case also involved the defendant in this case.

21. Ultimately, I am persuaded that conditional stay of execution should be granted in respect of lower court Civil Suit numbers 418/2016 and a 419/2016 in which vehicle registration number KBK 838 A was involved in an accident.

Disposition

22. My final orders are as follows:

a. Stay of execution is granted of the judgments and proceedings of the suits in Civil Suit Nos 418/2016 and 419/2016 in the lower court on condition that the applicant shall deposit into court half of the decretal sum in respect of each of the aforesaid cases within thirty (30) days from the date of this ruling.

b. The application fails in respect of Civil Suit No 967/2016, and no orders are granted therein.

c. The present suit shall be fixed for hearing within ninety (90) days from the date hereof, and the applicant shall avail a copy of the insurance policy Policy Number AM3/085/1/004084/2013 at that hearing.

23. Costs are in the cause.

24. Orders accordingly.

Dated and Delivered at Nairobi this 20th Day of December, 2018.

RICHARD MWONGO

JUDGE

Delivered in the presence of:-

1. Ms Matu holding brief for Muchella for the Plaintiff/ Applicant

2. No representation for the 1st Interested Party

3. No representation for the 2nd Interested Party

4. No representation for the 3rd Interested Party

5. Court Clerk – **Quinter Ogutu**