



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYAMIRA
HIGH COURT CIVIL CASE NO. 3 OF 2017

BRITAM GENERAL LTD.....PLAINTIFF

-VERSUS-

GEOFFREY .O. NYAKORA.....DEFENDANT

R U L I N G

This is the ruling following the application to this court dated 6th March 2017.

First, the application under certificate of urgency came before me, on 15th March, 2017, seeking for orders:-

1. The application be certified as urgent.
2. The stay be granted in the (7) listed cases, being heard at Keroka Law Courts, pending the hearing of the instant application.
3. That a further stay in the proceeding pending the hearing and determination of the instant suit.

This court granted orders **1 to 3 above**, as interim orders.

However, 20/03/2017, the counsel for interested parties, Ben Gichana, applied that interim order thereof be lifted first, so that this application can be argued for the court to determine whether it could be granted or not. As it were, if the 3rd interim order remained on record, the present application is superfluous.

Accordingly, with good reason, the court lifted interim order No. 3 of the application.

Madam Mireri, counsel for the applicant submitted as follows.

1. Essentially, her arguments were that if the suits in Keroka are determined, the applicants whom she represents, will be forced to make payments yet it seeks to repudiate the insurance policy. That therefore the instant suit will be rendered nugatory, if the stay of the proceeding is not granted. That the cases at Keroka have high chances of success, and they have been listed for hearing and the current application and suit touches on those matters.
2. The suit before this court seeks for declaration that the information that was supplied by the insured is misleading. It seeks to repudiate the policy on grounds of misrepresentation.
3. The applicant in this regard relies on supporting affidavit of Peninah Kinyua sworn on 6th march

2017 with several documentary attachments.

4. These documents seek to bring out the issues of misrepresentation, in that by the time of the issuance of policy, the insured had indicated that the said motor vehicle KCC 523K was for private use. **See 1a & 1b**. At the time of the accident, however, the said motor vehicle KCC 523K was carrying passengers, on payment. **See PK 2** – private use. Persons injured column – None. Passengers on your vehicle – None. **See PK3** – are plants. **See PK -4** – the investigation report by the applicant, **see page 3, Paragraph 6, see page 7 Paragraph 9, Page 8, Paragraph 1b See PK5** – a letter to the insured.

5. **Paragraph 9** of the replying affidavit, the applicants are the insurers to the defendants in the lower court, and would be liable to make payments if the suit succeeded. **Paragraph 10** is relevant.

6. I rely on **legal authority No.3** of the respondent's list of authority, **Nairobi HCCC NO.495 of 2012**, relevant to my application.

7. I pray that this application be allowed.

Ben Gichana for interested parties [the 6 plaintiffs] thereof, opposes this application.

1. He relies on the replying affidavit of Christopher Agayo Nyangweso and Charles Moseti Omari respectively which affidavit was sworn on 27th March 2017.

2. Britam Insurance Co. Ltd is not a party to the suit filed in Keroka Law Courts.

3. Cap 405, Third Party Motor Vehicle Act, S. 10 (4) gives two requirements in cases where the insurance is seeking repudiation of such a claim.

(i) Such declaration must be filed within a period of three (3) months from the date of the accident.

(ii) Since the applicants decided to repudiate the claim they ought to have issued notices to interested parties, specifying the non-disclosure and misrepresentation by the insured. The suit filed before this court was filed out of time, outside the three months.

From the record, the accident occurred on 21st April, and the suit was filed on 28th February, 2017 – 2 years after the accident.

(iii) It was not demonstrated by the applicants that leave to file out of time was ever sought as required **under S.27 & 28 of limitations of actions act**, and therefore a suit before this court is but a nullity.

4. However, the interested parties – the plaintiff's – had issued notices to the applicants on 3rd November 2015, of their intention to file their duties for recovery of general damages. Those notices are attached to the affidavit of B & C.

It is therefore our position that the applicants did not respond to the notices issued by interested parties herein as required **under S. 10 (4) Cap 405**. And therefore that failure does not entitle the applicant to repudiate those claims at Keroka Law Courts.

5. The **P4** –Applicants has no *locus standi* to stay the matters pending before Keroka Law Courts, I refer the court to **legal authority 2, Kisii HCCC No.249 of 2013**, where **Justice Okwenyi See page 234 Paragraph 47 & 48**.

The judge found that the applicant did not have *a locus standi* in cases in the lower court to obtain orders

of stay of proceedings. It is premature for the applicant to seek a stay in proceedings of suits going on in the lower court where they are not party to. The fear therefore of being exposed to execution is far fetched.

6. **O. 42 r6 (2) (a) of C.P. rules**, the applicant must demonstrate that they would suffer substantial loss for a stay to be granted. Essentially, seeking a stay of these suits is a pre-mature exercise.

(1) Nairobi CA No.197 of 1986 Kenya Shell limited –vs- Benjamin Karuga Kibiru & Another, and

(2) Nairobi HCC NO.405 of 2012, Lucy Waithaka Kimanga & 2 others –vs- John Waiganjo Gichuri.

The judges upheld a clear position of law that the applicant must show or demonstrate that the applicant stand to suffer substantial loss, not fear.

7. I urge this court to find that **prayer No.3** is pre-mature. In fact the interested parties stand to suffer substantial loss if **prayer No.3** of this application were allowed. They would suffer unnecessary delay or penitential witness would not show up and even crucial documents would get lost.

That therefore I urge this court to find that this application lacks merit and proceed to dismiss it with costs.

(a) The **REPLYING AFFIDAVIT**, the two **DEPONENTS**: Christopher Agayo Nyangweso and Charles Mosei Omari depons as follows

The accident occurred on 21/10/2015 on Keroka Masimba road **Paragraph 7** thereof: the insurer of the Defendant were served with statutory notices to sue on **3/11/2015 See B & C.**

Paragraph 8 thereof: it was incumbent upon the Plaintiff/Applicant to issue notice to repudiate the claim. They did not do so todate.

Paragraph 9 thereof: The Plaintiff/Applicants are not party to the primary suits filed in Keroka, and therefore they stand to suffer no prejudice if our suits were to proceed in their absence.

Paragraph 11, thereof: the applicant seek to stay the primary suits on the basis of instituting a declaratory suit which suit is already time barred.

Paragraph 12 thereof: no declaration was ever obtained within 3 months of instituting primary suit with mandatory notice as envisaged **under S. 10 (4) of insurance motor vehicles [Third party risks] Act, Cap 405.**

Paragraph 13 thereof: the orders sought have been overtaken by events in **PMCC 222 & 223 of 2015** which cases are now set for judgment.

Paragraph 14 thereof: the orders are therefore in vain it is only fair that the application be dismissed.

Paragraph 15 thereof: the applicant will not suffer any prejudice if the application is dismissed.

Issues for determination

(1) Is sufficient cause shown by the applicant to justify the court staying further proceedings in the cited cases going on for hearing in Keroka Principal Magistrate's court?

The applicant in his notice of motion dated 6th March 2017 seeks, 1. **Paragraph 2**, a stay of further proceedings in the cited six cases **(a) to (g)** and **3**, a stay of further proceedings in the aforesaid cases,

pending the hearing and determination of the instant suit.

The subordinate courts have partially dealt with the two of these suits **PMCC No.222 of 2015** and **PMCC No.223 of 2015** respectively.

The interested parties in all those suits, as plaintiffs, filed their respective suits against the Defendant, **Godfrey Ondimu Nyakora**, to seek both special and general damages following the road accident occurred on 21/10/2015 in which they suffered and damages.

The applicant, - Plaintiff, Britam General (Kenya Limited are not party to the said cases in the lower court. It is not in dispute that the applicant is the insurer of the said motor vehicle to the extent that ultimately, upon these cases being determined in their favour, the said interested parties would have to file Declaratory suits against the instant applicant to extract damages from the as the insurer of motor vehicle KCC 523 K. It would be at that juncture that the applicant would raise the issue of repudiation of the Policy of insurance, citing misrepresentation of material facts by the Defendant. However, the said repudiation is subject to the applicant having given notice of repudiation in accordance **Cap 405, Insurance Act.**

Second, the applicant seeks therefore to stay the (2) cases, because not to do so now, the final court orders would be rendered nugatory.

However, the interested parties are the ones who have an overriding objective of just and expeditious resolution of disputes in their favour. Again the applicant has no *locus standi* in the matter.

Analysis

The applicant has no *locus standi* in all the cases going on a Keroka Snr. Principal Magistrate's Court in Keroka, to obtain a stay prayed for, **See Civil Suit No.24 of 2013 lady Justice Okwany.**

The applicant will suffer no prejudice if the said lower court cases proceed to conclusion. There is no evidence of substantial loss to the applicant. The interested parties however are entitled to justice and, it would be to their prejudice if they stay of their case would be given. **See Court of Appeal, No.197 of 1986 Hancox JA, Pttat Platt JA and Gachuhi JAA.**

Findings

For these reasons above, it is my finding that sufficient cause has not been shown to stay the proceedings of the above cited lower court cases in Keroka Snr. Principal Magistrate's Court, having found that the applicant not only lacks *locus standi* to obtain orders for having found that the applicant has not demonstrated the real specific reasons for the grant of stay.

Therefore the instant **NOTICE of Motion**" dated **6th March 2017** be and is hereby dismissed with costs to the interested parties.

Dated and delivered at Nyamira this 28th day of April 2017.

C. B. NAGILLAH

JUDGE

In the presence of:-

Sagwa Hold brief for Oguttu Applicant

Ben Gichana (absent) for the Respondent

