



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
CIVIL SUIT NO. 8 OF 2015

PACIS INSURANCE COMPANY LIMITED PLAINTIFF

VERSUS

OUTREACH COMMUNITY CENTRE DEFENDANT

SAMUEL OKOTH OMONDI INTENDED INTERESTED PARTY

RULING:

1. The Plaintiff/Applicant **M/s. Pacis Insurance Company Limited** through a Notice of Motion dated **6th May, 2015** brought pursuant to **Section 1A, 1B, 3A and 63 of the Civil Procedure Act** seeks the following orders:-

- a. ***That pending the hearing and determination of this suit there be a stay of proceedings in Bondo PMCC Suit No. 1 – 58 of 2015, various Plaintiff's V. Outreach Community Center filed in Bondo Court against the defendant herein.***
- b. ***Costs of the application be provided.***

2. The application is premised on the grounds on the face of the application inter alia, that the plaintiff herein issued a policy of insurance to the defendant herein in respect of motor vehicle Registration number KBR 591S, that on 28th November 2014 an accident occurred involving the vehicle. That has resulted in 58 suits having been filed at Bondo Court, being **Bondo PMCC Nos. 1-58 of 2015 various Plaintiffs V. Outreach Community Centre**, that this suit seeks declarations in terms that the defendant/insured breached fundamental warranties, terms and conditions of the Insurance Policy, thus entitling the plaintiff/insurance to avoid the obligations, under the policy, that should the suits filed in Bondo Court which seek damages be heard prior to the hearing and determination of this suit the plaintiff herein will be held liable to settle the same under the provisions of **Cap 415, insurance (motor vehicle Third Party Risks) Act** despite having filed this suit seeking declaration that it is entitled to avoid the Policy and that in the circumstances it is first fair and in the interest of justice that if the proceeding in the suits filed in **Bondo Court suits No. 1-58 of 2015** be stayed pending the hearing and determination of this suit.

3. The Application is supported by affidavit of Joseph Mwai, an advocate and legal officer with the plaintiff's company who attached a copy of authority annexure "JM-1" showing that he is duly authorized to swear this affidavit. He availed that the plaintiff entered into contract of insurance with the defendant under which the Plaintiff issued the defendant with **motor insurance police number 030/086/1/000375/2013 COMP** to cover comprehensively liability in respect of motor vehicle Registration No. KBR 591S as per annexure "JM-2", that in gross and fundamental breach of terms and conditions of Policy the defendant breached the terms thereby by permitting the vehicle to cause passengers in excess of the authorized capacity and as such the plaintiff is entitled to avoid the policy,

that in January 2015 the Plaintiff's Company received a volume of documents from firm of **Ngala Awino & Company Advocates** being summons and attendant documents filed at **Bondo PMCC Suit Nos.1-58 of 2015 various Plaintiffs V Outreach Community Centre**, being suits filed seeking documents arising out of accident that occurred on 28.11.2014 involving motor vehicle Registration No. **KBR 591S as per annexure "JM-3"** being copy of the summons in the 58 suits filed, that the suits are likely to proceed to hearing and the ex parte judgment being entered in default of appearance and defence, that the plaintiff in this suit seeks declaration that it is entitled to avoid the policy in view of the fundamental breaches of the terms and conditions of the policy by the defendant, that should the suits filed at Bondo Law Courts proceed to hearing and determination prior to the hearing and determination of this suit the plaintiff will be held liable to settle the judgment sums and costs despite it having filed this suit seeking declarations that it is entitled to avoid the policy, thus rendering this suit nugatory as that substratum of the prayers in this suit will have been overtaken and that in the interest of justice suits filed in Bondo Court being **Bondo PMCC Nos. 1-58** be stayed pending the hearing and determination of this suit, and that the plaintiff is desirous, ready and willing to prosecute this suit expeditiously so as to limit any prejudice that may be occasioned to the plaintiffs in Bondo suits.

4. The interested party Samuel Okoth Omondi opposed the Plaintiff/Applicant's application through an affidavit in opposition of the applicant's application dated 15th January, 2016. He contended inter alia, that Section 9 of annexure "JMI" of the applicant's affidavit clearly states that any dispute between the defendant and the plaintiff must first be referred to Arbitration and therefore the suit is premature, that this contract is between the plaintiff herein and M/s. Outreach Community Centre and orders sought are based on speculation that the defendant will not be able to pay for the claims if any, that the interested party is not party to the contract between the plaintiff and Defendant in this suit, that application for stay is misconceived and the suit can go on without involving the interested party and only involve or inform or alert interested party if the interested party threatens to file a declaratory suit, that the application is based on speculation that all interested parties who filed suit were in the bus, yet that it is fair and just for the plaintiff to claim it will repudiate liability for the excess passengers only but not all passengers, that it would be prejudicial to interested party if this suit is stayed on basis that the numbers of passengers were excess yet interested party will prove that the bus had the capacity to carry the number of persons who were in the bus that day, that the interested party had not sued the plaintiff, that the defendant has good financial books and is capable of settling the claim in case of any order to the interested party, that the letter of authority given to the deponent of Applicant's Application is defective, that no board resolution giving authority to file suit has been annexed, that the application is premature as the interested party is not seeking indemnity from the plaintiff. That the plaintiff has resisted any negotiation to settle the claim and the latest move is made in bad faith, that it is in public domain that previously some insurance companies in effort to avoid paying any claims used to file constitutional References in in court and used to obtain orders stopping the continuous prosecution of claims against their insured and against themselves in the whole Republic in the guise that claims were fraudulent and/or there were in breach of Policy holders, that this is one of the new devise which has been devised by some of the insurance companies to avoid paying for claims thus the policy has been breached, that the filing of this suit and the application is a conspiracy between the plaintiff and the insured in an effort to avoid paying for the claims, that there is nothing in the application showing the number of passengers the bus was carrying was in excess and wanting to stay the suit on that basis and/or lack of proof of excess passengers is asking too much from Court, that no policy document has been annexed by the plaintiff in its application relating to the plaintiff and the defendant as the defendant's name does not appear anywhere in the policy.

5. I have very carefully considered the application and affidavit in support and annexures, and the affidavit in opposition of the plaintiff/Applicant's application dated 6th May 2015 and the rival oral submissions by the plaintiff and the interested party. I have also considered that the defendant opted not to participate in this application at this stage, of course in exercise by his constitutional rights. The issues emerging for consideration from the pleadings can in my view be summed up as follows:-

(a) Whether the plaintiff has satisfied the conditions for granting stay of proceedings in Bondo PMCC Nos.1-58 of 2015 between various plaintiff's filed in the Bondo Court against the defendant?

(b) Whether the interested party has raised sufficient reasons/grounds to justify refusal to grant orders of stay of proceedings in Bondo PMCC Suit Nos.1-58 of 2015, various plaintiff's V. Outreach Community Centre filed in Bondo Court against the defendant herein?

6. The Plaintiff/Applicant main reasons for seeking stay of proceedings in **Bondo PMCC Suit Nos.1-58** is that the defendant/insured breached fundamental warranties, terms and conditions of Insurance Policy thus entitling the plaintiff to avoid the obligations under policy and further on determination of Bondo suits the plaintiff will be held liable to settle the claims under the provisions of **Cap 415, Insurance (Motor Vehicle Third Party Risk) Act**, despite having filed this suit seeking declaration that it is entitled to avoid the policy.

7. The plaintiff/applicant relied on several annexures in support of its prayer for staying of the proceedings. One of the annexure is “**JM-1**” “Letter of Authority by the company authorizing the deponent to swear the affidavit in support and annexure “**JM-2**” a copy of policy between the plaintiff and the defendant in respect of the insurance policy number **030/086/1/000375/2013/COMP** in respect of motor vehicle registration number **KBR 591S** and “**JM-3**” being various summonses between various plaintiffs and the defendant herein, to which no copies of complaints were attached. I have perused annexure “**JM-1**” the “**Letter of Authority**” and noted the names of the Directors thereto have not been disclosed and the company seal is also missing, though the document it has a provision for putting the Company seal. In absence of the names of the directors in the “**letter of Authority**” and in absence of the “**company seal**” it is difficult to verify whether the signatories to the letter of authority are the right persons, thus the directors. The letter of authority is in my view defective and is struck out. The plaintiff being a public company should have complied with the law by attaching to the pleadings the Board Resolutions giving the plaintiff the authority to file this suit. On annexure “**JM-2**” it does not have any nexus to the Policy issued to the defendant. This document does not contain the particulars of the insured, thus the defendant nor the actual number of passengers or the capacity of the defendant's vehicle. The annexure “**JM-2**” is a general document which does not relate to the defendant at all, the plaintiff should have annexed the actual agreement between itself and the defendant but not to give a sample of their general policy document. On annexure “**JAM-3**” which summons are between various plaintiffs and the defendant it is difficult for the Court herein to ascertain the nature of the claim and whether the various plaintiffs in suits **Nos. 1 - 58 of 2015** claims are based on being passengers or otherwise. The Court cannot be left to speculate on the nature of the claim. I am therefore not satisfied that the plaintiff/Applicant has satisfied the conditions for granting stay of the proceedings in **Bondo PMCC Nos. 1 – 58 of 2015 between various plaintiffs V. Outreach Community Centre** to warrant orders of stay of such proceedings.

8. The interested party has on his part raised various grounds seeking refusal of granting orders of stay of the proceedings in **Bondo PMCC Nos 1-58 of 2015, various Plaintiffs V. Outreach Community Centre** filed in Bondo Court against the defendant herein. To begin with there is evidence from the affidavit that there is no other suit or any other suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceedings between the plaintiff herein and the various plaintiffs in Bondo Court Suits or between the plaintiffs and the defendant herein or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceedings is pending in the same or any other Court having jurisdiction to grant relief claimed (**See Section 6 of Civil Procedure Act**)

9. The Application before this Court is based on a contract between the plaintiff and the defendant herein, in which the various plaintiffs in **Bondo Suits Nos. 1-58 of 2015 are not parties**. The application is based on a presumption that the defendant in Bondo Suits won't be able to settle the plaintiffs' claims if granted. That I find that it is speculative on part of the plaintiff to assume the defendant won't be able to settle the claims of various plaintiffs in Bondo suits once successful. In the instant case the plaintiff can proceed with its suit without seeking stay of the proceedings in various **Bondo suits Nos. 1- 58** and once faced with a declaratory suit(s) seeking it to settle the claims it can point out that it has a pending case or that this case was decided in its favour absorbing it from liability against the defendant by Court. The applicant has not demonstrated that the interested parties who have filed suits in **Bondo court Nos. 1-58 of 2015** were passengers and not otherwise. The plaintiffs in various suits at **Bondo Court Nos. 1- 58 of**

2015 will have to prove their cases on balance of probabilities and more specifically whether they were passengers or otherwise and how they were involved in the accident. The plaintiff/ applicant if the court finds the passengers were in excess will be at liberty to seek to repudiate liability for excess passengers but it would be wrong or unjustified to shut the various plaintiffs at this stage from ventilating their claims at the corridors of justice. That granting orders of stay could negate the provision of **Article 159 of the Constitution of Kenya 2010** which articulates on the need for justice not be delayed but for justice to be administered without undue technicalities. There will be an opportunity in **Bondo court in cases Nos. 1-58** for number of passengers and capacity of the bus to be determined and a decision be reached as to whether the bus on the material time had excess passengers or not and as such I find the plaintiff would not be prejudiced by refusing to stay the proceedings of **Bondo suits Nos. 1-58** as the Plaintiff/Applicant would be in a position to exercise its rights as per terms and conditions of the Policy document depending on the out come of this case. The interested parties at this stage are not seeking an indemnity from the plaintiff but determination of their case between themselves and the defendant and as such I find the plaintiff in seeking orders of stay of Bondo court proceedings in **Cases Nos 1- 58 of 2015** at this Stage to be premature and unjustified as the plaintiff is not bound to pay after judgment is delivered if it has good defence and which can be raised once a declaratory suit is filed against it by any successful plaintiff in the **Bondo Court cases Nos. 1 – 58 of 2015**.

10. In view of the foregoing I am satisfied the interested party has raised sufficient grounds and reasons for justifying refusal to grant orders of stay of proceedings in Bondo **PMCC Nos. 1-58 of 2015 various plaintiffs V. Outreach Community Centre filed in Bondo** Court against the defendant herein.

11. **The upshot is that the application is without merits and is dismissed with costs to the interested party.**

DATED, SIGNED AND DELIVERED AT SIAYA THIS 28TH DAY OF APRIL, 2016.

J. A. MAKAU

JUDGE

Delivered in Open Court in the Presence Of

Mr. Maganga for Plaintiff/Applicant

No Appearance For Defendant's

Mr. Ngala Omondi For Interested Party

Court Clerk Kevin Odhiambo

Mohammed Akide

J.A. MAKAU

JUDGE