



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CIVIL SUIT NO. 7 OF 2015

THE MONARCH INSURANCE CO. LTD ----- PLAINTIFF

VERSUS

WYCLIFFE ONYANGO ODENDA-----DEFENDANT

RULING

1. On 20th June, 2016 the plaintiff, Monarch Insurance Co. Ltd filed a notice of motion under a certificate of urgency seeking, among other orders, a stay of proceedings in **Busia CMCC No. 405 of 2015, Simon Makhabi Ombogo V Monarch Insurance Company Limited** and **Busia CMCC No. 179 of 2015 Trivian Akinyi (a minor suing through next friend and or father Vincent Wabwire Nyongesa) vs Monarch Insurance Company** pending the hearing of this suit.
2. The application is unopposed though the Defendant/Respondent Wycliffe Onyango Odenda is said to have been served through registered post, the Applicant having obtained the leave of this Court to serve the Respondent through Substituted Service.
3. Pursuant to notices dated 29th May, 2015 issued under Section 10(4) of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405, Laws of Kenya, the Applicant notified Simon Makhabi Ombogo and Vincent Wabwire Nyongesa that it intended to file a declaratory suit denying liability to satisfy any judgment against the Respondent herein in respect of claims arising out of a traffic accident that occurred on 21st April, 2014 involving the Respondent's motor vehicle registration number KAD 679Q which was insured by the Applicant. According to the Applicant, the Respondent had used the motor vehicle contrary to the terms and conditions of the policy cover. Apparently, the said Simon Makhabi Ombogo and Vincent Wabwire Nyongesa being victims of the said accident had gone ahead to file claims and obtained judgments against the Applicant. They had then proceeded to file declaratory suits against the Applicant, which Applicant now seeks to stay through the instant application.
4. The Applicant contends that having served the requisite notices it will be prejudiced if the two suits proceed to the judgment stage before the issue of liability between itself and its insured is sorted out. The Applicant asserts that this particular suit ought to be determined first and as such it would be rendered nugatory if stay is not granted.
5. Before proceeding to make a decision, it is noted for purposes of record that on 26th July, 2016 after the Applicant's counsel had argued the application, a letter dated the same date was received from Balongo & Co. Advocates who represents the Plaintiff, Simon Makhabi Ombogo in Busia CMCC No. 405 of 2015 protesting the manner in which the Applicant herein had sought stay without serving his client who is an interested party.

6. In **Corporate Insurance Company Limited v Charles John Musee [2014] eKLR** J.K. Sergon, J faced with a similar application held that:

“It is my considered view that declaratory suits are an alternative to review proceedings. That being the case and as correctly held by Mutava, J. in Corporate Insurance case (supra) which opinion I share, I find that the application herein is premature since the suit from which a declaration as to whether or not the insurer is entitled to avoid liability under the contract of insurance between the plaintiff and the defendant is yet to be determined.”

That decision may not be applicable in this case since the primary suits have been determined and what awaits to be heard on 28th July, 2016 are the declaratory suits against the Applicant.

7. Again in the case of **Corporate Insurance Company Ltd v Charles John Musee [2014] eKLR**, J.K. Sergon, J dismissing a similar application held that:

“First, the Applicant is not a party in Milimani H.C.C. C. No. 112 of 2013. It is clear that the aforesaid suit is between the injured and the Applicant’s insured. Even if judgment was given in favour of the injured party, the decree will not be executed against the insurer but against the insured. I therefore see no damage that the Applicant will suffer. In any case it will be upon the Interested Party in the end of the compensating suit to apply for a declaratory suit against the insurer who has refused to settle the insurance claim.”

The facts in the cited case are also different from the case before me. The Applicant herein is a party to the cases it seeks to stop.

8. That what the Applicant seeks to do is achievable is not in dispute. In **Gateway Insurance Company Limited v Kaboyilek Farmer Cooperative Society Limited [2014] eKLR**, E.K. O. Ogola, J granted the plaintiff a declaratory judgment allowing it to avoid the policy of insurance.

9. In the case before me, the Applicant faces eminent judgment. It has filed its suit against the Respondent and issued notices to the affected parties. Its suit will be rendered nugatory if stay is not granted.

10. In light of the facts of this case, I find that the application has merit. A slight delay will not prejudice the plaintiffs in the civil suits that the Applicant seeks to stay. They however need to be made parties to this suit. The Applicant is therefore directed to place in motion the necessary mechanisms for enjoining the plaintiffs in these proceedings.

11. In light of what I have stated above, an order of stay is hereby issued staying the proceedings in Busia CMCC No. 405 of 2015 and Busia CMCC No. 179 of 2016 for a period of 60 days from today’s date or further orders of the Court. The Applicant is directed to prepare this suit and list it for hearing on priority basis. Costs in the cause.

Dated and delivered at Busia this 28th day of July 2016.

W. KORIR

JUDGE OF THE HIGH COURT.