



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CIVIL SUIT NO.100 OF 2013**

**APOLLO OGUNDA..... PLAINTIFF**

**VERSUS**

**AFRICA MERCHANT ASSURANCE CO. LTD..... DEFENDANT**

**AND**

**JUSTUS MUKWANAN OUTOR.....1ST INTERESTED PARTY**

**FREDRICK ODHIAMBO OTOR..... 2ND INTERESTED PARTY**

**STEPHEN NENGO DUTO..... 3RD INTERESTED PARTY**

**EVERLYN OWANO RAPHAEL.....4TH INTERESTED PARTY**

**RULING**

The application dated 7th November 2013 and supported by three affidavits sworn by the applicant, seeks orders to (1) stay execution of the decree in Nakuru CMCC No.666 of 2011 pending hearing and determination of this suit. (2) That there be stay of proceedings in Nakuru CMCC No.254, 528 and 1189 all of 2011.

The background to this matter is that the applicant had a Third Party Motor Vehicle Insurance Policy issued by the Respondent.

On 19/12/10, his motor vehicle was involved in an accident along Nakuru - Eldoret Highway, resulting in the death of one passenger (who is represented by the 4th Interested Party), while the 1-3rd Interested parties sustained varying injuries. These interested parties have filed the various suits claiming general and special damages resulting from the injuries sustained in the accident.

After the accident, the Insurance (Respondent) asked the applicant to pay excess as to enable the processing of the claims. Meanwhile the Respondent appointed an advocate who represented the applicant in Nakuru CMCC No.666 of 2011, when judgement was entered against the applicant. Thereafter the Respondent declined to settle the claim, resulting in the applicant's properties being proclaimed by Igare Auctioneers in execution of the judgement.

The applicant's contention is that the Respondent should not be allowed to collect premiums and excess fees then turn around to avoid its contractual obligations.

The application is opposed on grounds that the refusal to honour the terms of the policy is justified on

grounds that while the Court proceedings were on-going, they conducted investigations which disclosed that the applicant had breached his duty of utmost good faith in non-disclosure of material information while filling his claim form.

The result of the investigations were that the vehicle's use at the time of the accident, was outside the scope of the policy cover. This is what led the Respondent to instruct the advocate who was representing the applicant in the suits to withdraw his services and a letter repudiating the Respondent's obligation to settle the claims followed.

Meanwhile Interested Parties contest the application, terming it as improper and incompetent, and that this suit is intended to defeat their pursuit of their claims in the cases they filed in the lower Court, and that it is infact a simple conspiracy by the applicant and Respondent.

The Counsel in this matter have given very detailed submissions, almost as though the suit filed herein is the one being argued.

The pleadings by the applicant are that the Respondent is in breach of the contractual obligations, which it only repudiated after judgement had been delivered and this Court ought to find that it is under an obligation to indemnify the plaintiff in all the claims filed against him in the lower Court.

He also prays for an order declaring that no execution should be levied against him in all those suits, and such execution should be against the defendant.

This is what is pending hearing.

The issues as filed by the Respondent's Counsel will be very helpful to the Court when hearing the substantive suit namely;

- a) Who was in breach of the terms of the contract
- b) Was the Respondent entitled to repudiate its contractual obligation.
- c) Did the Respondent waive it's right to repudiate policy cover when it appointed an advocate to represent the applicant in the lower Court's proceedings.

If I were to consider those issues in detail, then there could be absolutely no reason to hear the substantive suit.

The mischief suggested by the interested parties does not arise because

- (a) It is a fact that the applicant had a policy cover issued by the Respondent
- (b) It is a fact that the Respondent has declined to satisfy the judgement entered against the applicant on grounds that he is in breach of the terms of the contract.
- (c) The likelihood of execution being carried out against the applicant is real, because his properties have already been proclaimed.

At this stage, what the Court ought to consider is

- (i) Whether the applicant stands to suffer substantial loss if the order sought is not granted.
- (ii) Has the application been brought without unreasonable delay.

On the first limb, I have no doubt in my mind that the prelude to the applicant's tribulations is just beginning i.e. the proclamation.

The next step will be attachment, and if he is unable or does not have the financial mettle to meet the terms of the judgement, undoubtedly his property will be sold to satisfy the judgement. However his woes will not end there, because CMCC No.666 of 2011 is related to three other suits which are pending, and which arise from the same suit.

The applicant's goose will be as good as cooked, he will feel the ripple effect of that execution in all the other three related suits.

The tragedy and prejudice is that, were this suit against the Respondents to succeed, and were this Court to find that the Respondent has no basis for repudiating the contract, then I don't think the applicant would even have a way of recovering the property which will already have been sold to satisfy the judgement on CMCC No.666 of 2011.

The issues as to whether section 5 and 10 of the Insurance Third Party Risks Act applies or not, are best canvassed at the substantive hearing of the suit. I agree with the applicant's Counsel that this application should not be confused with applications made under Order 42 Rule 6 - It is not an application for stay pending appeal- but that execution be stayed pending sorting out the issue regarding who between the applicant and Respondent should satisfy the judgement entered in the lower Court, taking into account the relationship that existed between the parties at the time of the accident.

With greatest respect to the Interested Party's Counsel, this is not an application which is ill conceived as the suit raises factual and legal issues which must be addressed satisfactorily. They could not have been addressed during the trial before the Magistrate's Court because at that point, the Respondent had not indicated that it would no longer honour the contract it entered with the applicant, and that he was on his own.

I hold and find that there is merit in granting stay of execution in Nakuru CMCC No.666 of 2011, and staying the proceedings in Nakuru CMCC No.254, 528 and 1186 all of 2011 until the suit filed in this High Court is heard and determined.

To avoid delay, I direct that the applicant's set the matter for hearing within the next 90(ninety) days from date of delivery of this ruling.

**Written and dated this 19<sup>th</sup> day of December 2014 at Bungoma**

**H. OMONDI**

**JUDGE**

**Delivered and dated this 3<sup>rd</sup> day of February 2015 at Nakuru**