



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO 160 OF 2010

CANON ASSURANCE (KENYA) LIMITED.....PLAINTIFF

VERSUS

PETER L. MASAKU.....DEFENDANT

AND

MATHEW NTHENGE.....INTERESTED PARTY

RULING

INTRODUCTION

1. The Proposed Interested Party's Notice of Motion application dated 29th August 2014 and filed on 1st September 2014 was brought under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act, Order 12 Rule 7, Order 1 Rule 10(2), Order 51 Rule 1 of the Civil Procedure Rules and all enabling provisions of the law. It sought for the following orders:-

1. **THAT this Honourable Court be pleased to grant an order that the Applicant herein be enjoined in the suit as an interested party.**
2. **THAT this Honourable Court be pleased to grant an order to set aside the Judgment and all consequential orders delivered on 5th June 2014 in this suit.**
3. **THAT the Applicant be granted leave to unconditionally defend and/or respond to the Plaintiff's claim as the Honourable Court shall direct.**
4. **THAT the costs for this application be provided for.**

THE PROPOSED INTERESTED PARTY'S CASE

2. The application was supported by the affidavit of Mathew Nthenge, the intended Interested Party herein. It was sworn on 27th August 2014 and filed on 1st September 2014. His Written Submissions were dated 30th October 2014 and filed on 31st October 2014.

3. The Proposed Interested Party averred that he was involved in a road traffic accident on 21st September

2009 while travelling as a fare-paying passenger in the Defendant's Motor Vehicle registration number KAL 141 D which was insured by the Plaintiff. He issued the Plaintiff with a Statutory Notice as insurers of the Defendant.

4. He filed a suit against the Defendant on 23rd November 2009 and Judgment therein was entered on 14th May 2012. The Plaintiff herein filed the present suit on 18th March 2010 and Judgment was delivered on 5th June 2014. It was his contention that he was never served with any notice by the Plaintiff of this suit and that he only became aware of the same after his advocates were served with an Order on 20th May 2014 and a copy of the judgment that was entered on 5th June 2014.

5. It was his further averment that the suit herein was contrary to the provisions of Section 10 (4) of the Insurance (Motor Vehicle Third Party Risk) Act Cap 405 (Laws of Kenya) as the Plaintiff was required to give him notice of the present suit before or within fourteen (14) days of instituting the suit. In addition, it was his position that the suit ought to have been brought before or within three (3) months after commencement of the suit in which he obtained Judgment.

6. It was his case that the failure by the Plaintiff to have served him with a Notice denied him an opportunity to raise valid points of law. As a result, the Judgment obtained herein was adverse and prejudicial to him as he would be subjected to loss and damage unless the orders sought for were granted. He therefore argued that it was in the interest of justice that this court grant him the orders he had sought.

THE PLAINTIFF'S CASE

7. In response to the said Application, Martha Mutoro, a Legal Officer of the Plaintiff Company, swore a Replying Affidavit on 13th October 2014. It was filed on even date. The Plaintiff's Written Submissions were dated 24th February 2015 and filed on even date.

8. The Plaintiff stated that it had filed the present suit seeking declaratory orders against the Defendant on 18th March 2010. It denied the Proposed Interested Party's allegations that he only became aware of the present suit when his Advocates were served with an Order on 20th May 2014 as in their Statement of Defence filed on 25th March 2014 to the Proposed Interested Party's declaratory suit in **Machakos CMCC No 169 of 2014 Matthew Nthenge vs Canon Assurance (K) Limited**, it clearly stated that it would, at an opportune time, seek the staying of the proceedings therein pending the hearing and determination of its declaratory suit herein.

9. It further averred that its Advocates sought and obtained stay orders against his declaratory suit pending the hearing and determination of the present suit. However, by the time this suit came up for hearing on 27th May 2014, the Proposed Interested Party had not filed any application to be enjoined in the suit. Subsequently, Judgment herein was entered on 5th June 2014.

10. It was its contention that the said Proposed Interested Party had been indolent in bringing the current application and that the same was an afterthought as it took the Applicant over five (5) months to bring the current application having heard notice of the present declaratory suit when it served him with its Statement of Defence aforesaid.

11. It was also its argument that the said Proposed Interested Party's present application was untenable there being was no nexus between his claim and its cause of action in this suit as he was not privy to the contract of insurance signed between the Plaintiff and the Defendant.

12. It contended that it would be prejudiced if the orders sought by the said Proposed Interested Party were granted and therefore urged the court to dismiss the applicant's said application with costs to it.

LEGAL ANALYSIS

13. Both the Plaintiff and the Proposed Interested Party addressed the issuance or otherwise of notices to each other. On one hand, the Plaintiff contended that the Proposed Interested Party never notified it of the filing of his suit in which judgment therein was entered as was required under the provisions of Section 10 (2) (a) of the Insurance (Motor Vehicle Third Party Risk) Act. On the other hand, the Proposed Interested Party was emphatic that the Plaintiff could not purport to rely on the declaratory orders that were issued herein as it did not give him the mandatory statutory notice required under the provisions of Section 10 (4) of the Insurance (Motor Vehicle Third Party Risk) Act.

14. The court deemed it fit to address the issue of notification by the Proposed Interested Party under Section 10 (2) (b) of the Insurance (Motor Vehicle Third Party Risk) Act as the same would definitely have an impact on its determination of whether or not the Proposed Interested Party could rely on the provisions of Section 10(4) of the Insurance (Motor Vehicle Third Party Risk) Act. Indeed, the two (2) notices were dependent on each other.

15. Section 10 (2) (a) of the Insurance (Motor Vehicle Third Party Risk) Act provides as follows:-

“No sum shall be payable by an insurer under the foregoing provisions of this section-

a. In respected of any judgment, unless before or within fourteen days after the commencement of the proceedings in which judgment was given, the insurer had notice of the bringing of the proceedings...”

16. The Plaintiff was categorical that the Notice dated 13th October 2009 annexed to the Proposed Interested Party’s Supporting Affidavit and marked “MN 2” was an intention to file suit, the time of filing not being indicated and did not constitute a Notification of the proceedings in which judgment was given.

17. It was its submission that the said notice was merely a notification of the Proposed Interested Party’s intent to file suit and seek enforcement judgment entered in those proceedings both against the Plaintiff and the Defendant herein. It placed reliance on the definition of proceedings given in **The Black’s Law Dictionary (6th Edition)** in which proceedings were defined as **“the form or manner of conducting judicial process before a Court of law”** which in this case was the filing of the suit.

18. The Proposed Interested Party did not submit on this suit. There was no indication when the Proposed Interested Party notified the Plaintiff herein of his suit, to wit, **Machakos CMCC No 1579 of 2009 Mathew Nthenge vs Zerah M Okari & Peter Masako.** What was, however, clear to the court is that the Proposed Interested Party’s declaratory suit dated 17th February 2014 was filed on 18th February 2014. The Plaintiff herein filed its Statement of Defence dated 25th March 2014 on even date in which it notified the Proposed Interested Party of its declaratory suit.

19. In the absence of any evidence to the contrary and rebuttal of the Plaintiff’s assertions that it had never been notified of the filing of **Machakos CMCC No 1579 of 2009 Mathew Nthenge vs Zerah M Okari & Peter Masako.** it was the finding and holding of this court that it would have been placing an onerous task upon the Plaintiff herein to have knowledge of the institution of the said suit. Indeed, the time line for the Plaintiff to issue a notice under Section 10 (4) of the Insurance (Motor Vehicle Third Party Risk) Act was dependent on it having received notice under Section 10 (2) of the Insurance (Motor Vehicle Third Party Risk) Act.

20. As was rightly submitted by the Plaintiff, the commencement of proceedings could only have been through notification of the exact date the suit was filed. While it is doubttable that its Statement of Defence would constitute the notice that was envisaged under the provisions of Section 10 (4) of the aforesaid Act, it is evident that the Plaintiff notified the Proposed Interested Party at the earliest time possible when it became aware of the Defendant’s claim against it.

21. The Plaintiff was thus not obligated or under any obligation to issue the Proposed Interested Party with a notice under the provisions of Section 10(4) of the Insurance (Motor Vehicle Third Party Risk) Act

as it was not aware of the existence of the Proposed Interested Party's suit against the Defendant herein.

22. In this regard, the court also wholly concurred with the holdings in the cases of **Gateway Insurance Co Ltd vs Thomas Njenga Gitau & Another [2014] eKLR** and **Techera vs United Insurance Company Limited [2005] 1 KLR 216** relied upon by the Plaintiff where the common thread was that an insurer who had no Notice of the institution of a suit could not commence an action seeking a declaration to avoid the obligations under the insurance contract.

23. It is therefore clear that the Plaintiff herein could not have issued a notice under the provisions of Section 10 (4) of the Insurance (Motor Vehicle Third Party Risk) Act that states as follows:-

“No sum shall be payable by an insurer under the foregoing provisions of this section if in an action commenced before, or within three months after the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which is false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it;

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings, specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is given shall be entitled, if he thinks fit, to be made a party thereto. (Emphasis supplied)

24. Evidently, the Proposed Interested Party's assertions that the Plaintiff, having failed to serve them with the Notice as required, could not be entitled to benefit from the provisions of the aforesaid subsection were clearly misplaced. Upon filing of a declaratory suit and issuance of a notice under Section 10 (4) of the Insurance (Motor Vehicle Third Party Risk) Act, the Proposed Interested Party would then have sought to be enjoined in the declaratory suit that was filed by the Plaintiff herein at that stage.

25. However, in view of the confusion that had been caused by the Proposed Interested Party in not having issued the requisite notice under the provisions of Section 10 (2)(a) of the Insurance (Motor Vehicle Third Party Risk) Act, the Proposed Interested Party still had a chance of bringing to the attention of the court of the existence of the judgment he had obtained and the filing of his declaratory suit once it was served with the order of 15th May 2014 by Havelock J (as he then was).

26. He did not do so but filed his application to be enjoined in the proceedings herein almost five (5) months after judgment was entered herein in favour of the Plaintiff. In this respect, the court had no option but to agree with the Plaintiff's submissions that the Proposed Interested Party was indolent in bringing his application to be enjoined in the proceedings herein and the way he had managed his case from inception.

27. Accordingly, having considered the pleadings, the affidavit evidence, the written submissions and the case law that was relied upon by the parties, the court was more persuaded by the Plaintiff's submissions that the Proposed Interested Party's application was untenable. Undoing proceedings that had been heard and determined by a court of similar and concurrent jurisdiction as this court would be tantamount to sitting on an appeal, something which is completely untenable. The court was thus not inclined to grant the Proposed Interested Party the orders that he had sought herein as that would greatly prejudice the Plaintiff herein.

DISPOSITION

28. In the circumstances foregoing, the upshot of this court's ruling was that the Applicant's Notice of Motion dated 29th August 2014 and filed on 1st September 2014 was not merited and the same is hereby dismissed with costs to the Plaintiff.

29. It is so ordered.

DATED and DELIVERED at NAIROBI this 23rd day of June, 2015

J. KAMAU

JUDGE