



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 213 OF 2014**

**CHARLES MAKENZI WAMBUA ..... PLAINTIFF**

**VERSUS**

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

**AND**

**STANLEY MBATHA MULULI & 9 OTHERS ....INTERESTED PARTIES**

**RULING**

By an application dated 16<sup>th</sup> July 2014, the applicant/plaintiff Charles Makenzi Wambua seeks from this court orders against the respondent Africa Merchant Assurance Co. Ltd that:

There be stay of enforcement of all judgments against the plaintiff/applicant arising from the accident which occurred on or about 20<sup>th</sup> August 2011 involving motor vehicle registration number KBL 383M until the hearing and determination of this suit.

The application by way of notice of motion is brought under the provisions of Order 51 Rules 1, 3, 4 Sections 1A,1B and 3A of the Civil Procedure Rules, Article 159 (2) (d) of the Constitution of Kenya and all other enabling provisions of the law. It is premised on the grounds that the defendant hereby has intimated that it will not settle the decree issued against the plaintiff insured in various suits ensuing from an accident involving his motor vehicle registration number KBL 383M which occurred on 28<sup>th</sup> August 2011, even after the plaintiff had paid Ksh. 330,000/= as excess. That the defendant has no valid grounds for failing to settle the aforesaid judgments/decrees in favor of the interested parties herein and that the plaintiff, a 75 year old pensioner has no means of settling the decrees/judgments entered against him in favor of the interested parties as his monthly pension only Ksh.16,000./=

The notice of motion is further supported by the affidavit of Charles Makenzi Wambua sworn on 16<sup>th</sup> July 2014.

The defendant did not oppose the application at the hearing, its counsel Mr. Njiru informed the court that the client was not opposed to the application as negotiations had been initiated to settle the matter out of court and if not reached then the hearing of the main suit to determine all issues involved in the dispute shall be fixed.

All the interested parties were opposed to the application for stay of execution of their respective decrees obtained in their favor against the plaintiff/applicant and filed responses thereto.

The brief history and summary of the subject matter of the dispute herein is contained in the supporting affidavit sworn by the applicant/plaintiff on 16<sup>th</sup> July 2014. The plaintiff deposes that he was the owner of the accident motor vehicle which he had a comprehensive insurance cover with the defendant. He had obtained a loan to purchase the said motor vehicle when it was involved in an accident, several people were injured in an accident while others died and they sued him for the loss and damage. He notified the defendant insurer who took up the defence of the said claims in court by appointing their own panel of lawyers to defend the claims and even asked the plaintiff to pay excess fee of Ksh. 330,000/= which he dutifully paid.

That after the settling a number of claims and paying their lawyers' fees, the defendant then wrote to the plaintiff intimating that they had surpassed the sum assured Ksh. 7 million by another Ksh. 7,071,869/= hence they would not settle any more claims or outstanding judgments with respect to the same claim. They asked him to arrange to settle all other outstanding claims without any further reference to the defendant.

Meanwhile, the 3<sup>rd</sup> parties who held decrees in their favor started executing the same against the plaintiff who deposed that he is not a man of means and that he was compelled to file this declaratory suit after it became clear that the 3<sup>rd</sup> parties who were entitled to the sums due as awarded to them by the courts were harassing him with execution by way of attachment and sale of his movable properties and even threatening to have him committed to civil jail.

He deposes that he was never made aware of any policy limits until May 2014 which he describes as malicious since he was never notified of those limits at the time of insuring the said motor vehicle.

He prays that the execution of decree in the respective suits should be stayed to enable him seek declaratory orders from this court compelling the defendant to settle the claims.

The third parties on the other hand are aggrieved by the orders being sought herein and aver that they are not parties to this suit. That they shall be prejudiced if stay of execution sought is granted as they are being prevented from enjoying their lawfully obtained judgment.

In his submissions in support of the plaintiff's application, Mr. Gathu urged the court to grant the orders sought as the defendant had purported to impose policy limits, after the fact which is an afterthought to demonstrate that the plaintiff has an arguable case. He further submitted that even if there were policy limits as alleged the same would be illegal and cannot be relied upon by the defendant to refuse to settle the claims arising from the material accident. The Defendant under Cap 405 is obliged to settle the claims and follow up the issue with the insured. He attached and relied on the authority of **Thomas Muoka Muthoka & Another – Vs - Insurance Company of East Africa (2008) eKLR** whose facts were similar to the present case where Hon. Justice D.A Onyancha held that

***“The clause in the insurance contract No 020/970/10/18101/2003 at section V (as limiting the defendant's liability to third parties to Ksh. 2 million is invalid, is invalid, void and unenforceable ... That is so because the sought declaration (to avoid the insurance policy under discussion) does not presently exist and its existence in the future will not help the defendant to avoid its liability to third parties”***

Mr. Gathu submitted that in a case of this nature, the principle for granting interlocutory injunctions as set out in the **Giella – Vs - Cassman Brown** are applicable. Further, that once it is shown that the applicant has an arguable case with the probability of success, and that he stands to suffer irreparable loss or harm if the orders sought are not granted, and that as the balance of convenience tilts in his favour since the interested parties can as well sue the defendant for declaratory orders, the application should be granted.

Mr. Nzavi, Mrs Keya and Mr. Munyu for the interested parties all opposed the applications. In their

submissions, they urged the court not to grant the orders sought as the stay would prejudice the interested parties who should be at liberty to enforce decrees against the plaintiff unhindered and that as the orders sought are not directed at them directly and them being strangers to the contract of insurance in question, they should not be made to suffer.

Mr. Gathu maintained in response to the interested parties' submissions that they were enjoined as interested parties in order to accord them the right to a hearing to avoid orders being issued that would affect their rights without according them an opportunity to be heard. He further submitted that the orders sought are in their interests as the plaintiff's wish is that their decrees be settled by the defendant insurer.

I have carefully considered the plaintiff/applicant's application and the rival submission by counsels for the applicant and the interested parties. I note that the defendant is not opposed to the orders of stay being granted in favour of the plaintiff and its counsel informed the court that negotiation to settle this matter out of court were ongoing. I further note that the interested parties have lawful judgments against the plaintiff in various claims wherein they are entitled to payment of various sums of money as compensation for loss and damage suffered following the material accident. I further note that it is not denied by the defendant that it insured the plaintiff motor vehicle comprehensively and that following the accident, the plaintiff paid excess money totaling to Ksh. 330, 000/= and that the defendant is therefore bound by Cap 405 to settle all claims arising out of the material accident giving rise to the various claims and decrees in favour of the third/interested parties herein.

The plaintiff's claim against the defendant in the main suit is for declarations that the defendant is bound by the insurance contract entered into with the plaintiff to settle all claims arising from an accident involving the third parties herein, which contract is governed by Cap 405 Insurance Motor Vehicle 3<sup>rd</sup> Parties Risk Act.

It is not denied that the plaintiff insured his motor vehicle subject of these proceedings with the defendant and decrees in favour of the interested parties herein in various suits, were passed against the plaintiff.

Under section 10(1) of the Insurance Motor Vehicle 3<sup>rd</sup> Parties Risks Act Cap 405, where the owner of motor vehicle has taken out a policy of insurance which purports to indemnify him and other authorized persons in respect of liability to third parties intended to be protected under Section 5(b) of the Act for injuries or death to them in the use of the Motor Vehicle on the road; and

- a) a judgment in respect of liability as is required to be covered is obtained against such owner of motor vehicle (the insured);
- b) then, notwithstanding that the insurer may in accordance with the terms of the insurance contract be entitled to avoid or may even have avoided the policy or liability (under Section 8), or would have restricted or limited the liability as per the terms of the policy (under section 16);
- c) nevertheless, the insurer is under mandatory statutory liability first to pay the full judgment sum to the persons entitled to the benefits of the judgment (the injured or estate of the deceased); and
- d) thereafter, the insurer may recover the due sum so paid to the third party under a clause in the terms of the insurance contract, if any under the Act (as per the proviso to Section 8) or a statutory obligation or liability created against the insured under the Act (as per proviso to Section 10).

The purpose of the above provisions and the entire Cap 405 was to ensure that a third party who was injured by an insured motor vehicle gets compensated for his suffering, loss or inconvenience if either the owner or driver of the accident motor vehicle happened to be of no means to settle the claims. As was aptly put by **Sir Clement De Lestang, J.A.** in **New Great Insurance Co. of India Ltd – Vs - Lilian Everlyne Cross & Another (1966) EA, 90 at page 104** that:

***“Generally speaking the Act seeks to achieve that object (of making provision against third party risks arising out of the use of motor vehicle on the roads) not by placing the whole burden of compensating***

**third parties injured in accidents on the insurers but by combination of two means namely:**

**1) by making it obligatory, on pain of punishment, for any person who uses or causes or permits any other person to use a motor vehicle on the road, to have in relation to the user of the vehicle a policy of insurance which satisfies the requirements of the Act, and**

**2) restricting the right of insurers to avoid liability to third parties.”**

Thus, both the owner of a motor vehicle who authorizes its use on the road or its insurer are mandated to respect each other's calling under the law, to avoid a situation where the law is enacted in vain. **Lord Denning in Escoigne Properties Ltd – Vs - I.R. Commissioners (15) [1958] A.C at 565** stated that,

***“A statute is not named in a vacuum, but in a framework of circumstances, so as to give a remedy for a known state of affairs. To arrive at its true meaning, you should know the circumstances with reference to which the words were used, and what was the object, appearing from those circumstances, which parliament had in view.***

Consequently, it is incumbent upon the courts and this court in particular, to ensure that the intention and purpose of the legislative, where the words of the Act are not so expressly clear, to do its reasonable best to achieve the original purpose of “suppressing the mischief intended to be addressed and advance the remedy, and to suppress subtle invention and evasions for continuance of the mischief, ... and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico.*” Per **Heydoni case (1584) 3 Co. Rep 70 [1957] All ER 2.91.**

The plaintiff having insured his motor vehicle comprehensively with the defendant, it would be erroneous if it attempted to limit the liability to Ksh. 7 million only, noting that it even took up the defense of the claims against the plaintiff and instructed its lawyers to enter judgment for the interested(third) parties on liability.

The provisions of Section 10 (1) of Cap 405 are clear that notwithstanding that the defendant may be entitled to avoid or may have avoided the policy, it nevertheless must pay to the persons holding judgment against the defendant and therefore any purported restriction or limitation on the extent of the quantum it can pay is not supported by laws as the rights of the third (interested) parties under the Act override the insurer's and the insured's contractual rights under the policy of insurance.

To allow the third/interested parties execute decrees against the plaintiff in my view, in the glare of the provision of Section 10 (1) would be occasioning him unnecessary hardship and not to mention, would be to assist the defendant avoid a contract whose terms are expressly dictated by statute and therefore rendering the statute impotent. The insurer has a remedy under Section 10 (2), (3) and (4) to (after paying third parties), recoup from the insured what it has paid over and above the sum assured.

In the **Thomas Muoka & Another – Vs - Insurance Company of East Africa Ltd [2008] eKLR, Hon Justice D.A Onyancha** allowed a similar application against the defendant insurer in favour of the plaintiff insured. In that case, the defendant had purported to limit the liability under the insurance policy to third parties to only 2 million which the Hon. Judge held to be invalid, void and unenforceable.

In this case, it is clear that the orders sought will no doubt affect the interested parties and it is for that reason that they were enjoined to these proceedings to accord them a right to be heard. I have heard them and considered their concerns if the orders of stay are granted.

Albeit this is not an appeal and therefore the principle applicable in applications of stay pending appeal may not, strictly speaking be applicable, I have no doubt in my mind that such principles are applicable to some extent. For example, the plaintiff herein must prove that he has an arguable case against the defendant with a probability of success, which, in my analysis of section 10 (1) of Cap 405 have clearly shown that indeed he has an arguable case against the defendant. Secondly, that unless such stay is granted, the intended suit shall be rendered nugatory. In my analysis, I have found that if stay is not

granted, the court will be assisting the defendant to avoid a contract whose terms are dictated by statute, to compensate the interested parties herein then revert to the plaintiff to recoup any extra sums that they may have paid to third(interested)parties.

Thirdly, that unless stay is granted, the plaintiff shall suffer substantial loss. The plaintiff has demonstrated to this court that he is not a man of means. He is a retired pensioner earning a monthly pension of Ksh.16,000/= only. He has high blood pressure and any attempts to execute against him has caused him stress. Furthermore, as his insurance company is 'alive' and bound by law to settle the claims as per the decrees, he would not be doing the right thing under the law and insurance contract to struggle to pay a claim which the insurance is by law mandated to settle. Consequently, I find that if stay is not granted, the execution will create a state of affairs that will irreparably affect or negate the very essential core of the plaintiff as the successful party in the pending suit.

Furthermore, the interested parties too have a right to sue the defendant herein in a declaratory suit to compel them settle the decrees passed against them. (See **James Wangalwa & Another – Vs - Agnes Naliaka Cheseto [2012] Eklr.**)

However, the circumstances of this case, unlike in application under Order 42 Rule 6 the Civil Procedure Rules, do not require or mandate this court to order for deposit of security for the due performance of such decree or order as may ultimately be binding on him.

The application herein was made without undue delay. The plaintiff all along believed that the defendant was settling the claims until May 2014 when the defendant wrote to the plaintiff advising him of the limits of liability and asking the plaintiff to settle any excess sums as it had surpassed the claims by over 7 million. This is what provoked this suit and hence this application being filed on 17<sup>th</sup> July 2014 after efforts to settle the dispute out of the Court failed to materialize.

I must also consider whether granting the stay sought will in any way prejudice the interested parties who have opposed this application. The interested parties being persons covered under Section 4 (1) of the Act-Cap 405 Laws of Kenya, the liability of the defendant is preserved as against them and they could as well, sue the defendant by way of a declaratory suit to recover the sums due as per the decrees in their favor.

However, the plaintiff has opted to carry that burden on their behalf. If the suit herein is determined in favor of the plaintiff, then the interested parties stand to benefit directly. They need not file any other declaratory suit against the defendant. For that reason therefore, time and resources, will also be saved for the interested parties. Therefore, no prejudice will be caused to them.

The upshot of all this is that I am persuaded that the plaintiff has satisfied the condition for granting stay of execution of all judgments and decrees against the plaintiff arising from the accident that occurred on 20<sup>th</sup> August 2011 involving motor vehicle registration number KBL 383M belonging to the plaintiff pending hearing and determination of this suit.

Costs of this application will be to the plaintiff in the suit herein.

I further direct that the suit herein being a fast track, all the parties do comply with Order 11 of the Civil Procedure Rules within 45 days from the date of this ruling to facilitate its expeditious disposal.

**Dated, signed and delivered at Nairobi this 26<sup>th</sup> day of November, 2014**

**R.E ABURILI**

**JUDGE**