



CIC INSURANCE GROUP LIMITED.....PLAINTIFF

VERSUS

MUTUA MULWA KAINGA.....DEFENDANT

RULING

1. The plaintiff in the suit herein and the applicant in the Notice of Motion application dated **06/10/2011** (“*Application*”) is an insurance company by the name **CIC Insurance Group Limited** (“*Applicant*”).
2. The Applicant has approached the Court vide a *Plaint* dated **06/10/2011** seeking a declaration that it is not liable to make any payment under an insurance policy it has with the defendant in the main suit and the Respondent herein, **Mutua Kainga** (“*Respondent*”) respecting motor vehicle registration No.**KAK 945Y** (the “*Motor Vehicle*”). The Applicant seeks to repudiate the insurance policy on the grounds that the motor vehicle was not used for the purposes for which it was insured. In particular, the Applicant believes that the motor vehicle was used to ferry fare-paying passengers in violation of the insurance policy
3. The Applicant was nudged to file the *Plaint* in this action after it learnt that the Motor Vehicle was involved in a road traffic accident on **18/09/2009** in which numerous passengers in the Motor Vehicle were injured. The Applicant is apprehensive that the third parties who were injured in the accident will sue the Respondent and thereby trigger the Applicant’s mandatory obligation to settle all and any judgments entered against the Respondent arising from the accident. To forestall that possibility and the concomitant loss it would suffer, the Applicant filed the present suit.
4. If successful, this suit will obviate the need of the Applicant to settle any claims arising from the accident that occurred on 18/09/2009. This is because the Applicant would have successfully brought itself within the provisions of The **Insurance (Motor Vehicle Third Party Risks) Act, Chapter 405** of the **Laws of Kenya**, in particular **section 10** thereof.
5. In the interim, to give itself an opportunity to pursue the instant suit, the Applicant has filed this *Application*. The *Application* asks for the substantive prayer:

THAT this Honourable Court be pleased to stay the proceedings in the suit against the Respondent herein the same being Tawa SRMCC No. 107 of 2011 (Rosemary Mumbua Musyimi AKA Tina Mumbua v Mutua Mulwa Kainga & Benson Kyalo Kavita) and all other suits already filed or which may be filed against the Respondent emanating from the road traffic accident which occurred on 18/09/2009 involving the motor vehicle registration number KAK 945Y Mitsubishi Lorry/Truck along the Masii-Tawa Road pending the hearing and determination of this suit.

6. This *Application* is supported by the Supporting Affidavit of **Mary Wanga**, the Company Secretary of the Applicant. The Supporting Affidavit reiterates the factual posture of the case including the fact that the Respondent is, according to the Applicant, in fundamental breach of the Insurance Policy entitling the Applicant to repudiate the policy and the apprehension that the Applicant “may be held liable to compensate the Plaintiffs in the suits already filed and/or which may be filed against the Respondent herein should this honourable court fail to stay the proceedings therein.”

7. The Application is resisted by the Respondent. He has filed a Replying Affidavit, which, in the main avers in one form or another that the Application is bad in law, is frivolous, presumptuous and should not be allowed. These are all legal issues more appropriate for submissions, and **Mrs. Nzei** who argued the Application for the Respondent before me picked them up in her submissions.

8. Factually, the Respondent avers that he has not reported the alleged accident to the Applicant and that he has not called upon the Applicant to honour its part of the terms of the insurance policy regarding the alleged accident. Since the Respondent has not called upon the Applicant as the insurer to cover any possible liabilities arising from the accident; and since he has never sought to involve the Applicant, the Respondent does not comprehend the utility of the present Application and wishes it to be dismissed.

9. The parties appeared before me on **08/02/2011** with **Mr. Kituku** arguing the Application on behalf of the Applicant. **Mrs. Nzei** submitted on behalf of the Respondent. **Mr. Kituku** argued that it was imperative that the prayers sought be granted to protect the Applicant from major losses that it might suffer if all the passengers who were being ferried in the Motor Vehicle in violation of the insurance policy sued the Respondent thereby triggering the Applicant's statutory duty to pay upon entry of judgment. Mr. Kituku referred me to **section 10** of the **Insurance (Motor Vehicle Third Party Risks) Act, Chapter 405** of the **Laws of Kenya** and argued that issuing a stay against all and any present and future suits which may be filed arising from the accident of **18/09/2009** involving the Motor Vehicle, was the only safe way to protect the Applicant.

10. **Mrs. Nzei** submitted that the Application cannot be granted because it is not even certain that an accident occurred as alleged; that is one of the issues in Tawa SRMCC No. 107 of 2011. She referred to the Statement of Defence filed in that action denying that the accident occurred. She also argued that the Application is frivolous and an abuse of the process of the Court since the Respondent has not called upon the Applicant to pay any claims arising from the alleged accident or at all. **Mrs. Nzei** further submitted that, in any event, the Applicant has not established a *prima facie* case which may warrant the issuance of any interlocutory orders. Finally, she argued that the orders prayed cannot be issued against parties who are not present in Court.

11. I agree with **Mrs. Nzei** on the last point. The Applicant is asking the Court to grant an omnibus stay against any existing and any future suits which are now filed or may be filed against the Respondent respecting the accident which occurred on 18/09/2011. That is an incredibly broad use of the Court's discretion in circumstances which are, in my humble view, unwarranted. I say so for at least three reasons:

a. First, it is troubling that the Applicant is seeking the stay in the present suit and not in the concrete suit filed against the Respondent. Its reason for doing so is that it wants a wider stay – covering all and any proceedings emanating from the accident of 18/09/2009. The problem is that the Applicant is requesting for a stay of proceeding, and if successful, the one concrete suit will be stayed before the Plaintiff in that suit has been given audience before the Court. That flies in the face of natural justice. It is even worse if one considers the position of would-be plaintiffs: their attempt to file a suit against the Respondent would be still-born on account of an order given in proceedings they had no opportunity to participate in.

b. Second, perhaps the situation I have described in (a) above would be more tenable if it was the best of available bad alternatives. Only, it is not. The Applicant can make its application for stay in Tawa SRMCC No. 107 of 2011 which will give the Plaintiff there a chance to respond to the request. The Applicant complains that this would be unduly costly because it would mean that they have to do the same for every suit filed. I say cost is not sufficient reason to deny the existing parties and would-be parties to suits against the Respondent audience before the Court.

c. Third, the statute gives the Applicant a safe mode of protecting itself in such situations hence obviating these overly broad measures the Applicant proposes here. That mechanism is in the self-same section 10(4) of the Insurance (Motor Vehicle Third Party Risks) Act which Mr. Kituku cited to me. That section reads:

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 was 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 so given shall be entitled, if he thinks fit, to be made a party thereto.

d. The protection the Applicant seeks is right there: this sub-section immunizes the Applicant from any liability in as long as the present suit was timeously filed and is successful; and this suit, if successful, shall equally immunize the Applicant from liability in any suit from the accident of 18/09/2009 filed in the future.

12. If the Applicant fears that some of these suits might be concluded before the present suit has been concluded, the proper procedure, in my view would be to request for a stay in those concrete suits – costs notwithstanding. Even then, I am unsure it would prevail in staying the proceedings. The most it can hope is a stay of execution pending the hearing of the present suit.

13. For these reasons, I hereby dismiss the Application with costs to the Respondent.

DATED, SIGNED and DELIVERED at MACHAKOS this day 27TH day of FEBRUARY 2012.

J.M. NGUGI
JUDGE