



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 141 OF 2008

CORPORATE INSURANCE COMPANY LIMITED.....PLAINTIFF

V E R S U S

KENNETH CHEGE NJENGA.....DEFENDANT

AND

1. JOYCE WAMBUI KABUTHIA

2. LEAH WANJIRU GATHU.....INTERESTED PARTIES

R U L I N G

1. This is an application (**notice of motion dated 24th October 2011**) by the Plaintiff seeking two main orders-

(i) That prosecution of **Nairobi CMCC No. 3141 of 2011** (which is a claim said to have arisen from an accident which occurred on 6th June 2007 involving motor vehicle registration No. KXA 643) be stayed pending hearing and determination of the suit herein.

(ii) That prosecution of all other compensation claims arising from the said accident involving the aforesaid motor vehicle be stayed pending hearing and determination of this suit.

2. The application is stated to be brought under **sections 1A, 1B, 3, 3A and 63** of the **Civil Procedure Act, Cap 21** (the **Act**). **Order 51, rule 1** of the **Civil Procedure Rules** (the **Rules**) is also cited.

3. The grounds for the application appearing on the face thereof are-

(i) That motor vehicle KXA 643 was involved in a road accident on 6th June 2007 “in which several people (were claimed) to have been...injured or died”.

(ii) That the estate of one of the alleged deceased passengers has already filed a compensation claim vide Nairobi CMCC No. 3141 of 2011.

(iii) That the Plaintiff has contended in the present suit that the insurance cover it had issued to the Defendant herein (who was the owner of the accident motor vehicle) was confined to the use of the

motor vehicle for carriage of own goods and expressly excluded use of the vehicle for “hire and/or reward and/or carriage or conveyance of passengers”.

(iv) That when the accident occurred on 6th June 2007 the vehicle was being used for carriage of passengers, and that therefore the Plaintiff was entitled to avoid the contract of insurance, and the present suit is seeking declarations to that effect.

(v) That the prosecution of any compensation claims arising from the said accident before the suit herein is heard and determined will prejudice and/or embarrass the proceedings and outcome of the present suit, and may even render the suit nugatory.

4. There is a supporting affidavit sworn by one NANCY SHIKUKU, the Chief Legal Officer of the Plaintiff. The same provides the factual basis for the grounds listed above.

5. The Defendant has not filed any papers in response to the application. But the Interested Parties have by a replying affidavit sworn by the 1st Interested Party filed on 30th January 2012. She has deponed as follows, *inter alia*:-

(i) That she is the widow and co-administrator of the estate of one WILSON KABUTHIA THAIRU (the **Deceased**) “who died on 6th June 2007 while travelling in motor vehicle KXA 643”, the other administrator being the 2nd Interested Party who was the Deceased’s mother.

(ii) That the Interested Parties filed suit against one KENNETH CHEGE NJENGA, the owner of the motor vehicle, and also against one PETER THIRU WANJIRU, the driver, vide Nairobi CMCC No. 3141 of 2011 seeking necessary damages.

6. The grounds of objection to the Plaintiff’s application emerging from the replying affidavit are-

(i) That the Plaintiff herein is not entitled to interfere in the proceedings of the said Nairobi CMCC No. 3141 of 2011 as the issues in that suit and in the present suit are different; there is thus no “direct relation between the two suits”.

(ii) That the Plaintiffs application is thus misconceived.

7. I have considered the submissions of the learned counsels appearing, including the authorities cited. Those authorities are not quite germane to issue in the application at hand. That issue is, **whether or not the Plaintiff herein is entitled to an order of stay of proceedings in Nairobi CMCC No 3141 of 2011 pending disposal of the present suit?**

8. In the present suit the Plaintiff, who was the insurer of the accident motor vehicle KXA 643 at the time of the accident on 6th June 2007, seeks two main reliefs as follows-

(i) A declaration that the Plaintiff is, and has at all material times been, entitled “to avoid the Commercial Vehicle Policy Insurance No C01/080/1/001493/2005 issued on 24th March 2005” upon the ground that the said policy of insurance was obtained by the non-disclosure of material facts and/or by representations of fact which were false in some material particular.

(ii) A declaration that the Plaintiff is not liable to indemnify the Defendant for claims by the passengers injured or killed as a result of the said accident under the said policy “or under the Insurance (Motor Vehicles Third Party Risks) Act, Cap 405.

9. Nairobi CMCC No. 3141 of 2011 (which is the negligence claim filed by the estate of a person who was said to have died in the accident involving the motor vehicle in question), is not directly against the insurer of the motor vehicle (the Plaintiff herein). The suit is against the alleged driver of the motor vehicle (the alleged tortfeasor) and the alleged owner of the motor vehicle (alleged vicarious liability).

10. Whatever judgment the Interested Parties may get in that compensation suit can be executed against the insurer (the Plaintiff herein) **only as permitted by section 10(2) of Cap 405 aforesaid.** It is thus after any judgment favourable to the Interested Parties in the suit that the Plaintiff herein should apply for stay of execution or proceedings as against it pending disposal of the present suit. Prosecution of the suit cannot of itself prejudice the Plaintiff's suit herein in any way, and the suit cannot thereby be rendered nugatory. On the contrary, it is the Interested Parties who stand to suffer prejudice if they are prevented from prosecuting their suit on account of a dispute between the Plaintiff and its insured that should not concern them at this point in time.

11. It must be remembered that if the Interested Parties get judgment in the compensation suit, it will be against the tortfeasors, not against the insurance company, and they will be entitled, if they are so inclined, to execute as against the tortfeasors. So, why should they be prevented from prosecuting their suit against the tortfeasors?

12. This application is without merit. It is hereby dismissed with costs to the Interested Parties.

13. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF MAY 2012

H.P.G. WAWERU
JUDGE

DELIVERED AT NAIROBI THIS 25TH DAY OF MAY 2012