



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 581 of 2009**

CORPORATE INSURANCE CO. LTD. PLAINTIFF

VERSUS

IBRAHIM GICHUHI MUGO DEFENDANT

R U L I N G

This application is brought a notice of motion dated 15th March, 2010, and made under **Sections 3, 3A and 63 (e) of the Civil Procedure Act, and Order L Rule 1 of the Civil Procedure Rules** and all other enabling provisions of the law.

By the application, the Plaintiff seeks from the Court the following orders –

1. *That the prosecution of RMCC No. 228 of 2009 (Kiambu) arising from the accident which happened on 10th April, 2009, and involving motor vehicle registration No. KBA 163 E be stayed pending the hearing and determination of the suit herein.*
2. *That the prosecution of all other compensation claims arising from the accident which happened on 10th April, 2009, involving motor vehicle registration No. KBA 163 E be stayed pending the hearing and determination of this suit.*
3. *That costs of this application be provided for.*

The application is supported by the affidavit of Nancy Shikuku, Chief Legal Officer of the Plaintiff company, and is based on the following grounds –

- (a) *That motor vehicle registration No. KBA 163 E was involved in a road traffic accident on 10th April, 2009, in which several people who claim to have been traveling therein as passengers allegedly got injured and/or died.*
- (b) *That one such claimant, Ann Wanjiku Kamau, has already filed a compensation claim No. 228 of 2009 (Kiambu).*
- (c) *That the Applicant herein contends that the Insurance cover it has issued to the Defendant herein expressly excluded any carriage of goods or passengers by third parties or usage of the said motor vehicle for hire or reward and contends further that the use of the motor vehicle was confined to the Insured in person in connection with his business and it has indeed filed the suit herein seeking declarations to that effect.*
- (d) *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 in this case and may render this suit useless.*
- (e) *That it is fair and just that the prosecution of all such claims be stayed until this suit is heard and determined.*

When the application came for hearing *inter partes*, Mr. Muturi appeared for the Plaintiff/Applicant, but the Defendant did not attend Court. According to the Court record, the Defendant was duly served on 13th April, 2010, with a copy of the notice of motion which clearly indicated that the same would come for hearing on 22nd April, 2010. He duly signed a copy of the application which is attached to the affidavit of service filed in Court on 22nd April, 2010. Although he filed a replying affidavit, he did not attend Court on 22nd April, 2010.

Mr. Muturi for the Applicant, told the Court that he would rely on the annexed supporting affidavit. In a nutshell, he argued that the subject motor vehicle was at all material times insured by the Plaintiffs. It got involved in an accident on 10th April, 2010. By that time it was carrying passengers who sustained serious injuries. It is the Plaintiff's contention that at the time of the accident, the motor vehicle was being used contrary to the terms of the Insurance Policy. It was for this reason, that the Plaintiff filed this suit claiming that it is not bound to compensate any of the claims which may arise from that accident. He referred to Clause 7 of the said Policy a copy of which was attached to the application. It was the Plaintiff's further contention that at the time of the accident, the vehicle was being driven by someone other than the insured himself. On those grounds, the Plaintiff further contends that it has a proper suit against the Defendant. He therefore asks that the prayers sought be granted as prayed otherwise the suit will be rendered useless and the Plaintiff will suffer prejudice.

A quick perusal of a copy of the Insurance Policy attached to the application shows, *prima facie*, that the Insurance Cover under the Policy issued in this matter was confined to instances in which the vehicle was used for social, domestic and pleasure purposes and for the insured's own business or profession. Furthermore, the Plaintiff undertook to indemnify the Defendant against liability to Third Parties, other than fare paying passengers provided that the motor vehicle was at the time of an accident being used by the insured in person in connection the Defendant's business or profession. On the facts of this case, it seems that at the time of the alleged accident, the motor vehicle was being driven by a person other than the insured. This raises the issue as to whether the incident was covered under the Insurance Policy.

In his replying affidavit, the Defendant concedes that he took a Comprehensive Insurance Cover from the Plaintiff covering Third Party risks in respect of his car registration No. KBA 163 E. He contends, however, that the accident which is the subject matter of this suit occurred on a date in which the car was being driven by his authorized driver as required. He therefore argues that it is out of mischief that the Plaintiff intends to repudiate the Policy by way of this declaratory suit.

In view of the fact that liability by the Plaintiff is contested, it seems reasonable to grant the Plaintiff herein a chance to exonerate itself, if at all, from liability. In my view, it would be more convenient for the would-be Plaintiffs to await the outcome of this case as such outcome would obviously either pave the way for them for automatically recovering damages under the Policy rather than rush to Court only to find that the Plaintiff is not liable under the Insurance Policy, in which case they would loose their valuable money and time.

For these reasons, prayers (1) and (2) of the application by notice of motion dated 15th March, 2010, are hereby granted as prayed. Costs in the cause.

It is so ordered.

Dated and delivered at Nairobi this 3rd June, 2010.

L.

NJAGI

JUDGE