REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Case 195 of 2005

BLUESHIELD INSURANCE CO. LTD…….....……....PLAINTIFF

VERSUS

KENNEDY TANGARA & 8 OTHERS…….....……DEFENDANTS

RULING

By a notice of motion dated the 23rd of June 2005, the plaintiff filed an application purportedly made under **sections 18, 63(b) & (e) and section 3A of the Civil Procedure Act, Order L rule 1, Order V rule 17, Order XI rule 1 of the Civil Procedure Rules**, **High court Practice rules**, **the Constitution of the Republic of Kenya** and all enabling provisions of the law seeking the orders of this court to stay execution or further proceedings in respect of certain suits pending before the Chief Magistrate's Court Nakuru pending the hearing and determination of this suit filed by the plaintiff against the defendants. The said suits are enumerated as *Nakuru CMCCC No. 560 of 2004, Nakuru CMCCC No. 559 of 2004, Nakuru CMCCC No. 230 of 2004, Nakuru CMCCC No. 228 of 2004, Nakuru CMCCC No. 554 of 2004, Nakuru CMCCC No. 239 of 2004, Nakuru CMCCC No. 243 of 2004, Nakuru CMCCC No. 242 of 2004 and Nakuru CMCCC No. 231 of 2004*. The grounds in support of the application as appears on the face of the application are that the plaintiff, an insurance company, had insured motor vehicle registration number KZU 830, Isuzu lorry which was involved in an accident with motor vehicle registration number KAR 889F Toyota Hiace Matatu. The plaintiff stated that the defendants alleged that they were passengers in the matatu which was involved in the accident and had filed suits against the owner of motor lorry registration number KZU 830 seeking to be compensated allegedly for the injuries which they had sustained in the accident. The plaintiff states that it had undertaken investigations and had established that the defendants herein were not passengers in the said motor vehicle nor were they injured in the said accident. The plaintiff contends therefore that the defendants in the said suits in the subordinate court had filed false claims with a view of defrauding the plaintiff, the insurer of motor vehicle registration number KZU 830. The plaintiff contend that it will establish in its case against the defendants that the defendants were guilty of deceit and therefore the proceedings and execution against the insured of the plaintiff should be stayed pending the hearing and determination of the suit filed herein.

The application is opposed. The defendants have sworn replying affidavits denying the plaintiff's allegation that they were false claimants. They averred that they had filed legitimate claims against the insured of the plaintiff and in fact the plaintiff had participated in the proceedings in the subordinate court to its conclusion. It was their view that if there were any issues of their alleged impropriety, then the plaintiff should have raised the same in the suits which have either been determined or are pending before the subordinate court. They urged this court to dismiss the application.

At the hearing of this application, I heard the submissions made by Mr. Mbigi learned counsel for the plaintiff, Mr. Nyagaka learned counsel for the 5th defendant (*he was also holding brief for Mr. Ombui counsel for the 1st and 2nd defendants*) and Mr. Mboga learned counsel for the 3rd and 4th, 6th and 7th defendants (*he was also holding brief for Mr. Juma learned counsel for the 8th and 9th defendants*). The facts that led to the plaintiff filing this application are generally not in dispute. The defendants claimed that they were passengers or had filed suits on behalf of minors who were passengers in motor vehicle registration number KAR 889F and had been injured when the said motor vehicle was involved in an accident with a lorry registration number KZU 830 which was insured by the plaintiff. Before the defendants filed suits against the owners of motor vehicle KAR 889F and the lorry registration number KZU 830, they issued the requisite statutory notice to the plaintiff as the insurers of motor vehicle KZU 830 of their intention to file suit against the plaintiff's insured.

Subsequently thereafter they did file suit against the owners of the two motor vehicles. The plaintiff, as the insurer of the said lorry, was notified of the suits filed. The plaintiff appointed the firm of Messrs Wambua Musembi Advocates to act on their behalf in respect of the suits filed by the defendants. It is apparent that the said firm of advocates acting on instructions from the plaintiff compromised the said suits on liability. The insurers of the two motor vehicles involved in the said accident agreed to apportion liability between themselves at the ratio of 50:50. Thereafter the damages payable were assessed and judgment entered for the defendants against the said owners of the said motor vehicles. According to the defendants, the insurer of motor vehicle registration number KAR 889F paid their apportioned damages as was assessed by the subordinate court. However, the plaintiff declined to pay its portion of the damages that it ought to have paid pursuant to the consent judgment entered on liability. It is when the defendants sought to execute and indeed executed against the insured of the plaintiff, that the plaintiff sought to have the said judgments reviewed on the grounds that the defendants or the minors whom they had brought the suits on their behalf were fake claimants who wanted to fleece the plaintiff. The plaintiff through its insured withdrew the application for review and brought this suit against all the nine defendants.

What is the basis of the plaintiff's suit? The plaintiff claims that it has established by investigations that the defendants are false claimants who intend to fleece it. They allege that the defendants or the minors on whose behalf the suits were brought, were neither passengers nor were they injured in the said accident involving the motor vehicle of the plaintiff's insured. Mr. Mbigi submitted that the plaintiff was within its right in law to bring an independent suit because as an insurance company it was bound to settle any claim that was brought against its insured. He submitted that if the plaintiff detected that it was being defrauded, it could in law bring an independent suit to protect its interest. For this proposition Mr. Mbigi relied on the English decision of **William Derry and others –vs- Sir Henry William Peak [1889] Vol. XIV House of Lords reports 337**. He also relied on the case of **Jonesco –vs- Beard [1930] AC 298**.

I have considered the said decisions and whereas I agree that a litigant who feels aggrieved by a decision of the court which he feels was procured by fraud may file an independent suit to assert his rights, in the circumstances of this case, I am not persuaded that the plaintiff used the correct procedure in law in seeking to have its complaints addressed by the courts. This court recognizes that the plaintiff as the insurer of a motor vehicle may by the principle of subrogation appear in a suit on behalf of its insured. This is because an insurance company will ultimately be responsible for the settlement of the judgment of the court.

In this case, the plaintiff under the principle of subrogation instructed an advocate who appeared on its behalf in the nine suits filed before the subordinate court. The suits were compromised on liability. This settlement was based on the fact that the plaintiff then recognized that the defendants were genuine claimants. Mr Mbigi told this court that the plaintiff had investigated the claim and established that the suits filed by the defendants were not genuine and were filed with the sole purpose and intention of defrauding the plaintiff. He told the court that the plaintiff made the discovery after the said judgments had been entered. In my opinion, if the plaintiff discovered new evidence which establishes that the defendants were fake claimants then the plaintiff ought to have made an application before the subordinate court to review the said judgments under the provisions of **Section 80 of the Civil Procedure Act and Order XLIV** of the **Civil Procedure Rules**. The plaintiff therefore abuse the due process of the law by filing this suit in the High Court. Mr. Mbigi submitted that the defendants had frustrated the plaintiff by having the files concealed at the civil registry of the subordinate court. This is a very serious allegation. Does the plaintiff want this court to believe its submission that the civil registry staff of the subordinate colluded with the defendants to frustrate the plaintiff? I do not think so. In any event if the plaintiff was unable to procure the said files, it could have applied for skeleton files to be constructed to deal with the matters in issue pending the resurfacing of the "*lost*" files.

Furthermore **Section 34 of the Civil Procedure Act** is explicit in a situation where a judgment has been entered and a party wishes to raise questions concerning the said decree. The **said section** provides that:

"***(1) All questions arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be***

determined by the court executing the decree and not in a separate suit.

(2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of additional court fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purpose of this section, be determined by the court."

In this case, it is clear that the plaintiff ought to have made the complaints relating to its allegation of fraud before the court which issued the said decree. The plaintiff could not therefore in law file a different suit. If the plaintiff is aggrieved by the decision of the subordinate it would be at liberty to file an appeal to this court.

The procedure adopted by the plaintiff, if allowed by this court would cause confusion in the hierarchy of courts. If this court were to allow the plaintiff's application to stay the decrees of the lower court, would it be doing so as an appellate court or a court of original jurisdiction? And if the defendants are aggrieved by the decision of this court to stay execution, would they file an appeal to the Court of Appeal or apply to this court to review its decision? Such confusion of jurisdiction should not arise if the plaintiff followed the laid down procedure and made the appropriate applications for review in the name of its insured before the subordinate court which issued the decree.

Litigants should adhere to the procedures established regarding the establishment of courts. If this court were to entertain the plaintiff's application it would make nonsense of the established hierarchy of courts. The plaintiff should first conclude all the pending matters before the subordinate court before coming to this court for appropriate remedy. In the pendency of the suits in the subordinate court, this court lacks jurisdiction to entertain the plaintiff's complaint as to what it perceives to be the fraud being perpetrated against it by the defendants. The proper forum for the plaintiff to raise those complaints is the subordinate court which issued the decrees complained of. The fact that litigants ought to respect the hierarchy of courts was considered by Ibrahim J. in his dissenting judgment in the Constitutional Reference Case **Nairobi HC Civil Case No. 1176 of 2004 Kamau John Kinyanjui –vs- The Attorney General** *(unreported),* where at page 39 he held as follows:

"***In my humble view the resulting situation will be reductio absurdum. I cannot see how the High Court can in any situation review or inquire in the proceedings or decision of the court of appeal which is constitutionally and under other laws a higher and more superior (court). Such a situation would lead to judicial chaos in the administration of justice in our courts and if this happens the legislature must move post haste to prevent a constitutional and jurisprudential crisis."***

In this case, I would not allow the plaintiff to make nonsense of the hierarchy of courts and cause judicial chaos in the administration of justice by raising issues in the High Court under the guise that this court has unlimited jurisdiction to question a decision of a subordinate court which heard and determined the issues in dispute based on the facts which were presented before it. If the plaintiff was aggrieved that the said subordinate court reached an erroneous conclusion based on information which it did not then have, then the plaintiff ought to have applied for the said decisions to be set aside or reviewed based on the new evidence that it alleged to have discovered.

I therefore find no merit whatsoever with the application for stay of proceedings filed by the plaintiff. The plaintiff has not persuaded me that it has filed a proper suit before this court to enable this court exercise discretion in its favour. I therefore dismiss the application dated the 23rd of June 2005 with costs to the defendants.

DATED at NAKURU this 24th day of March 2006.

L. KIMARU

JUDGE