



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 141 of 2006

MERCANTILE LIFE & GENERAL ASSURANCE COMPANY LTD.....PLAINTIFF

VERSUS

J.A.R. (EPZ) KENYA LIMITED.....DEFENDANT

R U L I N G

The plaintiff is the insurer of the defendant and by policy of insurance number MGL/11/111/00/00709/1997 which policy was renewed annually the plaintiff undertook, on consideration of the defendant paying premiums when due, to indemnify the defendant in respect of death or injury to employees arising out and in the course of their employment.

The plaintiff's case is that it was a condition precedent that required the defendant to notify the plaintiff in writing immediately a claim arose under the policy. That the defendant breached that condition precedent and failed to notify the plaintiff of all the claims that arose. That there were various injuries that occurred at the defendant's premises between 2001 and 2003 which the defendant failed to notify the plaintiff when they occurred. The plaintiff therefore filed this present suit seeking determination on the clause relating to late reporting.

As well as filing the action the plaintiff has sought a interlocutory stay of all the suits filed in the subordinate court relating to those injuries. The defendant hereof on being sued in those suits in the subordinate court and on the plaintiff hereof repudiating liability, the defendant applied and obtained orders to join the plaintiff as a third party thereof. It is those third party proceedings that the plaintiff seeks to stay, in respect of 36 different suits. The plaintiff argues that it will be in the interest of justice to stay those third party proceedings until the determination of the issue raised in this suit since a common issue is germane in all third party proceedings.

The plaintiff therefore sought stay of those third party proceedings by a chamber summons application brought under section 3A of the Civil Procedure Act, Order 14 Rule 2, order 37 Rule 2 of the Civil Procedure Rules. In that chamber summons the plaintiff sought that this action be selected as a test suit for the determination of the common question of law and fact.

The application was opposed the defendant alleged that reports of accident, when notified to the defendant, were also notified to the plaintiff. that in most cases the defendant first got knowledge of the claim when it was served with the summons and plaint which on being forwarded to the plaintiff hereof, were returned with a note of repudiation of liability. The most convincing argument by the defendant was in the replying affidavit as follows:

“.....that staying the third party proceedings in the lower court as prayed would, in fact, amount to

injuncting the defendant/respondent from following the law to its detriment.”

That indeed is correct, for to grant stay to the hearing of the third party proceedings in subordinate court without staying the action between the plaintiff and the defendant, if at the end of this action, on determination of repudiation, if the court determined against the insurer, yet the subordinate proceedings proceeded and were determined, the insurer would have been denied the right to participate thereof. Further the execution may proceed against the insured/defendant hereof without recourse to the insurer who has obtained stay. I am of the view that the plaintiff hereof ought to have sought stay in the individual subordinate court matters and if stay was sought it ought to have been stay of the whole suit.

On the other hand the plaintiff has delayed to bring action on issue of repudiation. The plaintiff certainly by June 2005 knew of the existence of the suits against the defendant. It ought, to my mind, have instituted this suit then and it is possible that by now that suit would have made much progress. The delay in so moving the court would, in my view, defeat the application for stay.

The application for this suit to be made a test suit is merited, and will be granted.

The orders of the court: -

- (1) That this suit is selected to be a test suit between the plaintiff and the defendant to determine on the question of the issues of law and fact relating to the repudiation of the policy of insurance number MGL/11/111/00/00709/1997.**
- (2) The other prayers in chamber summons dated 27.3.2006 are dismissed.**
- (3) That the costs of the chamber summon dated 27th March 2006 be in the cause.**

MARY KASANGO

JUDGE

Dated and delivered this 14th day of June 2006

MARY KASANGO

JUDGE