



**Wambugu v Xplico Insurance Company Limited; Githinji & another (Interested Parties) (Civil Suit 1 of 2023) [2024] KEHC 1167 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1167 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL SUIT 1 OF 2023  
SM MOHOCHI, J  
FEBRUARY 9, 2024**

**BETWEEN**

**JOSPHAT CHARAGU WAMBUGU ..... APPLICANT**

**AND**

**XPLICO INSURANCE COMPANY LIMITED ..... DEFENDANT**

**AND**

**PHILIP MAINA GITHINJI ..... INTERESTED PARTY**

**KIIRU BENSON BENARD ..... INTERESTED PARTY**

**RULING**

1. The Application before Court is a Notice of Motion filed under Order 51 Rule 1 of the Civil Procedure Rules 2010, and Sections 3A, and 63(e) of the *Civil Procedure Act* and all enabling provisions of the law being an Application seeking the following relief(s);
  - a. SPENT.
  - b. That, there be stay of proceedings in Nakuru CMCC NO. 646 OF 2017, Nakuru CMCC no. 817 of 2017 and any other suit that may arise pending the hearing and determination of the instant application and determination of the instant suit filed by the Plaintiff/Applicant
2. The Application is based on the following grounds inter alia:
  - i. That, a suit has been filed by the Plaintiff/Applicant herein Josphat Charagu Wambugu being the registered owner of motor vehicle registration number KAA 875 P Isuzu Lorry against the Insurer Xplico Insurance Company Limited in which the Plaintiff has sought a declaration that the Defendant/Respondent ought to indemnify the Plaintiffs for claims arising from a road traffic accident which allegedly occurred on 4th October, 2016.



- ii. That, the insurance policy, in question is policy number 080/2734/16/06/030/TPO in respect of motor vehicle registration number KAA 875 P Isuzu Lorry which was involved in an accident on 4th October, 2016.
  - iii. That, the Plaintiff/Applicant as the insured of motor vehicle registration number KAA 875 P Isuzu Lorry is seeking a declaration that the Defendant is obligated to indemnify the Plaintiffs in respect of Nakuru CMCC No. 646 of 2017 and Nakuru CMCC No. 817 of 2017.
  - iv. That, there are existing primary suits in the subordinate Court, Nakuru CMCC No, 646 of 2017 and Nakuru CMCC No. 817 of 2017 compensatory claims for loss and damages arising from a road traffic accident involving the insured's motor vehicle registration number KAA 875 P Isuzu Lorry.
  - v. That, the Plaintiff/Applicant promptly reported the occurrence of the accident to the Defendant.
  - vi. That, the Defendant/Respondent has not appointed any firm of advocates to enter appearance and/or to represent the Defendant in the aforementioned matters.
  - vii. That, ex-parte judgement was entered in Nakuru CMCC No. 646 of 2017 and the Defendant/Respondent failed and/or neglected to instruct an advocate to set aside judgement and/or enter appearance or settle judgement as a result of which the Plaintiffs motor vehicle registration number KAK 911F and assorted stock in their shop were proclaimed by M/S/ Nasioki Auctioneers and their motor vehicle registration number KAA 911 F.
  - viii. That, we since have instructions to act for the Plaintiff/Applicant in the instant suit and the primary suits and have halted execution.
  - ix. That, the Plaintiff's numerous requests to the Defendant to settle the claims and visits to the Defendant's premises have borne no fruit and the Defendant has left the Plaintiff to his own devices and the Plaintiff is prone to attachment on the final judgement.
  - x. That, Nakuru CMCC No. 646 of 2017 and Nakuru CMCC No. 817 of 2017 can proceed to completion with a subsequent declaratory suit being filed against the Plaintiff.
  - xi. That, in the event the compensatory suits in the subordinate Court proceed to conclusion and judgements issued, then the plaintiffs therein would be at liberty to enforce the judgement against the Plaintiff/Applicant herein as the registered owners of motor vehicle KAA 911F which event would render the instant application a mere academic exercise.
  - xii. That, in the circumstances, it would be prudent and in the interest of justice that further proceedings in the Nakuru CMCC No. 646 of 2017 and Nakuru CMCC No. 817 of 2017 be stayed pending the outcome of this Application and the instant suit, which Application would result into Orders directly affecting the said suits.
3. The Application was supported by the Affidavit sworn by Josphat Charagu Wambugu dated 21<sup>st</sup> February 2023. Directions as to the disposal of the Application were issued on the 22<sup>nd</sup> February 2023 and it is noteworthy that ever since the filing of the Application, the Defendant has failed and or refused to enter appearance or defend the Suit and the Application.



## Analysis and Determination

4. In the case of Kenya Wildlife Service Vs James Mutembei (2019) eKLR, Gikonyo J held that:

“Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent”.

5. Further, in the persuasive authority in Global Tours & Travels Limited; Nairobi HC Winding up Cause No. 43 of 2000 Ringera J, (as he then was) stated that: -

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice .... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”.

6. In the Kenya Wildlife Case (Supra), Gikonyo J quoted Halsbury’s Law of England, 4th Edition. Vol. 37 page 330 and 332, that:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the Court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case”.

7. I am persuaded by the above authorities which lay down the clear principles that stay of proceedings is a grave matter to be entertained only in the most deserving cases as it impacts the right to expeditious trial. It is a discretionary power exercisable by the Court upon consideration of the facts and circumstances of each case. As stated by the Court of Appeal in the case of David Morton Silverstein VS. Atsango Chesoni (2002) eKLR: -

“The Court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5 (2) (b) of the Court’s own rules. But as the Court pointed out in the case we have already cited, each case must depend on its



own facts and the facts of this particular case before us, as were the facts in the earlier case, do not show that the appeal will be rendered nugatory if we do not grant a stay”.

8. I have considered the extensive submissions in support of the motion and the submissions by the Interested Parties leading me to the conclusion that no sufficient cause to my satisfaction has been established that it is in the interest of justice to stay proceedings where an ex-parte judgment has been entered and an ongoing compensatory suit.
9. The primary declaratory suit herein emanates from compensatory suits that are sought to be stayed. The proceedings sought to be stayed are functus officio and the motion does not seek to stay execution of judgment. Service to the Defendant/Respondent is not exhibited nor demonstrated.
10. If such innovation was to be allowed, the multitude of suits shall be stayed in Subordinate Court while ordinary declaratory suits mushroom the same shall negate the constitutional predicate of expedite dispute resolution.
11. Finally, the Application is irregularly in Court since, it not only seeks to stay proceedings in two active matters, one after judgment without basis, and the litigants thereon stand to be deprived off their right justice while an insurer and the insured engage in unrelated arguments.
12. Accordingly, and in exercise of my discretion I am thus constrained to find that:
  - i. Disallow the Notice of Motion Application dated 21<sup>st</sup> February 2023, as the Application and Orders sought are academic and of no import.
  - ii. The Notice of Motion Application dated 21<sup>st</sup> February 2023 is accordingly found to be without merit and is accordingly dismissed.
  - iii. The Applicant/Plaintiff shall set down the suit for Pre-trial directions within the next fourteen (14) days from the date hereof.
  - iv. Costs shall be in the cause.

It is so ordered.

**DATED,SIGNED, DELIVERED VIRTUALLY ON TEAMS PLATFORM ON THIS 9<sup>TH</sup> DAY OF FEBRUARY 2024**

**MOHOCHI S.M**  
**JUDGE**

