



Directiline Assurance Co. Limited v Otiso; Otondo (Interested Party) (Suing as Personal Representative of the Estate of Abel Dickson Michara (Deceased)) (Civil Suit E005 of 2023) [2024] KEHC 2567 (KLR) (12 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2567 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL SUIT E005 OF 2023
TA ODERA, J
MARCH 12, 2024**

BETWEEN

DIRECTILINE ASSURANCE CO. LIMITED PLAINTIFF

AND

EVANS MOSE OTISO DEFENDANT

AND

ALFRED MICHARA OTONDO INTERESTED PARTY

**SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ABEL
DICKSON MICHARA (DECEASED)**

RULING

1. Vide a Notice of Motion Application filed under a Certificate of Urgency and dated 30th May 2023, the Plaintiff/Applicant sought the following orders:
 1. Spent.
 2. Spent.
 3. That pending the hearing and determination of this application, this Honourable Court be pleased to order stay of proceedings in Ogembo CMCC No. 341 of 2022 Alfred Michira Otondo (suing as personal representative of the estate of Abel Dickson Michara deceased).
 4. That pending the hearing and determination of the suit, this Honourable Court be pleased to order stay of any other proceeding against the defendant arising from the road traffic accident which occurred on 26.11.2019 along Mogonga – Kionyo road involving motor vehicle registration no. KCE of 829C.



5. That costs of this application be provided for.
2. The grounds on the face of the Application are that;
 - a. the Plaintiff insured the Defendant's motor vehicle registration number 829 C vide Policy Number 09516227 .
 - b. The interested party's deceased sustained fatal injuries in a road traffic accident which occurred on 26.11 .2019 along Mogonga – Kionyo road involving motor vehicle registration no. KCE of 829C.
 - c. The interested party filed Ogembo CMCC No. 341 of 2022 Alfred Michira Otondo (suing as personal representative of the estate of Abel Dickson Michara deceased).
 - c. Seeking damages under the Law reform and *fatal accidents Act*.
 - d. The plaintiff herein seeks a declaration that it is entitled to repudiate the policy and or claims arising from it vide the accident which occurred on 26.11.2019 on the grounds that the defendant breached the terms of the said contract.
 - e. The plaintiff/ applicant is apprehensive that in the likelihood of judgment being entered against the defendant herein, the interested party herein is going to seek to have the plaintiff satisfy the decree herein.
 - f. That there is thus need for the issue of validity /avoidance of the policy between the plaintiff and defendant herein who is also the defendant in the primary suit filed be determined first.
 - g. That unless the orders sought herein are granted the said Ogembo case is likely to proceed causing extreme prejudice and hardship to the plaintiff as it will be forced to satisfy a decree that it is entitled to avoid under section 10 (4) of the *Insurance (Motor vehicles Third party risks) Act*.
 - h. That it is in the interest of justice that the application be allowed.

The application is supported by the annexed affidavit of Kelvin Ngure the Deputy claims officer of the applicant. He reiterated the facts laid down in the grounds on the face of the application and produced the insurance and a copy of the policy KN -1a and the also a copy of the investigation report indicating that the vehicle was being used contrary to the policy terms. KN-3 and copies of pleadings in the lower court KN -2

3. It was submitted that the Respondent did not prove how the Plaintiff in Ogembo PMCC No. E137 of 2023 Laban Kibet vs. Co-op Bank Fleet Africa Leasing Limited will be prejudiced is the suit was stayed. It was submitted that stay of proceedings has previously been granted with timelines that are not prejudicial to the Plaintiff. In support, the Plaintiff relied on the case of Monarch Insurance Company Limited vs. Wycliffe Onyango Odenda (Supra).

Determination

4. I have considered the Application, the Affidavit in Support, and the Annexures,
5. Section 3 of the *Civil Procedure Act*, Cap. 21 Laws of Kenya provides as follows:
 3. Saving of special jurisdiction and powers

In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the being in force.



Section 3A of the *Civil Procedure Act* of the *Civil Procedure Act*, Cap. 21 provides as follows:

3A. Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

6. It then follows that under Section 3A of the *Civil Procedure Act*, this Honourable Court has power to stay proceedings in the interest of justice or to avoid abuse of the court process.

7. In the case of *Kenya Power & Lighting Company v Njumbi Residents Association & Another* [2015] eKLR, the Court cited the case of *In the Matter of the Estate of George M'Mboroki*, Meru HCSC No. 357 of 2004, where Ouko J (as he then was) held: -

“...the court retains certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular, to ensure the observance of the due process of the law, to prevent abuse of process to do justice between the parties.”

8. The Court further cited the case of *Rev. Madara Evans Okanga v Housing Finance Company of Kenya*, HCCC No. 262 of 2005 where the Court held as follows: -

“...the jurisdiction of the Court which is comprised within the term “inherent”, is that which enables it to fulfill itself properly and effectively as a court of law... in sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being reserve or fund of powers, a residual source of powers which the court may draw upon as necessary whenever it is just and equitable to do so, in particular to ensure the observance of the due process of the law, to prevent improper vexation or oppression, to do injustice between the parties and secure a fair trial between them.”

9. The Court finally stated “...The conclusion I draw from the account of the above citations is that this court, even where there are no specific provisions to do an act, has inherent and/or residual powers to act in a fair or equitable manner in the interest of justice and/or to ensure the observance of the due process of the law. Therein also lies the power for the court to act to prevent abuse of court process by a party so that fairness is maintained between the parties.” I associate myself fully with the said finding.

10. Halsbury’s Laws of England, 4th Edition. Vo. 37 at page 330 and 332 states as follows as relates stay of proceedings:

“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.”

11. Courts have, over time, pronounced themselves on stay of proceedings. The purpose of stay of proceedings was captured in the case of *Martin Kamakya v Resolution Insurance Company Ltd; Peter Ngumbi (Interested Party)* [2021] eKLR as follows:

“ 35. This jurisdiction is meant to avoid a waste of valuable judicial time; prevent the court from duplication of efforts and prevent multiplicity of suits and applications being filed and where if the stay is not granted and defendant were to succeed it would have rendered the appeal nugatory. In such applications the Court aims at ensuring that the object of the application is not rendered nugatory and that substantial loss and irreparable harm is not suffered by the applicant once the Plaintiff proceeds with the suit and the appeal succeeds.”

12. It is also trite law that grant stay of proceedings is purely a discretionary power that must be exercised judiciously.

13. In the case of *Martin Kamakya*, the Court cited the case of *Re Global Tours & Travel Ltd. HCWC No. 43 of 2000, Ringera, J* (as he then was) held 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 case, 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.”

14. However, to me, the greatest concern is whether by allowing a stay of proceedings, one’s right to a fair hearing, will be impeded, and in this case, a third party’s right to fair and expeditious hearing.

15. The instant Application is premised on Section 10(4) of the Insurance (Motor Vehicles Third Party Risks) Cap. 405 of the Laws of Kenya, which provides as follows:

10. Duty of insurer to satisfy judgment against persons insured

4. No sum shall be payable by an insurer under the foregoing provisions of this section if in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provisions contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the



commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposed to rely, and any person to whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto.

16. In that case, the Court granted stay of proceedings since interlocutory judgment had already been entered.
17. The Applicant cited the case of Britam General Insurance Company (Kenya) Limited v Stephen Wambua & 11 Others [2020] eKLR. In that case, the Court stayed the proceedings in the lower courts for 60 days.
18. In the case of The Monarch Insurance Co. Ltd. v Wycliffe Onyango Odenda, the Court granted stay of proceedings since “...the primary suits have been determined and what awaits to be heard on 28th July, 2016 are the declaratory suits against the Applicant.”
19. In Trident Insurance Company Ltd. v Amos Njenga Gitau t/a Young Achievers School [2019] eKLR, the Court granted the stay of proceedings.
20. I note the decisions are persuasive.
21. In the cases of Saham Assurance Company Limited v Lameck Okari Mairura [2021] eKLR, the Court noted as follows:

“(11) The case sought to be stayed is the primary suit against the insured; the suit is competent and proper. The case is yet to be heard. Another legal reality; enforcement of the decree in the primary suit is through a declaratory suit against the insurer. In these circumstances, I do not see any danger of loss to the applicant or reasonable cause to stay the proceeding by third parties. In the circumstances, the applicant should prepare its case for hearing and seek the court to determine it expeditiously. The approach adopted by the applicant could be problematic in so far as it seeks to subject the right of third parties to litigate their case against the insured to the determination of this case. I doubt liability between the third party and the insured is subject to liability between the insurer and insured. Unmerited order of stay of proceedings violates the principle of justice on expeditious disposal of cases.”

22. In Madison Insurance Company Limited v Andrew Kariuki & Another [2018] eKLR, the Court declined to stay of proceedings. The Court cited the case of HCCA No. 398 of 2006 Concord Insurance Co. Ltd. v Hardships Services [2009] eKLR, where the Court held, inter alia, that staying the proceedings in the lower court would be fettering the rights of the plaintiff therein to access justice and/or to have her dispute resolved by a court of competent jurisdiction contrary to Article 50 of [the Constitution](#) of Kenya, 2010 because she had absolutely no knowledge of this matter.
23. In the Madison Case (Supra), the Court held as follows:

“26. Indeed, there was a possibility of the present matter being heard before or after the matter in the lower court. Since the matter in the lower court had not been heard, nothing stopped the Plaintiff herein from proceeding to trial herein.



27. The court’s opinion was that not only did the Plaintiff herein have a remedy if the plaintiff in the lower court case were to proceed with her case and obtained judgment, the Plaintiff herein could proceed with the hearing of its case expeditiously and obtain the relief it had sought in its Plaintiff, if at all, without fettering the interests and rights of the plaintiff in the lower court.”
24. In the case of *Britam Insurance Co. Ltd. v Jane Muthoni Mwangi; Kevin Ouma Ochieng & 3 Others (Interested Parties)* [2021] eKLR, the Court declined to grant stay of proceedings. The Court held as follows:
- “ 19. It bears repeating that it is necessary that courts should consider two pertinent matters whenever they are faced with this question; (i) the disclaimer suit relate to statutory obligations to pay judgment of third parties; and (ii) orders of stay sought will rudely interrupt the right of third parties to litigate their cases. It, therefore, defeats every sense of justice to conduct such proceedings in the absence of the third parties who will be directly affected by such orders. The interested parties have signified the desire to be in these proceedings as and are accordingly parties.....
21. Be that as it may, the greater constitutional lesson is that an application for stay of proceedings portend serious impediment to the right to fair hearing, access to justice and the expeditious disposal of cases. Courts of law should therefore guard zealously against imposing such impediments except for good cause. Thus, the test is quite stringent for stay of proceedings interferes with a person’s right to litigate his grievances in court expeditiously and without unnecessary interruption. The sole questions is whether it is in the interest of justice to order a stay of proceedings.
23. I will take a more pragmatic approach to his question so as to balance the rights of parties. There is no reason to stay the cases by the third parties as no judgment has been obtained against the insured. It is strange that the insured did not say anything about the disclaimer proceedings yet he knows that should it succeed, the liability to pay the judgment would fall squarely on his shoulders. Without sounding any alarm, stay or proceedings have been used in the past to stall the suits by third parties to their detriment. The proper order to give, therefore, is that the disclaimer suit by the insurer be fast-tracked. Accordingly, I dismiss the application for stay of proceedings with no order as to costs. It is so ordered.”
25. Indeed, in the *Monarch Case (Supra)* that was cited by the Plaintiff/Applicant, the Court held as follows:
- “ 6. In *Corporate Insurance Company Limited v Charles John Musee* [2014] eKLR J.K. Sergon, J faced with a similar application held that:
- “It is my considered view that declaratory suits are an alternative to review proceedings. That being the case and as correctly held by Mutava, J. in *Corporate Insurance Case (supra)* which opinions I share, I find that the application herein is premature since the suit from which a declaration as to whether or not the insurer is



entitled to avoid liability under the contract of insurance between the plaintiff and the defendant is yet to be determined.”

That decision may not be applicable in this case since the primary suits have been determined and what awaits to be heard on 28th July 2016 are the declaratory suits against the Applicant.

7. Agains in the case of Corporate Insurance Company Ltd. v Charles John Musee [2014] eKLR, J.K. Serگون, J dismissing a similar application held that:

“First, the Applicant is not a party in Milimani H.C.C.C. No. 112 of 2013. It is clear that the aforesaid suit is between the injured and the Applicant’s insured. Even if judgment was given in favour of the injured party, the decree will not be executed against the insurer but against the insured. I therefore see no damage that the Applicant will suffer. In any case it will be upon the Interested Party in the end of the compensating suit to apply for a declaratory suit against the insurer who has refused to settle the insurance claim.”

26. I am persuaded by the said decisions. The Plaintiff is apprehensive of execution in the event the lower court matter is determined in favour of the Plaintiff therein. It is not immediately clear at what stage the suit is. Whichever the case, it is clear that there is no judgment and therefore, execution has not commenced. The apprehension is therefore premature in the circumstances.
27. On whether the interested party will be prejudiced if stay orders are granted, the plaintiff and defendant herein are the parties to the insurance contract. It would thus be obviously prejudicial, therefore, to hold a third party’s suit in abeyance on account of another’s contract. And to make matters worse, judgment has not even been rendered.
28. I therefore find the Appellant’s Application is unmerited and I hereby proceed to dismiss it. I however direct that the suit shall be heard on priority basis. Costs shall abide the outcome of the suit.
29. Mention for pre-trial directions on 3.7.24

DATED, DELIVERED AND SIGNED AT KISII THIS 12TH DAY OF MARCH 2024.

T.A ODERA

JUDGE

In the presence of:

N/A for the Plaintiff/Applicant

N/A for the Defendant/Respondent

Oigo- Court Assistant

