



**Occidental Insurance Co Ltd v Shengli Engineering Construction Company Ltd; Kaleli & another (Interested Parties) (Civil Suit E004 of 2023) [2024] KEHC 7401 (KLR) (13 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7401 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CIVIL SUIT E004 OF 2023  
WA OKWANY, J  
JUNE 13, 2024**

**BETWEEN**

**OCCIDENTAL INSURANCE CO LTD ..... PLAINTIFF**

**AND**

**SHENGLI ENGINEERING CONSTRUCTION COMPANY LTD ... DEFENDANT**

**AND**

**MWONGELA KALELI ..... INTERESTED PARTY**

**CYNTHIA KERUBO NYANDEMO ..... INTERESTED PARTY**

**RULING**

1. This ruling is in respect to the Application dated 17<sup>th</sup> July 2023 in which the Applicant seeks orders to stay proceedings in Nyamira CMCC No. E009 of 2023 and Nyamira CC No. 200 of 2022 pending the hearing and determination of this suit. The Applicant also seeks the costs of the Application.
2. The Application is supported by the affidavit of Mr. Phestus Ramogi Ojala and is premised on the following grounds: -
  - a. That there was a contract of insurance between the Plaintiff and the Defendant and the Plaintiff discovered that the Defendant had breached the provisions of the Policy Agreement.
  - b. That in breach of the said policy agreement, the Defendant's motor vehicle registration No. KCL 803A Toyota Station Wagon was involved in an accident on 10<sup>th</sup> September 2022 or thereabout along Kericho-Kisii road where the occupants got injured.
  - c. That The dispute arose as to the use of the motor vehicle at the time of the accident that led to the filing of the suit.



- d. That there are two suits that have been filed against the Defendant by persons who were injured in the accident that occurred on 10<sup>th</sup> September 2022 and those suits are at various stages and it would be in the interest of justice for the said suits to be stayed pending the hearing of this suit, which will determine who between the Plaintiff and the Defendant is liable to settle decree that might be passed in the said primary suits.
  - e. That it will be just to grant the orders herein proposed in the interests of justice.
3. The 1<sup>st</sup> Interested Party, Mwongela Kaleli, opposed the application through the Replying Affidavit dated 2<sup>nd</sup> October 2023 wherein he avers that the Application is defective and contravenes the rules of natural justice as it seeks to stop ongoing proceedings in which the Applicant is not a party. He further avers that Applicant's right to repudiate the insurance policy contract he had with the Defendant/ Respondent has nothing to do with the negligence claims. He states that the Applicant's subrogation rights had not crystallized and that he will suffer no prejudice if the matters were to proceed. He urged the Court to dismiss the Application.
  4. The Interested Parties also filed a Notice of Preliminary Objection dated 25<sup>th</sup> September 2023 in which they raised the following grounds: -
    1. The instant suit has been lodged out of the mandatory statutory timelines set under Section 10 (4) of the *Insurance (Motor Vehicles Third Party Risks) Act*, Cap 405 Laws of Kenya.
    2. The instant suit stands in contravention of the express provisions of Section 8 and Section 10 (4) of the *Insurance (Motor Vehicles Third Party Risks) Act*, Cap 405 Laws of Kenya.
    3. The instant suit has no effect ab initio on the Plaintiff's liability to settle the Interested Parties' claims in Nyamira CMCCC No. E009/2023 and 200/2022.
  5. The Application was canvassed by way of written submissions which I have considered.

### **Issues for Determination**

6. The main issues for my determination are: -
  - i. Whether the Preliminary Objection is merited.
  - ii. Whether the Applicant has made out a case for the granting of orders for stay the proceedings Nyamira CMCCC No. E009/2023 and 200/2022.

### **Analysis and Determination**

#### **i. Whether the Preliminary Objection is merited.**

7. In *Mukhisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd* (1969) EA 696 the court discussed as follows: -

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

8. The Interested Party's case was that the Application is time barred having been filed outside the mandatory statutory timelines set Section 10 (4) of the *Insurance (Motor Vehicles Third Party Risks)*



Act, Cap 405 Laws of Kenya. He contended that the Application also contravenes the express provisions of Section 8 and Section 10 (4) of the Insurance (Motor Vehicles Third Party Risks) Act, Cap 405 Laws of Kenya.

9. It was also submitted that the Application has no legal effect on the Plaintiff's liability to settle 3<sup>rd</sup> party claims.

10. Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act stipulates as follows: -

10. Duty of insurer to satisfy judgments 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 provision 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 proposes 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.

11. I have considered the timelines within which the Applicant herein filed the present suit vis-à-vis the time when the subordinate court cases were filed and I note that in both instances, the window period provided under the Act being 'before or within 3 months' had already lapsed. I also note that no material was placed before this court to show that Applicant notified the Interested Parties herein that it sought or obtained a declaration to avoid the claim arising from the subject accidents.

12. I therefore find that the Preliminary Objection is merited and I allow it.

ii. My above finding on the merits of the Preliminary Objection would have been sufficient to determine this Application but I am still minded to determine if the Applicant has made out a case for the granting of orders to stay the proceedings in Nyamira CMCCC No. E009/2023 and 200/2022.

13. The principles governing stay of proceedings were laid out in the case of Global Tours & Travels Limited; Nairobi H.C. Winding up Cause No. 43 of 2000 where Ringera J. (as he then was) held thus: -

“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”.

14. The Applicant’s case was that the Defendant breached the terms of the Insurance Contract and that the proceedings in Nyamira CMCCC No. E009/2023 and 200/2022 should be stayed so that the court can first determine who between the Plaintiff and the Defendant should be held liable for any judgement or decree that may arise from those suits. I have considered the rights of the Interested Parties’ to pursue their accident claims and the Applicant’s prayer for stay of the Interested Parties’ suits. It is my view that granting orders to stay the proceedings will unduly prejudice the Interested Parties who diligently filed their claims before a court of law.
15. I further find that the Applicant’s contention that the Defendant herein breached the terms and conditions of the insurance contract is a matter that has nothing to do with the Interested Parties who were not privy to the said insurance contract.
16. This Court holds the view that staying the Interested Parties’ suits will unnecessarily delay their cases and impede the course of justice. In the final analysis, I find that the instant Application is not merited and I therefore dismiss it with costs to the Interested Parties.
17. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 13<sup>TH</sup> DAY OF JUNE 2024.**

**W.A. OKWANY**

**JUDGE**

