



Zhongao Overseas Construction v Occidental Assurance Company Limited; Muthungu (Interested Party) (Civil Suit E001 of 2023) [2023] KEHC 1061 (KLR) (9 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1061 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL SUIT E001 OF 2023
LW GITARI, J
FEBRUARY 9, 2023**

BETWEEN

ZHONGAO OVERSEAS CONSTRUCTION PLAINTIFF

AND

OCCIDENTAL ASSURANCE COMPANY LIMITED DEFENDANT

AND

LEWIS GITONGA MUTHUNGU INTERESTED PARTY

RULING

1. Before this court is the plaintiff's Application dated January 13, 2023 and filed on January 17, 2023. The said application seeks for orders That:
 - i. Spent.
 - ii. Spent.
 - iii. Upon hearing and determination of this Application, the honourable court be pleased to order a stay of proceedings of this matter and/or issue an order restraining the Interested Party from proceeding with further hearing and determination of Chuka Civil Suit No. E042 OF 2020; Lewis Gitonga Muthungu Mutegei Versus Zhonghao Overseas Construction Engineering Co. Ltd.
 - iv. Upon hearing of this Application and suit, this honourable court be pleased to order the defendant/respondent to take over Chuka Civil Suit No. E042 Of 2020; Lewis Gitonga Muthungu Mutegei Versus Zhonghao Overseas Construction Engineering Co. Ltd and defend it and settle all consequential decrees or orders arising thereto.
 - v. The costs of this Application be in the cause.



vi. Any other orders that court may deem fit.

The application was certified as urgent and the court directed that the respondent be served for the matter to come up for interpartes hearing on 2/2/2023.

2. The Application is based on the grounds on the face of it and is supported by the affidavit sworn by Ephraim Waikwa Ndegwa, the Legal Officer of the Plaintiff/Applicant herein. He avers that the Interested Party was involved in a road traffic accident on or around 1 March 2, 2020 and consequently filed suit No. Chuka Civil Suit No. E042 of 202; Lewis Gitonga Muthungu Mutegi –versus- Zhonghao Overseas Construction Engineering Co. Ltd. That the said accident involved motor vehicle registration number KCJ 419N owned by the plaintiff/applicant and insured by the defendant/respondent at the material time under Policy Number COMP/07/02/2611/10. The Applicant thus asserts that the respondent is liable to take up the matter, defend it, and settle consequential decrees and orders arising thereto. It is the applicant's case that despite being aware of the accident and its liability and statutory obligation, the defendant/respondent has blatantly failed to take up the matter and defend it thus exposing the plaintiff/applicant to unnecessary litigation and losses. That if the hearing of the matter proceeds on January 19, 2023, the Plaintiff/Applicant will suffer injustice. The Applicant thus urged this court to allow the application as prayed.
3. The application is expressed to have been brought under the provisions of article 22 and 23 of the Constitution of Kenya, sections 1A, 1B, 3 & 3A of the Civil Procedure Act (cap 21 of the Laws of Kenya), Order 40, Rules 1 & 2, Order 52 Rule 1 of the Civil Procedure Rules (2010) and all other enabling provisions of the law.
4. The application is unopposed as the defendant though duly served did not appear in court at the time of hearing nor did they file any documents to oppose the application. The affidavit of service was filed in court on 2/2/2023 showing that the defendant was served on 27/1/2023

Analysis

5. I have considered the present application and the affidavit in support of the same. The main issue for determination is whether this Court should order the defendant/respondent to take over Chuka Civil Suit No. E042 Of 2020; Lewis Gitonga Muthungu Mutegi Versus Zhonghao Overseas Construction Engineering Co. Ltd, defend it and settle all consequential decrees or orders arising thereto.
6. Article 22(1) of the Constitution provides as follows:

“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”
7. Further Article 258(1) of the Constitution provides that :

“Every person has a right to institute court proceedings claiming that this Constitution has been contravened, or is threatened with contravention.”
8. The right to institute court proceedings under article 22(1) of the Constitution is available to any person claiming that their right or fundamental freedom has been infringed.
9. It is correct, as asserted by the applicant, that a party who takes out an insurance policy should expect that, in the event that the risk insured against occurs, the insurance company will make payment in respect thereof, and that the insured will not have to be personally liable. However, it is a general



proposition that the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107(1) of the Evidence Act (chapter 80 of the Laws of Kenya), which provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

10. In the present case the applicant contends that she had contractual rights with the defendant under Policy Number Comp/07/02/2611/10 covering injuries suffered by the Interested Party. The applicant has annexed a police abstract showing that the vehicle which was involved in the said accident being Policy Number COP/07/02/2611/10 and certificate No.19660827 commencing on 5/11/2019 and expiring on 4/10/2020. The Insurance Company is given as Occidental Assuarances. The accident involving Lewis Gitonga who was a rider occurred on 12/5/2020. The abstract is annexure EWD -2. This I find is conclusive evidence that the said motor vehicle which is owned by the record applicant as per the record from National Transport and Safety Authority annexure EWD -1, was insured by the respondent and the insurance cover was in place at the time the accident occurred.

The gravamen of the applicant’s case is that in pursuance of the insurance contract, and section 5 and 10 of The Insurance Motor Vehicles (Third Party Risks) Act cap 405 Law of Kenya, the defendant is obligated to take up the matter and defend it on behalf of the applicant as well as settle any claims as may be awarded against the applicant. However, the respondent has abandoned its obligation under the said contract of Insurance and the applicant risks being ordered to compensate the plaintiff in the case proceeding before the Magistrate’s Court section 5 of the Insurance Motor Vehicles Third Party Risks Act (*supra*) it is provided as follows:-

In order to comply with the requirements of section 4, the Policy of Insurance must be a policy which-

- a. is issued by a company which is required under the Insurance Act 1984 (cap 487) to carry on motor vehicle Insurance business; and
- b. Insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on the road.

Provided that a policy in terms of this section shall not be required to cover-

- i. Liability in respect of the death arising out of and in the cause of his employment of the person in the liability in respect of the death arising out and in the employment of a person insured by the policy, or of bodily injury sustained by such person arising out of and in the course of his employment ; or
- ii. Except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of occurrence of the event out of which the claims arose; or
- iii. Any contractual liability
- iv. Liability of any sum in excess of three million shillings, arising out of a claim by one person. Act No.46 of 1960 Section 48, (Act No. 10 of 2006 Section 34.)”

Under section 10 of the Act, there is a statutory duty on the insurer to satisfy Judgments against persons insured. The Section provides as follows:

10 (1) If after a Policy of Insurance has been effected, Judgment in respect of any such liability as is required to be covered by a police under paragraph (b) of Section 5 (being liability covered by the terms of the Policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled



to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section pay to the person entitled to the benefit of the Judgment any sum payable there under in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interests on Judgments.

Provided that the sum payable under a Judgment for a liability pursuant to this section shall not exceed the maximum percentage of the sum specified in section 5b prescribed in respect thereof in the schedule.”

Having considered the application and the above provisions, I find that the Act obliges an insurer to pay the decretal sum in respect of an accident covered by its Insurance Policy.

The applicant has produced a police abstract which proves on a balance of probabilities which is the standard of proof in civil cases that an accident did occur involving its motor vehicle which was covered by the respondent under a policy of Insurance Number.

The Insurance Company, that is the defendant is bound by section 10(1) of the Act to pay third- party claims.

The issue which I have to consider is whether this court has jurisdiction to order the defendant to take over Chuka Civil Suit No.E042/2020 and defend it and settle all consequential decrees or orders arising thereto. The import of section 10 of the Act is that for liability to accrue, the applicant has to prove *inter alia* that the vehicle was insured by the respondent, there is a Judgment in favour of a claimant against the insured, that statutory notice was issued to the insurer either at least 14 days before filing of the suit wherein Judgment has been obtained or within 30 days of filing the suit where Judgment has been obtained and the claimant was a person covered by the Insurance Policy.

The applicant has demonstrated that the vehicle was insured by the respondent. The courts intervenes to compel the insurer to satisfy Judgment against persons insured. The applicant has however not demonstrate the other requirements under section 10 of the Act (*supra*). This application is premature and does not meet the threshold for this court to issue the orders the applicant is seeking. The interested party has filed a suit against the defendant. There is a procedure for joining a party in a suit.

In the end I find that the application lacks merits. I dismiss it. The interim order of stay of proceedings in Chuka Civil Suit No.E042 of 2020 lapses as it was issued pending the hearing and determination of this application.

Dated, signed and delivered at Chuka this 9th day of February 2023.

L.W. GITARI

JUDGE

9/2/2023

The ruling has been read out in open court.

L.W. GITARI

JUDGE

9/2/2023

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