



Occidental Insurance Co. Ltd v Omondi; Makongo (Suing as Admin of Estate of Cain Menganyi Nyandira - Deceased) (Interested Party) (Civil Appeal E001 of 2023) [2024] KEHC 15234 (KLR) (14 November 2024) (Ruling)

Neutral citation: [2024] KEHC 15234 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL E001 OF 2023
A. ONG'INJO, J
NOVEMBER 14, 2024**

BETWEEN

OCCIDENTAL INSURANCE CO. LTD APPLICANT

AND

ERICKSON ODHIAMBO OMONDI RESPONDENT

AND

**MENGANYI MAKONGO (SUING AS ADMIN OF ESTATE OF CAIN
MENGANYI NYANDIRA - DECEASED) INTERESTED PARTY**

RULING

1. Before this court for determination is the applicant's application dated 9th August, 2024 seeking the following reliefs against the Respondent;
 - a. That an order does issue staying proceedings in the following case;
 - i. Kehancha SPMC No. E001 of 2023 *Meng'anyi Makongo (Suing as Admin of the Estate of Cain Meng'anyi Nyandira v Erickson Odhiambo Omondi.*
 - ii. Migori CMCC No. 13 of 2023 *Jared Murimi Roba v Erickson Odhiambo Omondi.*
 - iii. Migori CMCC No. 40 of 2023 *Consolata Mwajuma Otieno & Brian Horace Otieno (Suing as personal Representatives of the Estate of Bestine Awour Otieno v Erickson Odhiambo OmondI.*
 - iv. Any other matter arising from the same cause of action.
 - b. That Costs of this application be provided for.



2. The application is supported by an affidavit sworn by Phestus Ramogi Ojala who states that he was instructed to defend the following cases by Occidental Insurance Company Ltd;
 - a. Kehancha SPMC No. E001 of 2023 *Meng'anyi Makongo (Suing as Admin of the Estate of Cain Meng'anyi Nyandira v Erickson Odhiambo Omondi)*.
 - b. Migori CMCC No. 13 of 2023 *Jared Murimi Roba v Erickson Odhiambo Omondi*.
 - c. Migori CMCC No. 40 of 2023 *Consolata Mwajuma Otieno & Brian Horace Otieno (Suing as personal Representatives of the Estate of Bestine Awour Otieno v Erickson Odhiambo Omondi)*.
3. He avers that upon filing memorandum of appearance and defence, the dispute arose as to whom between the Plaintiff and Defendant in the instant suit is liable to settle decrees that might be passed in the said primary suits. This suit is therefore brought by the plaintiff/applicant seeking to avoid liability for the accident.
4. He prays for an order in the suits given that the suits relates to a determination of the issue whether the Defendant/Respondent is to be blamed for the accident and upon determination of this issue, a question will arise whether the plaintiff/applicant should settle the decrees that might be passed in Kehancha SPMC No. E001 of 2023 *Meng'anyi Makongo (Suing as Admin of the Estate of Cain Meng'anyi Nyandira v Erickson Odhiambo Omondi)*, Migori CMCC No 13 of 2023 *Jared Murimi Rioba v Erickson Odhiambo Omondi* and Migori CMCC No 40 of 2023 *Mwajuma Otieno & Brian Consolata Horace Otieno (Suing as Personal Representatives of the Estate of Bestine Awour Otienov Erickson Odhiambo Omondi* and any other matter arising from the same cause of action.
5. It would be in the interest of justice to stay the said suits pending hearing and determination of this case. As the insurer to the Defendant/Respondent, the Plaintiff is exposed to tremendous prejudice since on the other hand, the Plaintiff is seeking to prove that the Defendant/Respondent was in breach of the policy agreement No. COMP/07/5685987/03.
6. He states that if the court makes a determination that the plaintiff herein is under no obligation to indemnify the Defendant, it will suffer prejudice if Kehancha SPMC No. E001 of 2023 *Meng'anyi Makongo (Suing as Admin of the Estate of Cain Meng'anyi Nyandira v Erickson Odhiambo Omondi)* Migori CMCC No 13 of 2023 *Jared Murimi Rioba v Erickson Odhiambo Omondi* and Migori CMCC No 40 of 2023 *Consolata Mwajuma Otieno & Brian Horace Otieno (Suing as Personal Representatives of the Estate of Bestine Awour Otieno v Erickson Odhiambo Omondi* and any other matter arising from the same cause of action are paid by the plaintiff before the determination of this suit.
7. He deposed that the Plaintiffs in the above stated cases will not suffer and do not stand to suffer any much loss or prejudice given that the determination of this case will settle the issue as to who is supposed to settle any decree that may be passed in their favour. It would be in the best interest of justice to grant the prayers as proposed in the notice of motion application.
8. In opposition to the application, the 1st interested party filed a replying affidavit dated 9th October, 2023. In the replying affidavit, he deposes that;
 - a. The application dated 9th August, 2023 is bad in law, frivolous and vexatious as it offends the provisions of the [Insurance \(Motor Vehicles Third Party Risks\) Act](#) Cap 405 of the Laws of Kenya.
 - b. The application offends Sections 4, 10 and 16 of Cap 405.



- c. In the event the application is allowed then it will allow the insurer abdicating their statutory obligations and mandate of compensating accident victims thus defeating the very essence of the enactment of the *Insurance (Motor Vehicle Third Party Risks) Act*.
- d. If the Defendant breached its terms of insurance policy, the law is clear that the plaintiff should first pay the claim and thereafter seek redress from the Defendant as per the law.
- e. A case had been filed against the applicant and if the application is allowed it will delay my case leading to a delayed justice and miscarriage of justice.
- f. The application is brought in bad faith and the same should be dismissed with costs.

Plaintiff's/Applicant's submissions

- 9. The applicant submitted that the application is in the interest of justice as the same was brought expeditiously as required under the *Constitution*. The constitutional concern in an application for stay of proceedings is for the court to guard against the right to fair trial, access to justice and the need for expeditious disposal of cases.
- 10. It was urged that the declaratory suit in which the application for stay is made was filed on time before the primary suits proceeded so as to dispose of the matters and for the plaintiffs in the lower court can get timely justice. This suit is competent and yet to be heard and can only succeed if this current application is allowed because in the event the lower court cases are not stayed then the declaratory suit will be rendered nugatory.
- 11. It will be in the interest of justice to grant orders of stay of proceedings in the lower court to give room for the determination of the declaratory suit which is yet to be heard. The determination of the declaratory suit will give a clear picture on who is liable to whom the decree in the primary suit should be enforced.
- 12. It was submitted that Section 10 of the *Insurance (Motor Vehicle Third Party Risks) Act* Cap 405 provides that the Insurer has a duty to satisfy a judgement against the person insured. That obligation is detached from an Insurer who obtains declaration that he can avoid the policy of insurance.
- 13. The motor vehicle registration No. KCR 240 N in question had been insured only for private use only but on that particular day when the accident occurred, the said motor vehicle had been hired contrary to the policy terms and conditions of insurance between the Applicant and the Defendant.
- 14. The applicant asked this Court to allow the application and grant stay of proceedings. The Applicant put reliance on the case of Machakos Civil Suit No. 20 of 2019-Trident Insurance Company Ltd vs Amos Njenga Gitau T/A Young Achievers School and urged this court to allow the application as the declaratory suit has high chances of success and if orders of stay are not issued it may be rendered nugatory.
- 15. The Interested party in his submissions argued that stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant as it infringes on the right to access justice, right to be heard and right to fair trial. That the test for stay of proceedings is high and stringent and the Applicant had not provided satisfactory reason in the cited cases. This position was supported by the *Kenya Wildlife Service vs. James Mutembi* (2019) eKLR.
- 16. The interested party contended that the reason that the applicant wants to determine whom between the applicant and the Respondent should satisfy decrees in the filed suits is not reason enough to stay proceedings. That the issue can be deliberated even after conclusion of the filed suits. It was further



argued that if suits are stayed it will lead to prolonged delay leading to injustice and a miscarriage of justice on the part of the interested party.

17. The interested party argued the court to dismiss the application dated 9th August, 2023 as it lacks merit.

Analysis and Determination

18. Having considered the applicant's application dated 9th August, 2024; I find the issue condensing for determination is whether the applicant's deserves the orders being sought.

19. The applicant is seeking stay of proceedings in Kehancha SPMC No. E001 of 2023 *Meng'anyi Makongo (Suing as Admin of the Estate of Cain Meng'anyi Nyandira v Erickson Odhiambo Omondi*, Migori CMCC No. 13 of 2023 *Jared Murimi Roba v Erickson Odhiambo Omondi* and Migori CMCC No. 40 of 2023 *Consolata Mwajuma Otieno & Brian Horace Otieno (Suing as Personal Representatives of the Estate Of Bestine Awour Otieno v Erickson Odhiambo Omondi* and any other matter arising from the same cause of action.

20. This court has powers to stay proceedings under its inherent jurisdiction reserved in section 3A of the [Civil Procedure Act](#) which provides as follows: -

“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.

21. In the case of [Kenya Wildlife Service vs. James Mutembei](#) [2019] eKLR the court held that stay of proceedings is a grave judicial action which seriously interfere with the right of a party in conducting his or her litigation. It impinges on the right to access to justice, right to be heard without delay and overall right to fair trial as enshrined in the Constitution. Therefore, the test for stay of proceedings is high and stringent.

22. The parameters for staying of proceedings were set out in the case of *Global Tours & Travels Limited*; Nairobi HC Winding Up Cause No. 43 of 2000 where the Court 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”

23. Similarly, on the subject of stay of proceedings, the [Halsbury's Law of England](#), 4th Edition. Vol. 37 pages 330 and 332 states as follows;

“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 not 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.”

24. The instant application before Court is brought pursuant to Section 10(4) of the *Insurance (Motor Vehicle Third Party Risks) Act* Cap 405 provides:-

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.

25. The applicant submitted that the motor vehicle subject of these proceedings had been insured for private use only but on the material date of the accident, the motor vehicle had been hired contrary to the terms and conditions of the insurance policy. It is as a result of the alleged breach of the terms of the policy that the applicant is seeking this court to determine the issue of liability before the suits filed in the subordinate courts are heard and determined.
26. Going by the above provisions of Section 10 (4) of Cap 405 the Insurer is required to file and obtain a declaratory order before, or within three months after, the commencement of the proceedings in which the judgment was or is to be given against the insured. The second condition is that the Insurer ought to have given notice to the plaintiff in the said proceedings before or within fourteen days after the commencement of that action. The prayers for stay of proceedings against the plaintiff's insured does not therefore arise in the circumstances of the above provisions. The question that begs to be answered is when the suits in the lower court were filed, whether the Applicant commenced the proceedings herein within three months of commencement of the suits in the lower court and whether declaratory orders have been obtained.
27. The Applicant has not indicated the current position of the matters before the subordinate courts and it has not been shown what prejudice will be suffered if the trial court proceeds and determine the said suits considering that they are yet to be concluded and it is not known whether the defendant in those suits will be found liable to compensate the plaintiffs for any damages that may have been suffered.
28. In any case, in the event that the suits are determined in favour of the plaintiffs they will be at liberty to pursue the defendant in execution of the decrees therein. The Applicant should therefore concentrate



on prosecuting the declaratory suit rather than struggling to stay proceedings in which it is not a party. The claims in the trial court and the ones herein and the respective parties are distinct from each other and determination of liability in the current matter cannot affect determination of liability between the interested party and the defendant herein save that at the time of execution of the decree against the defendant the applicant may be called upon to satisfy the same as the insurer. If the Applicant will have prosecuted the declaratory suits successfully then they have nothing to fear.

29. This court therefore finds that the application for stay of proceedings in Kehancha SPMC No. E001 of 2023 *Meng'anyi Makongo (Suing as Admin of the Estate of Cain Meng'anyi Nyandira v Erickson Odhiambo Omondi*, Migori CMCC No. 13 of 2023 *Jared Murimi Roba v Erickson Odhiambo Omondi* and Migori CMCC No. 40 of 2023 *Consolata Mwajuma Otieno & Brian Horace Otieno (Suing as personal Representatives of the Estate of Bestine Awour Otieno v Erickson Odhiambo Omondi* does not have merit and the same is demised with costs to the interested party.

DELIVERED DATED AND SIGNED AT MIGORI THIS 14TH DAY OF NOVEMBER, 2024.

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A. ONGIJO

JUDGE

In the presence of:

Court Assistant Victor / Lola

Mr. Ojala Advocate for Appellant

Ms. Cheboi Ouma & Co Advocate for 1st interested party

