



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAROK
CIVIL SUIT NO. 14 OF 2018

SAHAM ASSURANCE COMPANY LIMITED.....PLAINTIFF

-VERSUS-

LAMECK OKARI MAIRURA.....DEFENDANT

RULING

Stay of proceedings

[1] The significant order sought in the Notice of Motion dated 2nd October, 2020 is stay of proceedings in NAROK CMCCC NO 225 OF 2018 pending the hearing and determination of this suit.

[2] The Motion is supported by grounds set out in the motion, the supporting affidavit, further affidavit and which are duly expounded in the written submissions filed herein. It is discernible from these filings that the applicant's arguments are: -

(i) That the insurance cover issued by the applicant on the insured vehicle was for private use. But, their investigations reveal that the insured vehicle was being used for hire and reward contrary to the policy of insurance thereto. The insured had made a false statement in the claim form that the injured persons were his cousins and friend.

(ii) That following the discovery of this breach of the policy of insurance, the applicant notified the insured of the intention to avoid liability arising from the said breach, and consequently, filed this suit within the period prescribed in section 10 of the Insurance (Motor vehicles Third Party Risks) Act to avoid liability.

(iii) That section 10 of the Act requires the insurer to satisfy judgment obtained by third parties against the insured. And, upon obtaining judgment the claimant will institute declaratory suit for payment of the judgment by the applicant. According to the applicant, the imminent danger of a declaratory suit poses real loss and damage, hence, the need for stay of proceedings by the third parties.

(iv) That the court should grant stay of proceedings in the interest of justice.

[3] The applicant cited the following cases in support of their arguments: -

a. **George Oraro vs. Kenya Television Network Naroibi HCCC No. 151 of 1992**

b. **Britam General Insurance Company (Kenya) Limited vs Stephen Wambua Masila & 11 others [2020] eKLR**

c. **Re Global & Travel Ltd HCWC No. 43 of 2000**

e. **Ezekiel Mule Musembi v. H. Young & Company (E. A) Limited [2019] eKLR**

f. **Muchanga Investment Limited vs. Safari Unlimited (Africa) Ltd & 2 others Civil Appeal No. 25 of 2002 [2009] KLR 229**

g. **Monarch Insurance Co.Ltd vs. Wycliffe Onyango Odenda [2016] eKLR**

h. **Trident Insurance Company Ltd v. Amos Njenga Gitau t/a Young Achievers school [2019] eKLR**

i. The Great Insurance Company of India Ltd vs. Lillian Evelyn Cross and Another [1966] EA 90

[4] The respondent opposed the application through a replying affidavit and submissions which augment his position. According to him: -

(i) The applicant cannot seek from this court a stay of proceedings in the lower court lest they should create confusion in the hierarchy of courts. Instead, they should seek for stay of proceedings in the lower court file.

(ii) That the claimants were not fare-paying passengers and so are covered by the policy. He took a swipe at the investigation and said it was biased and that it contains matters of evidence which can only be evaluated in a trial.

(iii) That the advocates for the applicant are acting for him in the proceedings in the lower court, hence, it is improper for them to act for the applicant in a suit against him.

(iv) That one of the parties in the lower court proceedings has not been joined as a party in these proceedings. Thus, it would be unjust to make orders of stay of those proceedings in the absence of such party. He asked the court to decline the request to stay the proceedings in the lower court.

[5] The respondent relied on the following cases: -

i. *Blue shield Insurance Co. Ltd v. Kennedy Tangara & 8 others [2006] eKLR*

ii. *Bigot flowers (K) Limited v. Kenya Alliance Insurance Company Ltd & Another [2008] Eklr*

iii. *Geminia Insurance Co.Ltd v. Jackson Waweru [2016] Eklr*

iv. *Christopher Ndolo Mutuku & Caroline Njoki Mutuku v. CFC Stanbic Bank Limited Gikonyo, J in High Court Civil Court No. 74 of 2011.*

[6] The interested party also opposed the application through a replying affidavit and submission which succinctly set out the following grounds: -

(i) That no notice of the declaratory suit was served upon the plaintiff as required by the proviso to section 10(4) of the Act. They faulted the purported certificate of posting annexed in the further affidavit on two fronts; (a) it is not authentic; and (b) the affidavit hosting it was filed without leave of the court.

(ii) That the applicant is not a party in the proceedings in the lower court. As such execution will be against the insured. Hence, the applicant stands to suffer no loss or damage.

ANALYSIS AND DETERMINATION

[7] To understand the serious nature of an order of stay of proceedings, read the following passages from eminent literary writing in *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.”

[8] **Ringera J (as he then was)** stated in a masterly fashion, **some** of the relevant considerations for stay of proceedings pending appeal in **Daniel Walter Rasugu Nbi Hccc No 15 of 2006; Global Tours & Travel Limited; Nairobi HC Winding Up Cause No.43 of 2000** as follows: -

“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 in deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. It will also consider 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.

[9] Be that as it may, the greater constitutional concern in an application for stay of proceedings is for the court to zealously guard against impediment of the right to fair hearing, access to justice and the need for expeditious disposal of cases. Therefore, the test for stay of

proceedings is quite stringent for it interferes with a person's right to litigate his grievances in court expeditiously and without unnecessary interruption. Thus, although the decision by Ringera J (as he then was) was determined before the Constitution of Kenya, 2010, the statement that "...**the sole question is whether it is in the interest of justice to order a stay of proceedings**" is an indication that right to litigate a suit before a court of law should not be interrupted easily except in the interest of justice.

[10] I do note, albeit inadvertent, a dangerous invitation. Some arguments made by the applicant and the insured in this application relate to the merit of the suit. Thus, I will avert the temptation to fall to the invitation; I will state just enough for purposes of this application.

[11] Applying the test, this suit is in the nature of a declaratory suit against the insured to repudiate liability for breach of the policy conditions. 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 the insured. Unmerited order of stay of proceedings violates the principle of justice on expeditious disposal of cases.

[12] That is not all. Notably, one of the plaintiffs in the lower court proceedings is not even a party in these proceedings, thus, violating the basic principle of justice that no one should be condemned unheard. Being of that orientation, when I place all these matters on scale, the preponderant weight tilts towards refusing the request for stay of proceedings. The answer to "... **the sole question... whether it is in the interest of justice to order a stay of proceedings**" is; it is not in the interest of justice to stay proceedings by third parties herein. As such, the application is denied with no order as to costs. It is so ordered.

Dated, signed and delivered at Narok through Microsoft Teams Online Application this 1st day of March 2021

F. GIKONYO

JUDGE

In the Presence of:

1. M/s Chelule holding brief for Karanja for the Plaintiff
2. M/s Khan for Interested Party - absent
3. Mr. Langat for Respondent - absent
3. Mr. Kasaso – Court Assistant

F. GIKONYO

JUDGE