



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAROK
CIVIL SUIT NO. E001 OF 2021
(CORAM: F.M. GIKONYO J.)

BRITAM INSURANCE CO. LTD.....PLAINTIFF/APPLICANT

-VERSUS-

JANE MUTHONI MWANGI.....DEFENDANT/RESPONDENT

KEVIN OUMA OCHIENG, BEATRICE AYUGI, ROSELI NE ADHIAMBO

MUNGA & GEORGE OKEBE RADDING.....INTERESTED PARTIES

RULING

1. Other than costs, the significant order sought in the Notice of Motion dated 20th April, 2021 is;

i. Stay of proceedings in Narok CMCC NO. E4, E5, E20 all of 2020 and E027 of 2021 pending the hearing and determination of the instant application and suit herein.

2. The Motion is supported by grounds set out in the motion, the supporting affidavit sworn by EDINAH MASANYA, a legal officer of the plaintiff/Applicant. The grounds are also duly expounded in the written submissions filed herein. It is discernible from these filings that the applicant's arguments are: -

i. That whereas the insurance cover issued by the applicant on the insured vehicle was for private use, their investigations reveal that the insured vehicle was being used for hire and reward contrary to the policy of insurance thereto.

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 this court is clothed with the requisite jurisdiction to grant such orders under Section 3A of the Civil Procedure Act.

iv. That the preliminary objection is raised on the application and not the suit. That the disclaimer suit was filed on 20th January 2020, the plaintiff applicant was served with the pleadings on 30th October 2020 hence the plaintiff applicant adhered to the stipulated timelines in Section 10(4) of the Insurance Act of filing within three months of service of pleadings.

v. That the suit herein is between the insurer and the insured and that the interested parties are bystanders in these proceedings and lack locus standi to raise any substantive issues as they may not be directly involved in the litigation

vi. That Section 10 of the Act requires the insurer to satisfy judgment obtained by third parties against the insured. And, upon obtaining judgment the claimants will institute declaratory suit for payment of the judgment by the Plaintiff/ applicant. According to the Plaintiff/applicant, the imminent danger of a declaratory suit being a mere academic exercise, hence, the need for stay of proceedings by the third parties.

vii. That the court should grant stay of proceedings in the interest of justice.

3. The Plaintiff/ applicant cited the following cases in support of their arguments: -

i. George Oraro Vs Kenya Television Network Nairobi HCCC No. 151 of 1992

ii. Britam General Insurance Company (Kenya) Limited V Stephen Wambua & 11 Others [2020] eKLR.

iii. Methodist Church in Kenya V Mohamed Fugicha & 3 Others [2019] eKLR.

iv. Mumo Matemu V Trusted Society Of Human Rights Alliance & 5 Others Civil Appeal No. 290 Of 2012.

v. Re Global Tours & Travel Ltd HCWC NO. 43 OF 2000.

vi. Monarch Insurance Co. Ltd Vs Wycliffe Onyango Odenda [2016] eKLR.

vii. Trident Insurance Company Ltd V Amos Njenga Gitau T/A Young Achievers School [2019] eKLR

viii. The Great Insurance Company of India Ltd Vs Lilian Evelyn Cross and another [1966] EA 90.

4. The Defendant/respondent did not oppose the application.

5. The interested parties opposed the application through a replying affidavit, a notice of preliminary objection dated 25th September, 2021 and written submission which succinctly set out the following grounds: -

i. That the plaintiff/ applicant's application dated 20/04/2021 offends the provisions of Section 10(4) of the Insurance (Motor Vehicles Third Party Risks) Act Cap 405 as the applicant ought to have filed this disclaimer suit within a period of 3 months from the date upon which he was served with the summons and pleadings. They therefore sought to have the same struck out *ex debito justitiae* with costs to the respondent.

ii. The interested parties submitted that the application dated 20th April 2021 is grossly lacking both in form and substance. The Plaintiff/ applicant has not met the requirements for granting the orders sought in their application. They urged this court to frown upon the fragrant abuse of the court process by the Plaintiff/ applicant and protect the interested parties herein from an academic exercise.

iii. The interested parties further urged this court to find merit in their notice of preliminary objection and replying affidavit and subsequently proceed to dismiss the application dated 20th April 2021 with costs.

6. The interested parties cited the following cases in support of their arguments: -

i. Intra Africa Assurance Company Limited Vs Simon N Njoroge Avertana Costa Nrb Ca Civil Appeal No. 41 Of 1996[1997] eKLR.

ii. Geminia Insurance Co. Ltd V EN (Minor Suing Through His Father And Next Of Friend AA0) [2019] eKLR

iii. Britam General Insurance Co Vs Josephat Ondieki KJD HCCC No. 14 Of 2017[2018] eKLR.

iv. APA Insurance Company V Vincent Nthuku [2018] eKLR

ANALYSIS AND DETERMINATION

7. The pleadings and the rival submissions of the parties show the pertinent issues for determination to be: -

a. Of the P.O; the incompetence of the disclaimer suit. It is claimed the suit is barred and or was filed in violation of the law.

b. Of the substantive motion; Whether stay of proceedings in Narok CMCC NO. E4, E5, E20 all of 2020 and E027 of 2021 instituted by interested parties is merited?

Limitation of time on disclaimer suit

8. The core of the preliminary objection herein is that the disclaimer suit was not filed within three months of service of summons as provided in law.

9. A preliminary objection should not be entangled in factual analysis to prove. See Mukhisa Biscuit case.

10. Does the PO herein meet the threshold?

11. The PO is based on Section 10(4) of the Insurance (Motor Vehicle Third Party Risks) Act which provides as hereunder:

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.

12. The section makes three pertinent requirements of a disclaimer suit: i) that the suit should be filed before or within three months of the filing of the suit by the third parties; ii) notice with details of grounds of disclaimer is given before or within 14 days of the commencement of the disclaimer suit to the plaintiff in the primary suit; and iii) the person to whom notice of action is so given shall be entitled to be made a party thereto.

13. Establishing when the two suits- the one by interested parties and the disclaimer suit were filed- or when or whether service of summons of the former was effected- or when or whether notice to third parties was given- are relevant considerations for purposes of limitation of actions and competency of the disclaimer suit. Such exercise will involve much probing of evidence. Courts have stated time and again that matters of limitation of actions should be determined in the trial rather than in summary or preliminary procedures. Accordingly, the PO herein is better for the trial where probing of evidence can take place. The PO fails.

Third party mere bystander?

14. Be that as it may, I noted quite problematic submission by the applicant that the third parties are mere bystanders and are not involved in the disclaimer proceedings.

15. The primary object of the Insurance (Motor Vehicle Third Party Risks) Act is: -

...to make provision against third party risks arising out of the use of motor vehicles

16. The Act provides for a statutory exception to the doctrine of privity of contract and enables third parties to claim under an insurance contract they are not party to. Of essence, the Act creates an obligation on the insurer to pay judgment obtained by a third party. In a sense, the third party also gets a statutory right to so claim. Is this statutory nexus a condemnation of the third party into a mere bystander in a proceeding that may affect the statutory obligation and right in section 10 of the Act?

17. The second pertinent consideration is that the law requires third parties to be given notice of the institution of disclaimer suit, and provides that such person served with notice may be made a party in the disclaimer suit. Does this requirement envisage the third party becoming a mere bystander in disclaimer proceedings?

18. The last important consideration is that Section 10(4) of the Insurance (Motor Vehicle Third Party Risks) Act is an existing law and should be subjected to the ultimate yardstick; section 7 of the Transitional Provisions in the Sixth Schedule of the Constitution which requires courts to construe existing law with such modifications, alterations, adaptations and exceptions in order to bring it into conformity with the Constitution. Consequently, the right to fair hearing which requires that parties should be heard on any matter that is to be resolved by application of the law, should drive a change of approach and enrich earlier jurisprudence by apportioning appropriate proportion of significance to the position of third parties in disclaimer suits.

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 being 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. The court will give directions on this aspect.

Stay of Proceedings.

20. Understanding the nature of an order of stay of proceedings; see 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.”

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 question is whether it is in the interest of justice to order a stay of proceedings.

22. The Plaintiff/Applicant’s main reasons for seeking stay of proceedings in **Narok CMCC NO. E4, E5, E20 all of 2020 and E027 of 2021** is that the defendant/insured breached fundamental warranties, terms and conditions of Insurance Policy thus entitling the plaintiff /applicant to avoid the obligations under policy .That further on determination of Narok suits the plaintiff /applicant will be held liable to settle the claims under the provisions of **Cap 415, Insurance (Motor Vehicle Third Party Risk)Act**, despite having filed this suit seeking declaration that it is entitled to avoid the policy.

23. I will take a more pragmatic approach to his question so as to balance the rights of the 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 of proceedings have been used in the past to stall the suits by the 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.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 15TH DAY OF NOVEMBER, 2021

F. GIKONYO M.

JUDGE

In the presence of:

1. Nduhukire for Interested parties - present

2. Gikaria for defendant - present

3. Nganga for plaintiff (holding brief for Ngeno)

4. Mr. Kasaso - CA