



REPUBLIC OF KENYA



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**Britam Insurance Company Limited v Murage; Mose & 4 others (Interested Party)
(Civil Suit 27 of 2019) [2021] KEHC 247 (KLR) (11 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 247 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL SUIT 27 OF 2019
MW MUIGAI, J
NOVEMBER 11, 2021**

BETWEEN

BRITAM INSURANCE COMPANY LIMITED APPLICANT

AND

ESTHER NJAMBI MURAGE RESPONDENT

AND

SAMSON MAGWARO MOSE INTERESTED PARTY

WASHINGTON NDERITU GICHOI INTERESTED PARTY

NICHOLAS KIPKIRUI YEGON INTERESTED PARTY

MORGAN STANLEY OGUNDEN INTERESTED PARTY

HEZRON OMONDI OKUMU INTERESTED PARTY

RULING

1. By a Notice of Motion dated 11th June, 2021 filed under Certificate of Urgency on 14th June 2021, the Applicants seek the following orders:-
 - a. Spent
 - b. THAT there be interim stay of proceedings in:-
 - i. KITHIMANI PMCC NO. 331 OF 2018 SAMSON MAGWARO MOSE VS BRIAN MUIA, ESTHER NJAMBI MURAGE & MILKA WACHUKA MURAGE



- ii. KITHIMANI PMCC NO. 393 OF 2018 WASHINGTON NEDRITU GICHOI VS BRIAN MUIA, ESTHER NJAMBI MURAGE & MILKA WACHUKA MURAGE
 - iii. KITHIMANI PMCC NO. 28 OF 2021 NICHOLAS KIPKURUI YEGON VS BRITAM INSURANCE CO. LTD
 - iv. KITHIMANI PMCC NO. 30 OF 2021 MORGAN STANLEY OGUNDEN VS BRITAM INSURANCE CO. LTD.
 - v. KITHIMANI PMCC NO. 31 OF 2021 HEZRON OMONDI OKUMU VS BRITAM INSURANCE CO. LTD pending the hearing and determination of the Application.
 - vi. THAT all steps in the above suits listed and any other suit arising out of the aforementioned accident on 30th June, 2017 involving motor vehicle registration number KBP 789R be stayed until Machakos High Court case No. 27 of 2019 which seeks a Declaration to avoid any liability under Policy No. NR4/MPRV/POL/2122152 herein is finally heard and determined.
- c. THAT there be stay of proceedings in the aforementioned matters and any other suit arising out of the aforementioned accident on 20th June, 2017 involving motor vehicle registration number KBP 789R pending hearing and determination of the main suit.
 - d. THAT the costs of this application be provided for.
2. The application is based on ground inter alia that the Applicant may be called upon to satisfy the Judgement if any in the subordinate court suit listed above under Section 10(4) of the *Insurance (Motor Vehicles Third Party Risks) Act*, Cap.405 hence the contradictory Court Orders between the finding of liability between this court and subordinate courts will be an embarrassment to the administration of justice. According to the Applicant, the claim in this suit and the listed suit emanate from the same cause of action.
 3. The Application is supported by the affidavit of Linda Njenga, the Applicant's Legal Manager. She deposed that she has information that the listed suits above which are declaratory suits pursuant to Section 10(4) whose proceedings are sought to be stayed are pending before the subordinate court at Kithimani Law Courts since the Applicant was served with Summons to Enter Appearances.
 4. According to her, the Applicant's advocates on record have filed appearance and defense in the suits. She deposed that investigations on behalf of the Applicant established that at the material time of the accident, 'fare paying passengers' were aboard motor vehicle KBP 789R contrary to the terms and conditions of the insurance contract between the Respondent and the Applicant wherein it was stipulated that the vehicle was strictly for 'private purposes only'. Based on the investigations, she deposed that the Applicant is entitled to avoid the contract under Section 10(4) as no contractual obligation or duty to satisfy any judgement obtained by any party for compensation under the Respondent's policy of insurance exists.
 5. Based on the advice of the advocate, she deposed that the issue of responsibility of the Applicant under Section 10(4) is set to be determined under this suit will be binding on the subordinate court matters listed above. According to her, this suit takes precedence over the Trial Court matters since the



Applicant will suffer irreparable damages in the event the matters before the Trial Court proceed to conclusion before this matter is heard and determined.

6. The Court Notes that the Applicant requested for interlocutory Judgement for declaration that the Applicant is not liable to indemnify the Respondent or any other party. It will be noted that interlocutory judgement was entered. It is not an issue before the court now for hearing and determination.

INTERESTED PARTIES GROUNDS OF OPPOSITION

7. In opposition to the application, the Interested Parties filed grounds of opposition dated 12th July, 2021 stating:-

- a. THAT the Applicant's application is: frivolous, incompetent, vexatious, bad in law, incurably defective, abuse of the court process, an afterthought and brought in bad faith and inordinately filed;
- b. THAT the application discloses no cause of action against the Interested parties;
- c. THAT the Interested Parties were Third Parties within the meaning of Insurance Motor Vehicle 3rd Party Risks Cap 405 and were travelling in a different motor vehicle to the one the Applicant had insured and are therefore strangers to any disagreement as there may be between the Applicant and its insured;
- d. THAT the Applicant fully insured motor vehicle registration KBP 789R Toyota Station Wagon against 3rd party liabilities as per the policy document annexed to the Applicant's application;
- e. THAT there is connection whatsoever between the Applicant and the 3rd Party motor vehicle passengers who are enjoined as interested parties herein.
- f. THAT the Applicant was personally served with a statutory notice on 23rd April 2018 prior to filing of the primary suit and acknowledged receipt thereof by stamping and dating the same; (Copy herein annexed)
- g. THAT the application is solely brought to frustrate the process of execution from its timing as the Applicant was personally served with a notice of intention to file declaratory suit on 30th October, 2020 yet never took any action. (Copy of notice attached).
- h. THAT the Applicant's application lacks merit.

8. The Interested Parties urged the court to dismiss the application.

SUBMISSIONS

Applicant

9. On behalf of the Applicant, the court was referred to the Policy document 'LN1' at page 4 ("Limitation to use" Use for social, domestic and pleasure and for your business and profession"), Police abstract 'LN2', Summons to Enter Appearance 'LN3', Investigation report 'LN5' and Demand letter LN6'. Reliance is placed on Section 10(4) of Cap.405, in *Monarch Insurance Co. Ltd vs. Wycliffe Onyango Odenda [2016]eKLR*, in [*Gateway Insurance Co. Ltd vs Kaboykek Farmers Co-operative Society*](#)



Ltd[2014]eKLR and in *Gateway Insurance Co. Ltd vs Musyoka Muthengi, Nairobi HCC No.666 of 2004* in support of the orders of stay of proceedings against the declaratory suits. It is submitted that the Interested Parties will not suffer any prejudice. According to the Applicant, the orders will prevent this suit being rendered nugatory. It is submitted that the claims fall outside the scope of Cap 405 with no hope of recovery if the court find for the Respondent in this suit. Reliance is placed in *Britam General Insurance Co. (Kenya) Ltd vs Stephen Wambua Masila & 11 Others[2020]eKLR*.

10. It is submitted that judicial time will be squandered if the suits before the Trial Court proceed and judgement arising therefrom have to conform to the outcome of this suit or reversed. Reliance is placed in *Muchanga Investment Limited vs. Safaris Unlimited(Africa) Ltd & 2 Others Civil Appeal No.25 of 2002[2009] KLR*.
11. The Applicant has urged the court to allow the application with costs in the cause.

Interested Parties

12. The Interested parties relied on their grounds of opposition. It is submitted in the affirmative that the Interested parties were covered by the terms of the policy, judgements have been entered against the Applicant at 100% liability and that the Interested Parties are Third Parties within the meaning of the Act (Cap.405). According to the Interested Parties they are were not passengers in the motor vehicle insured by the Applicant hence no issue of breach of policy arises at all. It is submitted that the investigation report established that the Interested Parties were police officers travelling in motor vehicle registration number GK A406 Toyota Land Cruiser. According to them, they are not privy to the dispute between the Applicant and Respondent (Insured).
13. The Interested Parties have urged the court to dismiss the application with costs. Reliance is placed in *HCC No.24 of 2013, Kisii ICEA Lion General Insurance Co.Ltd vs. The Board of Governors Rioma Mixed Secondary School & Nicholas Munge Tai & 22 Others* (Okwanyi J.), Investigation report, Interested Parties police abstract and Policy Document.
14. The court notes that the Respondent did not file a response and/or written submissions in opposition to the Applicant's application.

DETERMINATION

15. The Court considered the application together with the Supporting Affidavit, Grounds of Opposition by interested parties and the written submissions respectively.
16. The suit herein was filed on 24th October 2019 by the Plaintiff/Applicant a licensed insurer and at all material times relevant, the Defendant's motor vehicle Reg No KBP 789R, the Plaintiff issued Certificate of Insurance under Policy Number NR4/MPRV/POL/2122152 for the period of 1st July 2016-30th June2017.
17. The Defendant's Motor Vehicle Reg KBP789R was involved in a road traffic accident on 30th April 2017 along Matuu-Thika Road at Kwa-Majini Bridge in which 5 passengers in the vehicle sustained injuries and the passengers in the other motor vehicles were also injured.
18. The Plaintiff was served with a Notice of intention to sue and summons to enter Appearance in PMCC 330,331,332, 393,394 of 2018 in Kithimani PMCC.
19. The Plaintiff served the Defendant with the Plaint & Summons to enter Appearance and the Affidavit of Service filed on 21st March 2021. The Defendant Esther Njambi Murage failed to enter Appearance and Defense within the requisite statutory timelines. The Plaintiff filed Request for Judgment on 11th March 2021 and judgment was entered on 10th July 2021.



20. The Plaintiff's Application dated 11th June 2021, is premised on Order 40 of the Civil Procedure Rule which provides for Temporary Injunctions and Interlocutory orders. On behalf of the Applicant, its Legal Manager averred that the Applicant may be sued to satisfy the Judgment if any in the subordinate courts as required under Section 10 Insurance (Motor Vehicles Third Party Risks) Act, Cap.405.
21. According to Okwany J. in *Peter Kairu Gitu v KCB Bank Kenya Limited & another* [2021] eKLR:-
- “The important consideration before granting a temporary injunction under order 40 Rule 1 of the Civil Procedure Rules is the proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property, the court is in such a situation enjoined to grant a temporary injunction to restrain such acts.
22. In *Giella vs. Cassman Brown & Company Limited* (1973) E A 358, the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction as follows:
- “Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”
23. The application is also premised on Sections 1A and 1B of the *Civil Procedure Act* which calls for expeditious disposal of suits. Section 3A of the same Act relates to the wide powers of the Court to exercise its discretion to the end of justice between the parties. In *Jadva Karsan vs. Harnam Singh Bhogal* [1953] 20 (1) EACA 74 court held that it is true that there is a wider power under section 97 [now 3A of the *Civil Procedure Act*] to stay proceedings where the ends of justice so require or to prevent an abuse of the Court process.
24. The 1st -5th Interested Parties filed submissions and objected to grant of stay of proceedings of the Applicant's list of cases filed in Kithimani Law Courts which involve the interested parties. They contend that they were not passengers in the Defendant's motor vehicle Motor Vehicle Reg KBP 789R but they were passengers in Reg No GK406 Toyota Land Cruiser which was involved in the road traffic accident with Motor Vehicle KBP 789 R. They are strangers to any dispute or suit between the Plaintiff/Applicant and Defendant and have no relationship with the Plaintiff/applicant and its Insured.
25. The Applicant is seeking stay of proceedings in several suits pending the determination of this suit wherein a Declaration has been sought on behalf of the Applicant to avoid any liability under the Policy No. NR4/MPRV/POL/2122152 that is claimed to have been taken by the Respondent.
26. According to the Applicant two outcomes from different courts will be a waste of judicial time. *Madison Insurance Company Limited v Andrew Kariuki & another* [2018] eKLR15 where Kamau J. stated that:-
- “15. Notably, the main purpose of staying proceedings is to avoid the mischief of different courts of competent jurisdiction hearing a matter between same parties over the same or similar subject matter due to the likelihood of the different courts coming up with different decisions which could cause embarrassment to them.”



27. According to Githua J. in *Kenya Power & Lighting Company Limited vs. Esther Wanjiru Wokabi [2014] eKLR* :

“.....the courts discretion in deciding whether or not to grant stay of proceedings as sought in this application must be guided by any of the following three main principle;

- a) Whether the applicant has established that he/she has a prima facie arguable case;
- b) Whether the application was filed expeditiously; and
- c) Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.”

See Ringera J. (as he then was) *Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000* thus;

“...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”.

28. According to the *Halsbury's Law of England, 4th Edition. Vol. 37 page 330 and 332;*

“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.”

29. The Applicant's declaratory suit is pegged on Section 10(4) of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405:

“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.)

The above provision is to the effect that the insurer can avoid a judgment made in favor of a third party if ".... before or within three months after the commencement....." of the primary suit, the Insurer has obtained a declaration that he was entitled to avoid the policy.

30. In the Plaint dated 24th July, 2019 and filed on 24th October, 2019, the Applicant seeks a declaration that:-

“b. A declaration that the Plaintiff (Respondent) is and has all material times been entitled to avoid the said Policy of Insurance apart from any provision contained therein on the ground that said policy of insurance was obtained by non-disclosure of material facts and or misrepresentation of the facts which were false in some material particulars.”

31. In her supporting affidavit, the Applicant’s Legal Manger averred at paragraph 8 that a Statutory Notice attached and marked as ‘LN5’ was served upon the Respondent. The court notes that a copy of such a notice is not attached. If we go by the Legal Manager’s averments, then the notice would be the one attached to the Plaintiff’s list of documents dated 24th July, 2019 filed together with Plaint in this declaratory suit. The list contains at No.7 a document referred to as a ‘Notice to the Defendant under Cap.405’. A copy of the attached notice is referred to as ‘Notice to File a declaratory suit under Section 10 of Cap.405’ sent by the Applicant’s advocates M.W Muli & Co. Advocates. The Notice is dated 23rd April, 2019.

32. The court notes in the grounds of opposition, the Interested Parties attached a Statutory Notice dated 16th April, 2018 pursuant to Section 10(2) that was served upon the Applicant by the Respondent’s advocates on 23rd April, 2018. The Interested Parties contend that this was prior to filing of the primary suit. The court notes that the record establishes the suit sought to be stayed was filed in the year 2018 and the matter in this court in 2019.

33. In the grounds of opposition, a copy of Notice of Intention to file a declaratory suit proceeding against the Applicant from the Respondent’s advocates is attached. The Notice is dated 29th October, 2020 and bears a stamp from the Applicant dated 30th October, 2020. The Statutory Notice and the Notice to initiate declaratory suits against the Applicant bear the stamp of the Applicant which is clear evidence that the Applicant was aware of the suits. The Legal Manager is silent on whether the notices were served upon the Applicant hence service is not disputed.

34. The suit in this Court is between the Plaintiff/Applicant and the Defendant and has no relation with/to the suits and proceedings filed in Kithimani Law Courts that are between the passengers in GKA406 Toyota Land Cruiser and the Defendant owner and/or driver KBP 789 R. The Investigation Report of 1st July 2017 confirms that on 30th April 2017 at 5.30 hrs along Matuu-Thika Road at Kwa Majini area, as KBP & 789U caught up with Reg KBU164A and as he was midway overtaking, an oncoming 3rd party vehicle Reg No GKA406 H appeared closely ahead and swerved [and collision occurred].

35. These facts depict the relationship between the Plaintiff/Applicant, the Defendant and Interested parties and confirm that the matter in Court now and those in Kithimani Law Courts relate with different parties but both cases revolve around the accident that occurred on 30th April 2017.



36. In deciding whether to order stay of proceedings, the Court has weighed the pros and cons of granting or not granting the stay order. In considering the suit filed herein the parties, the Plaintiff's claim and prayers are different from the matters filed in Kithimani Law Courts which concern the Defendant and the interested parties. The Plaintiff is sought to be joined only as the Insurer of the Defendant.
37. Secondly, the stay of proceedings order sought in the instant suit against the matters in Kithimani to be stayed until the declaratory suit herein between the Insurer/Plaintiff/Applicant and the Insured the Defendant, is merely to avoid liability and not due to any prejudice or injustice. The Interlocutory judgment was entered on 10th July 2021. There is no hearing envisaged in this matter until the interlocutory judgment is set aside as declaratory suit is not determined at an Interlocutory stage and formal proof proceedings are conducted to determine liquidated amounts and not declaratory matter/suit.
38. The Applicant is seeking a declaration to avoid the policy insurance now vide the Plaint on 24th October, 2019 when the suit sought to be stayed were filed in the year 2018. It therefore means as of now the Applicant does not have a declaration sought pursuant to Section 10(4) of *Insurance Act* yet, the interlocutory judgment is only conclusive of a liquidated amount and formal proof proceedings are conducted.
39. Further the Court notes that a Notice of Dismissal of this suit dated 10th March 2021 had been issued by this court pursuant to Section 17(2) of the Civil Procedure Rules, 2010. To the Court this was a sign of indolence. No explanation has been offered by the Applicant on the delay. Ringera J. in *Global Tours & Travels Ltd NBIHC W.U. Cause No. 43 of 2000 (UR)* was clear on the need to file applications seeking stay of proceedings without unreasonable delay.
40. Further the Learned Judge stated that:-
- “ the sole question is whether it is in the interest of justice to order a stay of proceedings.”
41. The court's view is that it would not be in the interest of justice to stay proceedings in the suits before the Trial Court. The Applicant has filed appearance and defenses in the declaratory suits before the Trial Court.
42. The Trial Court has the opportunity to ventilate the issue of liability and/or quantum between the parties and/or whether the Plaintiff/Applicant is liable to settle the claim if at all as Insurer of the Defendant, if judgment is against the Defendant or not. Also, the issue whether the Defendant breached the contract of insurance and/or whether the Plaintiff/Applicant may legally avoid Insurance Policy will be determined. Thereafter, any aggrieved party may exercise right of appeal in the High Court.
43. The Court finds that no prejudice will be suffered by the Applicant if the proceedings before the subordinate courts are not stayed. Stay of proceedings is granted where the Applicant establishes a prima facie case, shows sufficient reason that in the interest of justice the stay is granted. The Applicant has not established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.

DISPOSITION

44. Accordingly, the court issues the following orders: -

The Court finds that the application lacks merit.

- a. The application for stay of proceedings accordingly dismissed.



b. The costs of this application be borne by the Plaintiff/Applicant.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 11TH DAY OF NOVEMBER 2021.
(VIRTUAL CONFERENCE)**

M.W MUIGAI

JUDGE

IN THE PRESENCE OF:

Gad for the Plaintiff/Applicant

Kilonzo holding brief Mutonga for interested parties

Geoffrey - Court Assistant

