



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL SUIT NO 19 OF 2017

BRITAM GENERAL INSURANCE COMPANY (KENYA) LIMITED.....PLAINTIFF

VERSUS

STEPHEN WAMBUA MASILA.....RESPONDENT

AND

JONATHAN MAKAU MBINDYO & 10 OTHERS.....INTERESTED PARTIES

RULING

1. By a Motion on Notice amended on 2nd September, 2019, the Plaintiff/Applicant herein seeks orders staying proceedings in Kithimani PMCC No. 426 of 2018, RMCC No. 207 of 2016, RMCC No. 238 of 2016, RMCC No. 221 of 2016, RMCC No. 212 of 2016, RMCC No. 400 of 2016, PMCC No. 232 of 2016, PMCC No. 367 of 2016, PMCC No. 372 of 2016 and PMCC No. 235 of 2016 pending before the Magistrate's Courts involving motor vehicle registration number KBZ 613G till the determination of this suit.

2. In this suit the Plaintiff contends that it was the insurer of the said vehicle which was insured for the purposes of carrying small luggages like clothes with limitations as to use which does not involve the carriage of fare paying passengers. However, contrary to the terms of the said policy, the Defendant herein, the insured, allegedly carried fare paying passengers who were allegedly injured on or about 9th February, 2016 as a result of which the insured was sued in the said various suits.

3. In this suit, the Plaintiff seeks declaration that since the policy was obtained by misrepresentation of facts which were false in some material particulars or by non-disclosure of material facts by the Defendant/insured, the Plaintiff is entitled to avoid the said policy of insurance.

4. According to the Plaintiff it has been sued or may be sued to satisfy judgement in the said suits under section 10 of Cap 405 yet the Plaintiff's liability to the Defendant/Insured is yet to be determined in this suit. That decision will be binding on the subordinate court matters. Since the Defendant forwarded to the Applicant herein the motor claim indicating that the said vehicle was carrying small luggage (clothes), it was the Plaintiff's case that contradictory findings of liability will be an embarrassment to the administration of justice hence it is in the interest of justice that this matter takes precedence over the subordinate court matters.

5. In their opposition to the said application the interested parties relied on grounds of opposition filed herein.

Determination

6. I have considered the issues raised in this application.

7. It is not in doubt that this Court has powers to stay proceedings under its inherent jurisdiction reserved in section 3A of the *Civil Procedure Act*. See George Oraro vs. Kenya Television Network Nairobi HCCC No. 151 of 1992.

8. It was therefore held in Jadva Karsan vs. Harnam Singh Bhogal [1953] 20 (1) EACA 74 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.”

9. This jurisdiction is meant to avoid a waste of valuable judicial time; prevent the court from duplication of efforts and prevent multiplicity

of suits and applications being filed and where if the stay is not granted and defendant were to succeed it would have rendered the appeal nugatory. In such applications the Court aims at ensuring that the object of the application is not rendered nugatory and that substantial loss and irreparable harm is not suffered by the applicant once the Plaintiff proceeds with the suit and the appeal succeeds. Obviously the decision whether or not to grant stay of proceedings being discretionary, the application must be made without unreasonable delay. Whereas I agree that delay is neither the sole factor nor the predominant factor to be considered, I am convinced that delay is a factor that ought to be taken into account. In **Re Global Tours & Travel Ltd HCWC No. 43 of 2000 Ringera, J** (as he then was) held 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 matter, it should bear in mind such factors as the need for expeditious disposal of case, 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.”

10. In my view delay in making an application where the Court is expected to exercise discretion must always be a factor for consideration since it is an equitable principle that delay defeats equity as equity aids the vigilant, not the indolent.

11. In **David Morton Silverstein vs. Atsango Chesoni Civil Application No. Nai. 189 of 2001 [2002] 1 KLR 867; [2002] 1 EA 296** the Court of Appeal citing **Kenya Commercial Bank Ltd vs. Benjoh Amalgamated Ltd & Another Civil Application No NAI 50 of 2001** held that it is not the law that a stay of proceedings cannot be granted but that each case depends on its own facts. In **Niazons (Kenya) Ltd. vs. China Road & Bridge Corporation (Kenya) Ltd. Nairobi (Milimani) HCCC No. 126 of 1999 Onyango-Otieno, J** (as he then was) held that:

“Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay...should be granted.”

12. Similarly, the Court of Appeal in **Wachira Waruru & Another vs. Francis Oyatsi Civil Application No. Nai. 223 of 2000 [2002] 2 EA 664** held that:

“In an application for stay of proceeding pending appeal where the Judgement is entered in an application for striking out a defence, it cannot be gainsaid that unless a stay is granted the appeal will be rendered nugatory since if the process of assessing damages goes on and the appeal is allowed that process would be an exercise in futility.”

13. The present suit is premised on section 10 of the ***Insurance (Motor Vehicles Third Party Risk) Act*** Cap 405 which states that:

(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 policy under paragraph (b) of section 5 (being a 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 persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(2) No sum shall be payable by an insurer under the foregoing provisions of this section—

(a) in respect of any judgment, unless before or within fourteen days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings; or

(b) in respect of any judgment, so long as execution thereon is stayed pending an appeal; or

(c) in connexion with any liability if, before the happening of the event which was the cause of the death or bodily injury giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provision contained therein, and either—

(i) before the happening of the event the certificate was surrendered to the insurer, or the person to whom the certificate was issued made a statutory declaration stating that the certificate had been lost or destroyed; or

(ii) after the happening of the event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer, or the person to whom the certificate was issued made such a statutory declaration as aforesaid; or

(iii) either before or after the happening of the event, but within a period of twenty-eight days from the taking effect of the cancellation of the policy, the insurer has notified the Registrar of Motor Vehicles and the Commissioner of Police in writing of the failure to surrender the certificate.

(3) It shall be the duty of a person who makes a statutory declaration, as provided in subparagraphs (i) and (ii) of paragraph (c) of subsection (2), to cause such statutory declaration to be delivered to the insurer.

(4) 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.

(5) Deleted by Act No. 8 of 2009, s. 41.

(6) In this section, “material” means of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk, and, if so, at what premium and on what conditions; and “liability covered by the terms of the policy” means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel, or has avoided or cancelled, the policy.

(7) In this Act, references to a certificate of insurance in any provision relating to the surrender or the loss or destruction of a certificate of insurance shall, in relation to policies under which more than one certificate is issued, be construed as references to all the certificates, and shall, where any copy has been issued of any certificate, be construed as including a reference to that copy.

14. In The Great Insurance Company of India Ltd vs. Lilian Evelyn Cross and Another [1966] EA 90, the Court expressed itself as hereunder:

“It is a rule of construction that when a law which has received judicial interpretation is enacted without change it will be presumed that the Legislature which enacted it was aware of the construction given to it at the time of the enactment and intended it to bear the construction. Consequently since the Act which was enacted in Kenya in 1945 was taken from British legislation on the subject it may be helpful to ascertain the construction placed on the provisions with which the court is concerned by the courts in Britain. In Britain the courts have consistently held that an insurer was not liable to a third party injured as a result of a motor accident if the use of the car was not covered by the policy at the time e.g. where the driver of the vehicle was unlicensed or disqualified or where the vehicle was used otherwise than for private purposes and the policies excluded such driving or user as the case may be.”

15. It follows that if the applicant herein were to succeed in this suit, it would not be liable to settle the decrees which have been or would be obtained against its insurer arising from the subject accident. Accordingly, if that were to happen and by then the declaratory suits against it would have proceeded, the judgements arising therefrom would have to be reversed. The judicial time spent in hearing and determining the said suits would have been wasted. As was held in by the Court of Appeal in Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229:

“No party should have a right to squander judicial time. Hearing time should be allocated by the court on a need basis and not as a matter of routine. Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice...Litigants are not entitled to the uncontrolled use of a trial judge’s time. Other litigants await their turn. Litigants are only entitled to so much of the trial judges’ time as is necessary for the proper determination of the relevant issues.”

16. This was the position adopted by Nyamu, J (as he then was) in Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728 when he expressed himself as follows:

“Judicial time is an expensive resource which must be apportioned fairly to the entire spectrum of the work in the Court.”

17. I therefore agree with the decision in Monarch Insurance Co. Ltd vs. Wycliffe Onyango Odenda [2016] eKLR where Korir, J held that:

“That what the Applicant seeks to do is achievable is not in dispute...In the case before me, the Applicant faces eminent judgment. It has filed its suit against the Respondent and issued notices to the affected parties. Its suit will be rendered nugatory if stay is not granted. In light of the facts of this case, I find that the application has merit. A slight delay will not prejudice the plaintiffs in the civil suits that the Applicant seeks to stay. They however need to be made parties to this suit. The Applicant is therefore directed to place in motion the necessary mechanisms for enjoining the plaintiffs in these proceedings. In light of what I have stated above, an order of stay is hereby issued staying the proceedings in Busia CMCC No. 405 of 2015 and Busia CMCC No. 179 of 2016 for a period of 60 days from today’s date or further orders of the Court. The Applicant is directed to prepare this suit and list it for hearing on priority basis.”

18. Similarly, the applicant herein is in imminent danger of a declaratory judgement being entered against it in respect of which its liability is conditional on the outcome of this suit. It is therefore my view that the proceedings in the said suits ought to be stayed for a specific period that would allow the applicant to prosecute this suit.

19. Consequently, I allow this application and direct that there be a stay of proceedings in Kithimani PMCC No. 426 of 2018, RMCC No. 207 of 2016, RMCC No. 238 of 2016, RMCC No. 221 of 2016, RMCC No. 212 of 2016, RMCC No. 400 of 2016, PMCC No. 232 of 2016, PMCC No. 367 of 2016, PMCC No. 372 of 2016 and PMCC No. 235 of 2016 for a period of 60 days within which period the Applicant herein is expected to prosecute this suit.

20. The costs of this application will be in the cause.

21. Liberty to apply granted.

22. It is so ordered.

Ruling read, signed and delivered in open court at Machakos this 4th day of February, 2020.

G V ODUNGA

JUDGE

In the presence of:

Mr Kubai for Mr Kirimi for the Plaintiff/Applicant

CA Geoffrey