



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 465 OF 2011 (OS)

IN THE MATTER OF BLUE SHIELD INSURANCE COMPANY LTD

(Under Statutory Management)

AND

IN THE MATTER OF THE COMPANIES ACT (CAP 486 LAWS OF KENYA)

AND

IN THE MATTER OF THE INSURANCE ACT (CAP 487 LAWS OF KENYA)

BETWEEN

GIDEON MUTUNE ITUTE.....INTERESTED PARTY

RULING

The interested party herein, GIDEON MUTUNE ITUTE, filed the Notice of Motion dated the 3rd day of May, 2019, Under Section 1A and 1B of the Civil Procedure Act, Article 22, 23(3), 27(1) 47(1), 48, 50(1) and Article 159(2) of the Constitution, seeking for orders;

- 1. That Gideon Mutune Itute be granted leave to be joined as interested parties in this suit.*
- 2. That the firm of Patrick Law Associate's be granted leave to come on record for the interested party.*
- 3. That the order given by the Honourable court on the 28th October, 2011 barring all proceedings of whatever nature against the policy holders of Blue Shield Insurance Company Limited (under Statutory management) during the pendency of the moratorium declared by the statutory manager be set aside in respect of the interested party herein.*
- 4. That the costs of the application be provided for.*

The application is premised on the grounds set out on the body of the same and it's supported by the annexed affidavit of the interested party sworn on the 3rd day of May, 2019.

The interested party is the plaintiff in Nairobi CMCC No. 239/2011 (Gideon Mutune Itute vs. N. R. Odongo & 2 others. He avers that the said defendants were insured by Blue Shield Insurance Company Limited which suit cannot progress due to the orders that were issued by the court on the 28th day of October, 2011 barring all proceedings of whatever nature against policy holders of Blue Shield Insurance Company Limited (Under Statutory Management) during the pendency of the moratorium that was declared by the statutory manager.

The interested party avers that he has been adversely affected by the moratorium whose net effect is to stifle or curtail or scuttle the normal adjudicative process of the courts which, has in effect, denied him the fundamental rights of equal protection and benefit to the law. He contends that the effect of the moratorium is to shield and/or cushion the Insurer from fulfilling the statutory obligation flowing from the provisions of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405.

He argued that the order of the moratorium amounts to discrimination and differential treatment contrary to Article 27 of the Constitution as the same bars the interested party from accessing justice contrary to Article 48 of the Constitution.

The statutory manager opposed the application vide grounds of opposition filed on 4th November, 2019 in which, it has averred that no

appeal has been preferred against the order issued on the 28th October, 2011 and that in as far as the application seeks to reverse or set aside an order issued by a court of parallel jurisdiction, it is incompetent as the only recourse open to it is to either appeal or review the said orders.

The other ground of opposition is that since the interested party has lodged a claim in the subordinate court against the defendant who is a policy holder of the insurer in respect of a third party cover, the insurer is upon proof of liability liable to settle the third party claim. Further, that the policy holders rightly expect the insurer to take over the conduct of any such cases brought against them and to settle or compromise them as would be necessary.

In submissions, the interested party contends that an insurer has a duty to satisfy judgments against persons insured as per the provisions of Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act Cap 405 and having filed a suit against the insured of Blue Shield Insurance company Limited in CMCC no. 239/2011, he has an interest in the outcome of the matter herein and deserves to be enjoined as a party.

He further submitted that under Section 67C (10) of the Insurance Act a Statutory Manager can only by law declare a moratorium on payment to its policy holders and creditors as the moratorium is meant to protect the insurer against the policy holders and creditors and not meant to protect policy holders and shield them from meeting their liabilities to third parties. He thus submitted that the moratorium in so far as it extends to the interested party's suit was clearly ultra vires Section 67C (10) of Cap 487. He urged the court to invoke its inherent jurisdiction conferred upon it under Section 3A of the Civil Procedure Act and make such orders as are necessary for ends of justice or to prevent an abuse of the process of the court.

On its part, the statutory manager submitted that the application is incompetent as it seeks to reverse or set aside an order by a court of parallel jurisdiction. In support of this contention reliance was made on the case of **Ntoithia M'Mithiaru vs. Richard Maoka & 2 others (2007) eKLR.**

It further submitted that setting aside of the said order will result in exposure of policy holders to legal claims which they may not be in a position to defend for risks whose liabilities they had passed to the insurer as required under the law. This is notwithstanding that the policy holders have complied with Section 4 of the Insurance (Motor Vehicles Third Party Risks) Act requiring them to insure their motor vehicles and having complied with that requirement, there is a legitimate expectation on their part that in the event of occurrence of an accident relating to the risks for which their motor vehicles are covered, it would be the responsibility of the insurer to settle any claims arising therefrom.

The statutory manager was careful to submit that allowing the application would contradict the clear provisions of Section 10(1) of the Act, the legal effect of which is to protect the insured from the liability accruing from judgments and decrees issued against them and place the obligation on the insurer on whom a statutory notice has been served.

The statutory manager in its submissions asked the court to take judicial notice of the fact that there is a winding up cause being Nairobi High Court Milimani Commercial & Admiralty Division Misc. cause No. 238 of 2017 pending before the court for winding up of Blue Shield Insurance Company Limited. It urged the court to dismiss the application.

The court has considered the application, the supporting affidavit, grounds of opposition and the submissions filed herein by the respective parties. The interested party is seeking to be enjoined as a party in this suit and setting aside of the orders that were issued on 28th October, 2011 among other orders.

In the **Black's Law Dictionary, 9th Edition, page 1332.** an interested party is defined;

“as a party who has a recognizable stake and therefore standing in a matter”.

Under Order 1 Rule 10(2) of the Civil Procedure Rules a joinder could be made at any stage of the proceedings before the court. However, a joinder would normally be allowed where a party's presence may be necessary for purposes of allowing the court to adjudicate on all questions involved in a suit.

In the supreme court case of **Francis Kariuki Muruatetu & Another vs. the Republic & 5 others (2016) eKLR** the court set out the elements applicable where a party seeks to be enjoined in any proceedings as an interested party thus;

- 1. The personal interest or stake that a party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.*
- 2. The prejudice to be suffered by the intended interested party in case of non-joinder must also be demonstrated to the satisfaction of the court. It must also be clearly outlined and not something remote.*
- 3. Lastly, a party must, in its application set out the case and/or submissions it intends to make before the court and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the court (emphasis mine).*

Further, in the case of **Trusted Society of Human Rights Alliance vs. Mumo Matemo & 5 others (2014) eKLR** the court defined an interested party thus;

“Consequently, an interested party is one who has a stake in the proceedings, though he or she was not a party to the cause ab

initio. He or she is one who will be affected by the decision of the court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings and champions his or her cause.”

The interested party herein has filed a compensation suit against a policy holder of the insurer which matter is yet to be heard and determined due to the order made on the 28th October, 2011. The court has not been told if liability is denied in the pending suit and/or what defence the policy holder has put forth. What is clear is that the said matter is yet to be heard and the legal interests of the parties determined by the trial court.

Section 4(1) of the Insurance (Motor Vehicles Third Party Risks) Act Cap 405 Laws of Kenya makes it compulsory for every motor vehicle to have a Third Party Insurance Cover. The insurer is, under proof of liability liable to settle third party injury claims during the currency of the policy of insurance. Upon proof of this claim, the interested party would expect the insurer to settle his claim. It is therefore my considered view that by virtue of that fact, the interested party has an interest in the suit.

On the other hand, the court also appreciates that the policy holder expects the insurer to take over conduct of any cases brought against them, and to compromise those cases as would be necessary, and settle all resultant costs as determined by the court. It is for this reason that the counsel for the statutory manager has argued that setting aside the orders given by the court on the 28th October, 2011 will result in exposure of policy holder to legal claims which they may not be able to defend but the risks of whose liability they have passed onto the insurer as required by law.

In the circumstances of this case, I will allow the joinder of the proposed interested party as it would be unfair to bar a party from pursuing its rights.

My understanding of Section 67C(10) of the Insurance Act is that declaration of a moratorium can only be made on payment to the policy holders and the creditors as it is meant to protect the insurer against the policy holders and the creditors but not to shield them from meeting their liabilities to third parties. It is also fair and just that the orders made on 28th October 2011 are set aside to enable the proposed interested party pursue his rights.

In the premises, I find that the application has merits and the same is allowed as prayed with no orders as to costs.

Dated, Signed and Delivered at Nairobi this 13th day of February, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

..... Plaintiff

..... Defendant