REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

MISC CIVIL APPL NO. 543 OF 2019

YH WHOLESALERS.....1ST APPLICANT

KIFARU HAULIERS.....2ND APPLICANT

-versus-

KENYA ORIENT INSURANCE CO LTD.....1st RESPONDENT

AFRICAN MERCHANT ASSURANCE

COMPANY LIMITED.....2ND RESPONDENT

AND

NATHAN MBITHI WAMBUA (*Suing as the Legal Representative of the estate of* **BRIAN MWENDWA MBITHI.....INTERESTED PARTY**

RULING

1. One of the main issues for determination in this application is the effect of a judgment in favour of an insured and the duty of an insurer to satisfy claims arising from a suit against the insured in the instance where there is no judgement against the insurer.

2. The background of this application is that the interested party herein, **NATHANIEL MBITHI WAMBUA,** filed **Mavoko Senior Principal Magistrate's Civil Case No. 69 of 2018** as personal representative of the estate of **Brian Mwendwa Mbithi** who allegedly died as a result of an accident that occurred on 7.2.2016 involving the applicants' motor vehicle registration number KBE 758V/ZC 2267. The judgement in the suit was entered against the applicants jointly and severally for the sum of Kshs 5,560,730/- with costs of the suit plus interest. The suit vehicle had been insured by **Kenya Orient Insurance Limited,** the 1st respondent**.**

3. A decree for Kshs. 5,725,266.66/= was eventually drawn. A proclamation was issued to attach movable properties of the applicants and hence the instant application.

4. The applicants approached the court vide certificate of urgency as well as a notice of motion dated

28.11.2019, that was brought under section 1A (1) (2) (3), 3 and 3A of the Civil Procedure Act, Order 51 Rule 1 and Order 54 Rule 2(a) of the Civil Procedure Rules; Section 4(1) and 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act CAP 405. The applicants sought the following orders;

a) Spent

b) That the honorable judge do give leave for the applicants herein to file the attached plaint under certificate of urgency and upon payment of the requisite fees same be deemed as duly filed.

c) Spent

d) That there be a stay of execution of the judgement entered on 26th May, 2019 against the applicants in ***Mavoko Senior Principal Magistrate's Civil Case No. 69 of 2018 Nathaniel Mbithi Wambua (Suing as legal representative of the Estate of Brian Mwendwa Mbithi-Deceased) v YH Wholesalers & 3 Others*** *pending the heading and determination of the intended suit filed under this certificate;*

e) That the Honorable court do direct the Respondents to jointly and severally comply with the statutory provision of section 10 of the Insurance (Motor Vehicle Third Party Risks) CAP 405 to satisfy the decretal amount in ***Mavoko Senior Principal Magistrate's Civil Case No. 69 of 2018 Nathaniel Mbithi Wambua (Suing as legal representative of the Estate of Brian Mwendwa Mbithi-Deceased) v YH Wholesalers & 3 Others;***

f) That the honorable judge do give other relief as it deems fit for the interest of justice;

g) That the costs of this application be provided for.

5. In support of the application was an affidavit deponed on 25.11.2019 by Mahmud Khalif, indicated as the director of the applicants group of companies and with authority to make the affidavit. It was averred that the motor vehicle KBE 758V/ZC 2267 was involved in a motor accident and that the respondents had insured the suit vehicle make prime mover and trailer vide policy numbers ELD/008/089142/2015 and AMN/080/1/001312/2013. The deponent averred that the applicants were sued in **Mavoko CMCC 69 of 2018** and that judgement was entered against the applicants whereupon the respondents were notified of the judgement but however they failed to satisfy the judgement in terms of section 10 of the Insurance (Motor Vehicle Third Party Risks) Act CAP 405. According to the deponent, at the time of the accident the suit vehicle had valid insurance covers in compliance with section 4(1) of the Insurance (Motor Vehicle Third Party Risks) Act CAP 405. It was pointed out that the applicants' movable property had been proclaimed. Copies of the abstract, insurance policy of the suit vehicle, pleadings and judgment in Mavoko CMCC 69 of 2018, draft plaint for declaratory suit and the proclamations for the applicants' movable property were annexed to the affidavit.

6. In reply to the application was a replying affidavit deponed by the interested party on 6.2.2020. It was pointed out that the judgement of the court in **Mavoko CMCC 69 of 2018** had not been challenged. It was averred that the dispute between the insurer and the insured ought not to be used to deny the deponent the fruits of his judgement; that the insured had options to recover the judgement sum from the insurer and further that it was not demonstrated that the insurer had refused to settle the judgement sum. The deponent pointed out that he was not party to the contract between the applicants and the respondents. It was averred that the court if inclined to grant the orders sought then the applicants be ordered to deposit half the decretal amount with the interested party and half in a joint interest earning account in the joint names of the advocate of the deponent and the applicants' counsel.

7. On record is a replying affidavit deponed on 7.9.2020 by Catherine Kendi Kaburu who is stated as the legal officer with the 1st respondent and with authority to swear the affidavit. It was averred upon advice from her counsel on record that the application was brought under the wrong provisions of the law; that was contrary to section 25, 30, 31 and 34 of the Civil Procedure Act and Order 22 of the Civil Procedure Rules. It was averred that by dint of section 5 as read with section 10 of the Insurance (Motor Vehicle

Third Party Risks) Act CAP 405, the 1st respondent was entitled to settle the decretal sum in Mavoko CMCC 69 of 2018 to a maximum of Kshs 3m/- and further that the 1st respondent entered into a consent to settle the sum in six bi-weekly installments of Kshs 500,000/-. The deponent averred that the 1st respondent settled the sum of 3m/- and hence fulfilled its obligation under sections 4, 5 and 10 of the Insurance (Motor Vehicle Third Party Risks) Act CAP 405 as evidenced by the cheque numbers 00948, 152970, 153649, 153682, 002013 and 002118 annexed and marked A. It was averred by the deponent that it was for the applicants to settle the balance of Kshs 2.56m/- of the decretal sum in Mavoko CMCC 69 of 2018. It was averred that the 1st respondent is a stranger to the 2nd respondent and that the 2nd respondent had no contractual relationship with the 1st respondent; that the policy number ELD/008/089142/2015 was taken out by the 1st applicant with the 1st respondent only.

8. In rejoinder, there is an affidavit deponed on 21.9.2020 by Mahmud Khalif stated to be a director of the applicants group. The deponent admitted that the 1st respondent completed the settlement of Kshs 3m/- on 17.3.2020 and that the judgement for Kshs 6,010,380/- in Mavoko CMCC 69 of 2018 was delivered on 29.5.2019. It was reiterated that the application sought for stay of execution of the judgement in Mavoko CMCC 69 of 2018 pending the hearing of a declaratory suit. It was added that the ten-month delay in the judgement period accumulated interest of over Kshs 600,000/- that the 1st respondent ought to be condemned to pay.

9. There is no indication of any response by the 2nd respondent.

10. Directions were taken to the effect that the application be disposed of by way of written submissions. Counsel for the applicants in appreciating the provisions of section 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act CAP 405 as well as the case of **Joseph Mwangi Gitundu v Gateway Insurance Co Ltd (2015) eKLR** submitted that the applicants had proved their case and are deserving of the orders sought. It was pointed out that the respondents had not repudiated the claim and that they had failed to settle the judgement sum.

11. Learned counsel for the interested party in his submissions dated 10.9.2020 framed two issues for determination; firstly, whether execution should be stayed pending the hearing and determination of the suit; Secondly, who should pay the costs of the application? The court was reminded that the applicant had a duty to settle the decretal sum as the 2nd respondent is not doing well financially while the 1st respondent had already paid a portion of the decretal sum that they were entitled to pay. Reliance was placed on the case of **Kenney Jaden Kwaji v Minister for Finance & 3 Others (2005) eKLR.**

12. On the element of stay of execution, it was submitted that the judgement in Mavoko CMCC 69 of 2019 that was delivered on 26.5.2019 remained unchallenged and that the applicants could not properly seek stay of execution by the interested party as they seek to compel performance of a contract between them and the 2nd respondent that the interested party is not privy to.

13. Learned counsel for the 1st respondent vide undated submissions framed two issues for determination; Firstly, whether the application is competent and Secondly, whether the applicants are entitled to the prayers sought. In respect of the 1st issue, it was submitted that for liability to accrue under section 10 of the Insurance (Motor Vehicle Third Party Risks) Act CAP 405, there is a 4-fold test to be met. Firstly, that the motor vehicle in question was insured by the respondent; Secondly, that the applicant has a judgement in his favour against the insured; Thirdly, that statutory notice was issued to the insurer either at least 30 days before the filing of the suit wherein judgement has been obtained or within 30 days of filing the suit where judgement has been obtained and finally the applicant was a person covered by the insurance policy. It was pointed out that the law required the applicant to file a declaratory suit. Reliance was placed on the cases of **Roseline Violet Akinyi v Celestine Opiyo Wangwau (2020) eKLR** and **Stephen Kiarie Chege v Insurance Regulatory Authority & Another (2009) eKLR.**

14. It was the strong argument of counsel that the applicants were not entitled to the prayers sought as they have not met the 4-fold test set out in paragraph 13 above. Learned counsel reiterated that the 1st

respondent met its obligation by paying Kshs 3m/- that was the statutory limit by dint of section 5 and 10 of the Insurance (Motor Vehicle Third Party Risks) Act CAP 405.

15. I have carefully and keenly read and understood the application, affidavits and annextures, the submissions and the decisions referred thereto. Should the respondents be compelled to pay the decretal amount in Mavoko SPMCC 69 of 2018?

16. It is imperative that I first deal with the law on the subject. **Section 10** of the **Insurance (Motor Vehicles Third Party Risks) Act**, Chapter 405 of the Laws of Kenya (hereinafter referred to as '**the Act**' is *inter alia* what the notice of motion was hinged on and it provides as follows -

"Duty of insurer to satisfy judgments against persons insured:

> ***(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 provisions 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) ……***
>
> ***(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 provisions 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 whim notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto.

17. Declaratory judgements and orders are covered under Order 3 Rule 9 of the Civil Procedure Rules that state as follows;

[Order 3, rule 9.] Declaratory judgment.

9. No suit shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make a binding declaration of right whether any consequential relief is or could be claimed or not.

18. The import of the provision is that the applicant is entitled to bring a suit to declare their right to payment of monies accruing on a judgement entered against the applicants.

19. In **Guaranty Trust Company of New York versus Hannay and Company Limited [1915] 2 KB 536**, Pickford LJ held at page 562 that the rule that is in *pari materia* with our Order 3 Rule 9 imposed no limitations once it is established that a declaration can be made where no consequential relief can be given. He stated that

"*The effect of the rule is to give general power to make a declaration whether there be a cause of action or not, and at the instance of any party who is interested in the subject matter of the declaration. It does not extend to enable a stranger to the transaction to go and ask the court to express an opinion in order to help him in other transactions*.

20. Bankes L.J. at page 572 in the same case held that a suit for declaratory orders should not be defeated merely because the plaintiff has no legal cause of action. He stated thus;

"*In every action there must be a plaintiff who is the person seeking relief (Judicature Statute Act, 1873, s. 100), or to use the language of order XVI, r. 1, a person in whom a right of relief is alleged to exists, whose application to the Court is not to be defeated because he applies merely for a judgment or order, and whose application for declaration of his right is not to be refused merely because, he cannot establish a legal cause of action. It is essential, however, that a person who seeks to take advantage of the rule must be claiming relief. What is meant by this word relief? When once it is established, as I think it is established, that a relief is not confined to a relief in respect of a cause of action it seems to follow that the word itself must be given its fullest meaning. There, is, however one limitation which must always be attached to it, that is to say, the relief claimed must not be something unlawful or unconstitutional or inequitable for the court to grant or contrary to the accepted principles upon which it exercises jurisdiction. Subject to this limitation, I see nothing to fetter the discretion of the Court in exercising a jurisdiction under the rule to grant relief, and having regard to the general business convenience and the importance of adapting the machinery of the Courts to the needs of suitors I think the rule should receive as liberal a construction as possible*."

21. From the notice of motion and the affidavit in support of the applicants' affidavit, and considering the case of **Roseline Violet Akinyi v Celestine Opiyo Wangwau (2020) eKLR** and **Stephen Kiarie Chege v Insurance Regulatory Authority & Another (2009) eKLR** there was nothing that stopped the applicant from filing a declaratory suit against the respondents. The handicap with the route taken by the

applicant is that there had been no proof of the existence of an insurance contract between the applicant and the respondents; there would be need to prove liability as well as to tender documents in court so that the court may have the benefit of seeing the documents in support of the applicants' claim. There ought to have been more evidence on record that quite unfortunately does not exist. The applicants case is made worse by the fact that they failed to file a declaratory suit against the respondents if they had any claim against them but instead they have moved this court by way of a miscellaneous application which is improper.

22. The 1st respondent's case is that there were monies paid to the applicants and I am inclined to agree with their argument after considering their annexure as well as the admission by the applicant in their affidavit in rejoinder dated 21.9.2020**.** I take issue with the claim for interest as the same is not mentioned in the application and such a claim would be departing from the pleadings.

23. The upshot is that prayer no.5 in the instant application ought not to see the light of day.

24. Looking at prayer no.4 of the application, I am unable to see any reason for granting the same. In the case of **Legal Brains Trust (LBT) Limited vs Attorney General, Civil Appeal No. 4 of 2012 of the Appellate Division court in the East African Court of Justice**, it was held that *a court of law will not adjudicate hypothetical questions*. A court will not hear a case in the abstract, or one which is purely academic and speculative in nature, where no underlying facts in contention exist. For this court to indulge in a hypothetical and speculative suit that is yet to be filed by the applicant would amount to an abuse of court process. Consequently, I find the prayer lacks merit and I decline to grant the same. It is clear that the applicants' application has been brought in an omnibus manner wherein they have thrown everything therein with the hope that any of the prayers might catch the eye of the court. This is pure speculation. Again, a declaratory suit can still be filed before the court that heard the primary suit and that the applicants have not given cogent reasons why they seek to file it here yet the trial court is still seized with power to entertain the same. Again, there is no declaratory suit filed yet and this miscellaneous application definitely is not a substitute for the intended declaratory suit. Even if the pleadings were to be saved, the prayers sought is likely to prejudice the interested party who had no privity of contract with either the applicants or the respondents. The applicants quest to have the respondents compelled to satisfy the judgement and decree of the trial court must be rejected summarily on the grounds that the declaratory suit is yet to be formally lodged in court. The application must fail on all fronts.

25. The foregoing observations leads me to come to the finding that the Applicants' application dated 25.11.2019 lacks merit. The same is dismissed with costs to the 1st Respondent and interested party.

It is so ordered.

Dated and delivered at **Machakos** this **8th** day of **October, 2020**.

D.K. Kemei

Judge