



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**CIVIL SUIT NO. 5 OF 2018**

**MBUKONI SERVICES LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**AFRICAN MERCHANT ASSURANCE COMPANY LTD.....DEFENDANT/RESPONDENT**

**R U L I N G**

1. By an application dated **19<sup>th</sup>** day of **February, 2018**, the Applicant seeks an order restraining Decree Holders in all claims arising from the accident subject matter of the suit herein from attaching any property belonging to it.
2. The Application is premised on grounds that the Applicant has a *prima facie* case with a high probability of success; it will suffer irreparable injury, loss and damage; the balance of convenience favours it and it is in the interest of justice that the order sought be granted and the Decree Holder shall not suffer any prejudice or loss if orders sought are granted.
3. The application is supported by an affidavit deposed by **Alfred Kyalo Kivuu**, a director of the Applicant who deposes that the Applicant is a body duly incorporated under the **Companies Act** under Certificate of Incorporation Number **C137454** that was issued on the **27<sup>th</sup> March, 2007**; it is engaged in the business of public transport and tools of its trade are motor-vehicles. Amongst them are motor-vehicle Registration Numbers **KCK 146C** and **KBW 933Z**.
4. That on the **23<sup>rd</sup> August, 2015** one of the Applicant's motor-vehicle Registration Number **KBR 116B** was involved in a road traffic accident as a result whereof several passengers were injured. Subsequently, several cases were filed, heard and concluded and amongst them were **Kitui CMCC No. 270 of 2015, Josephine Kisilu Mwanzia vs. Mbukoni Services LTD, Kitui CMCC No. 449A of 2015, Veronica Katiwa Muuo vs. Mbukoni Services LTD** and **Kitui CMCC No. 449B of 2015, Veronica Katiwa vs. Mbukoni Services LTD**.
5. That the Plaintiff's motor-vehicle was insured by the Defendant and the Plaintiff duly complied with all the terms of the policy; That the Plaintiff (Applicant) instituted the suit herein on **15<sup>th</sup> November, 2018** and on the **7<sup>th</sup> December, 2018** the Respondent (Defendant) was served with summons to enter appearance as well as the copy of Plaintiff and other documents; and on the **13<sup>th</sup> December, 2018** **Ms. Icon Auctioneers** served upon it warrants of attachment as well as the Auctioneers Bill of costs in the mentioned cases.
6. Following the development, the Applicant forwarded the warrants to **Restof Insurance Agency** which underwrote the policy, who forwarded the same to the Defendant (Respondent); All along the Decree Holders have been engaging with the Respondent directly therefore the attachment is premature as the Respondent has not indicated its unwillingness to settle the claims.
7. That failure to give notice, meant that the attachment was actuated by malice. Therefore, in the interest of justice the order sought should be given so that the suit filed should not be rendered nugatory.
8. The application is unopposed as the Respondent failed to meet timelines set for filing the response.
9. It was urged by **Mr. Kinyua Musyoki** for the Applicant that no form of denial of the application was filed, therefore on merit the orders sought were merited. That if not issued various actions will be taken in various suits instituted which will render the main suit nugatory.
10. In reply, **Mr. Kariuki** Counsel holding brief for **Mr. Macharia** for the Respondent argued that copies of the policy had not been annexed to establish the contract of insurance therefore the order would not apply.
11. In a rejoinder, **Mr. Kinyua Musyoki** stated that the documents had been annexed and there was no denial by way of affidavit evidence.
12. I have duly considered rival arguments raised.

13. In considering whether or not to grant orders sought, I must interrogate whether the Applicant has met conditions requiring granting restraining orders sought which are injunctive in nature. In the case of **Charter House Investments LTD vs. Simon K. Sang and Others, Civil Appeal No. 315 of 2004** it was stated that:

*“Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of a temporary injunction by courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them and to third parties. In the Giella case (supra) the predecessor of this Court laid down the principle that for one to succeed in such an application, one must demonstrate a prima facie case with reasonable prospect of success; that he stands to suffer irreparable damage which cannot be compensated for by an award of damages; and that the balance of convenience tilts in his favour.”*

14. The Applicant was therefore required to demonstrate:

- (i) That it has a *prima facie* case with a high probability of success.
- (ii) That the Applicant shall suffer irreparable damage that cannot be compensated.
- (iii) The balance of convenience tilts in favour of the Applicant.

15. The contention of the Applicant was that if orders sought are not granted the main suit will be nugatory.

16. It has been demonstrated that the Applicant herein has sued the Respondent seeking a declaration that he is under a duty to settle claims that arose from a road traffic accident involving motor-vehicle Registration Number **KBR 116B**. It also seeks an injunction order restraining various claimants from executing decrees against it.

17. Annexure **AKK4(e)** is a letter authored by **Restof Insurance Agency** addressed to the Respondent notifying it of the Court warrants that had been issued and the proclamation that had been made by **Icon Auctioneers**.

18. I have however been asked to restrain Decree Holders in all claims arising from the accident, the subject matter of the suit herein from attaching the property belonging to the Plaintiff, a prayer I find ambiguous. An order cannot issue against a person it shall affect without the person being heard and/or notified of the intention to make it. In such an instance the order shall be a nullity. This is a case where the auctioneer who proclaimed the property was not included in the suit, therefore the order sought which will affect him will be improper.

19. In the premises, I find the application unmerited. Accordingly, it is struck out with no orders as to costs.

20. It is so ordered.

**Dated, Signed and Delivered at Kitui this 3<sup>rd</sup> day of December, 2019.**

**L. N. MUTENDE**

**JUDGE**