



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL MISC. APPL. NO. 147 OF 2018

ANNE MUMBI KABIA & ARTHUR GAKERE NJERI)....PLAINTIFF/RESPONDENT

(Suing as the administrators of the estate of BENSON NGUGI – DECEASED)

- V E R S U S -

JUBILEE INSURANCE COMPANY LTD..... DEFENDANT/APPLICANT

RULING

1. The subject matter of this ruling is the motion dated 26th February 2018 taken out by the defendant in which it sought for the following orders:

1. This application be certified urgent and heard ex-parte in the first instance.

2. There be stay of proceedings in Machakos CMCC 641 of 2016 Anne Mumbi Kiabia & Arthur Gakere Njeri (Suing as the legal administrator of the estate of Benson Ngugi) vs. Jubilee Insurance Company pending the inter parties hearing and final determination of this application.

3. This honourable court be pleased to stay proceedings in Machakos CMCC 641 of 2016 Anne Mumbi Kabia & Arthur Gakere Njeri (Suing as the legal administrator of the estate of Benson Ngugi) vs. Jubilee Insurance Company pending the inter parties hearing and final determination of Nairobi High Court Civil Case No. 311 of 2011 The Jubilee Insurance Company vs. Francis Muriithi.

4. The costs of this application abide the outcome of Nairobi High Court Civil Case No. 311 of 2011 The Jubilee Insurance Company vs. Francis Muriithi.

2. The motion is supported by the affidavit of Dinah Ogulla. When served with the motion, the plaintiff filed the replying affidavit of E. Supeo Karei to oppose the motion. Learned counsels appearing in the matter recorded a consent order to have the motion disposed of by written submissions.

3. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the motion. I have also taken into account the rival written submissions plus the oral highlights. Before delving deeper into the merits or otherwise of the motion, let me set out in brief the background of this dispute. The defendant issued to one Francis Githinji with a Third Party Insurance cover upon paying the requisite premium over motor vehicle registration no. KAY 458E. The aforesaid motor vehicle was on 10.10.2009 involved in a road traffic accident which resulted in the demise of one Benson Ngugi, who was a passenger therein.

4. The administrators of the estate of Benson Ngugi, deceased filed Machakos C.M.C.C no. 791 of 2010 against Bangladesh Japan International (K) Ltd to recover damages for the fatal injuries the deceased suffered. It would appear the defendant applicant was notified of the filing of the suit under Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405 Laws of Kenya. The matter proceeded for hearing ex-parte when the defendant failed to file an appearance nor file a defence. The formal proof proceedings gave rise to the judgment of 10.10.2012 which was in the following terms interalia:

General damages for pain & suffering ksh.20,000/=

General damages for loss of expectation of life ksh.150,000/=

General damages for loss of dependency ksh.592,000/=

Special damages	ksh. 30,550/=
Net total	ksh.792,550/=

5. The plaintiff was prompted to file Machakos C.M.C.C no. 641 of 2016, a declaratory suit to compel the defendant herein to settle the decree in Machakos C.M.C.C no. 791 of 2010. The defendant filed a defence and denied the plaintiff's claim in Machakos C.M.C.C. no. 641 of 2016. They are now seeking for an order to inter alia stay proceedings in Machakos C.M.C.C No. 641 of 2016 pending the hearing and determination of Nairobi H.C.C.C. no. 311 of 2011, Jubilee Insurance Co. Ltd =vs= Francis Muriithi Githinji. The later case appears to have been filed by the defendant with a view of repudiating the insurance contract with Francis Muriithi Githinji.

6. Having given the brief background of this matter, I now turn my attention to the motion dated 26.2.2018. It is the submission of the defendant/applicant that this court should issue an order staying proceedings in Machakos C.M.C.C no. 641 of 2016 to avoid the occurrence of a miscarriage of justice against the defendant/applicant. It was pointed out that the result of the suit in this court may render the suit sought to be stayed as a nullity if the contract of insurance is repudiated. The defendant submitted that it has an arguable case which has high chances of success.

7. It is the submission of the plaintiffs that the defendant/applicant has failed to establish that it has a prima facie arguable case. It was pointed out that the application is predicated on the wrong provisions of the law. It is argued that Order 7 rule 1 of the Civil Procedure Rules, 2010 deals with defences which the plaintiffs have already filed. It is the plaintiffs' submission that the defendant's application is only meant to delay the trial of the declaratory suit filed by the plaintiffs thus prejudicing the plaintiffs' enjoyment of their judgement.

8. The plaintiffs raised and argued another fundamental point which is to the effect that there was inordinate delay in filing the application. It is submitted that the respondent was duly served with a statutory notice prior to the filing of the Machakos C.M.C.C. no. 791 of 2010 against its assured and therefore had notice and was fully aware of the existence of the said civil suit.

9. It is not in dispute that Nairobi H.C.C.C no. 311 of 2011 is applicant seeking for orders inter alia that it is not liable to indemnify Francis Muriithi Githinji against any claim that arose out of the accident since the insurance policy was obtained by non-disclosure of material facts and or by misrepresentation of facts by the insured thus entitling the defendant to avoid the policy. The defendant's assertion that it is entitled to avoid the policy is not controverted by the plaintiffs/respondents. The plaintiffs' main contention is that the defendant was notified of the filing of the suit under Section 10(2) of the Insurance (Motor Vehicle Third Party Risks) Act. The declaratory suit which is now being sought to be stayed seeks to have the defendant herein compelled to settle the decree on the basis of the doctrine of subrogation. The defendant/ applicant has beseeched this court to stay further proceedings in Machakos C.M.C.C. no. 641 of 2016 pending the hearing and determination of the suit between it and its insured. In other words, the basis of Machakos C.M.C.C no. 641 of 2016 is the contract of Insurance which is now being impugned vide Nairobi H.C.C.C no. 311 of 2011.

10. After considering the rival arguments, I am convinced that it will serve the best interest of justice to issue the order staying proceedings. At the end of the day, the liability of the defendant/ applicant will have been determined and it will be easier even for the plaintiffs to have a clear picture as to who to pursue in settling the decree in the primary suit.

11. In the end, I allow the motion dated 26th February 2018 in terms of prayers 3 and 4.

Dated, Signed and Delivered in open court this 6th day of July, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

.....for the Respondent