

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL SUIT NO. 4 OF 2018

MADISON INSURANCE CO. LTD..... PLAINTIFF

VERSUS

MICHEAL MUATHE.....DEFENDANT

RULING

1. On 20th June, 2016 the plaintiff, Madison Insurance Co. Ltd filed a notice of motion under a certificate of urgency seeking, among other orders, a stay of proceedings in **Mavoko PMCC No. 1132 of 2017, Hannington Ouma Odera v Micheal Mwathe and another** pending the hearing of this suit.

2. The application is unopposed though the Defendant/Respondent Micheal Muathe is said to have been served through his advocates offices, Sigey Arap Bett & Co Advocates, the Applicant having been told to do so by the Defendant via phone.

3. The applicant was provoked by the institution of Mavoko Civil Suit 1132 of 2017, against the Respondent herein in respect of claims arising out of a traffic accident that occurred on 18th March, 2017 involving the Respondent's motor vehicle registration number KCF 806D which was insured by the Applicant. According to the Applicant, the Respondent had used the motor vehicle contrary to the terms and conditions of the policy cover. Apparently, the said suit was filed by the plaintiff who claims to be a victim of the said accident and seeks compensation from the Respondent herein; it is that suit which the Applicant now seeks to stay through the instant application.

4. The Applicant contends that having filed a declaratory suit against the Respondent herein seeking a declaratory order that it is not obliged to satisfy any judgment and or liability arising from the abovementioned accident pursuant to the provisions of Section 10(4) of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405, Laws of Kenya will be prejudiced if the suit in the lower court proceeds to the judgment stage before the issue of liability between itself and its insured is sorted out. The Applicant asserts that this particular suit ought to be determined first and as such it would be rendered nugatory if stay is not granted.

5. In **Corporate Insurance Company Limited v Charles John Musee [2014] eKLR** J.K. Sergon, J faced with a similar application held that:

“It is my considered view that declaratory suits are an alternative to review proceedings. That being the case and as correctly held by Mutava, J. in Corporate Insurance case (supra) which opinion I share, I find that the application herein is premature since the suit from which a declaration as to whether or not the insurer is entitled to avoid liability under the contract of insurance between the plaintiff and the defendant is yet to be determined.”

6. In the said case of **Corporate Insurance Company Ltd v Charles John Musee [2014] eKLR**, J.K. Sergon, J held that:

“First, the Applicant is not a party in Milimani H.C.C.C. No. 112 of 2013. It is clear that the aforesaid suit is between the injured and the Applicant's insured. Even if judgment was given in favour of the injured party, the decree will not be executed against the insurer but against the insured. I therefore see no damage that the Applicant will suffer. In any case it will be upon the Interested Party in the end of the compensating suit to apply for a declaratory suit against the insurer who has refused to settle the insurance claim”.

7. The facts in the cited case are not very different from the case before me. The Applicant herein is not a party to the case it seeks to stop, however the said suit was filed in 2017 and is likely to be concluded if this suit is not heard speedily and the issue of the use of the vehicle in contravention of the policy is to be determined in the instant suit. The applicant has even attached an investigation to support his suspicions.

8. In the case before me, the Applicant faces no eminent judgment or execution, however it faces the danger of liability being determined against it's insured and has duly notified the insured of this application as well as the suit. In the circumstances this suit will not be rendered nugatory if stay is not granted.

9. In light of the facts of this case, I find that the application to be pre-mature. Delay in prosecuting the **Mavoko PMCC No. 1132 of 2017** will prejudice the plaintiff and the 2nd Defendant therein. They however may need to be made parties and or witnesses to this suit. The Applicant is therefore directed to place in motion the necessary mechanisms for involving the plaintiff and 2nd Defendant in these proceedings.

10. In light of what I have stated above, an order of staying the proceedings in **Mavoko PMCC No. 1132 of 2017** is denied. The Applicant is

directed to prepare this suit and list it for hearing on priority basis. Costs in the cause.

It is so ordered.

Dated, Signed and delivered at Machakos this 6th day of December, 2018.

D.K. KEMEI

JUDGE