



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT. NO. 432 OF 2013

GATEWAY INSURANCE COMPANY LIMITED.....PLAINTIFF

VERSUS

GATHONGA JOSEPH.....DEFENDANT

RULING

1. By its Notice of Motion dated 10th November 2016, the Plaintiff seeks orders that this “court be pleased to stay Milimani CMCC No. 7250 of 2014 (**Lilian Nini Kang’ara –v- Joseph Gathonga & Attorney General**) pending hearing and determination of this suit”. The grounds upon which the application is pegged are stated on the face of the application and are largely to the effect that the Plaintiff has challenged and sought to avoid any liability under policy No. 030/084/1/033565/2012/11 on grounds that the Defendant herein who is also the 1st Defendant in CMCC No. 7250 of 2014 (“ the primary suit”) violated the terms and conditions of the said policy. Additionally, the Plaintiff contends that it is likely to suffer financial loss if judgment is entered against the 1st Defendant in the primary suit.
2. The application is not opposed. Despite service, the Defendant who has thus far not participated in the proceedings, did not file any Replying Affidavit or Grounds of Objection.
3. A brief background may be stated as follows
4. The Defendant on 2nd November 2012 took out a third party risk insurance cover with the Plaintiff for KAN 476A. The policy covered private hire third party only and not fare-paying passengers. The Plaintiff states that all parties were bound by the principle of utmost good faith. On 8th November 2012, the Defendant’s motor vehicle subject of the insurance cover was involved in a road accident with another motor vehicle registration number GK A 953F, the owner of the latter vehicle being the government of the republic of Kenya. The Plaintiff in Milimani CMCC No 7250 of 2014 was then a fare paying passenger in motor vehicle registration number KAN 476A. She sustained serious injuries as a result of the road accident.
5. Then in 2013, the Plaintiff herein sought to avoid its liability to the insured Defendant. It specifically seeks in this suit orders that it has at all times been entitled to avoid the insurance policy on the grounds that the Defendant is in breach of the insurance contract. The Plaintiff also sought a declaration that it is not liable to make payment under the insurance policy in respect of any claim against the insured Defendant arising out of the accident.
6. Prior to the determination of the suit herein, the primary suit was filed and the Defendant herein (also

the 1st Defendant the primary suit) duly notified the Plaintiff who instructed counsel to contest and defend the primary suit.

7. It is not in controversy that the primary suit is yet to be determined. It is also not in controversy that the plaintiff in the primary suit is not a party to this suit and neither was the said Plaintiff invited to participate in the instant proceedings which amazingly seek to stay the plaintiff's claim.

8. It is not in doubt that the policy herein was issued pursuant to the mandatory requirements of Section 4 of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 Laws of Kenya (" the Act"). Section 4 of the Act prohibits the use of a motor vehicle on a road unless there is in force a policy of insurance or security in respect of third party risks. Exempt from this mandatory provision are motor vehicles owned by the Government. The insurance policy under the Act must be issued by an insurance company licenced under the Insurance Act (Cap 487) to carry on motor vehicle insurance business.

9. Relevant to the proceedings herein, is Section 10 of the Act which stipulates partly 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) ...-

(b) ...-

(c)-...-

(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 provision 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 whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto.

(5)-...

(6)-...

(7)-....

10. The insurer, in this case the Plaintiff herein, is bound to satisfy any judgments made against its insured so long as the insurance policy is still subsisting and so long as the insured. It matters not that the insurer is entitled to avoid or cancel the policy or could have avoided or cancelled the policy.

11. The liability of the insurer is however subject to the beneficiary of any judgment having notified the insurer of the claim prior to filing the proceedings where judgment is ultimately obtained. The judgment will also not be satisfied by the insurer if there is any stay of execution or if the policy had been cancelled by mutual consent.

12. Likewise, the insurer shall not be obliged to satisfy any judgment made against the insured if the insurer obtains a declaration from the court that he is entitled to avoid the policy.

13. The Plaintiff in the instant suit is yet to obtain a declaration that it is entitled to avoid the policy. The Plaintiff is also yet to avoid the policy. As it were the compulsory policy, as far as any claimant would be concerned, is still in force and its purpose ought not to be defeated through a speculative and pre-emptive effort. In my view, the Plaintiff is speculating that judgment will be made against the insured in the primary suit. Secondly, and contrary to statute, it would be inappropriate to pre-empt a judicial process and hold that enforcement will be sought against the Plaintiff herein.

14. More crucially, the claimant in the primary suit was not a party to the instant proceedings. It would be disproportionate and contrary to public policy which dictates that a party is only condemned after being heard or afforded the opportunity to be heard. It is procedurally improper and unreasonable so to proceed and make orders affecting a party's right in his absence. The claimant in the primary suit would also be entitled to enforce any decree against the Defendant herein without necessarily involving the Plaintiff.

15. I also consider it that the Plaintiff will not be unduly prejudiced or inconvenienced if the orders sought are not granted. The Plaintiff may still pursue its claim for a declaratory order and adequately invoke the same, when any judgment is sought to be enforced against it. Both procedurally and substantively, I am not satisfied that the Plaintiff herein is entitled to the order of stay of proceedings of the civil suit currently in existence in the court below.

16. Let the Plaintiff expedite and prosecute its suit.

17. The application dated 10th November 2016 is dismissed but with no order as to costs.

Dated, signed and delivered at Nairobi this 9th day of February, 2017.

J.L.ONGUTO

JUDGE