



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CIVIL SUIT NO. 5 OF 2015**

**MICHEAL MUTHOKA MAKAU (Suing as legal Representative of  
the estate of EARNEST MWEU DAUDI).....PLAINTIFF**

**VERSUS**

**SIMON NGANGA MBUGUA .....1<sup>ST</sup> DEFENDANT**

**STEPHEN NDIRANGU .....2<sup>ND</sup> DEFENDANT**

**KEVIN NJOROGE.....3<sup>RD</sup> DEFENDANT**

**AND**

**THE MONARCH INSURANCE COMPANY LTD.....INTERESTED PARTY**

**RULING**

**The Application**

The Applicant is the Interested Party herein, and has made an application by way of a Notice of Motion dated 6th May 2016 seeking the following substantive orders:

- a) THAT this Court do grant leave for The Monarch Insurance Company Limited to be enjoined as an Interested Party.
- b) THAT this Court do grant leave for the firm of M/S Mose, Mose & Millimo Advocates to come on record for the Interested Party.
- c) THAT this court be pleased to order stay of proceedings pending hearing and final disposal of Machakos HCCC NO. 27 of 2015.

The facts and grounds for the application are stated in the said application; in the supporting affidavit and further affidavit sworn on 6th May 2016 and 9th September 2016 respectively by Philomena Theuri, the Applicant's Manager for Claims and Legal Services; and in submissions dated and filed on 28th November 2016 by Mose, Mose & Milimo Advocates, the Applicant's Advocates.

In summary, these are that the Applicant issued an insurance policy to Joseph Njenga, the defendant herein, with respect to motor vehicle KAM 997Z, against third party risks only for the period commencing on 3rd March, 2014 until 29th March, 2015. On 5th March, 2014, the said motor vehicle

was involved in a road traffic accident while it was ferrying passengers for hire and reward contrary to the insurance policy, and the Applicant instituted Machakos HCCC NO. 27 of 2015 and the Plaintiff herein also instituted the present suit.

The Applicant submitted that in the event that this suit proceeds for hearing, and being the insurer of the said motor vehicle it will inevitably be affected by the outcome of the instant suit as it will be called upon to settle claims on behalf of the defendant. Further, that this will be highly prejudicial given that the Defendant was on his own volition in breach of the insurance policy. Reliance was in this respect placed on the provisions of Order 34 Rule 3 of the Civil Procedure Rules and the decision in Global Tours & Travel Limited, Winding Up Cause No. 43 of 2000.

### **The Response.**

The application was opposed by the in a replying affidavit sworn on 16th August 2016 by the Plaintiff herein, and submissions dated 14th February 2017 filed by P. Kiiru Kamau & Co Advocates for the Plaintiff. The Plaintiff states that the Applicant had been served with a demand letter and notice of intention to sue as well as with the summons and pleadings in this suit but chose not to respond or apply to be joined as an interested party, but instead elected to file Machakos HCCC 27 of 2015 against one Joseph Njenga Maina, who is a stranger in Machakos HCCC 5 of 2015.

In addition, that since Machakos HCCC 5 of 2015 was filed by the Plaintiff before the Applicant filed Machakos HCCC 27 of 2015, the Applicant was obligated vide the proviso in section 10 of Insurance (Motor Vehicle Third Party Risks) Act Cap 405 Laws of Kenya to issue to the Plaintiff a notice of the alleged breach of the policy terms by the Applicant's insured within 14 days of filing of Machakos HCCC 27 of 2015. However, that no such notice was issued by the Applicant and the Plaintiff only got to know of the existence of Machakos HCCC 27 of 2015 through the pleadings in the Applicant's instant application.

Therefore, that the Applicant shall not be shielded from liability in this suit by obtaining a declaration in Machakos HCCC 27 of 2015 because of its breach of the cited proviso, and granting the Applicant the orders sought would amount to an exercise in futility that would primarily serve to unjustifiably delay the determination of the Plaintiff's suit and deny him audience in the suit as the Defendant in Machakos HCCC 27 of 2015, Mr. Joseph Njenga Maina, is not even a party to this suit.

Reliance was placed on the decision in **CIC Insurance Group Limited vs Mutua Mulwa Kainga (2012) e KLR** that an application seeking an omnibus stay against any existing and any future suits which were filed or to be filed against the Respondent respecting an accident which occurred on 18/09/2011 was an incredibly broad use of the Court's discretion in circumstances which were unwarranted, and that the proper procedure would be to request for a stay in concrete suits.

### **The Determination**

I have read and carefully considered the pleadings and submissions filed. The issue for determination is whether the Applicant should be joined as a party to this suit, and whether the suit herein should be stayed pending the outcome of the declaratory suit in Machakos HCCC 27 of 2015. The other issues raised by the appeal as regards the serving of notice and time of serving notice under the Insurance (Motor Vehicle Third Party Risks) Act (Cap 405 of the Laws of Kenya) go to the merit of the declaratory suit in Machakos HCCC 27 of 2015 which is yet to be heard and determined, and cannot therefore be decided at this stage.

A perusal of the Plaintiff filed in this suit on 13th August 2015 shows that the Plaintiff has sued the three Defendants herein in their capacity as the insured, registered owner and driver of the motor vehicle registration number KAM 997 Z respectively, arising out of an accident that occurred on 5th March 2014 involving the said motor vehicle, as a result of which the deceased Earnest Mweu Daudi suffered fatal injuries. The Plaintiff in Machakos HCCC No. 27 of 2015 dated 28th May 2015 concerns a declaration sought by the Applicant therein that it is not bound to indemnify the Defendant therein, one Joseph

Njenga Maina, for claims arising out of an accident that occurred on 5th March 2001 involving the said Defendant's motor vehicle registration number KAM 997Z . The said Defendant was the Applicant's insured.

While motor vehicle registration number KAM 997Z is the same motor vehicle involved in the accident in the suit filed herein , and is also the subject of Machakos HCCC No. 27 of 2015, the Defendant in Machakos HCCC No. 27 of 2015 is not a defendant in or party to this suit. I find for this reasons that the Plaintiff will be prejudiced if this suit is stayed to the extent that he has not filed a claim against the said Joseph Njenga Maina, against whom the Applicant seeks indemnity.

In any event if the Applicant is successful in Machakos HCCC No. 27 of 2015, it can still use the said judgment if the need arises in the present proceedings. It is my view that any prejudice the Applicant may suffer will be adequately mitigated by its joinder as a party in this suit so that it has an opportunity and is able to make any representations it considers necessary. It is evident in this respect that the Applicant is an affected party, being the insurer of motor vehicle registration number KAM 997 Z which is not contested by the Plaintiff.

The Notice of Motion dated therefore succeeds only to the extent of the following orders:

- a) The Monarch Insurance Company Limited be and is hereby joined as an Interested Party to this suit.
- b) The firm of M/S Mose, Mose & Millimo Advocates be and is hereby granted leave to come on record for the Interested Party.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 12<sup>th</sup> day of June 2017.

**P. NYAMWEYA**

**JUDGE**