



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 204 OF 2015**

**IMPRESSA COSTRUZIONI GIUSEPPE MALTAUR SPA.....PLAINTIFF**

**V E R S U S –**

**GENERAL ACCIDENT INSURANCE CO.. LTD.....DEFENDANT**

**AND**

**JOSEPH M. CHEKULO.....1<sup>ST</sup> INTERESTED PARTY**

**FESTUS MASILA MUGWERU.....2<sup>ND</sup> INTERESTED PARTY**

**REUBEN MUDEREMA.....3<sup>RD</sup> INTERESTED PARTY**

**MOSES LIVEHA MANASE.....4<sup>TH</sup> INTERESTED PARTY**

**GABRIEL ASIAYA GANANI.....5<sup>TH</sup> INTERESTED PARTY**

**CALEB WILIAB OTHICHILO.....6<sup>TH</sup> INTERESTED PARTY**

**RULING**

1. The subject matter of this suit is the motion dated 4<sup>th</sup> June 2015 taken out by the plaintiff herein in which it sought for the following orders:

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

***2. There be a stay of proceedings of all cases filed against the plaintiff by the interested parties or such other persons arising out of any alleged accident that may have occurred at any of the plaintiff's premises between the years 2009 to 2014 during which the plaintiff's insurance policies covering Work Injury Benefits Act and Employers Liability taken with the defendant were in force pending the hearing and determination of this application.***

***3. There be a stay of proceedings of all cases filed against the plaintiff the interested parties of such other person arising out of any alleged accident that may have occurred at any of the plaintiff's premises between the years 2009 to 2014 during which the plaintiff's insurance policies covering Work Injury Benefits Act and Employers Liability taken with the defendant were in force pending the hearing and determination of this suit.***

***4. Further and/or in the alternative to prayer 2 above, the defendant be compelled to take up defence, settle judgments, settle assessments under the Work Injury Benefits Act and otherwise take up the general conduct of all cases filed against the plaintiff the interested parties or such other persons arising out of any alleged accident that may have occurred at any of the plaintiff's premises between the years 2009 to 2014 during which the plaintiff's insurance policies covering Work Injury Benefits Act and Employers Liability taken with the defendant were in force pending the hearing and determination of this application.***

***5. Further and/or in the alternative to prayer 3 above, the defendant be compelled to take up defence, settle judgments, settle assessments under the Work Injury Benefits Act and otherwise take up the general conduct of all cases filed against the plaintiff the interested parties or such other persons arising out of any alleged accident that may have occurred at any of the plaintiff's premises between the years 2009 to 2014 during which the plaintiff's insurance policies covering Work Injury Benefits Act and Employers Liability taken with the defendant were in force pending the hearing and determination of this application.***

***6. Any other orders be made as this honourable court may deem fit to grant.***

2. The motion is supported by the supporting and supplementary affidavits of Roberto Gesti. When served with the motion, the defendant and the interested parties each filed a replying affidavit to oppose the motion. When the motion came up for inter partes hearing, learned counsels appearing in this matter recorded a consent order to have the motion disposed of by written submissions.

I have considered the grounds stated on the face of the motion plus the facts deposed in the affidavits filed in support and against the motion.

4. It is the submission of the plaintiff applicant that it took out various insurance policies with the defendant to cover the employer's liability as well as risks under the **Work Injuries Benefits Act**. The plaintiff further aver that there are various cases filed by the Interested Parties seeking damages and other forms of compensation for injuries allegedly sustained between the years 2009 to 2014 during which period the plaintiff's insurance policies covering Work Injury Benefits Act and Employers' liability taken with the defendant were in force. The plaintiff has submitted that the defendant has without any justifiable reason indicated that it will not take up defence nor settle any judgments arising under the Work Injury Benefits Act nor take up the general conduct of all cases filed against the plaintiff arising out of any alleged accidents that may have occurred at any of the plaintiff's premises between the years 2009 and 2014. It is the submission of the plaintiff that the defendant's actions are actuated by malice and ill will since there were valid insurance policies at that time. The plaintiff further pointed out that if there is any dispute over outstanding premiums then that is a matter that the defendant can pursue with the plaintiff but as long as there is a valid insurance policy in force, it cannot avoid its obligations under the Insurance contract. The plaintiff also argued that it would suffer loss and double jeopardy if the orders sought are not given as it has to incur costs in defending and settling judgements over matters which should rightly, lawfully, fairly and justly be handled by the defendant. The plaintiff pointed out that it has a dispute over payments of premiums with the defendant which they are in the process of appointing joint auditors to look into the accounts in dispute.

5. In response to the motion the defendant filed the replying affidavit of Hellen Omiti Machora, its legal manager, to resist the application. It is the submission of the defendant that it cannot incur any legal obligation at all unless the plaintiff has applied to the defendant for the insurance and paid the premiums as consideration for each insurance cover. The defendant cited the provisions of Section 156 (1) of the Insurance Act which clearly states inter alia that no insurer shall assume a risk in Kenya in respect of insurance business unless and until the premium payable is paid to the insurer. The defendant argued that the plaintiff's suit is still born in that the plaintiff does not dispute that premiums were not paid. The defendant indicated that it had issued a demand notice to the plaintiff seeking for payment of outstanding premiums in the sum of kshj.17,560,888/=

6. The defendant further argued that even if the premium had been paid, thereby validating the insurance

policies the plaintiff was required to give notice of any claim immediately upon receipt. It is submitted that the plaintiff did not notify the defendant of the claims in respect of the Interested parties' claims hence the plaintiff was in breach of the insurance policies regarding notification of such claims therefore the defendant is not liable to the plaintiff in respect thereof. It was also pointed out that the plaintiff had failed to tender evidence showing that the insurance policies covering the period mentioned in the pleadings were renewed after expiry. The defendant further argued the order sought in prayers 4 and 5 of the motion cannot be granted in an interlocutory application. The interested parties in their responses and submissions were of the view that the order for stay of proceedings should not be granted because they would be greatly prejudiced in that the plaintiff may cease operations upon conclusion of the road construction thus leaving them with paper judgments. The interested parties were also of the view that the dispute over payment of premiums is a dispute between the plaintiff and the defendant hence it does not concern them therefore they should not be dragged into the affair. It was also argued that if the orders sought are issued it will cause considerable delay in concluding the interested parties' claims. In response to the defendant's claim that there is no evidence that the plaintiff renewed the expired insurance policies, the plaintiff attached to the supplementary affidavit of Robert Gestri copies of various renewal confirmation allegedly issued by the defendant.

7. After a careful consideration of the material placed before this court together with the rival submissions, it is apparent that there are various facts which are not in dispute. First, there is no dispute that the plaintiff and the defendant have had a contractual relationship in respect of insurance policies.

Secondly, that the plaintiff and the defendant have a dispute over non-payments of insurance premiums.

Thirdly, that the defendant has declined to address the claims and or suits filed by the interested parties against the plaintiff.

8. This court has been beseeched by the plaintiff to issue the orders sought in the motion dated 4<sup>th</sup> June 2015. I have carefully considered the orders sought as prayers 4 and 5 of the aforesaid motion.

9. I am in agreement with the submissions of the defendant that it is not appropriate to grant the aforesaid orders in an interlocutory application. The order sought in my view can only be issued after the suit has been heard substantively.

10. The remaining order which commends itself for consideration is whether or not an order for stay of proceedings should be granted. Despite the spirited arguments made by the defendant and the interested parties, I am convinced that the plaintiff has convinced me that it is entitled to be granted the order for stay of proceedings. This will enable the plaintiff have the dispute between it and the defendant to be settled first. The contractual relationship between the plaintiff and the defendant has a bearing on the claims and or suits filed by the interested parties against the plaintiff.

11. If in the end the plaintiff succeeds in proving that in the material time it had an insurance cover with the defendant, then the defendant will be bound by the doctrine of subrogation to take up the plaintiff's defence in the claims or suits filed against it. If the order for stay is denied, the plaintiff may suffer double jeopardy in that it will be forced to expend in defending and or settling the claims yet it may have had valid insurance policies.

12. The interested parties have raised valid concerns over the delay the order for stay of proceedings may cause. Upon taking those concerns into consideration, I think a fair order is to grant an order for stay for a limited period.

13. In the end, I allow the motion dated 4<sup>th</sup> June 2015 in terms of prayer 3 to last for a period of six (6) months. The plaintiff to use this period to conclude the dispute between it and the defendant. If the dispute is not concluded within the aforesaid period, the orders shall automatically stand discharged.

14. Costs of the motion to abide the outcome of this suit.

Dated, Signed and Delivered in open court this 2<sup>nd</sup> day of December, 2016.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant