



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 115 OF 2013**

**GEMINIA INSURANCE COMPANY LIMITED .....PLAINTIFF**

**VERSUS**

**ROSE MUTHAISU KASIVA ..... 1<sup>ST</sup> DEFENDANT**

**EZRA EVANS OLUOCH ..... 2<sup>ND</sup> DEFENDANT**

**DAUDI KAVOI JOEL ..... 3<sup>RD</sup> DEFENDANT**

**PILESI MWITHI JOEL (Suing on behalf of**

**the Estate of PIUS MATEI MUASA) .....4<sup>TH</sup> DEFENDANT**

**RULING**

**ON MOTION OF MOTION DATED 18<sup>TH</sup> JUNE 2014**

1. The Notice of Motion under consideration (**the Application**) is filed by 3<sup>rd</sup> and 4<sup>th</sup> Defendants. Those Defendants seek the setting aside of the Order issued on 9<sup>th</sup> October 2013 which Order stayed the **Mombasa CMCC No. 140 of 2013**.

**BACKGROUND**

2. This suit was initially filed by Geminia Insurance Company Ltd, the Plaintiff, against two Defendants namely **ROSE MUTHAISU KASIVA** and **EZRA EVANS OLUOCH**.
3. The 1<sup>st</sup> Defendant is the registered owner of motor vehicle Registration No. KAP 762E. The Plaintiff is the Insurer of that vehicle. The 2<sup>nd</sup> Defendant was the driver of that vehicle on 7<sup>th</sup> November 2011. By this suit Plaintiff seeks declaration that it is entitled to avoid the Insurance contract over the said vehicle and a declaration that it is not legally obliged to honour claims or judgment in respect of the Insurance cover. Plaintiff also seeks stay of **Mombasa CMCC No. 1430 of 2013** pending determination of this suit.
4. In **Mombasa CMCC No. 1430 of 2013** the 3<sup>rd</sup> and 4<sup>th</sup> Defendants sued the 1<sup>st</sup> and 2<sup>nd</sup> Defendants for compensation in respect of the Estate of **PIUS MATETI MUASA (Deceased)** who died as a result of accident allegedly caused by 2<sup>nd</sup> Defendant as authorized driver of 1<sup>st</sup>

Defendant.

5. The Plaintiff herein by Notice of Motion dated 4<sup>th</sup> October 2013 sought stay of **Mombasa CMCC No. 1430 of 2013**. That Notice of Motion was filed under Certificate of Urgency. It was heard ex parte on 9<sup>th</sup> October 2013 when the Court granted stay of **CMCC No. 1430 of 2013** for 3 months, that is upto 20<sup>th</sup> November 2013. The Court on that day also ordered this suit be Fast Tracked. When that stay order was granted the 3<sup>rd</sup> and 4<sup>th</sup> Defendants were not yet parties in this case.
6. On 20<sup>th</sup> November 2013 the 1<sup>st</sup> and 2<sup>nd</sup> Defendants though served with application to stay **CMCC No. 1430 of 2013** they did not attend Court nor did they oppose the application. The Court on that day extended stay of **CMCC NO. 1430 of 2013** upto the last day of May 2014. This suit was ordered to be heard before end of May 2014.
7. The Court on 25<sup>th</sup> March 2014 granted leave to the joining of 3<sup>rd</sup> and 4<sup>th</sup> Defendants in this case. From that date onwards the 3<sup>rd</sup> and 4<sup>th</sup> Defendants participated in this case.

#### **NOTICE OF MOTION DATED 18<sup>TH</sup> JUNE 2014**

8. The application under consideration as stated before seeks to vacate the order of 9<sup>th</sup> October 2013 staying CMCC No. 1430 of 2013. The order for vacation is sought on the basis that the Order of that day was granted when the 3<sup>rd</sup> and 4<sup>th</sup> Defendants were not parties in this case. Evan Gichuki Thiaka, Advocate for 3<sup>rd</sup> and 4<sup>th</sup> Defendants swore the affidavit dated 18<sup>th</sup> June 2014 in support of the application. He deponed-
  - **THAT the Plaintiff herein is not a party to MSA CMC No. 1430 of 2013 hence has no locus to obtain any Orders therein.**
  - **THAT the Plaintiff herein has not issued a Notice repudiating Policy No. CV/03/0342002/IMTPO.**
  - **THAT the Deceased on whose behalf MSA CMCC No. 1430 of 2013 is filed was not privy to the contractual obligations arising out of the cause of action between the Plaintiff herein and the 1<sup>st</sup> Defendant.**
  - **THAT the Plaintiff/Respondent herein seeks to gain undue advantage to escape liability by staying CMCC No. 1430 of 2013.**
  - **THAT the Appellant's and the Estate of the Deceased are equally entitled to equal protection and benefit of the Law hence MSA CMCC No. 1430 of 2013 should also proceed expeditiously and judiciously to full conclusion without unnecessary delays.**
  - **THAT the Applicants are entitled to a fair hearing, hence they ought to be given a chance to be heard.**
  - **THAT staying MSA CMCC No. 1430 of 2013 has be greatly prejudicial the Applicants and the Estate of the Deceased.**
9. Plaintiff in its replying affidavit sworn by Joseph Ogero on 7<sup>th</sup> July 2014 objected to the application. The deponent deponed in that affidavit-

**“THAT the dispute between the Insurer (Plaintiff) and the First Defendant (Insured) directly impacts on the 3<sup>rd</sup> and 4<sup>th</sup> Defendant's lower Court claim and in the unlikely event that stay orders are discharged the lower Court case will proceed and there will be execution which will expose the Plaintiff to the risk of loss and suffering.”**

Further it was deponed that the Plaintiff had prepared and was ready to proceed with the prosecution of this suit.

## **ANALYSIS**

10. The application was heard inter partes on 23<sup>rd</sup> July 2014. As a

consequence of its hearing the full hearing of this suit that had been set for that day could not proceed. It is therefore obvious that the filing of the application by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants has delayed the conclusion of this suit and has therefore caused the prolonging of the stay of **CMCC No. 1430 of 2013**.

11. Learned Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants as he argued the application stated thus-

**“We pray that the orders of stay be set aside and [the] matter do start afresh in the presence of 3<sup>rd</sup> and 4<sup>th</sup> Defendants, that is the Plaintiff’s application.”**

It does therefore seem that 3<sup>rd</sup> and 4<sup>th</sup> Defendants seek to vacate the order of 9<sup>th</sup> October 2013 because it was granted in the absence of 3<sup>rd</sup> and 4<sup>th</sup> Defendants. However as stated before the Order of 9<sup>th</sup> October 2013 was granted ex parte under Certificate of Urgency. By 14<sup>th</sup> May 2014 when the 3<sup>rd</sup> and 4<sup>th</sup> Defendants had already been joined as parties in this case the Court in the presence of Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants granted a stay of **CMCC No. 1430 of 2013** up to the last day of July 2014.

12. The Order of 9<sup>th</sup> October 2013 which granted stay upto to 20<sup>th</sup>

November 2013 expired on that date. It therefore follows having expired it would be in vain to set it aside or vacate it as sought by the Applicants. I therefore find that the prayer that is sought cannot be granted because they would be in vain. It is in vain because the Court cannot vacate an Order that has expired. It is for that reason that the application will be dismissed.

13. It is unfortunate the application interfered with the hearing of the

suit. Had the suit proceeded for hearing on 23<sup>rd</sup> July 2014 and a judgment issued the stay would have automatically vacated.

## **CONCLUSION**

14. The Notice of Motion dated 18<sup>th</sup> June 2014 is dismissed but the costs

shall be in the cause. The Court orders that **Mombasa CMCC No. 1430 of 2013** be and is hereby stayed for six (6) months from this date hereof.

**DATED and DELIVERED at MOMBASA this 9<sup>TH</sup> day of OCTOBER, 2014.**

**MARY KASANGO**

**JUDGE**