



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO 142 OF 2008

CORPORATE INSURANCE COMPANY LTD.....PLAINTIFF

VERSUS

SAMUEL KAMAU NGANGA.....DEFENDANT

RULING

1. The Interested-Party herein, GEOFFREY WARUIRU MAGUA, is the Plaintiff in ***Nairobi (Milimani) PMCC No. 1430 of 2008***. His said suit is against the Defendant herein, SAMUEL KAMAU NGANGA (as first Defendant), and another person, MOHAMED DAHIR ALI (as second Defendant). The suit is for damages on account of personal injuries received in a road accident.
2. The Interested-Party obtained default judgment against the Defendant herein in the aforesaid ***Nairobi (Milimani) PMCC No. 1430 of 2008***. His suit against the second defendant was pending hearing when the court herein by an **order dated 24th July 2009** (Sitati, J) stayed the said case pending hearing and determination of the suit herein. This order was obtained upon application by the Plaintiff.
3. The suit herein is by an insurer, the Plaintiff, against its insured, the Defendant, in respect to one of the motor vehicles involved in the accident that gave rise to the Interested Party's cause of action in his suit (***Milimani PMCC No. 1430 of 2008***). Its claim against the Defendant is for declarations that it is entitled to avoid its insurance contract with the Defendant, and that it is not liable to indemnify the Defendant in respect to claims by "passengers injured or killed as a result of the said accident under the said policy or under **The Insurance (Motor Vehicles Third Party Risks) Act, Cap 405**".
4. The Interested Party has applied by **notice of motion dated 28th December 2010** for the main order to set aside the aforesaid order of stay of 24th July 2009 to enable his suit (***Milimani PMCC No 1430 of 2008***) to proceed. He has sought in the alternative and without prejudice an order that the Plaintiff deposits in court or in a joint interest-earning account the sum of KShs 750,000/00 as security for the damages he anticipates to get in his said suit. That application is the subject of this ruling.
5. The application is brought under **sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act, Cap 21 (the Act)**. The grounds for the application include –
 - (i) That the Plaintiff herein is not a party in ***Milimani PMCC No. 1430 of 2008***.
 - (ii) That the order of 24th July 2009 was issued *ex parte* the Interested Party without notice, and that therefore he was condemned unheard.

(iii) That it is in the interests of justice that the Interested Party be allowed to proceed with his own suit (*Milimani PMCC NO. 1430 of 2008*).

6. The Plaintiff has opposed the application by replying affidavit filed on 23rd May 2011 sworn by one **Nancy Shikuku**, the Plaintiff's Chief Legal Officer. The main point taken is that the Interested Party was served with statutory notice under **section 10(4)** of Cap 405 aforesaid notifying him of the present suit, and that he did not then apply to be enjoined in the suit, thereby forfeiting the chance to participate in any subsequent proceedings (including the application for stay of his suit).

7. In response to the replying affidavit the Interested Party filed **supplementary affidavit** (wrongly titled "further affidavit") on 8th July 2011. He pointed out in this affidavit that the Plaintiff had in writing washed its hand off the Interested party's suit, and that it was, in effect, patently unjust for it to seek and obtain stay thereof.

8. I have considered the submissions of the learned counsels appearing, including the cases cited.

9. **Section 10(4)** of Cap 405 provides –

"10.(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 had 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."

10. It was up to the Plaintiff to obtain the necessary declarations against the Defendant as soon as possible after commencement of the Interested Party's suit. Such declaration would be a sufficient answer to any attempt by the Interested Party to execute against the Plaintiff under **section 10(1)** of Cap. 405 any decree that he may have obtained against the Plaintiff's insured (the Defendant herein).

11. As it is, the Interested Party had not as yet obtained any decree against the Plaintiff's insured in *Milimani PMCC No. 1430 of 2008*. All he had there was an interlocutory judgment; the case had still to be heard in respect to quantum. The case also involved another defendant who was not insured by the Plaintiff. Why then should the Interested Party be prevented from proceeding against him?

12. And even if the Interested Party already had a decree against the Plaintiff's insured, he would still have had to file suit and obtain a declaratory decree against the Plaintiff.

13. So, the order of stay of 24th July 2009 was pre-mature. It was also unjust because the Interested Party was not served with the application for it. He was condemned unheard. It was not sufficient that he had been served with statutory notice of the suit.

14. I have no hesitation whatsoever in allowing prayers A and B of the notice of motion dated 28th December 2010. The order of 24th July 2009 is hereby set aside. Costs of this application shall be in the cause. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 2ND DAY OF OCTOBER 2013

H. P. G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 9TH DAY OF OCTOBER 2013