

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT CHUKA**

**HCCC NO. E004 OF 2024**

**MADISON INSURANCE**

**COMPANY**

**LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**FARAH SAID BARE.....DEFENDANT/RESPONDENT**

**MOHAMED MUDEY BILLOW.....INTERESTED PARTY**

**R U L I N G**

1. By Notice of Motion dated 26<sup>th</sup> February 2025, the Applicant sought the following orders:-

- i. Spent
- ii. That an order of stay do issue staying proceedings in Chuka MCCC No. E117 of 2024; Mohamed Mudey Billow v. Farah

Said Barre and Salad Mohamed Musa pending the hearing and determination of the suit herein.

iii. That the honourable court do issue an order restraining the execution of any decree that may emanate from Chuka MCCC No. E117 of 2024; Mohamed Mudey Billow v. Farah Said Barre and Salad Mohamed Musa pending the hearing and determination of the application interparties.

iv. That the honourable court do issue an order restraining the execution of any decree that may emanate from Chuka MCCC No. e117 of 2024; Mohamed Mudey Billow v Farah Said Barre and Salad Mohamed Musa pending the hearing and determination of the suit herein.

- v. That this honourable court may grant any other orders it deems just to grant.

2. The Application is founded on the grounds on its face and on the supporting affidavit of Sharon Laboso senior supervisor Legal at Madison Insurance sworn on even date. She deponed that the Plaintiff had filed a declaratory suit against the Defendant seeking to avoid liability in respect to an accident which occurred on 7<sup>th</sup> July 2024. That the proceedings in Chuka MCCC No. E117 of 2024; Mohamed Mudey Billow v Farah Said Barre and Salad Mohamed Musa arose out of an accident that allegedly happened on 7<sup>th</sup> July 2024 involving motor vehicle registration number KDP 912G which was self-involving. She averred that the said suit is at an advanced stage and judgment may be rendered any time against the defendants.

3. It was further stated that if the suit in MCCC No. E117 of 2024; **Mohamed Mudey Billow v Farah Said Barre and Salad Mohamed Musa** succeeds, the Plaintiff will be compelled to settle any claims arising out of the said suit being the insurer of the said motor vehicle.
4. It was her statement that the Defendant breached the Plaintiff's Policy conditions in that the motor vehicle at the time of causation of the accident was being used to transport miraa/khat violating the stipulated terms in the Policy thus invalidating the said Policy.
5. She stated that in the interest of justice, the instant suit needs to be determined first to enable the Plaintiff make a decision whether there is need to defend its insured. That there will be no prejudice to the Defendant if stay is granted. Further, that the plaintiff stands to suffer

irreparable damage unless the Application is allowed.

6. In response, the Interested Party filed a replying affidavit dated 1<sup>st</sup> April 2025 stating that he is the Plaintiff in Chuka MCCC No. E117 of 2024. He stated that on 7<sup>th</sup> July 2024 he was involved in a road traffic accident caused by a vehicle owned by one Farah Said Bare, the Respondent herein and driven by one Salad Mohammed Musa and which vehicle was insured by the Applicant under Insurance Policy dated 15<sup>th</sup> March 2024. That as a result of the accident, he instituted the suit at the lower court seeking damages for bodily injuries he sustained which suit is at an advanced stage and had been fixed for hearing.

7. He stated that the Applicant claims in this Application that it had filed a declaratory suit to avoid liability for the said accident alleging that the

Defendant/Respondent breached the Plaintiff's Policy by allegedly using the insured vehicle to transport khat/miraa contrary to the terms of the insurance. That the Applicant was aware of the suit at the lower court from the onset as a statutory notice dated 4<sup>th</sup> September 2024 received by the Applicant was duly served on it in compliance with Section 10 (2) of the Insurance (Motor Vehicles Third Party Risks Act), Cap 405. That despite having been duly notified, the Applicant failed to take any steps to challenge its liability or seek a declaratory relief at the onset but instead waited until the matter was at an advanced stage which attempt was an afterthought. He disputes that at the time of the accident, the vehicle was carrying goods contrary to the Insurance Policy the vehicle had only two passengers.

8. The Interested Party further stated that Section II of the Policy clearly provides that the Applicant shall indemnify any authorized driver or person in the vehicle against legal liability for damages, death or bodily injury. That the Applicant has not demonstrated that the driver was unauthorised or that the Policy excludes liability in the circumstances of this suit. That despite alleging a breach by the defendant, the Applicant had not tendered evidence to show that it cancelled the Policy or formally notified the Defendant of any repudiation of liability prior to making this Application, suggesting it continued to recognize the Policy's validity until it became expedient to avoid liability.

9. He averred that he had already prosecuted his case which the Applicant admits is at an advanced

stage and therefore a stay of proceedings would unjustly delay his right to a determination and remedy for injuries suffered.

10. The Application was canvassed through written submissions as directed by the court.

### **The Applicant's Submissions**

11. The Applicant/Plaintiff filed its written submissions dated 8<sup>th</sup> April 2025 and raised the following issues for determination:-

(i) Whether the Applicant has established a *prima facie* case.

(ii) Whether the instant suit was filed expeditiously

(iii) Whether the Applicant has established sufficient cause to warrant stay of proceedings.

**(i) Whether the Applicant has established a prima facie case.**

The Applicant/Plaintiff submitted that it was entitled to avoid liability out of the said accident for breach of Policy of Insurance by the Defendant/Respondent for ferrying Khat/miraa which was excluded under the Policy. That the Defendant had not informed the Plaintiff that the subject motor vehicle would be used for miraa business for the Plaintiff to make an informed decision on the level of risk. That the Respondent concealed material facts thus rendering the subject Policy unenforceable.

12. The Applicant/Plaintiff submitted that the Plaintiff in the trial suit was a turnboy and therefore an employee of the Defendant and the subject Policy did not cover liability arising out of a death

or bodily injury to any employee of the insured. It was the Applicant/Plaintiff's submission that it had a *prima facie* case with overwhelming chances of success. They relied on the case of **Britam Insurance Company v Murage; Mose & 4 Others [2021] KEHC (KLR)** where it was held that stay of proceedings is granted where the Applicant establishes a *prima facie* case and shows sufficient reason that in the interest of justice the stay ought to be granted.

**(ii) Whether the instant suit was filed expeditiously.**

13. The Applicant/Plaintiff submitted that the trial suit was instituted on 4th September 2024 while the instant suit was instituted on 26<sup>th</sup> November 2024 which was within the three months period provided under the law.

**(iii) Whether the Applicant has established sufficient cause to warrant stay of proceedings.**

14. The Applicant/Plaintiff submitted that this court had powers to stay proceedings under its inherent jurisdiction reserved in Section 3A of the Civil Procedure Act. He cited **Jadwa Karsan Harnam Singh Bhogal [1953] 20 (1) EACA 74** where the court held that it was true that there was a wider power under Section 97 [now 3A of the Civil Procedure Act] to stay proceedings where the ends of justice so required and to prevent an abuse of the court process.

15. The Applicant further submitted that if the trial suit proceeded to conclusion, judgment would be entered against the Defendant which judgment when not settled may lead to execution against the Defendant or a declaratory suit against the

Applicant/Plaintiff. They cited the case of **Madison Insurance Company Limited V Andrew Kariuki & Another [2018] eKLR.**

16. The Applicant/Plaintiff further urged the court to exercise its discretion to say the proceedings to prevent waste of judicial time. To buttress their point, the Plaintiff relied on the case of **Muchanga Investments limited v Safaris Unlimited (Africa) Ltd & 2 Others [2009] (KLR)** where the court of appeal emphasized the need for economy of judicial time.

### **The Interested Party's Submissions**

17. The Interested Party filed his submissions dated 29<sup>th</sup> April 2025. He raised the following issues for determination:-

(i) Whether the Applicant has demonstrated exceptional circumstances justifying a stay of proceedings.

(ii) Whether the Plaintiff has established a prima facie arguable case with credible evidence.

(iii) Whether the Applicant has demonstrated irreparable harm or the Application or suit will be rendered nugatory.

(iv) Whether the balance of convenience favours the Applicant.

**(i) Whether the Applicant has demonstrated exceptional circumstances justifying a stay of proceedings.**

18. The Interested Party submitted that stay of proceedings is granted sparingly and only in exceptional circumstances where proceeding in the trial court would result in infringement of

constitutional rights, unfairness or oppression amounting to an abuse of process. He relied on the case of **William Odhiambo Ramogi & 3 Others v AG [2020] eKLR** where the court held: -

**“A scan of our decisional law reveals that our courts have established the following principles for grant of stay of proceedings pending the hearing and determination of an appeal over an interlocutory application to a higher court;**

**“a. First, there must be an appeal pending before the higher Court;**

**b. Third, the Applicant must demonstrate that the appeal raises substantial questions**

**to be determined or is otherwise arguable;**

**c. Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;**

**d. Fifth, the Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and**

**e. Sixth, the Applicant must demonstrate that the**

**application for stay was filed expeditiously and without delay.**

19. It was submitted that a stay must meet all the six criteria including proof of exceptional circumstances demonstrating that an Appeal/Application would be rendered nugatory. That additionally, this power ought to be exercised sparingly and in exceptional circumstances and, that the instant application did not meet the threshold.

**(ii) Whether the Plaintiff has established a prima facie arguable case with credible evidence.**

20. The Interested Party submitted that the requirement to establish a *prima facie* case is a fundamental threshold for grant of stay of

proceedings. He relied on the case of **Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi [2014] KEHC.**

21. The Interested Party further submitted that the Applicant alleged breach of Insurance Policy based on an interview with the driver, with no photographs or witness statements to corroborate the allegation. That the delay in raising the alleged policy breach suggested an afterthought. Further that Section II of the Policy indemnifies any authorised driver or person and the Applicant has not demonstrated that the driver was unauthorised or that the policy was cancelled or repudiated. The Interested Party urged that the Applicant had not established a *prima facie* case.

**(iii) Whether the Applicant has demonstrated irreparable harm or the Application or suit will be rendered nugatory.**

22. The Interested Party submitted that the Applicant must demonstrate that if stay is not granted, it will suffer harm that cannot be adequately compensated by damages. He relied on **David Morton Silverstein v Atsango Chesoni [2002] eKLR** where the court stated as follows:-

***“The court held that among the six principles to be proved for stay of proceedings to be granted the Applicant must establish that the Appeal would be rendered nugatory if the stay of proceedings is not granted.”***

**(iv) Whether the balance of convenience favours the Applicant.**

23. The Interested Party submitted that the court must weigh the prejudice to be suffered by either

Party from the grant or refusal of stay. That in the present case, the Interested Party's case trial was at an advanced stage pending hearing; whereas the Applicant's Application for stay was filed later despite having been served with a statutory notice. He relied on the case of **Kenya Shell Limited v Benjamin Karuga Kibiru & Another [1986] eKLR** and urged the court to consider the stage of proceedings, the conduct of the parties and the potential consequences of delay or disruption.

24. It was further submitted that the balance of convenience and the interests of justice strongly favour allowing the trial to proceed to its logical conclusion. He cited **Equity Bank Limited V West Link MBO Ltd [2013] eKLR** where the court stated that the court must avoid procedural abuse and unnecessary delay, especially when the

party seeking a stay has not acted diligently or shown exceptional circumstances.

### **Analysis and determination.**

25. I have considered the rival affidavits and the submissions by the parties as well as the authorities relied on. I find the following issues for determination:-

- i. Whether the Applicant has established a *prima facie* case warranting the grant of stay of proceedings;
- ii. Whether the Applicant has demonstrated sufficient cause and exceptional circumstances justifying stay;
- iii. Whether the Applicant will suffer irreparable harm if stay is not granted; and
- iv. Whether the balance of convenience and interests of justice favour granting the stay.

26. The law governing stay of proceedings is well settled. It is a discretionary remedy, to be exercised sparingly and with caution, as it impedes a litigant's right to have their case heard expeditiously.

27. In **Kenya Wildlife Service v James Mutembei [2019] eKLR**, Gikonyo J held that:-

***“Stay of proceedings is a grave judicial action which interferes with a party's right to conduct his litigation. It ought to be granted only in exceptional circumstances, where the ends of justice so demand.”***

28. Further, in **Re Global Tours & Travel Ltd; HC Winding Up Cause No. 43 of 2000**, Ringera J. (as he then was) observed:

***“The sole question is whether it is in the interest of justice to order a stay of proceedings, taking into account such factors as the need for expeditious disposal of cases, the prima facie merits of the intended case, scarcity of judicial time, and whether the application has been brought expeditiously.”***

**(i) Whether the Applicant has established a *prima facie* case.**

29. The Applicant contends that the Respondent breached the Policy conditions by transporting miraa, which was not declared at the inception of the contract. It asserts that such use invalidates the Policy, entitling it to avoid liability.

30. The Applicant annexed the Investigation report based on an interview with the driver. The

Interested Party also produced the same report, showing that the vehicle was empty when the accident occurred.

31. The Policy clause referred to by the Applicant excluding commercial use must be interpreted strictly. In **Blue Shield Insurance Co. Ltd v Joseph Mboya Oguttu [2009] eKLR** the Court of Appeal stated that exclusion clauses in insurance contracts must be strictly construed against the insurer and any ambiguity resolved in favour of the insured. The Respondent has urged that the Applicant did not adduce evidence of having repudiated or cancelled the policy upon discovering the alleged breach. These however were matters for substantive trial in the declaratory suit. Suffice to state that there was

insufficient evidence of a prima facie case at this stage.

32. Having considered the parties' respective positions, I am not satisfied that the Applicant has demonstrated a *prima facie* case with a likelihood of success.

**(ii) Whether there were exceptional circumstances to justify stay**

33. The Applicant argues that if proceedings continue in Chuka MCCC No. E117 of 2024, it may be compelled to satisfy any decree issued against the insured, hence prejudicing its rights. That is a legitimate concern. However, Section 10(4), of the Insurance (Motor Vehicles Third Party Risks) Act, expressly provides that an insurer may file a declaratory suit to contest liability even after judgment has been entered, provided

notice was served. Thus, the law already safeguards the insurer's rights.

34. In the case of **Madison Insurance Company Limited V Andrew Kariuki & Another [2018]**

**eKLR** it was held that stay of proceedings was necessary to avoid conflicting decisions on the same matter by different courts. The court stated:-

**“Notably, the main purpose of staying proceedings is to avoid the mischief of different courts of competent jurisdiction hearing a matter between the same parties over the same or similar subject matter due to the likelihood of different courts coming up with different decisions which could cause embarrassment to them.”**

35. In this case however, no evidence has been shown that continuation of the trial court proceedings would render the declaratory suit nugatory. The two suits address different legal questions: the trial in the lower court on liability and quantum, while the Declaratory suit would decide the question as to who would be responsible for satisfying the decree. Therefore, it is my finding that no exceptional circumstances have been established and the fear of conflicting decisions was not justified.

**(iii) Whether the Applicant will suffer irreparable harm**

36. The Applicant's main apprehension is that a decree may issue in the lower court which could result in financial exposure. It is trite that financial loss alone does not constitute irreparable harm, as

such loss can be compensated by damages or recovered through subsequent legal action. Moreover, under Section 10(4) of Cap 405, the Insurer can later seek reimbursement or avoid liability through declaratory proceedings. Thus, any harm the Applicant may suffer is not irreparable.

37. I am persuaded by the case of **Njoki v CIC General Insurance Limited; Mburu & 2 Others [2025]** where the court held that:-

***“...fear of “possible judgments and possible attachment is not a good satisfactory reason to interrupt in the legal right of the Interested Parties to conduct their suit to their logical determination.”***

***The Interested Party submitted that the Applicant has not demonstrated that any harm it may suffer is***

***irreparable or incapable of being compensated by damages or other legal remedies. The Applicant can still pursue its declaratory suit independently. If successful, it can recover any amounts paid under the policy from the insured or obtain reimbursement. That the existence of this alternative remedy negates any claim of irreparable harm.”***

**(iii) Whether the balance of convenience and interests of justice favour Stay**

38. The two competing interests on this case are that a stay would cause delay for the interested Party's case in the trial court while lack of stay may occasion the Applicant undue liability for the

decree that may ensue from the judgement. I have considered the two positions. On the other hand, the Applicant would still obtain relief in the outcome of the declaratory suit. If they succeed then there would be no execution against them. It has been demonstrated that the Interested Party's case in the lower court was at an advanced stage and ready for hearing. Further given the Applicant's delay in filing the Application, it would not serve the interest of justice to further delay the proceedings in the trial court.

39. I find that the balance of convenience weighs heavily in favour of not staying the proceedings.

40. Finally, it is to be remembered that the grant of stay of proceedings was a remedy in the discretion of the court having weighed all factors. I am persuaded by the decision in **Global Tours &**

**Travels Limited; Nairobi HC Winding up Cause No. 43 of 2000.**

**“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice... the sole question is whether it is in the interest of justice to order a stay of proceedings as it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh in the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious**

**disposal of cases, the prima facie merits of the intended appeal, in sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”**

41. In this case having taken all factors into consideration, I am persuaded not to stay the present proceedings. The Notice of Motion dated 26<sup>th</sup> February 2025 is without merit and is dismissed with costs to the Interested Party.

**Ruling delivered, dated and signed at Chuka this day of 15<sup>th</sup> October, 2025.**

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**R. LAGAT-KORIR**

## **JUDGE**

**Ruling delivered in the presence of Ms Otieno for the Interested Party and N/A for the Applicant and the Respondent. Muriuki (Court Assistant).**

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