



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NO. 287 OF 2012

IN THE MATTER OF

REAL INSURANCE COMPANY LIMITED.....PLAINTIFF

VERSUS

BOARD OF GOVERNORS VICTONEL ACADEMYDEFENDANT

AND

SIMON KIPNGETICH KORIR.....1ST APPLICANT

E A (MINOR SUING THROUGH WYCLIFFE

ASUNGU OTIENO AS NEXT FRIEND).....2ND APPLICANT

G O (MINOR SUING THROUGH WYCLIFFE

ASUNGU OTIENO AS NEXT FRIEND).....3RD APPLICANT

I A (MINOR SUING THROUGH WYCLIFFE

ASUNGU OTIENO AS NEXT FRIEND).....4TH APPLICANT

PHILEMON KIPYEGON BETT.....5TH APPLICANT

MOSES OYUGI OYOO.....6TH APPLICANT

WENSLAUS SIKUKU OKOTH.....7TH APPLICANT

PETERSON MORURI NYABOGA.....8TH APPLICANT

MICHAEL AMIN MAKUYU.....9TH APPLICANT

RULING

The Defendant has filed a Notice of Motion dated 24th September, 2012 under **Section 1A, 1B, 3 and 3A** of the **Civil Procedure Act Cap 21 Laws of Kenya** and any other enabling provisions of the law seeking orders:-

- a. That this honourable court be pleased to stay all proceedings in Kericho Chief Magistrate's Court Civil Case No. 352 of 2011 and all other suits filed within the series of cases falling between Kericho CMCC No. 133 of 2012 to CMCC No. 141 of 2012 (details of the suits enumerated in the schedule annexed hereto marked "VAL") all in respect to a road traffic accident that occurred on the 29th July, 2011 at Samutet area along the Kericho to Kisumu road involving the defendant's motor vehicle registration number KAK 096R Isuzu bus and motor vehicle registration number KBA 773B Toyota Hiace matatu, pending the hearing and determination of this suit on the issue of liability.
- b. That this honourable court be pleased to stay all proceedings in respect to any other claim whatsoever arising from the road traffic accident that occurred on the 29th July, 2011 at Samutet area along the Kericho to Kisumu road involving the defendant's motor vehicle registration number KAK 096R Isuzu bus and motor vehicle registration number KBA 773B Toyota hiace matatu, pending the hearing and determination of this suit on the issue of liability.

c. **That the costs of the application be provided for.**

The application is premised on the grounds found on the face of the application and the supporting affidavit of **Victor Mwaura Gichuru** who is the Director of the Defendant herein. He stated that on 28th May, 2009, the Plaintiff/Respondent issued the Defendant/Applicant with a policy cover number TPNKR/MCOM/POL/2022762 in respect of motor vehicle KAK 096R Isuzu Bus. It was renewable yearly and the terms of the policy were that the Respondent would indemnify the Applicant against third party claims in the event of an accident caused or arising from the use of the motor vehicle as provided for in the policy document. On 29th July, 2011, the said motor vehicle was involved in a road traffic accident along Kericho-Kisumu road. Subsequently, the passengers who were aboard the Applicant's motor vehicle on the material day lodged claims against the Defendant i.e. Kericho CMCC No. 133 of 2012 to Kericho CMCC No. 141 of 2012. When the Applicant notified the Respondent of the incident, the Plaintiff repudiated the Applicant's insurance cover claiming that the Applicant had contravened the policy requirements/conditions set out in the policy document dated 28th May, 2009. It is the Applicant's contention that the 3rd party claims lodged against the Applicant fell within the risk covered in the policy; that the claimants - the suits are keen on prosecuting their cases and that is why the applicant seeks to stay the suits as the issues in the suit have a bearing on this suit as to who between the two, the Applicant and Respondent will be liable to satisfy the claims in respect of damages.

In opposition, the interested parties have filed a replying affidavit through their representative Simon Kipng'etich Korir (1st interested party). They contend that the application is fatally defective, devoid of merit, oppressive and misconceived, bad in law and an abuse of the process of court and ought to be dismissed; that the interested parties were not party to the contract giving rise to insurance policy between the plaintiff and the defendant; that any conflict or issues arising from the said insurance policy should not involve the interested parties as they are third parties in the issue; that the application seeking orders to stay the proceedings filed by the interested parties is unfair and unjust on the part of the interested parties as they suffered injuries, loss and severe damages which ought to be indemnified at the quickest instance possible; that the subject application is therefore devoid of merit and ought to be dismissed.

When a party takes out an insurance cover, the insurer binds himself to indemnify the insured in the event of a loss or damage. In the plaint, the Respondent admits that indeed the Respondent took out a cover with them but that the insured vehicle was not supposed to be used for hire, gain or commercial use and that the policy did not cover third party passengers. On the other hand, the Applicant contends that the policy did cover 3rd party passengers. It is only the court that will determine the dispute between the parties and hence determine who is liable to honour the claims of the Interested Party. In my view, the dispute between the insurer and insured directly impacts on the Interested Party's claims and even if the cases before the Chief Magistrate's court proceed, there may be no execution till this matter is heard and determined. I do appreciate that the Interested Parties have commenced proceedings as of right; they should not be deprived of the right to continue those proceedings in the absence of very good reasons.

The applicant herein is apprehensive that unless an order of stay of the proceedings is granted, the claimants will proceed with their suits exposing it to the risk of execution and that would weigh heavily on the Defendant. The Applicant has a genuine concern. In the exercise of this court's discretion, it is well founded that the applicant be allowed time to prosecute this suit before the claim in the Chief Magistrate's court are heard and determined. I hereby grant an order of stay as prayed. I further direct that this matter be given preference and be heard on priority basis and the parties do speed up the prosecution of this case, comply with **Order II** of the **Civil Procedure Rules** within the next 21 days, then have the suit prosecuted within the next 12 months. Cots be in the cause.

DATED and DELIVERED this 4th day of October, 2013.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Mungai holding brief for Mr. Ochieng for the plaintiff

Mr. Wahome holding brief for Gikeria for the defendant

Kennedy – Court Assistant