



**REPUBLIC OF KENYA**

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

*(CORAM: CHERERE-J)*

**CIVIL APPEAL NO. 14 OF 2015**

**BETWEEN**

**LABAN SHIHEMBETSA & 3 OTHERS .....PLAINTIFFS**

**AND**

**DIRECTLINE ASSURANCE CO. LIMITED & 3 OTHERS.....DEFENDANTS**

**AND**

**JAPHETH MUNJAL & 12 OTHERS.....INTERESTED PARTIES**

**RULING**

**Background**

1. On 21st October, 2015, counsels for the plaintiffs and the defendants entered into consent in respect of plaintiffs' notice of motion dated 13th July, 2015 and filed on 14th July, 2015 staying the 32 civil suits filed in 2013 against the plaintiffs by various claimants among them the interested parties herein, pending the hearing and determination of this suit.

**Notice of Motion**

2. By a Notice of Motion dated 21st May, 2018, brought under the provisions of Sections 1A, 1B, and 3 of the Civil Procedure Act, the applicants/ interested parties pray for orders **THAT**: -

*1) The Honourable Court be pleased to discharge and or set aside in its entirety the order of this court granted on 21st October, 2015*

*2) That the Costs of this application be provided for*

3. The application is based on the grounds among others that the order herein was obtained on account of feuds between the plaintiffs and the defendants and upon non-disclosure of material facts and has completely frustrated the claimants in the suits that have been stayed indefinitely.

4. The application is supported by an affidavit sworn on 21st May, 2018 by Mourice Ouma, advocate for the applicants who reiterates the grounds on the face of the application. He further avers that it is in the interest of justice to set aside the orders to allow the interested parties an opportunity to prosecute their claims against the plaintiffs which are distinct in nature to the cause of action

between the plaintiffs and the defendants.

5. The application is opposed by way a replying affidavit sworn on 15th August, 2018 by Lilian Atuo Opondo, advocate for the plaintiffs. She avers that the determination of this case will enable the Honourable courts to determine who is liable to pay damages and costs sought by the interested parties in various cases.

6. I have considered the notice of motion in the light of the affidavitson record.

7. The claims by the interested parties are for damages arising of injuries they suffered while travelling in plaintiff's motor vehicle KBL642W on 29th January, 2013. The defendants are not parties to the claimants' suits.

8. The plaintiffs claim in this suit is for prayers among others a declaration that it had duly paid the amount of premiums for an insurance policy/cover for motor vehicle KBL642W.

9. The Honourable courts handling the interested parties' cases can only determine liability as between the interested parties and the plaintiffs who are the parties before those courts. The assertion on behalf of the plaintiffs that the determination of this case will enable those courts to determine who between the plaintiffs and defendants is liable to pay damages to the interested parties is therefore without merit and it is rejected.

10. The plaintiffs' claim that the interested parties herein have not sought leave to be enjoined in this suit as interested parties. Be as it may, this court will not impose conditions on itself to fetter the wide discretion given it by the rules in ensuring that its main concern to do justice to the parties is achieved. (See *Patel v EA Cargo Handling Services Ltd [1974] EA 75 at page 76*)

11. It is worthy to note that the interested parties were not given a hearing before the stay orderthat has had the effect of indefinitely staying their claims against the plaintiffs was granted.

12. The feuds between the plaintiffs and the defendants as to who is liable to settle the interested parties 'claims, which have not even been determined,and the stay order have had the effect of frustrating the interested parties' legitimate expectation under the provisions of Article 159 (2) (b) that justice shall not be delayed.

13. Consequently, this court is convinced that it is in the interest of justice to allow the interested parties suits against the plaintiffs to proceed even as the plaintiffs and the defendants continue to pursue their respective claims.

14. In the end, the Notice of Motion dated 21st May, 2018 is considered and found to have merit and is allowed in the following terms:

*1) The order granted on 21st October, 2015 staying the interested parties suits is discharged and set aside in its entirety*

*2) The Costs of this application shall be borne by the plaintiffs*

**DATED AND DELIVERED IN KISUMU THIS 1st DAY OF November 2018**

**T.W. CHERERE**

**JUDGE**

**Delivered in open court in the presence of-**

**Court Assistant** - Felix

**For the Petitioner** -

**For the Respondent** -



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