



**REPUBLIC OF KENYA**

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

**CIVIL CASE (APPLICATION) NO. 22 OF 2019**

**FRANCIS MWOBOBIA.....PLAINTIFF/RESPONDENT**

**VERSUS**

**INVESCO INSURANCE CO. LIMITED.....DEFENDANT/RESPONDENT**

**AND**

**MWIRIGI MUGUNA NKOROI.....INTENDED INTERESTED PARTY/APPLICANT**

**RULING**

***The Application***

1. Before the Court is an application dated 4<sup>th</sup> February 2020 seeking for the Applicant to be enjoined as an Interested Party to the suit. The subject matter herein is a declaratory suit, wherein the Plaintiff seeks for an order that the Defendant settles the decretal sum awarded in Meru CMCC No. 348 of 2014. In the said case, the Court awarded the Plaintiff damages of Ksh 2,490,550/=.

***Applicant's Case***

2. The application is supported by the Applicant's supporting affidavit sworn on 4<sup>th</sup> February 2020. He urges that he has a substantial stake in the outcome of the suit, due to the fact that he is one of the Judgment Debtors in Meru CMCC No. 348 of 2014 and may thus be greatly affected by the outcome of the suit, as should the suit be dismissed, he will be held liable to satisfy the decretal sum. That he desires to be heard together with the current Plaintiff and cannot be heard unless he is enjoined to the suit. That his inclusion to the suit will not in any way prejudice either of the parties to the suit.

3. The Applicant also filed written submissions dated 19<sup>th</sup> July 2021. In urging for joinder, he makes reference to Order 1 Rule 10 of the Civil Procedure Rules and Sections 1A, 1B, 3 and 3A of the Civil Procedure Act. He urges the Court to consider whether it is in the interests of justice to enjoin him and whether he has demonstrated sufficient interests in the matter. That the Court should also consider whether his joinder will be necessary for the Court to effectively and completely adjudicate upon and settle all questions involved in the suit. He urges that he has demonstrated interest in the fact of him being a Judgment Debtor in the primary suit.

4. He urges that his averments have not been contested save for the Plaintiff/Respondent stating that he, the Applicant, has stayed execution of Judgment in the primary suit pending the hearing of the declaratory suit and that the instant application has been made in bad faith intended to delay justice. He urges that the fact that he sought stay of execution does not mean that he is acting in bad faith, but that he simply wanted to be heard as against the insurance company. He urges that had he not sought stay, the proceedings herein would have been an exercise in futility since the Plaintiff/Respondent would have executed the said decree against him, thereby rendering the instant proceedings an exercise in futility.

5. He relies on the case of *Trusted Society of Human Rights Alliance vs Mumo Matemu & 5 Others* (2014) eKLR for the

proposition that an interested party is one who will be affected by the decision of the Court when it is made either way, which is what he urges will happen in his case since if the suit succeeds, he will be free from liability to settle the decree and if the suit does not succeed, he will be liable to settle the decree. He also urges that his interests will not be well articulated unless he himself appears and champions his cause against the Defendant.

6. He urges that for the Plaintiff to succeed in the case, he needs to establish that the Judgment Debtor in Meru CMCC no. 348 of 2014 was actually insured by the Defendant, but that in his list of documents dated 25<sup>th</sup> July 2019 the Plaintiff only annexed the Judgment and Decree. He urges that these documents only prove that the Plaintiff is the decree holder but none of them prove the existence of an insurance policy upon which the declaratory suit is based. He urges that he wishes to be heard as a policy holder and to establish the existence of the insurance contract between him and the Defendant.

7. He urges that if any interlocutory judgment has been entered against the Defendant, as claimed by the Plaintiff/Respondent, it was entered erroneously and it ought to be set aside because the Civil Procedure Rules only allow for entry of Judgment in respect of liquidated amounts. He cites *Fidelity Insurance Company vs Hussein M. Ali t/a Crescent Service Station* (2015) eKLR.

8. He further urges that the provisions of Order 1 Rule 10 (2) allow for the Court to enjoin parties at any stage of the proceedings and it therefore does not matter that the suit is part heard.

### ***Respondent's Case***

9. The Plaintiff/Respondent has opposed the application by his replying affidavit sworn on 24<sup>th</sup> June 2020. He urges that there is already a declaratory judgment against the Defendant, which has not been set aside and the Applicant is moving the Court in bad faith with the intention of delaying the suit, having failed to satisfy the decree in Meru CMCC No. 348 of 2014. That the suit is part heard and he has already produced all the exhibits he intends to rely on, except for the demand letter, the reason why he was stood down, and that upon its production in evidence he intends to close his case. That the Applicant has stayed execution of Judgment against him pending hearing and determination of the declaratory suit and thus the application for joinder has been made in bad faith and is meant to delay justice. That he is old and sickly. That the Applicant ran over him in 2011 and he has been sickly since then and he stands to suffer prejudice if the application is allowed. He prays for the application to be dismissed.

### ***Determination***

10. The subject matter of the suit herein is a declaratory suit, brought under the provisions of the Insurance (Motor Vehicles Third Party Risks) Act, seeking to have the Defendant, an insurance company settle the decree. The decree was for an award of damages of Ksh 2,490,550/= entered against the Applicant who at the material time was insured by the Defendant.

11. The Court considers that Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act provides for the duty of an insurer to settle a decretal amount as follows:-

#### ***10. Duty of insurer to satisfy judgments against persons insured***

***(1) If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of Section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.***

***Provided that the sum payable under a judgment for a liability pursuant to this section shall not exceed the maximum percentage of the sum specified in Section 5 (b) prescribed in respect thereof in the Schedule.***

12. Upon entry of judgment in such accident claims where the Defendant was insured, the above provisions require the insurer to settle the decretal amount as awarded and in accordance with the provisions of the Act. It is however not always the case that the insurers willingly settle the claim and this necessitates the filing of a declaratory suit to compel the insurer to settle the decree. Ordinarily, such declaratory suits are filed by the Defendant and/or Judgment Debtor in the primary suit.

13. It is an interesting scenario that in the present suit, it is the Plaintiff/Decree Holder who filed the declaratory suit. To this Court's mind, it was the duty of the Applicant/Judgment Debtor to file the suit because he is the one who stands to lose should the suit be dismissed, as he would have to settle the decree on his own. The Plaintiff/Respondent on the other hand would still have a recourse, as he would be at liberty to execute. The stay orders purportedly granted at the trial Court could be lifted and/or could lapse and execution would follow.

14. The parties have not addressed the Court on the question of the proper party to have filed the declaratory suit. However, by the request to be enjoined in the suit, the Court considers that the Respondent acknowledges that he stands to be affected by the decision of the Court, and is thus a necessary party to the suit.

15. The Court does not find that the Plaintiff/Respondent stands to be prejudiced in any manner by the joinder of the Applicant to the suit. In fact, in order to sustain the suit, as correctly pointed out by the Applicant, it is necessary to prove the existence of an insurance contract between him, the Judgment Debtor and the insurance company. The Court considers that the details of this contract, if any, are matters within the special knowledge of the Applicant. The Court further considers that the Plaintiff/Respondent is not privy to any such contract. It thus appears that in order to sustain his case against the Defendant/Respondent, the Plaintiff/Respondent actually needs the Applicant to participate in the proceedings.

16. The above is an indication that the participation of the Applicant in the suit is necessary for the Court to effectively resolve all the issues in the suit. The issue of joinder of all necessary parties was discussed at length by the Court of Appeal in *Civicon Limited v Kiyuwatt Limited & 2 others, Civil Appeal No. 45 of 2014 [2015] eKLR* where **Makhandia, Ouko (as he then was) & M'Inoti JJA** cited with approval the other case of *Gurtner vs Circuit (1968) I All ER 328* where Denning, M.R stated as follows: -

***“...The only reason which makes it necessary to make a person a party to an action is so that he may be bound by the result of the action, and the question to be settled therefore, must be a question in the action which cannot be effectively and completely settled unless he is a party...”***

***Clearly the rules of natural justice require that a person who is to be bound by a judgment in an action brought against another party and directly liable to the plaintiff on the judgment should be entitled to be heard in the proceedings in which the judgment is sought to be obtained.”***

17. According to *The Code of Civil Procedure (Mulla)* 16<sup>th</sup> Edition Volume 2: -

***“...What makes a person a necessary party is that he has relevant evidence to give on some of the questions involved; and this would make him a necessary witness. The only reason which makes it necessary to make a person a party to an action is so that they should be bound by the result of the action and the question to be settled therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party. The line has to be drawn on a wider construction of the rule between the direct legal interest and the commercial interest.”***

18. Based on the foregoing, this Court finds that the Appellant is indeed a necessary party to these proceedings as his participation will be effectual in determining the question of whether there was an insurance contract between him and the Defendant.

19. The provisions of Order 1 Rule 10 allow the Court to make such orders for joinder at any time in the course of the proceedings. It provides as follows: -

**Substitution and addition of parties (Order 1 Rule 10)**

***i) Where a suit has been instituted in the name of the wrong person as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.***

***ii) The court may at any stage of the proceedings, either upon or without the application either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as***

*plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.*

20. This Court finds that the justice of the case, requires the joinder of the Applicant to the suit as he is a proper and necessary party in these proceedings. The Court finds that it does not matter that the suit is part heard as upon conclusion of the Plaintiff's case, the Applicant will get opportunity to adduce his evidence and the matter will proceed appropriately.

#### **ORDERS**

21. Accordingly, for the reasons set out above, this Court makes the following orders: -

*i) The Applicant's application dated 4<sup>th</sup> February 2020 seeking joinder of the Applicant to the suit is hereby allowed as prayed.*

*ii) Each party shall bear their own costs of the application.*

*Order accordingly*

**DATED AND DELIVERED ON THIS 15<sup>TH</sup> DAY OF DECEMBER, 2021.**

**EDWARD M. MURIITHI**

**JUDGE**

#### **Appearances**

**M/S Murango Mwenda & Co. Advocates for the Applicant**

**M/S Vivian Aketch & Co. Advocates for the Respondent**



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