



**Sanlam General Insurance Limited v Wak Construction Limited & another (Miscellaneous Civil Case E046 of 2021) [2024] KEHC 16637 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16637 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
MISCELLANEOUS CIVIL CASE E046 OF 2021  
CW GITHUA, J  
DECEMBER 19, 2024**

**BETWEEN**

**SANLAM GENERAL INSURANCE LIMITED ..... APPLICANT**

**AND**

**WAK CONSTRUCTION LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**WICKLIFFE MWENDA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicant, Sanlam General Insurance Limited, approached this court through an Ex-parte Originating Summons dated 19<sup>th</sup> August 2021 (O.S) seeking leave to file a declaratory suit against the respondents out of time. The O.S is grounded on Section 10 of The Insurance (Motor Vehicle Third Party Risks) Act; CAP 405; Section 27 and Section 28 of the *Limitation of Actions Act*; Order 37 Rule 6 (1) of the Civil Procedure Rules; Section 3A of the *Civil Procedure Act* and all enabling provisions of the law.
2. A perusal of the summons show that the intended declaratory suit is supposed to apply to five suits already filed against the respondents at the Kangema Law Courts. According to the applicant, the suits seek damages in respect of personal injuries sustained by the plaintiffs as a result of a road traffic accident involving motor vehicle registration no. KCU 064 A (the suit vehicle) which the applicant had insured under Policy number 010/087/1/252765/2019/03, a general cartage policy allowing only the carriage of goods in the insured vehicle.
3. The application is anchored on the grounds stated on its face and in the depositions made by the applicant's Senior Legal Officer, Ms. Joan Oburu in the supporting affidavit sworn on 19<sup>th</sup> August, 2021.

Briefly, the applicant contends that on or about the 23<sup>rd</sup> of September 2019, an accident occurred along Kanjama-Kiriani Kangema road, involving its insured vehicle namely, motor vehicle registration No.



KCU 064 A and other passengers who had been conveyed in that vehicle. The accident was attributed to the negligence of the respondents' agent.

4. It was further contended on behalf of the applicant that after occurrence of the accident, the applicant was served with several statutory notices from the claimants in the suits pending before the lower court which was unusual given that the vehicle involved in the accident did not cover passengers. The applicant then engaged private Investigators, Leon Private Investigations Agency to enquire into the alleged accident.
5. The investigators subsequently submitted their report on 21<sup>st</sup> July 2021 which showed that the respondents had been using the suit vehicle for hire and reward and to ferry passengers without a passenger liability cover which was in total breach of the terms and conditions of their insurance policy. This is what prompted the applicant to file the instant summons.
6. The summons was prosecuted by way of oral submissions made by Learned counsel Mr. Waweru who represented the applicants. In his brief oral submissions, Mr. Waweru basically re-iterated the depositions made in the supporting affidavit and emphasized that by the time the applicant received the investigation report, the time limited by the law for filing of declaratory suits had already expired.
7. Having carefully considered the application, the supporting affidavit and the brief oral submissions by the applicant, I find that the key issue which emerges for my determination is whether this court can grant the applicant the orders sought in view of the provisions of the Insurance (Motor Vehicle Third Party Risks), Act CAP 405 which governs the filing of declaratory suits in circumstances such as those described by the applicant in this case.
8. It is trite that under Section 10 (1) of the Insurance (Motor Vehicle Third Party Risks) Act (hereinafter the Act), an insurer who had issued a policy of insurance covering third party risks was under a mandatory duty to satisfy a judgement issued against the person insured by settling any decretal sum that had been awarded to any person against the person insured.
9. The said provision stipulates as follows;

“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.”

10. The obligation on the part of the insurer is however not cast in stone considering that an insurer can obtain a declaration under Section 10 (4) of the Act which would allow it to avoid the policy of insurance if certain conditions were met.

Section 10 (4) of the said Act provides as follows;

“...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 has 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...”

11. From the above provision, it is clear that an insurance company which was seeking to obtain a declaration that it was entitled to avoid a policy of insurance on grounds that the policy was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular must commence the declaratory suit either before or within three (3) months after the suit for compensation was filed.
12. In my considered view, this provision does not give the court any discretion or leeway to extend the time for filing a declaratory suit after expiry of three (3) months of commencement of proceedings in which the judgement sought to be executed was issued.
13. In *Apa Insurance Company V Vincent Nthuka* [2018] eKLR; Odunga, J, (as he then was) when faced with a similar application, interpreted Section 10 (4) of the Act as follows;

“It is clear that this section does not provide for extension of the said period for commencing proceedings seeking declaratory orders. Further, the applicant has not addressed me on any other provision in the said Act that permits such a procedure and I am aware of none.”
14. Similarly, the court in *Madison Insurance Co. Kenya Ltd V David Kibe Mathenge* [2017] KEHC 233 (KLR) when interpreting the same provision stated as follows:

“The Actual Limitation Period pertinent to this matter pursuant to Section 31 Cap 22 is provided by the insurance (motor vehicle third party risks) Act, Cap 405 at Section 10(4). An insurer is by law entitled to seek the declaration akin to that the applicant now seeks to have time extended for later than three months after the suit for compensation is filed. That provision has no independent window for extension of time.”
15. Given the foregoing, it is my finding that the Insurance (Motor Vehicle Third Party Risks) Act particularly Section 10 (4) thereof does not provide this court with power or discretion to extend the time within which to commence a suit for declaratory orders.
16. As stated earlier, the applicant also relied on Section 27 and Section 28 of the *Limitation of Actions Act* in its quest to get an extension of time to file its intended declaratory suit. The Court of Appeal when interpreting Section 27 (1) of the Limitations of Actions Act in *Willis Onditi Odhiambo V Gateway Insurance Co Ltd* [2014] eKLR cited with approval its previous decision in *Mary Osundwa V Nzoia Sugar Company Limited* (2002) eKLR and stated as follows;

“In *Mary Osundwa - V - Nzoia Sugar Company Limited* [2002] eKLR, Osiemo J. had, with the consent of the parties, granted extension of time to file suit retrospectively. Notwithstanding that the parties had consented, on appeal this Court said of Section 27 (1) of the *Limitation of Actions Act*: “This Section clearly lays down the circumstances in which the court would have jurisdiction to extend time. That action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the plaintiff as a result of the tort. The Section does not give jurisdiction to the court to extend time for filing suit in cases involving contract or any other causes of action other than those in tort. Accordingly Osiemo, J. had no jurisdiction



to extend time as he purported to do on 28th May, 1991. That the order was by consent can be neither here nor there; the parties could not confer jurisdiction on the judge by their consent.” (Emphasis ours). That decision correctly interpreted the provisions of Section 27(1) of the *Limitation of Actions Act* and there is no basis to depart from the same.

17. As stated earlier, the applicant is seeking leave to file a declaratory suit out of time for a declaration that it was not under any legal obligation to satisfy any decree that may be issued in any of the five suits that have been filed against the respondents at the Kangema Law Courts on grounds that the respondents had breached a fundamental term and condition of their insurance policy.

It is therefore evident that the applicant’s intended suit against the respondents is solely based on allegations of breach of contract and not tort. In the premises, I am of the considered view that Section 27 and Section 28 of the Limitations of Actions Act are not applicable to the circumstance of this case.

18. Regarding Section 3A of the *Civil Procedure Act* which the applicant also invoked in support of its application, I will do nothing more than to associate myself with the opinion of the court in *Apa Insurance Company V Vincent Nthuka* [2018] eKLR wherein the court expressed itself as follows;

“As regards section 3A of the *Civil Procedure Act*, the provision simply reserves the Court’s inherent jurisdiction. It must however be noted that the Court’s inherent jurisdiction is not a substitute for the jurisdiction conferred upon the Court under *the Constitution* or by statute. The Court’s inherent jurisdiction is a reserve upon which the Court draws to ensure the ends of justice are met and to prevent abuse of its process. As was held in *Industrial & Commercial Development Corporation vs. Otachi* [1977] KLR 101; [1976-80] 1 KLR 529, section 3A is not a panacea for all ills. It was therefore held in *Elephant Soap Factory Ltd vs. Nahashon Mwangi & Sons Nairobi HCCC No. 913 of 1971* that the court will not invoke its inherent jurisdiction when there is an express provision dealing with the matter since the court may not nullify an express provision by invoking its inherent powers. Similarly, it is my view that where the Court has been deprived of jurisdiction it will not draw upon its reserve under the inherent jurisdiction to confer upon itself such non-existent jurisdiction.”

19. I fully agree with the above holding regarding the application of the court’s inherent powers under Section 3A of the *Civil Procedure Act*.
20. For all the foregoing reasons, I have come to the conclusion that this application lacks merit and it is accordingly dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT MURANG’A THIS 19<sup>TH</sup> DECEMBER 2024.**

**C.W GITHUA**

**JUDGE**

In the Presence of :

Mr. Boore for the Applicant

Ms. Susan Waiganjo, Court Assistant

