



**Jubilee Insurance Co. Ltd v Matfam Limited (Civil Suit 14 of 2017)
[2023] KEHC 2782 (KLR) (29 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2782 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL SUIT 14 OF 2017
F GIKONYO, J
MARCH 29, 2023**

BETWEEN

JUBILEE INSURANCE CO. LTD PLAINTIFF

AND

MATFAM LIMITED DEFENDANT

JUDGMENT

Avoiding liability or policy of insurance

1. The plaintiff vide plaint dated 6th March 2017 seeks a declaration that it is not liable or bound to make a payment or indemnify the defendant under policy cover number 01/29/350 568 TP in respect of any claim whatsoever arising out of the road traffic accident which occurred on 8th November 2012 along Narok- Bomet road near Kipturgut involving the defendant’s insured motor vehicle registration KBP 460W and other third-party motor vehicles.
2. The said insurance policy was a cover against third-party risks during the period commencing 11th August 2012 to 10th August 2013. The defendant paid the requisite insurance premiums.
3. According to the plaintiff, it was a term of the policy issued to the defendant that the insured motor vehicle registration number KBP 460W would be used to run private errands in Nakuru where the insured had a hotel and that the plaintiff would indemnify the defendant in the event of an accident caused or loss arising from the use of the subject motor vehicle in line with the insurance policy terms and conditions. The use clause of the vehicle policy covered private errands/business of the defendant and excluded hiring/leasing to third parties
4. The plaintiff alleged that, on or about 8th November 2012, the defendant’s motor vehicle registration number KBP460W was involved in an accident along Narok-Bomet road while on a self-drive hire arrangement to a third party outside- which is in contravention of the terms and conditions of the



insurance policy issued to the defendant in respect of the said motor vehicle. In the circumstances, the plaintiff claims that it is entitled to repudiate liability arising from the policy, hence the present suit.

5. The plaintiff made further claims; that the defendant misrepresented or failed to disclose fundamental facts when proposing to be issued with the said policy covered by the plaintiff. Subsequently, as a result of his conduct i.e. hiring the insured motor vehicle for a self-drive car hire arrangement with a third party, the defendant breached the terms and conditions of the said policy cover thus entitling the plaintiff to repudiate liability to pay or indemnify the defendant against the claims for any death, injury, damages or loss to persons and property or other claims from the insured and third parties arising from the said accident.

Plaintiff's witness statements

6. In support of their claim, the plaintiff filed witness statement by Collin Komori Nyaema, the plaintiff's legal officer. The witness reiterated the averments in the plaint and list of documents filed.

Defendant's case

7. With leave of the court the defendant filed amended statement of defence and counter-claim dated 16th June 2022, statement of Ambassador Colonel (Rtd) Elijah Matibo, the director of the defendant's company and list of documents dated 23rd June 2022.
8. The gist of the defendant's defence is that;
 - a. At the material time of occurrence of the accident on 14th August 2012, the insured vehicle registration no. KBP 460W was being driven and used within the terms and conditions of the policy.
 - b. The plaintiff's suit is defective, and incompetent as the plaintiff did not file the suit within three months from the date the third-party suits were filed i.e. Narok CMCC No.s 41 of 2014, 35 & 69 of 2015 relevant herein.
 - c. Having represented the defendant in the said suits, the plaintiff is estopped from seeking declaratory orders for repudiation of the said policy.
 - d. Leave obtained to file the present suit out of time was granted without jurisdiction and the same is ineffective, invalid, null, and void and the same is challengeable during the trial of the suit.
9. The defendant sought to have the plaintiff's case struck out on the ground that the leave to file suit out of time is ineffective since extension of time cannot be sought or granted on matters arising from contract.
10. In the counterclaim the defendant sought judgment against the defendant for;
 - a. A declaration that the Defendant-Jubilee Insurance Co. Ltd is liable and bound to make payments or indemnify the plaintiff under the said policy cover in respect of any claim in respect of death, bodily injury to any person, damage to property or any other claim whatsoever arising out of the road traffic accident which occurred on 8th November 2012 along Narok-Bomet road near Kipturgut involving the plaintiff's motor vehicle registration number KBP 460W or any other third-party claim.



- b. A declaration that no execution should be levied against the plaintiff in respect of the afore stated claims and that any execution should be levied against the defendant/jubilee insurance co. ltd.
 - c. General damages for breach of contract, inconveniences and indemnification of all legal costs incurred.
 - d. Cost and interest.
 - e. Any other or further relief that this honorable court may deem just to grant.
11. In support of the counter claim the plaintiff adopted the averments in the defence filed in this suit, verifying affidavit, plaintiff witness statement by ambassador colonel(Rtd) Elijah Matibo and the defendant's list of documents dated 23rd June 2022. All the above pleadings were adopted by consent as evidence to be relied upon during determination of the suit.
12. Under paragraph 26 of the counter claim, the plaintiff avers that the defendant acts of failing to settle decree in Narok CMCC No. 41 of 2014 is breach of terms and conditions of insurance policy particularized breach thereof as follows:
- i. Failing to indemnify the plaintiff against any claim for loss or injury resulting from the accident involving the insured motor vehicle.
 - ii. Failing to settle third party's claim obliged to settle.
 - iii. Exposing the plaintiff to execution and bankruptcy.
13. The defendant averred that it has suffered loss and damage which it particularized as follows;
- a. Legal costs and expenses amounting to kshs. 600,000/= incurred in prosecuting and defending suits incidentals to Narok CMCC no. 41 of 2014 in the following matters.
 - i. Narok HCCC No. 41 of 2014 Jared Nyambati Moranga Vs Matfam Ltd & Anor.
 - ii. Narok HCCC No. 10 of 2016 Jubilee insurance co. ltd vs Matfam ltd another
 - iii. Narok HCCC No. 15 of 2020 Matfam ltd & Anor Vs Jared Nyambati Moranga
 - iv. Narok CM Misc. Appl. No. E001 of 2020 Hezron Getuma Onsogo T/A Hegemons Auctioneers Vs Matfam Ltd & Anor
 - v. Narok HC Misc Appl no. 6 of 2017-Jubilee Insurance Co. Ltd Vs Matfam Ltd.
 - b. A declaration that no execution should be levied against the plaintiff in respect of the aforestated claims and that any execution should be levied against the defendant.
 - c. And the plaintiff claims general damages for breach of contract, embarrassment, inconvenience, psychological torture etc and the plaintiff claims damages.
14. The defendant filed an application dated 23rd January 2018 seeking to have the suit by the plaintiff commence by way of plaint dated 6th April 2017 and filed on the same date struck out.

Issues not disputed

15. It is not disputed: -



- a. That the plaintiff had insured the defendant's motor vehicle registration no. KBP 460W vide third party policy No. 01/29/30 568 TPO covering period from 11th august 2012 to 10th august 2013.
- b. That on or about the 8th November 2012 while the said policy was in force an accident occurred along Narok-Bomet road involving the insured motor vehicle and three other third-party vehicles registration Nos. KBP 608K, KAU 846B, and KAY 428P.
- c. That after the accident, three passengers-occupants of the motor vehicle KAY 428P were fatally injured and instituted three suits i.e. Narok CMCC No. 41 OF 2014, 35, and 69 of 2015.
- d. That Narok CMCC Nos. 35 and 69 of 2015 were stayed pending the hearing and determination of this suit, while Narok CMCC no. 41 of 2014 proceeded to full trial and the insured motor vehicle was found 70% liable.
- e. Upon the institution of the above cases, the defendant informed the plaintiff who instructed the firm of M/S Mose, Mose & Milimo advocates to defend the said suit.
- f. Immediately judgment was entered in Narok CMCC NO. 41 of 2014, the firm of Mose, Mose & Milimo advocates ceased acting for the defendant.
- g. That the plaintiff declined to settle judgment in Narok CMCC No. 41 of 2014 and filed the present suit.

Plaintiff's Submission

16. The plaintiff's submissions augmented and reiterated the averments in the plaint: breach by the defendant of the terms and conditions of policy on and withholding information on use of the insured motor vehicle against the principle of uberimae fidei. They also argued that the vehicle was used outside Nakuru as per the policy; the accident occurred along Narok- Bomet road, outside the scope of the agreed operating locations. They relied on the police abstract (p exh2).
17. On the basis of these reasons, they seek declaration to avoid the policy and liability therefrom.
18. The plaintiff relied on the following authorities;
 - i. Sita Steel Rolling Mills Limited Vs Jubilee Insurance Co. Ltd [2007] eKLR
 - ii. Monarch Insurance Company Limited V Joseph Njenga Maina [2021] eKLR
 - iii. UAP Insurance Company Limited Vs Lemmy Mutua Kavii[2018] eKLR
 - iv. Corporate Insurance Company Limited V Charles John Muse [2018] eKLR
 - v. Carter Vs Boehn [1766]
 - vi. Pan Atlantic Co. Ltd and Another V Pine Top Insurance Co. Ltd [1994] 3 All Er 581,638
 - vii. Section 10(4) of the Insurance (Motor Vehicle Third Party Risks) Act.
 - viii. Section 27(1) of the *Civil Procedure Act*.

Defendant's submissions.

19. The defendant's submissions reinforced and recapped the averments in the defence and counter-claim on; lack of jurisdiction to extend time ex parte; suit time barred as it was filed three years of the



- commencement of Narok CMCC Nos. 41 of 2014, 35& 69 of 2015 contrary to section 10(4) of CAP 405.
20. The defendant also submitted that the plaintiff has failed to prove the allegation that the accident vehicle was used other than for the purpose under the policy. They denied any breach of any term and/or condition. They sought the plaintiff's suit to be dismissed with costs.
 21. The defendant emphasized that both parties admit the insurance covered third parties. Thus, their counter-claim should be allowed.
 22. The defendant submitted that in appointing legal counsel to defend Narok CMCC No. 41 of 2014 until on 17th August 2018 when judgment was delivered, the plaintiff is estopped from avoiding liability. And failure to pay the third party judgment thereto is a breach of clause 1(a),2 and 4 of section 11: on liability to third parties.
 23. The defendant submitted that the resultant losses, inconveniences flowed directly from the defendant's breach of terms and condition. The court should allow the counter claim with costs.
 24. The defendant submitted that the right of the insurer(plaintiff) to avoid liability third party policy is restricted such that the insurer is under mandatory statutory liability first to pay the full judgment sum to the person entitled to the benefits of the judgment and thereafter the insurer may recover the due sum paid to third party from the insured.
 25. The defendant has relied on the following authorities;
 - i. Section 4(1) and 31 of the limitation of action Act
 - ii. Part III of Limitation of Action Act section 27 & 28 of the Act
 - iii. Oruta & Anor Vs Nyamato
 - iv. Madison Insurance Co. 9k) Ltd Vs David Kibe Mathenge [2017] eKLR quoting decision in Misc.Civil Appl. No. 1 Of 2016[2021] eKLR
 - v. Kenya Cargo Handling Services Ltd Vs Ugwang
 - vi. Family Bank Ltd Vs Shemsa Nassoro Itamde [2021] eKLR
 - vii. Isaac Wakolo Vs Xplico Insurance Co. Ltd [2021] eKLR

Directions of the court

26. On 27/10/2022, this court directed that striking out of the plaint be one of the issues during the hearing.
27. On 18/1/2023, it was agreed that the case be determined on statements and documents filed.
28. The matter was canvassed by way of written submissions. Both parties have filed submissions.

Analysis And Determination

Issue

29. The plaint and the counter-claim are the two sides of the same coin. Accordingly, the pleadings, the cited authorities, the respective parties' written submissions, and the relevant provisions of the Law relate to plaintiff's – insurer's- statutory liability to pay third party claims under section 10 of Cap



405 of the Law of Kenya. The alleged breach of the policy, non-disclosure of material facts as well as estoppel will be pertinent considerations in the resolution of the overall issues.

30. More specifically, the court should determine: -
- i. Whether the suit herein is statute barred
 - ii. Whether the plaintiff is entitled to avoid liability under or the policy of insurance issued to the insured herein.
 - iii. Or whether the insured should pay third party claims under the policy. This addresses the defendant's counterclaim.
 - iv. Who shall bear the costs.

Burden and standard of proof.

31. The onus of proof rests with the person alleging. The plaintiff bears the burden of proving its case; that its entitled to avoid liability or policy. And the defendant bears the burden of proving its counter-claim that; the plaintiff should pay the third party claims covered under the policy herein. The standard of proof is on a balance of probabilities. See sections 107 and 109 of the [Evidence Act](#) as well as case law.

Whether the suit herein is statute barred

32. The defendant sought to have the plaintiff's case struck out on the ground that the leave to file suit out of time is ineffective since an extension of time cannot be sought or granted on matters arising from a contract.
33. This court (Bwonwong'a J) granted leave to the plaintiff to file the suit herein on 29th March 2017.
34. Accordingly, Section 10(1) and (4) of the [Insurance \(motor vehicles third party risks\) Act](#) cap are specifically relevant. The section provides as follows: -
- (1) If after a policy of insurance has been effected, judgement in respect of any such liability as is required to be covered by a policy under paragraph 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 judgement any sum payable there under in respect of the liability, including any amount payable in respect of cost and any sum payable in respect on that sum by virtue of any enactment relating to interest on judgement"
 - "(4) 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 judgement was given, he has obtained a declaration that, apart from any provisions 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:

Provided that an insurer who has obtained such declaration as a-foresaid in an action shall not thereby become entitled to the benefit of this sub-section as respects any judgement obtained in proceedings commenced before the commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person



who is the plaintiff in the said proceedings specifying the non-disclosure of false representation on which he proposes to rely, and any person to whom notice of such action is so given shall be entitled if he thinks fit to be made a party to”

35. Section 10 of Cap 405 of the Law of Kenya creates a statutory obligation on the part of the insurer to pay judgments obtained by third parties in respect of events or incidents insured under the policy of insurance issued, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or canceled the policy. This is the rule.
36. The purport of this law is to create a statutory exception to rule on privity of contract to enable third parties who are not parties to the contract of insurance to benefit from the insurance taken out for that purpose. This objective of the law should never be defeated unless in accordance with the law.
37. Thus, the exception to the rule created in Section 10(4) of Cap 405 should be realized upon strict compliance with the law. First, the insurer must obtain a declaration to avoid liability or the policy on stated grounds. Second, the said declaratory suit must be commenced before, or within three months after the commencement of the proceedings in which the judgement by the third party was given. Third, must have given notice before or within fourteen days after the commencement of the declaratory suit to the person who is the plaintiff in the primary suit specifying the non-disclosure of false representation on which he proposes to rely.
38. These requirements in law explains the statement ‘...notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or canceled the policy... the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgement any sum payable there under...’
39. Therefore, merely that an insurer has obtained a declaration to avoid liability or the policy or has canceled or is entitled to cancel a policy does not absolve them from paying third party judgments arising from events or incidents covered by the policy. The insurer has to comply with the requirements of section 10 of Cap 405. See Britam General Insurance Co. Ltd-vs-Josephat Ondiek [2018] eKLR
40. The foregoing explains, inter alia, the importance of the time set out in section 10 for filing of a declaratory suit by the insurer.
41. Be that as it may, was this suit time barred?
42. Although the defendant seems to ask the wrong question, they have raised limitation of actions as an issue for trial. As such, it should be considered among other issues. Similarly, any leave granted to file suit out of time becomes one of the materials in the determination of the issue of limitation of action. Being of this orientation, I doubt that leave to file suit out of time decimates the defense of limitation of action or prevents the defendant from raising limitation of actions as an issue for trial.
43. The defendant is of the view that plaintiff’s suit is time barred and should be struck out.
44. The plaint shows that it was filed pursuant to leave granted by this court. The order to file suit out of time or the application in which the leave was granted is not part of the plaintiff’s list of documents produced in court. None was produced or in accordance with the law. The court only stumbled upon a photocopy of order for leave annexed to plaintiff’s application dated 19th December 2017. In all, the plaintiff was loudly quiet about the claim that this suit is time barred.
45. In the instant case, the third parties filed suit referenced as Narok CMCC No. 41 of 2014, 35 and 69 of 2015. The accident occurred on 08/11/2012 and according to the Defendant he informed the Plaintiff of the suit.



46. The evidence show that this declaratory suit was filed three years after the first suit by the third party was filed. Of special significance, this declaratory suit was filed after the plaintiff had instructed their legal counsel, M/S Mose ,Mose and Milimo advocates, to defend the suit by the third party until judgment thereto had been rendered. The plaintiff has not shown any lawful cause that prevented them from filing the declaratory suit as prescribed in section 10 of Cap 405.
47. In light of the evidence adduced, this suit was filed out of time in contravention of the law, and time barred.
48. The foregoing notwithstanding, I shall determine the merits of the case.

Avoiding liability under the policy.

Of validity of the insurance cover at the time of the accident

49. The defendant's motor vehicle registration no. KBP 460W got involved in an accident on 8/11/2012. According to the statement by Collin Kimori Nyaema, the motor vehicle KBP 460W was insured by the plaintiff under policy number 01/29/350568-TPO commencing on 11/08/2012 and expiring on 10/08/2013.
50. The plaintiff acknowledges that the accident occurred during the subsistence of the insurance policy cover, except they claim breach of the policy and non-disclosure in the use of the vehicle at the material time.
51. Despite the admission, I note that the private motor insurance policy document attached to the list of documents by the plaintiff does not show or bear; the policy number, the insured motor vehicle registration number and any details of the parties or the insured, or the period of insurance. I also note that the police abstract dated 20/11/2015 has no details of the motor vehicle KBP 460W.
52. The biggest dilemma in this case is that it is impossible to relate the policy document produced to the accident or the insured vehicle or the insured herein. I do not understand how the plaintiff could attempt to produce a document devoid of all pertinent details relative to the case at hand.
53. The accident in question occurred on 08/11/2012. Therefore, one cannot tell whether the said document duped policy cover the subject matter of this case.
54. Be that as it may, I note from the private motor insurance policy document provided, that, the schedule is the one that provides all the relevant details on the insured, the period of the insurance as well as the type of policy issued. Faced with such state of the evidence by the plaintiff, the court can only speculate- something a court of law will never do- a court of law lawfully acts only upon the particular policy issued for the material period and subject matter. Despite the other evidence adduced, it is not proper to attempt to impute or imply that the terms of the policy submitted in court are the terms applicable to the subject matter herein. On this score alone the case should be dismissed. But, let me consider the other issues nonetheless.

Alleged breaches

I. Unauthorized use of the suit motor vehicle

55. The plaintiff contends that the motor vehicle herein was hired/leased on a self-drive car hire arrangement to third parties hence breaching the terms and conditions of the policy.



56. The defendant in its amended statement of defence and counterclaim denied the allegation and stated that the vehicle was used as per the policy.
57. From the evidence adduced and in the absence of the policy, it is impossible to establish whether the policy permitted or excluded hiring out the motor vehicle on a self-drive car hire arrangement to third parties.
58. On the allegation of hiring out; other than making the allegation in the pleadings, and report by the investigator, no independent evidence was adduced to substantiate the allegation. The evidence available show the vehicle was being used by the insured's wife Susan Matibo to run private errands as she manages the insured hotel in Nakuru. The insured motor vehicle is said to have been leased to the insured's friend Antony Wainaina before it was involved in the subject accident.
59. Accordingly, the allegations by the plaintiff that the vehicle was hired out/leased on a self-drive car hire arrangement to third parties contrary to the policy conditions have not been proved.

Of the class of insurance

60. Parties have not disputed that the type of policy in place at the material time was third party only. I must reiterate, however, that the plaintiff did not produce the relevant insurance policy.

Insurers duty

61. Under section 10 of the Insurance (Motor Vehicle Third Party Risks) Act, the insurer bears a statutory duty to satisfy judgments by third parties against persons insured under a policy of insurance. The Act constitutes exception to privity of contract and serves to provide compensation under the policy for third parties who are injured by use of a vehicle on the road. Therefore, declarations to avoid a policy and liability arising under the statutory duty under section 10 of the said Act must be issued upon prove 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, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it. Similarly, the breach of the terms or conditions of the policy for which liability is to be avoided must be proved to the required standard.
62. It bears repeating that the requirements in section 10 and particularly section 10(4) are not mere directory command or adornments in the statute; they should be strictly adhered to. I have stated that nothing shows that this suit conforms to section 10 of Cap 405. on some of the peremptory substantive as well
63. In the upshot, the plaintiff's suit has not been proved on a balance of probabilities and I dismiss it.
64. Given the facts of the case, I order each party to bear own costs.

Counter-claim: is it merited?

65. On the facts of this case, the defendant who is the owner of the suit motor vehicle had taken out a valid policy of insurance in compliance with the Act and in order to indemnify it in respect of liability to the third parties who may suffer any loss or injury resulting from an accident involving the suit motor vehicle.
66. Despite the unsatisfactory state of the documents by the plaintiff, parties were in agreement that the insured motor vehicle was insured under policy cover number 01/29/350 568 TP in respect of third party claims. The policy was issued pursuant to section 4 and 5 of Cap 405. The said policy was subsisting from 11th August 2012 to 10th August 2013. The third party claims arose out of the



road traffic accident which occurred on 8th November 2012 along Narok- Bomet road near Kipturgut involving the defendant's insured motor vehicle registration KBP 460W and other third-party motor vehicles. The claim therefore falls within the said policy. The defendant has been able to establish these things in his case on a balance of probabilities.

67. As the plaintiff has not obtained a declaration to avoid the liability or policy herein, they are under a statutory obligation under section 10 of Cap 405 of the Law of Kenya to pay third party judgments-including costs and interest ordered thereto- lawfully obtained against the insured in respect of accident which occurred on 8th November 2012 involving the insured vehicle herein. The indemnity or payment thereto is as a result of use of the insured vehicle under the above policy of insurance.
68. The defendant's counterclaim is hereby allowed to the extent stated.
69. However, in light of the facts of this case, I order each party to bear own costs of the counter-claim

Conclusions and orders

70. The plaintiff's suit lacks a foot on which to stand as the relevant insurance policy document was not produced in court. Also, on the basis of my analysis above, the plaintiff has not proved its case on a balance of probabilities. Therefore, I dismiss the plaintiff's suit. Given the facts of this case, each party to bear own costs of the declaratory suit.
71. The defendant's counter claim is allowed to the extent stated; as the plaintiff has not obtained a declaration to avoid the liability or policy herein, they are under a statutory obligation under section 10 of Cap 405 of the Law of Kenya to pay third party judgments-including costs and interest ordered thereto- lawfully obtained against the insured in respect of accident which occurred on 8th November 2012 involving the insured vehicle herein. The indemnity or payment thereto is as a result of use of the insured vehicle under the above policy of insurance.
72. Given the facts of the case and the decision on the plaintiff's suit, each party shall bear own costs of the counter-claim.
73. Orders accordingly

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 29TH DAY OF MARCH, 2023.

F. GIKONYO M

JUDGE

In the presence of:

1. Ndolo for defendants
2. Mobegi holding brief for Omagwa for plaintiff
3. CA – Mr. Kasaso

