



**Jubilee Allianz General Insurance (K) Ltd v Nyamabe; Oliech & another (Interested Parties)
(Suing as the Legal Reps of the Estate of Jeremiah Oliech Oula - Deceased) (Miscellaneous
Civil Suit E138 of 2021) [2023] KEHC 22706 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22706 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
MISCELLANEOUS CIVIL SUIT E138 OF 2021
RPV WENDOH, J
SEPTEMBER 29, 2023**

BETWEEN

JUBILEE ALLIANZ GENERAL INSURANCE (K) LTD PLAINTIFF

AND

CHARLES MURIMI NYAMABE DEFENDANT

AND

VIVIEN AKINYI OLIECH INTERESTED PARTY

GEORGE OTIENO OULA INTERESTED PARTY

**SUING AS THE LEGAL REPS OF THE ESTATE OF JEREMIAH OLIECH OULA -
DECEASED**

RULING

1. This ruling is in respect to the Notice of Motion dated 9/1/2023 (the application). The application was filed by Vivien Akinyi Oliech & George Otieno Oula (the interested parties/applicants) suing as the legal representatives of the estate of Joseph Oliech Oula (Deceased). Jubilee Allianz General Insurance (K) Ltd is the (respondent) whilst Charles Murimi Nyamabe is the (defendant). The applicants are seeking the following orders:-
 1. Leave be granted to the applicants to be enjoined herein as interested parties.
 2. The ex-parte orders issued on 5/5/2022 staying the suit by the applicants before the subordinate court vide Rongo PMCC No. 70 of 2021 be set aside and/or varied.
 3. Costs of this application be borne by the respondent.
 4. Such further orders be made as the court may deem fit and expedient.



- 2 The application is based on the grounds on its face and the supporting affidavit of Vivien Aluoch Oliech sworn and dated on 9/1/2023. It was deposed that Jeremiah Oliech Oula (the deceased) was involved in a road traffic accident on 27/3/2021; that together with the co-applicant, they obtained letters of administration ad litem to institute a suit on behalf of the estate and dependants of the deceased in Rongo PMCC No. 70 of 2021 seeking damages under the Law Reform Act and Fatal Accidents Act; that upon institution of the suit, the applicants through their Counsel, issued a notice and duly served the respondent pursuant to Section 10 (2) (a) of the Insurance Motor Vehicle Third Party Risks Act.
- 3 It was deposed that the respondent instituted the claim herein without notice to the applicants and obtained ex - parte orders on 27/4/2022 staying proceedings in Rongo PMCC No. 70 of 2021; that the said orders were obtained irregularly as they were not parties to the proceedings and neither the application nor the said orders were served on them, therefore, denying the applicants an opportunity to be heard; that upon perusal of the application, the applicants learnt that the respondent claimed that they had served the applicants with the notice as required under Section 10 (2) (a) of the Insurance Motor Vehicle Third Party Risks Act yet the said notice had not been served upon them; that in any event, upon service of the orders on the applicants on 28/5/2022, the judgement which was pending before the trial court, was delivered on 7/6/2022.
- 4 The applicant further deposed that having not been served with the notice pursuant to Section 10 (2) (a) of the Insurance Motor Vehicle Third Party Risk Act, whatever orders which will be issued in the disclaimer suit will not affect the decree in Rongo PMCC No. 70 of 2021 which judgement has already been delivered; that the instant application will only be meant to delay the applicants from enjoying the fruits of their judgement; that there being a judgement delivered in Rongo PMCC No. 70 of 2021, there are no further proceedings hence the order ought to be set aside. The applicants urged the court to allow the application as prayed and the ex-parte orders be set aside and the applicants be at liberty to proceed with execution of the decree obtained before the subordinate court.
- 5 The application was not opposed. The record shows that Counsel for the respondent and the defendant were served with the mention notices but they never appeared in court for directions for the hearing of the applicants' application.
- 6 The applicants filed written submissions dated 5/6/2023. The applicants submitted that their right to fair trial was violated. They submitted that the application dated 17/9/2021 was against them but they were not given an opportunity to be heard; that in the case of James Kanyita Nderitu vs Maries Philotas Ghika & Another (2016) eKLR the court discussed the effect of an irregular judgement and the principles of setting it aside.
- 7 On whether the stay of proceedings in Rongo PMCC No. 70 of 2021 is necessary, it was submitted that even if the respondent is successful in the repudiation suit in Migori HCCC No. 4 of 2021, they are still under obligation to settle the decree in Rongo PMCC No. 70 of 2021; that the respondent filed the suit repudiating the claim outside the three months period as provided for under Section 10 (2) (a) of the Insurance Motor Vehicle Third Party Risks Act. The applicants relied on the findings in Geminina Insurance Company Limited vs EN (Minor suing through his father and next friend AAO) (2019) eKLR wherein the court discussed the legality of the provisions of Section 10 (2) (a) of the Insurance Motor Vehicle Third Party Risks Act and submitted that the repudiation claim was filed out of time and it serves no purpose to delay the applicants from enjoying the fruits of their judgement.
- 8 The applicants also submitted that even after filing the repudiation claim outside the three months period, the respondents did not serve them with the mandatory notice as required under Section 10 (2) (a) of the Insurance Motor Vehicle Third Party Risks Act. The applicants relied on the case of



Corporate Insurance Co. Ltd vs Violet Nabwire Ouma (2019) eKLR where the court pronounced itself on the consequences of an insurance company not informing a party of their intention to repudiate an insurance contract. In conclusion, the applicants submitted that their application is meritorious and unopposed and it should be allowed as prayed.

10 I have certainly read, understood and considered the application, the supporting affidavit and the submissions. The issues for determination are whether:-

- a. The applicants should be joined as interested parties.
- b. The orders issued on 27/4/2022 should be set aside.

11 The Black's Law Dictionary 9th Edition, at page 1232 defines an interested party as: -

“A party who has a recognizable stake and therefore standing in a matter.”

12 In the case of Communications Commission of Kenya & 4 others vs Royal Media Services Limited & 7 others (2014) eKLR the Supreme Court of Kenya held that: -

“In determining whether the applicant should be admitted into these proceedings as an Interested Party, we are guided by this Court's Ruling in the Mumo Matemo case where the Court (at paragraphs 14 and 18) held:-

“[An] interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause...”

Similarly, in the case of Meme v. Republic, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:

“(i) Joinder of a person because his presence will result in the

complete settlement of all the questions involved in the proceedings;

(ii) Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;

(iii) Joinder to prevent a likely course of proliferated litigation.”

13 For a party to be joined as a party to proceedings, they should demonstrate that they have an identifiable stake in the matter and their absence will greatly prejudice them if they are not heard.

14 The applicants contend that they should be joined as interested parties as they were the plaintiffs suing on behalf of the estate of Jeremiah Oliech Oula (Deceased) in Rongo PMCC No. 70 of 2021. To prove this, the applicants annexed to their application annexure “VAO-3” copy of the pleadings in Rongo PMCC No. 70 of 2021. The respondent, in its application dated 17/9/2021, sought to have stay of the proceedings in Rongo PMCC No. 70 of 2021. Therefore, it goes without saying that the orders which will emanate from the proceedings before this court, will directly affect the applicants herein since the respondents in their application, sought to stay the proceedings in the subordinate court which were instituted by the applicants.



- 15 It is this court's finding that the applicants' prayer to be joined as interested parties to these proceedings is merited.
- 16 On whether the orders dated 27/4/2021 should be vacated, the applicants argued that they were not given an opportunity to be heard before issuance of the orders; that the orders are in vain since judgement in the subordinate court has already been delivered; that they were not notified by the respondent of the intention to avoid the policy and the declaratory suit was filed outside the 3 months' statutory period.
- 17 In their application dated 17/9/2021, the respondent only named Charles Murimi Nyamabe (defendant) as a party since he was its insured. Even if the respondent believed that it is the defendant who was the only necessary party, the orders emanating from these proceedings, would directly affect the applicants since they were to be compensated as third parties. Therefore, I find that the interested parties were not given a right to be heard in the present proceedings before the orders of 27/4/2021 were issued.
- 18 The respondent also sought to have the proceedings in Rongo PMCC No. 70 of 2021 stayed. There is evidence that the suit had already been heard to its logical conclusion and judgement delivered on 7/6/2022. Hence, there being a valid judgement on record, the only avenue the respondent has; is to challenge the judgement and decree of the trial court through an appeal but it is not conceivable that stay orders can suffice at this point.
- 19 Although the stay orders were issued on 27/4/2022 and extracted on 8/5/2022, almost a month before the judgement of the subordinate court was issued; the respondent did not endeavor to demonstrate to this court that the said orders were brought to the attention of the trial Magistrate and/or the trial court had knowledge of the stay orders in order for it to stop further proceedings including delivery of the judgement. Therefore, the orders issued on 27/4/2022 will not come to the aid of the respondent. They are fit to be set aside.
- 20 Section 10 (4) Insurance (Motor Vehicles Third Party Risk) Cap 405 provides:-
- “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:
- Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment 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 or 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 thereto.”
- 21 Section 10 (4) of the Insurance (Motor Vehicles Third Party Risk) Cap 405 provides that if an insurer is entitled to avoid a claim, the insurer should file a declaratory suit within three months before or within three months after commencement of the proceedings suing the insured. Another aspect is that the



insurer should give notice to the plaintiff in the said proceedings notifying the plaintiff of the intention to avoid the claim.

- 22 There is evidence that the respondent was served with a notice of intention of filing suit by the interested parties' Counsel and plaint dated 14/7/2021 and 1/7/2021 respectively through an email dated 15/7/2021. The application by the respondent before this court, is dated 17/9/2021 but it was filed in court on 19/10/2021. The respondent sought to avoid liability in the claim filed in Rongo PMCC No. 70 of 2021 since the defendant failed to report and/or notify the respondent of the said accident as required in the terms of the insurance policy.
- 23 As per the provisions of Section 10 (4) of the Insurance (Motor Vehicles Third Party Risk) Cap 405, the declaratory suit ought to have been filed within three months from the date of the commencement of the proceedings, that is, on or before 15/10/2021. The suit was filed on 19/10/2021 which is four days outside the three months statutory period.
- 24 In *Britam General Insurance Co. (Kenya) Limited vs Josephat Ondiek* (2018) eKLR, the court extensively discussed the implication of non-compliance with the statutory mandatory time limit of the procedures under Section 10 (4) of the Insurance (Motor Vehicles Third Party Risk) Cap 405 as follows:-

“The procedure provided under Section 10(4) of the Act as I understand it presents the following scenarios, first, it creates an obligation on the part of the insurer to avoid the policy in respect of liability and anything arising from the accident which is in breach of the policy agreement. Secondly, it creates a condition precedent to the insurer's right of action to the in breach by bringing an action within 3 months of the claim against the insured being instituted. Thirdly, the claim to indemnify the insured or third party insurance which falls within the exceptions provided in the policy of insurance. Fourthly, the proviso that Section 10(4) stipulates that the insurer shall not be liable in respect of the accident, loss or liability unless before or within the days he gives notice to the insurer in the said proceedings.

In the present case the accident occurred on 3rd April, 2015 and by 11th May, 2015 the plaintiff had already received the investigators report from Pw2 on the findings on the occurrence and cause of the accident. The defendant filed the motor accident report in a clear form received by the plaintiff on 27th April, 2015. As I have already stated the defendant and third parties filed suit referenced as CMCC No. 625 of 2015 on 15th December, 2015. There is no evidence that the plaintiff made an application before the respective court for stay of proceedings for leave to file this declaratory suit. It is in this suit the plaintiff seeks to repudiate the claim. The conditions for commencement of a declaratory suit are time bound as stipulated in Section 10(4) of the Act.

I am of the view that this is one of those cases which the relief respect to the plaintiff is statute barred. I have no hesitation to rule that section 10(4) of the Act was not complied with as to limitation period. While I agree with the claim on the matter by the plaintiff I cannot accept the submission that the party relying on provisions of the law can circumvent the same statutory requirement to apply for a declaration to repudiate and avoid the policy.

In the present claim if the plaintiff wished to take the benefit of section 10(4) of the Act. It was mandated to apply for a declaration after receiving notice of the claim from the defendant and upon delivery of the notice of the suit. By filing a plaint outside the 3-month period the plaintiff lost its right to rely on the statute.



On the basis of this section the failure not to file the same within 3 months before or within the commencement of the proceedings has not been explained by the plaintiff. The section is couched and worded in mandatory terms. ..The plaintiff did not seek for leave of the superior court for the proposed suit to be filed outside the stipulated period of 3 months.”

- 25 This court is persuaded and in agreement with the above findings. The respondent’s suit was filed outside the mandatory statutory three months period. It therefore goes without saying that the declaratory suit is nonsuited and inoperative within the provisions of Section 10 (4) of the Insurance (Motor Vehicles Third Party Risk) Cap 405. I am of the further view that it would be contrary to the spirit of the law to allow the respondent to avoid the contract of insurance and/or the terms of the policy without complying with the provisions of Section 10 (4) of the Insurance (Motor Vehicles Third Party Risk) Cap 405.
- 26 The respondent did not also comply with the requirements of notifying the applicants of its intention to avoid the claim within fourteen days after institution of this suit as it is required under Section 10 (4) of the Insurance (Motor Vehicles Third Party Risk) Cap 405.
- 27 For failure to comply with the mandatory statutory requirement, it is this court’s finding that even the respondent’s pending application will be of no probative value to be heard and determined to its logical conclusion and it is hereby struck out.
- 28 In the end, I find that the applicants’ application dated 9/1/2023 is merited. The following orders do issue: -
1. The applicants are hereby joined as interested parties in these proceedings.
 2. The orders issued on 27/4/2022 are hereby vacated.
 3. The application dated 17/9/2021 is hereby struck out.
 4. Costs awarded to the interested parties to be borne by the respondent.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 29TH DAY OF SEPTEMBER 2023.

R. WENDOH

JUDGE

Ruling Delivered In The Presence Of;

No Appearance for the Interested Parties.

No appearance for the Respondent.

No appearance for the Defendant.

Emma & Phelix Court Assistants.

