



**Muchai v Xplico Insurance Co. Ltd (Civil Appeal E020 of 2019)
[2023] KEHC 24164 (KLR) (25 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24164 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CIVIL APPEAL E020 OF 2019
RB NGETICH, J
OCTOBER 25, 2023**

BETWEEN

MUSA MUCHAI APPELLANT

AND

XPLICO INSURANCE CO. LTD RESPONDENT

JUDGMENT

Background

1. This is an appeal from the Ruling of the Chief Magistrate Court at Kabarnet Spmcc Nos.38 & 39 all of 2018 filed against the appellant herein following accident which occurred on May 13, 2015 involving Motor vehicle Registration number KAC 186M owned by the appellant and insured by the respondent. Record show that the respondent filed disclaimer suit Kabarnet Spmcc no.29 of 2018 on March 27, 2018 seeking declaration that the respondent is entitled to disclaim liability in respect to Kabarnet spmcc no.38 and 39 of 2015.
2. The appellant applied for review orders vide application dated April 1, 2019 whose ruling was delivered on October 23, 2019
3. The appellant being aggrieved by the said ruling filed this Appeal on the following grounds:
 - i. That the trial magistrates ruling is wholly a tranversity of justice and embarrassing as it amounts to a declaration that an insurance company can file a disclaimer/declaratory suit seeking to disclaim liability out of time and outside the strict provisions of section 10(4) of cap 405 a situation not envisaged under section 10(4) of cap 405.
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4. The appellant urged the court to set aside ruling dated October 23, 2019. And review orders issued on March 14, 2018 which allowed the respondent to file suit out of time.



5. The appeal was dispensed by way of written submissions, with each party filing their respective submissions.

appellant's Submissions

6. Counsel for the appellant filed written submissions on January 13, 2023 and submitted that the appellant's appeal goes to the root of disclaimer suit and challenges the jurisdiction of the lower court to hear and determine the disclaimer suit. That the ruling dated October 23, 2019 is erroneous and essentially travesty of justice since it amounts to a declaration that an insurance company can file a disclaimer/declaratory suit seeking to disclaim liability out of time and outside the Strick statutory provisions of section 10(4) of *cap* 405 a situation not envisaged under section 10(4) of *cap* 405 laws of Kenya and section 4,22,27 and 28 of *Limitation of Actions Act* do not apply to a suit instituted under section 10 of *cap* 405.
7. Counsel submitted that from the plaint and pleadings, disclaimer suit was filed on March 27, 2018 in respect of Kabarnet pmcc no.38 and 39 of 2015 filed in 2015 while the parent suit was filed in 2015 arising from road accident which occurred on May 13, 2015; the disclaimer suit being filed after 3 years from the date of filing the parent suit whereas section 10(4) of *Cap* 405 require filing of declaratory suit within 3 months after filing the parent suit or after issuance of statutory notice; that the declaratory/disclaimer suit is bad in law in so far as section 10(4) of *cap* 405 is concerned. And it follows therefore that the ruling of October 23, 2019 allowing filing of disclaimer suit is a total illegality and without foundation in law.
8. Counsel further drew attention of this court to section 54(2) of the *Limitation of Actions Act* which restricts filing of suit founded on tort to 3 years and the plaintiff is not a victim of injury claim and does not fall within the ambit of *cap* 22 and allowing extension of time by trial magistrate was an illegality; and submitted that the respondent had a right to avoid, disclaim or repudiate the insurance as provided under section 10(4) of the Act within 3 months from the date of issuance of statutory notice or filing of parent suit.
9. And argument that motor vehicle KAC 186M was being used outside the terms of contract as it was carrying passenger's contrary to terms and condition of the insurance contract does not stand in law and if the respondent desired to be heard, it had to comply with section 10(4) of *cap* 405 LOK.
10. The appellant cited the case of *APA Insurance Company v Vincent Nthuka* [2018] eKLR. Where Justice Odunga pointed out that there was no statutory basis for extension of time for filing declaratory suit by stating as follows:

“It is clear this section does not provide for extension of the said period for commencing proceedings seeking declaratory orders...”
11. In conclusion counsel submitted that there is a glaring mistake on the face of record namely granting of extension of time to file declaratory suit was neither based on contract nor tort being purely based on statutes. That the declaratory suit is not based on contract between insurance and insured; a contract between parties herein could not give rise to declaratory suit but The Insurance (motor vehicle Third Party Risks) Act is the empowering statute which give such right and the right should be confined to statute itself
12. That this being an injury claim there were no intervening circumstances in tort which would have given the trial magistrate the jurisdiction to entertain the application to extend time for filing declaratory suit.



13. Counsel further cited the case of *Oadi Odhiambo v Gateway Insurance Co. Ltd* Civil Appeal No.37 of 2013 where the court of appeal faced with similar circumstances stated that under section 27(1) of the limitation of Action Act time to file suit can only be extended where the action is founded on tort and must relate to torts of negligence, nuisance or breach of duty and damages accorded should be in respect to personal injury to the plaintiff as a result of the tort.
14. The court further stated that it has no power nor jurisdiction to condone non-compliance with provisions of section 10(4) of the *Insurance Motor Vehicle Third Party (Risk) Act* cap 405 of LOK. Counsel concluded that the right to file declaratory suit emanates from section 10(4) of cap 405 which does not contemplate extension of time beyond 3 months.

respondent's Submissions

15. Counsel for the respondent filed submissions on July 19, 2023 and started with the background already captured above. On whether extension of time to file declaratory suit is contemplated in law, counsel submitted that the issue of when declaratory suit should be filed is provided under section 10(4) of *The Insurance (Motor Vehicle Third Party Risks) Act* cap 405 that it shall be before an action commences or within 3 months after commencement of suit and submitted that it is not in dispute that the respondent sought leave after the 3 months provided in law for filing of declaratory suit and urge this court to dissect the provisions of section 10(4) of cap 405 to determine whether framers of the statute did not contemplate a scenario whereby the insurer may be allowed to extend the time limit of 3 months indicated in the section; counsel urged this court to take a holistic and contextual interpretation of the statute and not to read the provision only to the exclusion of the rest of the provisions.
16. Counsel for the respondent cited the case of *In the matter of Kenya National Human Rights Commission*, supreme court Advisory Opinion Reference No,1 of 2012[2014] eKLR. Counsel further submitted that section 10(2) of cap 405 provides for when an insurer will not be liable to pay decretal sum.
17. The respondent further cited the case of *UAP Insurance Co. Ltd v Patrick Charo Chiro*[2021] eKLR where Justice Kemei explained 4 fold tests to determine when liability accrues; first being whether the vehicle was insured by the appellant, two whether respondent has a judgment in his favour, whether notice was issued to insurer and four whether respondent was a person covered by insurance policy; and submitted that there was no proof that notice was issued and submitted that the appellant became aware of the primary suit when judgment was served and lastly the important test is whether the persons who got injured were covered under the insurance policy.
18. Further, that it is imperative to note that at the time of the accident, the suit motor vehicle KAC 186M Isuzu Van was insured from the period September 17, 2014 to June 7, 2015 for purposes of carrying goods only but when the accident occurred, it was carrying passengers which was a breach of an express term of the policy contract; that in the primary suit, the plaintiff sustained personal injury meaning the vehicle was not being used in line with the contract entered into.
19. Counsel submitted that courts have held that if motor vehicle is not used for purpose it is insured for, the insurer is under no obligation to honor or satisfy the claims arising from the accident and/or indemnify the insurer and cited the case of *Paul Mutisya v Jubilee insurance company LTD*[2018] eKLR where the court held that where the vehicle was clearly employed for use which was not insured by the defendant, the defendant is not under legal obligation to honor/satisfy the claims arising from and/or indemnify plaintiff for bodily injuries sustained by passengers who at the time of the accident were in the plaintiff's vehicle.



20. And based on the above arguments, provisions of section 10 of *Insurance (Motor Vehicle Third Party Risks) Act* read alongside the rest of subsections, the framers of the Act contemplated extension of time when it could repudiate the claim.
21. On whether leave could be granted under sections 4,22,27 and 28 of *Limitation of actions Act*, counsel submitted that injuries sustained in the primary suits were personal injuries although the plaintiff was not personally a victim of personal injury claim, they are the insurers and would ultimately be required to pay the persons insured.
22. Counsel conclude that the issue of extension of time is usually the discretion of the court as it is an equitable relief and principles for grant of relief as set out in the case of *Nick Salat v IEBC & Zothers*[2014] eKLR; and submitted that the appellant conveniently failed to serve summons to enter appearance in the primary suits and the primary suits were undefended and there is no way the respondent could know the suits involved personal injuries to enable them repudiate the claim within 3 months under cap 405;that there was no evidence that statutory notice was served; that the respondents discovered primary suits when they were served with the judgment and immediately sought leave which was granted and upheld on review; that delay in filing declaratory suit was not inordinate and the court was right in exercising discretion to grant leave; that the appellant did not disclose material fact at the time of filing claim and at the time of the accident, the vehicle was carrying passengers
23. Further that the appellant has not demonstrated any prejudice that he will suffer if respondent is granted leave to file declaratory suit out of time; that the suit is pending in court and he will be able to defend it; and submitted that article 59 of *Constitution* provide that justice shall be administered without undue regard to technicalities; and urge this court to uphold the ruling of 23rd October 2019.
24. Counsel submitted that for this court to interfere with the discretion of trial court, this court has to be satisfied that there is plain and clear misapplication of the law.
25. Counsel submitted that the court found that no prejudice would be suffered by the appellant if leave was granted as he would have opportunity to defend the declaratory suit. That the court rightfully exercised its discretion by allowing the respondent file declaratory suit out of time; and the court denies the respondent leave, it would aid in perpetuating illegality/wrong; that it will against public policy to enforce such a contract as no one is entitled to benefit from his wrong doing; that the appellant breached the provision of the contract and the court should not be inclined to turn a blind eye to it. Counsel urged this court to uphold the ruling of trial magistrate and allow the respondent to prosecute the declaratory suits already filed.

Analysis and Determination

26. I have perused the record of appeal and the submissions by counsels. The issue for determination is whether this court should interfere with ruling delivered by the trial court. There is no dispute that under section 10(4) of *cap 405 LOK*, the insurer s required to file declaratory suit with 30 days from the date of filing suit against the insured or with 14 from the date of being served with statutory notice.
27. It is not dispute that in the instant case, the respondent failed to comply with section 10(4) of *cap 405*.The argument given is, they were not informed of the suits until the time they were served with judgment. Further that no statutory notice was served and the appellant did not disclose that the vehicle which was insured to carry goods carried passengers and the primary suits relate to passengers who sustained personal injuries in the accident which is the subject matter of the primary suits.



28. The appellant has not demonstrated that the respondents were aware of the primary suits. I take note of the finding by the trial magistrate to the effect that the appellant would have opportunity to defend the declaratory suits and therefore no prejudice would be occasioned to the appellant.
29. I have perused and considered authorities cited; however, in the instant case, the respondent has indicated that they were not aware of the existence of primary suits until when they were served with judgments. They have also indicated that the vehicle was in breach of the insurance contract and were therefore entitled to repudiate the contract but were kept in the dark until when they were served with judgment; that the primary suits proceeded undefended.
30. In my view the trial magistrate rightfully, exercised discretion by granted extension of time to the respondent to file declaratory suits. Further the appellant in my view will not suffer any prejudice as he has opportunity to defend the declaratory suits. From the foregoing, I see no merit in the appeal herein and proceed to dismiss.
31. Final Orders
 1. This appeal is hereby dismissed.
 2. Ruling dated October 23, 2019 is hereby upheld.
 3. Costs to the respondent.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET

THIS 25TH DAY OF OCTOBER, 2023

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RACHEL NGETICH

JUDGE

In the presence of

Mr. Elvis – Court Assistant.

Mr. Chelule for the appellant

Ms Khaemba for the respondent

