REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

MISC. APPLICATION NO. 318 OF 2018

BETWEEN

MADISON INSURANCE COMPANY LIMITED.....APPLICANT

VERSUS

DAVID WAMBUA.....RESPONDENT

AND

JACKSON MULINGE MAINGI.....1ST INTERESTED PARTY

DANIEL MUSYOKI REUBEN.....2ND INTERESTED PARTY

RULING

1. By a Notice of Motion dated 24th July, 2019 expressed to be brought under the provisions of Section 1A of the ***Civil Procedure Act***, Order 51 Rule 1 of the ***Civil Procedure Rules***, section 10(4) of the ***Insurance (Motor Vehicle Third Party Risks) Act*** and any other enabling provisions of the law, the applicant herein, **Madison Insurance Company Limited**, in substance seeks an order that this Court be pleased to grant it leave to file a declaratory suit out of time.

2. According to the applicant, it was the insurer of the Respondent having entered into an insurance contract over motor vehicle registration number KCA 970P, a vehicle which was involved in an accident on 23rd April, 2018 involving the interested parties herein. As a result, the Applicant commissioned Investigators to undertake investigations on the occurrence of the accident and upon receipt of the investigations report, the applicant realised that the insured was using the vehicle contrary to the terms of the insurance contract. However, by then the time for filing a declaratory suit being three months after the filing of the primary suit had already lapsed. However, the Applicant intends to file the said suit in order to absolve itself from liability of the loss caused by the un-contractual use of the vehicle hence the need for seeking leave of this court.

3. In support of the application the applicant submitted that it was only made aware of the primary suit when it was served with the pleadings in Mavoko PMCC No. 1340 of 2018, the primary suit by which time 5 months had already lapsed since the filing of the suit. It was then that the applicant commenced the investigations into the matter.

4. In support of its position that the court has the power to extend the time for filing the declaratory suit, the applicant relied on **Jubilee Insurance Co. of Kenya Ltd vs. Nelson Njenga Munene & 9 Others [2014] eKLR**, **Xplico Insurance Company vs. Simon Mkalla & 2 Others [2014] eKLR** and **Philip Keipto Chemwolo & Another vs. Augustine Kubende [1986] KLR 495**.

Determination

5. The first issue for determination is whether this court has the jurisdiction and power to grant the orders sought. As was held by **Nyarangi, JA** in **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1**:

> **"By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both**

of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

6. Similarly, in **Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367** the same Court expressed itself as follows:

"The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado."

7. Lastly, on the same issue, the Supreme Court in the case of **Samuel Kamau Macharia -vs- Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011**, observed that:

"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings…Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation."

8. As stated at the beginning of this ruling, the applicant's application is grounded the provisions of Section 1A of the ***Civil Procedure Act***, Order 51 Rule 1 of the ***Civil Procedure Rules***, section 10(4) of the ***Insurance (Motor Vehicle Third Party Risks) Act*** and any other enabling provisions of the law.

9. Section 10(4) of the ***Insurance (Motor Vehicle Third Party Risks) Act*** provides as hereunder:

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.

10. 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.

11. As regards sections 1A and 1B of the ***Civil Procedure Act***, the provision provides for overriding objective of the ***Civil Procedure Act*** and state as follows:

1A(1) The overriding objective of this Act and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act".

(2) The Court shall, in exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

1B For the purpose of furthering the overriding objective specified in section 1A, the court shall handle all matters

presented before it for the purpose of attaining the following aims-

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology.

12. Under the overriding objective in sections 1A(2) of the ***Civil Procedure Act***, the courts are now enjoined to give effect to the overriding objective as provided in section 1A in the exercise of its powers under the Act or in the interpretation of any of its provisions and under section 1B. To my mind the overriding objective does not create a cause of action. As was held by **Lord Woolf** in **Swain v. Hillman [2001] 1 All ER 91** at pp 94 and 95:

> **"It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and, I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know this as soon as possible….Useful though the power is under Part 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. As Mr Bidder put it in his submissions, the proper disposal of an issue under Part 24 does not involve the judge conducting a mini trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily."**

13. Therefore, where there is no cause of action or no real prospect of success in a suit, the overriding objective cannot be invoked to sustain proceedings. Similarly, it cannot be invoked to terminate an otherwise valid claim. In this case nowhere in sections 1A and 1B of the ***Civil Procedure Act***, is there a power to stay execution in matter that has been heard and determined pending the determination of a new suit.

14. In **Hunker Trading Company Limited vs. Elf Oil Kenya Limited Civil Application No. Nai. 6 of 2010** the Court of Appeal held:

> **"the applicant cannot be allowed to invoke the "O2 principle" and at the same time abuse it at will...All provisions and rules in the relevant Acts must be "O2" compliant because they exists for no other purpose. The "O2 principle" poses a great challenge to the courts in both the exercise of powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In the court's view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail redesigning approaches to the management of court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day. *If improperly invoked, the "O2 principle" could easily become an unruly horse and therefore while the enactment of the "double O" principle is a reflection of the central importance the court must attach to case management in the administration of justice, in exercising the power to give effect to the principle, it must do so judicially and with proper and explicable factual foundation. The overriding principle will no doubt serve us well but it is important to point out that it is not going to be a panacea for all ills and in every situation*. A foundation for its application must be properly laid and the benefits of its application judicially ascertained."** [Emphasis added].

15. It is therefore clear that the overriding objective does not confer jurisdiction on the court which is conferred by or under the Constitution and/or statute. As stated above, it is a case management tool and not a jurisdictional provision. Therefore, where the Court has no jurisdiction, it cannot under the guise of invoking the overriding objective grant to itself a jurisdiction which it does not have.

16. It is also clear that Order 50 rule 4 of the ***Civil Procedure Rules*** only applies to situations where computation of time is provided under the said Rules or by an order of the Court. In this case, the limitation is neither provided by the ***Civil Procedure Rules*** nor by an order of the Court but by section 10(4) of the ***Insurance (Motor Vehicle Third Party Risks) Act*** which Act however does not provide for extension of time. This position was appreciated **Mokombo Ole Simel & Others vs. County Council of Narok & Others Nairobi HCMA No. 361 of 1994** where the Court expressed itself as follows:

> **"If the limited time is prescribed under the Civil Procedure Rules or by an order of the court or by summary notice, the court could enlarge the period. But here the absolute period of six months has been laid down by a different statute namely the Law Reform Act. Order 49 rule 5 of the Civil Procedure Rules cannot be invoked to supersede the express provisions of the Act...Order 49 rule 3A is similarly a piece of delegated legislation and cannot have the effect of amending the express provisions of section 9(2) and (3) of the Act. The said provisions can only be altered or amended by an Act of the Parliament...The long established tradition in commonwealth countries is that we look in the main to the legislature rather than to the courts for the development of our law. Moreover it is a different thing if a statute is ambiguous and capable of different interpretations. Here in this case the legislation is clear and certain and not open to any conflict on interpretations. The duty of the court is to expound what the law is and not what in view of social changes it should be. To change the law according to social dictates of society is the function of legislature. The court cannot strike down or disregard the express provisions of section 9 of the Act and therefore the applicant's application for leave to apply for an order of judicial review to quash the resolution is rejected...But a copy of the ruling should be forwarded to the Honourable the Attorney General since the provisions of section 9 should be amended so that the court is given jurisdiction to enlarge the period of six months in**

deserving cases."

17. In its submissions, the applicant also alluded Articles of the Constitution including Article 159(2)(d) of the Constitution which provides that:

> ***In exercising judicial authority, the courts and tribunals shall be guided by the following principles—***
>
> **……..**
>
> ***(d) justice shall be administered without undue regard to procedural technicalities.***

18. In my view the failure to apply within the time prescribed by the law cannot be ignored pursuant to the provisions of Article 159 of the Constitution. It is my view Article 159(2)(d) of the Constitution cannot be a panacea for all ills. It cannot be relied upon to revive a claim which is expressly extinguished by statute since the provision does not give rise to a cause of action. That Article is not meant to destroy the law but to fulfil it. It is meant to ensure that the path of justice is not clogged or littered with technicalities. Where, however, a certain cause of action is disallowed by the law, the issue of the path of justice being clogged does not arise since in that case justice demands that that claim should not be brought. Justice, it has been said time without a number, must be done in accordance with the law. Dealing with the said Article of the Constitution, the Supreme Court in Petition No. 5 of 2013**, Raila Odinga versus Independent Electoral and Boundaries Commission & Others [2013] eKLR** expressed itself as follows:

> **"…...Our attention has repeatedly been drawn to the provisions of Article 159(2)(d) of the Constitution which obliges a court of law to administer justice without undue regard to procedural technicalities. The operative words are the ones we have rendered in bold. The Article simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law. In the instant matter before us, we do not think that our insistence that parties adhere to the constitutionally decreed timelines amounts to paying undue regard to procedural technicalities. As a matter of fact, if the timelines amount to a procedural technicality; it is a constitutionally mandated technicality."**

19. An issue that goes to jurisdiction cannot, in my view be termed a mere technicality. To the contrary the issue goes to the root of the matter since without jurisdiction the Court has no option but to down its tools.

20. The Court of Appeal for East Africa dealing with the policy behind statutory limitation periods in **Dhanesvar V Mehta vs. Manilal M Shah [1965] EA 321** expressed itself as follows:

> **"The overriding purpose of all limitation statutes is based on the maxim *interest reipublicae ut sit finis litium,* and it has been the policy of the courts to lean against stale claims. There is no reason why the legislature in this particular instance should enlarge the time within which the personal representative of a deceased plaintiff should have himself brought on the record. Such a construction as canvassed by counsel for the respondent would not only make article 175A nugatory or redundant in the 1877 Act, but would also operate to the prejudice of a defendant who has been lulled into a false sense of security and who would have lost all evidence for his defence...The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand to protect a defendant after he had lost the evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case. It is most desirable that legislation which prejudicially affects the rights of citizens should be readily accessible".**

21. The reason given by the Applicant for not filing the declaratory suit within time is that it only became aware of the proceedings in the primary suit after the period prescribed for filing the same had lapsed. Section 10(2)(a) of the 10(4) of the ***Insurance (Motor Vehicle Third Party Risks) Act*** however provides as hereunder:

> ***(2) No sum shall be payable by an insurer under the foregoing provisions of this section—***
>
> ***(a) in respect of any judgment, unless before or within thirty days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings.***

22. It follows that if the Applicant's contention as regards lack of notification is correct, the failure by the interested parties to notify it before or within thirty days after the commencement of the proceedings in the primary suit is a complete defence hence there is no need for the applicant to seek extension of time to file a declaratory suit.

23. This Court however has no jurisdiction to grant the orders sought in this application. Consequently, the application is incompetent and is hereby struck out with no order as to costs.

24. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 27th day of January, 2021.

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

CA Geoffrey