



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO.E081 OF 2019

JANE NJERI KINYA..... PLAINTIFF

(Suing as the administrator of the Estate of James Mbugua Kinya)

VERSUS

JUBILEE INSURANCE COMPANY LIMITED..... DEFENDANT

RULING

1. This is a ruling on defendant's Notice of Motion dated 18/6/2020 brought *inter-alia* under **section 63(e) of the Civil Procedure Act, Order 2 Rule 15(1) and Order 50 Rule 1 of the Civil Procedure Rules.**
2. The Motion sought to strike out the suit on the grounds set out in its body and the supporting affidavit of **Philomena Theuri**, the legal manager of the defendant, sworn on 18/6/2020.
3. The grounds are that the plaintiff filed the present suit seeking compensation against the defendant arising out of a Group Personal Accident Policy (hereinafter the GPA Policy) executed between the defendant (as underwriter) and CFC Stanbic Bank Kenya Limited; that the deceased, **James Mbugua Kinya**, was an employee of CFC Stanbic Bank Kenya Limited at the time of his death.
4. The defendant averred that neither the deceased nor his estate was a party to the contract between the defendant and CFC Stanbic Bank Limited. In the premises, the plaintiff has no locus standi to claim under the contract. That neither the plaintiff nor the deceased have/had an insurable interest in the GPA Policy and cannot therefore derive any benefit therefrom.
5. That in any event, any claim under the GPA Policy was repudiated by the defendant under its express terms therefore the present claim cannot be maintained.
6. The application was opposed vide two replying affidavits. The first one was by the plaintiff sworn on 12/10/2020. She averred that Stanbic Bank Kenya Limited took out a GPA policy to cover its employees from death, temporary or permanent disablement, medical and funeral expenses.
7. The deceased was an employee of the said Stanbic Bank at the time of his demise on 9/4/2013. He was a beneficiary of the GPA policy. The agent of Stanbic Bank Kenya Limited reported the incident to the defendant for compensation but the defendant repudiated the claim on the grounds that the claim was reported late.
8. That the defendant declined to compensate the estate of the plaintiff which is a beneficiary of the policy. The plaintiff therefore claims compensation under the policy for the deceased's 96 months earnings amounting to Kshs. 23,574,240.
9. As regards the contention that the plaintiff was not privy to the GPA policy, the plaintiff contended that insurance contracts provide exception to the doctrine of privity of contract for the benefit of third parties. That in the premises, as an administrator of the estate of the deceased, the plaintiff is entitled to seek enforcement of the rights and obligations under the policy. She concluded that the defendant cannot repudiate the claim based on late submission of the claim in accordance with the Insurance Act.
10. The second replying affidavit by **Peter Ngugi**, the Manager, Human Capital Shared Services by Stanbic Bank Kenya Limited sworn on 12/10/2020. He reiterated and agreed with the contents of the plaintiff's replying affidavit.
11. He averred that there was no legal basis for the defendant to repudiate the claim by the plaintiff or the deceased's estate as the beneficiary of the policy. That the repudiation was in breach of the terms of the policy. An insurer is precluded under statute from declining a claim on

the ground of breach of warranty or condition where circumstances of the loss are unconnected with the breach.

12. The court has considered the submissions and the record entirely. The first issue for determination is whether the plaintiff has the locus standi to institute this suit against the defendant.

13. The defendant submitted that the present suit should be struck out on the basis that **Mr. James Mbugua**, the deceased, and his estate have no locus standi to claim under the GPA as they were not parties to the contract and that the deceased did not make any contributions towards the policy. On her part, the plaintiff submitted that insurance contracts provide for exceptions to the common law doctrine of privity of contract.

14. It is not in dispute that the deceased was an employee of Stanbic Bank Kenya Ltd. The issuance of the GPA policy cover with Stanbic Bank to cover the latter's employees from death, temporary or permanent disablement, medical and funeral expenses is also not disputed. It is alleged that the deceased passed on as a result of an accident on 9/4/2013. The only issue is whether the deceased or his estate can sue on the said policy and whether the repudiation of the defendant can hold.

15. There was no allegation that the beneficiary of the policy was any other entity other than the employees of Stanbic Bank Kenya Ltd. The latter was paying premium in excess of Kshs. 29 million per annum. If the beneficiary was any other entity other than the employees of **Stanbic Bank Kenya Ltd**, then the defendant and the bank would have been involved in a fraud against the tax authorities of this Country which is unacceptable. Otherwise why would two entities insure the lives of persons who are intended to have no insurable interest in their lives or the benefits accruing from the insured risks?

16. In **Aineah Liluyani Njirah v Agha Khan Health Services [2013] eKLR**, it was held: -

“There is, however, an important distinction made between express and implied benefits which are enforceable under a contract by a third party. When a contract expressly benefits the third party, there is a presumption that the contracting parties intended the third party to have a right of enforcement. However, if the contract only impliedly benefits a third party, there is no such presumption, and the third party has no rights unless the contract expressly gives that third party a right to enforce the contract. This creates certainty for, and protects, contracting parties, in that third parties cannot enforce contracts which only incidentally benefit them unless the contract expressly states that they may do so.”

17. The question that arises is, why would an entity insure the lives and safety of its employees if it was not intended that those whose life and wellbeing was insured be compensated in the event the risk insured attached? The only irresistible conclusion is that, in the absence of any evidence to the contrary, it was the employees and/or their estates, in case of death, who were to be the beneficiaries. Unless otherwise the contracting parties intended to defraud the tax man exempting the premium paid from **section 5 of the Income Tax**.

18. This Court does not think this was the intention and it holds that the deceased and/or his estate has locus to sue on the GPA policy.

19. It was alleged and submitted that the plaintiff did not obtain the permission of the other administrator of the deceased's estate, **Mr. Robinson Kinya Gichohi**, before instituting this claim. The answer to this is that the letter on record dated 4/4/2019 was enough consent by the said Mr. Robinson Kinya Gichohi.

20. Consequently, the court finds that the plaintiff, as one of the administrators of the estate of the deceased, had the locus to institute this suit against the defendant, as the claim in the suit is for the amounts owing due to the death of the deceased.

21. The second issue for determination whether the defendant had a legal right to repudiate the GPA policy.

22. The defendant submitted that the GPA policy was repudiated under the terms of the policy due to the fact that the claim was reported after 16 months. That the terms of the policy required notification within 14 days after the occurrence of any event giving rise to the claim.

23. The plaintiff contended that although she submitted the claim late than required, the defendant did not have any legal basis to repudiate the claim. That a condition in an insurance policy is a term which would entitle an insurance company to claim damages in the event of a breach but not to disclaim liability under the policy.

24. Further, the plaintiff submitted that under the Insurance Act, which the defendant is subject to, an insurer shall not decline a claim on the grounds of breach of warranty and late reporting without establishing and considering the reason for late notification.

25. In **Imara Steel Mills Ltd v Heritage Insurance Co. Kenya Ltd & 38 others [2016] Eklr**, it was held: -

“A reasonable notice clause is designed to protect the insurance company from being placed in a substantially less favorable position that it would have been in had timely notice been provided e.g. being forced to pay a claim against which it has not had opportunity to defend effectively. In short, the function of a notice requirement is to protect the insurance company interests from being prejudiced where the insurance company interests have not been harmed by a late notice, even in the absence of exterminating circumstances to excuse the tardiness, the reason behind the notice condition in the policy is lacking, and it follows neither logical nor fairness to relieve the insurance company of its obligations under the policy in such a situation”.

26. The court associates itself with the foregoing fully. The defendant's obligations were not extinguished the mere fact of the delay in reporting the claim. The court is of the opinion that the whole picture should be looked at with the intention to promote fairness. In this circumstance, although the plaintiff reported the claim late, the fact that an employee of Stanbic Bank died and that he was entitled under the

GPA policy should be the main focus.

27. As such, the court finds that the plaintiff, having obtained letters of administration, and the consent of the other administrator to pursue this suit on his behalf, is well within her rights to bring this claim against the defendant under the GPA policy.

28. In the end the court finds that the suit should be heard and determined on merit and dismisses the application dated 18/6/2020 with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE, 2021.

A. MABEYA, FCI Arb

JUDGE