



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL SUIT NO. 24 OF 2017

BRITAM GENERAL INSURANCE COMPANY(K) LIMITED.....PLAINTIFF

VERSUS

SIMON BENJAMIN NJOROGE KARANJA1ST DEFENDANT

BUSAM CAPITAL LIMITED.....2ND DEFENDANT

RULING

1. When the matter came up on the 11/06/2021 for purposes of case conference pursuant to the directions given on the 20/5/2021 and when it emerged that parties had not completed filing of documents the court invited the parties to address it on how the suit stood with the provisions of section 10 (4) of CAP 405.
2. Parties honoured the invitation and did attend court on the 9/7/2021 to offer their respective arguments. Having filed the preliminary objection alleging that the suit was competent pursuant to section 10 (4) of the Insurance (motor vehicle third party risks) act, Mr. Mwanzia advocate for the interested parties began and told the court that the provisions of the statute mandate and limited the time within which an insurer must file a suit seeking to repudiate the claim to be not later than 3 months after the filling of the suit for compensation provided the insurer had been served with a statutory notice pursuant to the provisions of section 10 (2) a. To the counsel the suit was statute barred and thus incompetent deserving being strike out.
3. The counsel for the defendant supported the position taken by the interested parties and contended, as the insured, they were unaware of the reasons for repudiation and urged that the suit be struck out for being statute barred.
4. For the plaintiff the position was taken that there was no privity of contract with the interested parties, as plaintiffs in the suit seeking compensation for personal injury, thence there was never an obligation to notify the interested parties of this suit and that it was the court which thought it proper to notify the interested party and that a declaration order doesn't stop the claimants (interested parties) from proceeding against the defendant in the cause of action under tort.
5. He said that for the Preliminary Objection to succeed it was important for the court to establish when the notice was served and relate it to the date this suit was filed. He however declined to comment whether or not notices were served preferring that the same remain in the realm of evidence taking at the hearing.
6. In his rejoinder, counsel for the interested parties referred the court to the bundle of document and asserted that the notice was served upon the plaintiff on the 11/11/2016 and the plaintiff here had at most 3 months from the date of service to file the current suit but did not do so till the 25/07/2017. He reiterated that the suit was incompetent for being statute barred.
7. The court takes and did take the view that whether or not the suit was filed in time goes to the jurisdiction of the court hence when the matter was due for case conference and that matter was brought to the attention of the court it became a threshold issue to be determined before any next step could be taken. In the case **Bosire Ogero v Royal Medial Services [2015]eKLR**, where the court had this to say on similar circumstances

"...The law of limitation of actions is intended to bar the plaintiffs from instituting claims that are stale and aimed at protecting defendants against unreasonable delay in the bringing of suits against them. The issue of limitation goes to the jurisdiction of court to entertain claims and therefore if a matter is statute barred, the court has no jurisdiction to entertain the same. And even if the issue of limitation is not raised by a party to the proceedings, since it is a jurisdictional issue, the court cannot entertain a suit which it has no jurisdiction to..."

8. I make the foregoing comments because in his submissions, counsel for the plaintiff did submit that this court in seeking to be addressed by the parties on the issue of compliance with section 10 of Cap 405 was entering the arena of conflict and not casting the posture and stature of an impartial umpire. Such stand notwithstanding, my perusal of the record, shows that the interested parties did file a replying affidavit sworn on the 31/01/2021 and at paragraphs 6,7,8 and 9 raise the issue of the competence of the suit.

9. That is the kind of an issue that ought to have been addressed by the court when the matter was in court on the 20/05/2021 but was by some oversight not argued as the court thought it more expeditious to fast-track the matter.

10. That however does not deprive the issue of limitation its stature as a threshold issue. It remains, and it behoved the court to ensure that such issue be dealt with at the earliest opportunity.

11. On the substantive question whether the suit is statute barred or properly before the court, the court merely need to find out if and when the suit was instituted and if statute notice was ever served. That to the court is the only consideration to be taken into account because the Law under Section 10(4) Cap 405 provides:-

“(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 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”

12. In this matter a notice dated 28/10/2016 and evidently taken out pursuant to Section 10 (2)a of the statute is demonstrated to have been issued and served by registered mail as evidenced by the certificate of posting dated 11/11/2016. It is not in dispute that the notice was issued prior to the filing of the suit on the 21/12/2016.

13. That having been done, the plaintiff here as the insurer who had issued a policy in terms of the Act, was obligated under section 10(4) to have instituted the suit not later than three months from the date the suit was filed.

14. Even though the provision is quite long and capable of losing one on its true dictates and meaning, I do read it, in line with the decisions by the court on it to only mean that, a suit seeking to protect the insurer from being liable must be brought before or within 3 months after the primary suit has been filed. I consider the provisions to erect firm and definite timelines for bringing such a suit.

15. Before me, in this file, the suit was brought on the 25/7/2017, a period of some seven months subsequent to filling of the suit whose liability is sought to be avoided. When so done, it was done outside the prescribed time and thus statute barred. The court of appeal for East Africa when face with a similar position in the case of **IGA V Makerere University [1972]EA 65** held as follows:-

"A plaint which is barred by limitation is a plaint "barred by law... The appellant was clearly out of time, and despite the opportunity afforded him by the Judge he did not show what grounds of exemption he relied on, presumably because none existed. The Limitation Act does not extinguish a suit or action itself but operates to bar the claim or remedy sought for, and when a suit is time barred, the court cannot grant the remedy or relief sought...The effect then is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the plaint, the plaint must be rejected."

16. This suit having been filed outside the circumscribed time is faulty and incompetent and the court has no authority to entertain it. I find that this suit is incompetent for being statute barred and therefore reject the plaint and order that it be struck out with costs to the defendant and interested parties.

Dated signed and delivered at Meru **virtually via Microsoft teams** this 11th day of August 2021

Patrick J.O Otieno

Judge

In presence of

Mr. Mwanzia for the interested party

Miss Miwiti for 2nd defendant

No appearance for the plaintiff

Patrick J.O Otieno

Judge