



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAMIRA**

**MISC. CIVIL CASE NO. 30 OF 2018**

**HEZBON OBARE NYAKUNDI.....APPLICANT**

**=VRS=**

**TRIDENT INSURANCE CO. LTD.....RESPONDENT**

**RULING**

1. By the Notice of Motion dated 11<sup>th</sup> December 2018 the applicant seeks orders: -

**“1. That Civil Suit No. 109 of 2018 filed at the Senior Resident Magistrate’s Court at Keroka be transferred to the High Court at Nyamira for hearing and determination.**

**2. that the costs of this application be in the cause.”**

2. The gist of the application is that the defendant in Keroka SRM CC No. 109 of 2018 has filed a counter-claim for declaratory orders to repudiate the Insurance Policy arising from the accident that occurred on 13<sup>th</sup> February 2018 and all claims filed by third parties arising thereto and the subordinate court does not have jurisdiction to grant declaratory orders/reliefs.

3. The application is supported by the affidavit of Innocent Nyagaka Muma sworn on 13<sup>th</sup> December 2018 to which he has annexed the plaint, statement of defence and counter-claim in the lower court. The deponent reiterates the grounds in the face of the application and further deposes that it is only just and fair that this application be allowed.

4. The application is not opposed.

5. When Counsel for the applicant appeared before this court on 14<sup>th</sup> March 2019 she submitted that as the lower court has no jurisdiction to hear a declaratory suit and as the application is not opposed it ought to be allowed.

6. This court would ordinarily allow an unopposed application if it has merit. However, I am not persuaded that this application has merit. Counsel did not refer to any provision of the law either in statute or case law that stops a magistrate from hearing a declaratory suit and indeed there is case law that magistrates do in fact have jurisdiction in such cases. This was the holding of the Court of Appeal in **Corporate Insurance Company Ltd Vs Elias Okinyi Ofire Civil Appeal No. 12 of 1998 [1999] 2 EA 61, [1999] eKLR** where the court stated:-

**“.... as there is a certain amount of uncertainty in the profession as to whether or not a declaratory suit, such as was filed in the Senior Principal Magistrate’s Court could be filed in the magistrates court we find it necessary to deal with the point. Mrs. Nyaundi for the appellant argued that it was a matter of notoriety that such cases can only be filed in the High Court. She quoted no authorities to support her proposition. It is true that there is such a general belief as urged by Mrs. Nyaundi. But that is not correct. Section 3 (1) (c) of the Judicature Act Cap 8 Laws of Kenya, gives the High Court and all subordinate courts power to exercise jurisdiction in conformity with the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12<sup>th</sup> August 1987.**

**“*Court*” as defined in the Civil Procedure Act means the High Court or a subordinate court, acting in the exercise of its civil jurisdiction.**

**“*Suit*” as defined in the Civil Procedure Act means all civil proceedings commenced in any manner prescribed.**

Order 11 rule 7 of the Civil Procedure Rules reads: -

**“7. No suit shall be open to objection on the ground that a merely declaratory judgement or order is sought thereby and the court may make a binding declaration of right.”**

**As “Court” includes a subordinate court it has jurisdiction to make a declaratory order such as was sought by the respondent, provided the value of the subject matter is within the jurisdiction of that court.”**

**46. Therefore the ground challenging the jurisdiction of the Learned Trial Magistrate to make a declaratory order must fail.”**

7. I need not say more and accordingly this application is dismissed with an order that the applicant shall bear his own costs.

It is so ordered.

**Signed, dated and delivered in Nyamira this 29<sup>th</sup> day of March 2019.**

**E. N. MAINA**

**JUDGE**