



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 92 OF 2015

PACIS INSURANCE COMPANY LIMITED.....PLAINTIFF

VERSUS

MOHAMED F. HUSSEIN.....DEFENDANT

R U L I N G

1. In the suit the plaintiff seeks orders of declarations that:-

- a) That this application be certified as urgent and dispensed with in the first instance.
- b) That this court be pleased to allow service of this application, summons, plaint and other court documents to the Defendant herein by way of registered post through its last known address or through P.O.Box 28832-00100 NAIROBI advertisement in a daily newspaper of wide circulation.
- c) That this court be pleased to grant leave for the Plaintiff herein to serve the Plaintiff's advocate in Kwale Civil Suit No. 42 of 2015 (Mgandi Charo Chombo vs Mohamed Hussein) with this application, summons, plaint and other court documents.
- d) That this court be pleased to order stay of proceedings in Kwale Civil Suit No. 42 of 2015 (Mgandi Charo Chombo vs Mohamed Hussein) and all related suits arising from an alleged accident which occurred on 2nd January 2014 along Kombani Kwale road pending interpartes hearing of this application.
- e) That this court be pleased to order stay of proceedings in Kwale Civil Suit No. 42 of 2015 (Mgandi Charo Chombo vs Mohamed Hussein) and all related suits arising from an alleged accident which occurred on 2nd January 2014 along Kombani Kwale road pending hearing and determination of the declaratory suit filed against the Respondent.
- f) That the costs of this application be provided for.

2. The foundation of this suit is pleaded in the plaintiff to be that having taken out a policy of Insurance with the plaintiff, over motor vehicle registration no. 40 U N 219K, and completed a proposal for conforming to certain warranties, and the plaintiff having issued such a policy with its terms and obligation and while the policy was valid for the period between 22/5/2013 and 21/5/2014, the motor vehicle was involved in an accident on the 2/1/2014 which accident the defendant failed to report to the

plaintiff in terms of the policy and therefore to the plaintiff, that failure constituted a fundamental breach of the insurance policy which breach entitles the plaintiff to avoid liability thereby ensuing.

3. To the plaintiff the defendant didn't file any statement of defence as a consequence of which the plaintiff did request and obtained a default judgment on the 28/10/2015 and an interlocutory judgment was therefore entered on the 10/11/2015. That entry of judgment however occurred after one MGANDI CHARO CHOMBO had applied to be joined to the suit as an interested party and was so joined to the proceedings by consent on the 17/9/2015.

4. It is that interested party who has now filed a Notice of Preliminary Objection in which it contends that failure to report an accident is not one of the statutory basis to avoid a policy and that the suit being solely grounded on such a failure is bad in law, does not lie and ought to be struck out. This decision will thus be limited to the determination whether or not failure to report an accident as alleged, is a basis for an insurer to repudiate the policy and avoid the liability founded on such policy.

5. The declarations sought must be seen to be founded on the provisions of section 10 of the Insurance (motor vehicle third party risks) Act, Cap 405. That provision reads:-

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.

6. The question that begs determination by the court is whether or not failure to report an accident is a ground for an insurer to avoid a policy under the statute. In my understanding of the law, an insurer who intends to avoid a policy under section 10(4) must meet the following conditions:-

(i) Prior to filing of a suit to which it is bound to settle a decree or within three months of its commencement he filed a suit seeking a declaration to avoid the policy.

(ii) The suit is grounded on reasons that:-

a. It was obtained by the non-disclosure of a material fact.

b. It was obtained by presentation of facts which was false in some material particular.

c. The insurer has avoided the policy on such ground that he was entitled to do so apart from the provision in the policy.

7. To this court, the timeline whether to file the suit is a statutory set benchmark which must be considered first before the question of whether or not the suit is on the grounds pleaded can be gone into. According to the papers filed by the plaintiff, in this matter, the interested party filed his suit on the 25/3/2015 hence this suit if not filed before that date had to be filed within three (3) months from that date. In my calculation that period lapsed on the 24/6/2015. However, from the date-stamped in the filed, this suit was filed on the 21/7/2015 some 28 days after the time had lapsed. It was clearly filed

outside the statutory set timelines.

8. Fred Ochieng J, in Gateway Insurance Co. Ltd vs Tham Njenga Gitau & Another [2014] eKLR had this to say of when such a suit is due for filing:-

“In my understanding of that provision, an insurer would be entitled to avoid its obligations to make payment under a contract of insurance if it had commenced proceedings either before a case had been filed against its insured or within 3 months of the case being instituted against its insured. The claim by the insurer would need to be one in which the insurer sought and obtained a declaration that it was entitled to avoid its obligation under the contract of insurance?”

9. On the basis that this suit was filed outside the time provided by the statute, I hold even though the parties did not bring it up, that this suit was filed out of time and is in its present state, incapable of attracting any orders from the court. It does not lie.

10. On the question before court whether failure to report an accident is a ground sufficient for an insured to avoid its obligations under the contract of insurance, I am in no doubt that it is not I say it is not a ground to avoid a policy because my reading of the act only gives concealment of material facts or their misrepresentation as a basis for avoiding the policy. And this must be seen in the light of the fact that an insurance contract is largely founded on the doctrine of *“OVERRIMA FIDES”* as a cornerstone of insurance contract.

11. I have found a brief judicial justification and rationale of this doctrine in the decision in **UNITED INDIA INSURANCE CO. LTD VS M.K.J CORPORATION[1996] 6 SCC 428** when the supreme court of India had this to say:-

“It is a fundamental principle of insurance law that utmost good faith must be observed by the contracting parties. Good faith forbids either party from concealing (non-disclosure) what he privately knows, to draw the other party into a bargain, for his ignorance of the fact and believing the contract”

12. It is therefore my view and opinion that parliament in enacting the provisions of section 10(4) Cap 405 did nothing but to codify that well established principle in the law of insurance. I therefore take the view that what would entitle an insurer to avoid a policy is a matter that go to the root of the contract of insurance. In this case, does the question of giving of notice traceable or able to be seen to go to the root of the contract? I have no hesitation in saying, it does not. It doesn't because the purpose of the notice by the insured of an accident is purely a requirement of preparedness to meet any resultant claim. It does not change the landscape upon which the contract of insurance would have been entered into and executed. The notice enables the insurer to carry out its investigation and establish if indeed an insured event has occurred in order that decisions may be made whether to settle or to dare litigation.

13. I am aware that the scheme and justification of Cap 405, was to avoid the situation where third parties suffering injuries from use of motor vehicles on public road would go uncompensated by the impecuniosity of the owners and drivers of such vehicles. It is therefore compulsory to insure every motor vehicle using any public road to meet that objective. It is also mandatory that the insurer who issues a policy is made to meet the purpose of the statute. The insurer can only escape the responsibility if the contract itself is voidable and has been avoided. This to me is what the court in **Corporate Insurance Co. Ltd vs Stephen K. Wamutere HCC No. 500 of 2009** when it said:-

“However I am accurately aware that when the insurer is liable under the Act for such liabilities as are required to by insured by the Act, the insured is entitled to indemnity or payment of such sums which shall be paid out under the Act but which it would not have been obligated to pay but for the provisions of the Act”.

14. While it is true that there was condition 5 in the policy document which placed an obligation upon the

insured to, as soon as possible, give notice thereof to the insurer, that condition by itself did not contain a penalty for any breach of such a condition. Having said that failure to give notice of an accident is not one of the statutory grounds to avoid a policy, even if such a penalty existed it would not, in my view, with the provisions of section of the Act being taken into account, avail to the plaintiff any valid ground to avoid the policy.

Conclusions

15. The suit having been filed outside the statutory timelines and failure to give notice of an accident, being the only basis upon which this suit is grounded, I find that the suit does not lie, and therefore I uphold the preliminary objection and order that the suit be struck out with costs to the interested parties.

Dated and delivered at **Mombasa** this **24th** day of **February 2017**.

HON. P.J.O. OTIENO

JUDGE