



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 1 OF 2016

MADISON INSURANCE CO. KENYA LTD APPLICANT

VERSUS

DAVID KIBE MATHENGE RESPONDENT

RULING

1. The applicants, MADISON INSURANCE COMPANY KENYA LTD has brought the originating summons dated 7th January 2016 and expressed to be under the provisions of the overriding objectives of the court, inherent powers of the court as well as the Provisions of section 95 and Orders 37 and 50 Rule 6. The substantive prayer in the summons is for the grant to the Applicant leave to file a declaratory suit under section 10(4) of the Insurance (Third Party Motor Vehicle Risks) Act; out of time.

2. The brief facts given to give rise to the proposed dispute to be litigated between the parties is that the Respondent as the owner of a motor cycle Registration No. KMCC 535D took out a comprehensive insurance cover with the applicant for the period 22/7/2011 to 21/7/2012. It is disclosed on the face of the summons that there was a term in the policy that the motor cycle would be used only by the insured and by a person duly authorized by the insured and holding a valid driving license.

3. On or about the 4/8/2011 during the currency of the policy of insurance the motor cycle was involved in a collision with a motor vehicle Registered No. KAN 780D and two persons, the rider and his pillion passenger, suffered fatal injuries for which the administrators of their estates as personal representatives, have filed Mombasa Civil Nos. 1385 and 1997 both of 2014 and Respondent was joined to the proceedings as a 3rd party. According to the applicant it only became aware of the suits in August 2015 when the 3rd party Notices were served upon it. It is added that investigations conducted in the year not disclosed, had revealed that the rider of motor cycle on the date of the accident did not hold a valid driving licence hence was in breach of the insurance policy conditions for which reason the applicant therefore desires to file a suit repudiating the policy but time to do so lapsed due to factors beyond the control of the applicant hence the need to file the suit out of time.

4. The grounds on the face of the application were reiterated by the affidavit in support thereof sworn by one STANLEY MUTHOMBI which exhibits documents including the policy document, pleadings in the two suits as well as a draft plaint for the intended suit.

5. The application was resisted by the Respondent who filed a Replying affidavit sworn on the 24/11/2016. The hallmark of that affidavit was that the rider of the motorcycle was a licensed driver and was not a minor as alleged in that even the documents exhibited by the Applicant itself show that he was 25 years of age and therefore the alleged investigation report, which in any event was never exhibited, was not believable wherefore the basis upon which to file a declaratory suit is lacking. That Replying affidavit prompted the applicant to file a supplementary affidavit which exhibited the investigation report. That investigation report reports the deceased rider as aged 17 years and the only disclosed source of that age is the statement of one OMARI K. KARISA who is reported to have said:-

“His cousin was aged 17 years old. They are still following up with the death certificate”.

Submissions by the parties:

6. Pursuant to the courts directions given on the 28/11/2016, the applicant filed submissions dated 2/3/2017 on the 23/3/2017 while the defendant did so on the 20/4/2017.

7. On 20/4/2017 when the matter was set for highlighting of submissions only the advocate for the Applicant attended but the Respondent did not although he was duly served.

8. When Mr. Obinju appeared to highlight the submissions the court posed to him the propriety of arguing prayer 3 for stay of proceedings of

suits by the plaintiffs to who had not been made parties and the advocate agreed to abandon that prayer.

9. In his submissions, the advocate stressed the fact that the applicant only came to learn about the suits in August 2015 upon being served with a **Third Party Notice** and that it is entitled to avoid and repudiate the policy due to breach of the policy condition that mandated that the motor cycle be driven by only the insured or an authorized person with a valid driving license. Reliance was then placed on the provision of section 10(4) of Cap 405 and the decided cases being *Xplico Insurance Co. Ltd vs Simon Mkala Ndegwa & Others [2014]eKLR*, *Jubilee Insurance Co. of Kenya Ltd vs Nelson Njenga Munene & 9 Others [2014] eKLR* for the proposition that the insurer is bound to satisfy a decree arising out of an insured risk and for the further proposition that the court can extend time to file a declaratory suit out of time. Equally cited was the decision by the *Ugandan Supreme Court in Branco Arabe Epanol vs Bank of Uganda [1991] 2EA 22* and *Phillip Chemueolo vs Augustiono Kubende* all for the proposition that a blunder of an advocate should not be visited upon a litigant so as to drive him away from the seat of justice.

10. On his part the Respondent filed submission resisting the application by the applicant in which submissions the Respondent contend that the application being grounded on the alleged lack of driving licence by the rider was an afterthought and baseless because even the document exhibited by the Applicant including the certificate of death and pleading revealed that the deceased was actually aged 25 years old.

11. The Respondent equally contended that the terms of the policy could only be proved by the policy document which he contended was never exhibited. That position is not reconcilable with the fact that the affidavit in support did annex the motor cycle policy as Annexure – SM 1.

Issues for determination

12. Having read the affidavit filed, together with the written submissions and the law cited, I have identified the following issues as presenting themselves for determination by the court.

(i) Is the applicant entitled to extension of time to file a suit on the facts revealed.

(ii) How arguable is the intended suit.

(iii) Who should meet the costs of the application?

However the (ii) & (iii) issues will only be due for determination if it be found that time be extended.

Should time be extended and leave granted?

13. When to grant leave to a party to file a suit out of time is governed by the provisions of limitation of Actions Act, Section 27.

That provisions states:-

“(1) Section 4(2) does not afford a defence to an action founded on tort where –

(a) the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and

(b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries or any person; and

(c) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and

(d) the requirements of subsection(2) are fulfilled in relation to the cause of action.

(2) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which –

(a) either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and

(b) in either case, was a date not earlier than one year before the date on which the action was brought.

(3) This section does not exclude or otherwise affect –

(a) any defence which, in an action to which this section applies, may be available by virtue of any law other than

section 4(2) of this Act (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or

(b) the operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.

14. Although the originating summons I am called upon to determine, did not cite that section, this court proceeds from the learning that the substantive law regarding limitation and therefore extension of time is the Limitations of Action Act. Even though Civil Procedure provides for how to apply for extension, those provisions in the Civil Procedure Act and the Rules must remain purely procedural and the substance must be resorted to under Limitation of Action Act.

15. The first consideration is whether this court has jurisdiction to extend time when the intended suit is grounded upon a contract. In this matter the gist of the Application is that the Applicant seeks a declaration that it is not bound to satisfy any decree arising out of an accident which allegedly took place on the 14/8/2011 because the insured breached a fundamental term of the policy of insurance which bound the insured to allow the use of the motorcycle only by himself or a duly authorized and a person holding a valid driving licence. That must be seen to be the foundation of the intended suit. It is a contract based cause of action.

16. The Court of Appeal [1] had this to say when allowing an appeal against a decision of the High Court extending time to file a suit based on employment contract:

“Section 27, relates to extension of limitation period in cases of ignorance of materials facts in actions founded on tort where the negligence is alleged.....

The respondents suit had nothing to do with the tort of negligence and therefore the court had no jurisdiction to entertain the application for extension of statutory period of filing the suit....”.

17. Although the target of the intended suit being possible decrees for personal injury claims are grounded upon the tort of negligence and would thus be amenable for an application to extend time under Section 27, if Section 28, 29 and 30 be satisfied, the intended suit by these proceedings itself would be seeking a declaration that the insurer is not bound to pay based on the terms of the contract of insurance in policy of insurance.

18. The Actual Limitation Period pertinent to this matter pursuant to Section 31 Cap 22, is provided by the insurance (motor vehicle third party risks) Act, Cap 405 at Section 10(4). An insurer is by law entitled to seek the declaration akin to that the applicant now seeks to have time extended for not later than three months after the suit for compensation is filed. That provision has no independent window for extension of time.

19. Here the suits whose prospective decrees the Applicant seeks to avoid were filed in 2014 yet this Application was filed in 2016.

20. To grant the orders sought would be to extend time limited by the statute and in a cause based on contract. At paragraph 9 of the Affidavit of STANLEY MUTHOMBI filed in support of provisions, it is said that the Applicant only became aware of the suits in August 2015 when third party notices were served upon Poa Bus Services Limited. Even if that were to be true and even if it were possible to extend time for a cause of action in contract, the application would still be awfully belated.

21. This court finds that it has no jurisdiction to entertain the application seeking to extend to file a declaratory suit grounded upon a contract of insurance between the Applicant and the Respondent.

22. That being so the court can only do what the law dictates – down its tools. I down my tools and dismiss the application with costs to the Respondent who opposed it. Without jurisdiction there is no justification to consider the other two issues.

Dated and delivered at **Mombasa** this 26th day of **April 2017**.

P.J.O. OTIENO

JUDGE

[1] **Kenya AirportS Authority vs Abraham Kisongochi [2016]eKLR**