



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**MISC. CIVIL SUIT NO. 97 OF 2014**

**THE MONARCH INSURANCE CO. LTD.....APPLICANT**

**VERSUS**

**PARBAT SIYANI CONSTRUCTION CO. LTD.....RESPONDENT**

**RULING**

1. By Originating Summons dated 14<sup>th</sup> July 2015, the applicant relies on section 27 of the Limitation of Actions Act to seek orders that court grants the applicant leave to file out of time a suit based on section 10 (4) of the Insurance (Motor Vehicle Third Party Risk) Act and that upon such leave being granted that the applicant be permitted to file the Plaint within 14 days of the grant of leave to file suit out of time.

2. Section 10 (4) of the Insurance (Motor Vehicle Third Party Risk) Act provides that-

*“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 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 the ground that he is entitled so to do apart from any provision contained in it.”*

3. The applicant seeks leave to file out of time a declaratory suit that it is entitled to avoid the policy pursuant to the provisions of section 10 (4) of the Insurance (Motor Vehicle Third Party Risks) Act based on facts summarized in the applicant’s written submissions as follows:

*“The Respondent on or about the 9/11/2012 requested the applicant to issue him with a Third Party Only, Motor Vehicle Commercial Insurance Policy Cover for his motor vehicle registration number KSS593. As per his own declaration, the said motor vehicle would be used for commercial purposes. The Respondent was subsequently issued with a policy cover No. HDO/0800/000912/2012 for the period commencing on 9/11/2012 to 8/11/2013.*

*On or about 17/2/2013 the Respondent motor vehicle KSS 593 while in the course of ferrying passengers for hire and reward contrary to the insurance policy involved in an accident. The passengers aboard motor vehicle KSS593 subsequently filed suit in Machakos that is Machakos CMCC No. 953 of 2013, 954 of 2013 and 955 of 2013 claiming damages for injuries sustained.”*

4. The thrust of the applicant’s argument is set out in the submission’s Conclusion as follows:

*“The applicant in the instant suit has approached this Honourable Court seeking extension of time within which to file the plaint in view of the provisions of section 10 (4) of the Insurance Motor Vehicle Third Party Risk Act. Under section 31 of the Limitation of Actions Act, all limitation periods prescribed by any other written law is extendable by the provisions of section 27 of the said Act. The letter and spirit of the Constitution is to the effect that access to justice is available to all persons natural or juristic. In view of the breach of the insurance policy by the Respondent, it would amount to a miscarriage of justice if the prayers sought by the applicant are not granted to enable the suit be heard and determined on merit.”*

5. Sections 27 of the Limitation of Actions Act provides as follows:

***“27. Extension of limitation period in case of ignorance of material facts in actions for negligence, etc.***

*(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 of 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 character 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 written 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.”*

6. Section 30 of the Limitation of Actions Act clarifies that the material facts which forms basis for extension of time are material facts relating to personal injuries-

***“30. Interpretation of sections 27, 28 and 29***

*(1) In sections 27, 28 and 29 of this Act, any reference to the material facts relating to a cause of action is a reference to one or more of the following—*

(a) **the fact that personal injuries** resulting from the negligence, nuisance or breach of duty constituting that cause of action;

(b) **the nature or extent of the personal injuries** resulting from that negligence, nuisance or breach of duty;

(c) **the fact that the personal injuries** so resulting were attributable to that negligence, nuisance or breach of duty, or the extent to which any of those personal injuries were so attributable.”

7. As held by the Court of Appeal (Kneller, Hancox JJA & Nyarangi Ag JA) in **Kenya Cargo Handling Services Limited v Ugwang**, (1985) KLR 593, section 27 of the Limitation of Actions Act ‘does not affect actions for personal injuries founded on contract as it relates exclusively to actions founded on tort.’ *A fortiori*, neither does it affect claims by an insurance company based on breach of contract by an insured.

8. Section 27 (1) (b) of the Limitation of Actions Act makes it clear that the extension of time for filing of suit under that section can only apply in cases where “***the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person.***” The claim by an insurance company seeking a declaration that it is not bound to honour the insurance policy for breach by its insured of the terms of the policy ‘does not include damages in respect of personal injuries of any person’ and is therefore not covered by section 27 of the Limitation of Actions Act.

9. The answer to the contention by the applicant that to refuse to extend time for filing of its suit would unjustly hinder its right of access to justice is answered by Lord Diplock in the leading case of *Letang v Cooper* [1964] 2 All ER 929 (CA) (at p 936 F to I) explaining limitation of period period of limitation in all actions for damages for personal injuries, cited in **Ugwang**, supra, that-

*“The Act is a Limitation Act; it relates only to procedure. It does not divest any person of rights recognized by law; it limits the period within which a person can obtain a remedy from the courts for infringement of them. The mischief against which all limitation Acts are directed is delay in commencing legal proceedings; for delay may lead to injustice, particularly where the ascertainment of the relevant facts depend on oral testimony. This mischief, the only mischief against which the section is directed, is the same in all actions in which damages are claimed in respect of personal injuries.”*

10. Section 31 of the Limitation of Actions Act provides as follows:

**“31. Part to apply to other laws of limitation**

*Where a period of limitation is prescribed for any action or arbitration by any other written law, that written law shall be construed as if **Part III** of this Act were incorporated in it.”*

11. In this court’s view, all this means is that the part of the Limitation of Actions Act dealing with extension of time will apply to provisions in other legislation on limitation of actions. It does not create new grounds for extension of time; the grounds for extension of time must remain as set out in the Part III of the Limitation of actions Act.

**Conclusion**

12. Section 27 of the Limitation of Actions Act applies in cases of suits for claims which must include damages for personal injury as provided under section 27(1) (b) of the Act. Section 10 (4) of the Insurance (Motor Vehicle Third Party Risks) Act is meant to ensure prompt payment of decrees for damages in personal injury cases in traffic accident cases. The period of limitation for filing of declaratory suit does not take away the right of access to justice by an insurance company; it only requires the insurance to settle, in the first instance, claims based on judgment for damages for personal injuries

arising from motor vehicle accidents. The insurance company may recover from the insured any monies paid out in settlement of the decrees in personal injury cases by third parties. That must be the working of a third party insurance policy.

13. Although section 31 of the Limitation of Actions Act applies its Part III to all legislation on limitation of actions, an applicant must show which provision of the Part III of the Act applies to the nature of case before the court as Part III various relates to Extension of limitation period in case of disability, s. 22; Fresh accrual of right of action on acknowledgement or part payment, s. 23; Extension of limitation period in case of fraud or mistake, s. 26; and Extension of limitation period in case of ignorance of material facts in actions for negligence, etc., s. 27. The applicant's suit in this case is for declaration (as shown in the draft Plaintiff), and is not a suit for '*damages claimed by the plaintiff for the negligence, nuisance or breach of duty [which] consist of or include damages in respect of personal injuries of any person*' as required by section 27 (1) (b) of the Limitation of Actions Act. Section 27 of the Act clearly does not apply to this case.

### **ORDERS**

14. Accordingly, for the reasons set out above, the applicant's application herein filed on 14<sup>th</sup> July 2015 is declined.

**DATED AND DELIVERED THIS 26<sup>TH</sup> DAY OF JANUARY 2016.**

**EDWARD M. MURIITHI**

**JUDGE**

**In the presence of: -**

**Ms. Olesi for Ms. Karanja for the Applicant**

**N/A for the Respondent**

**Ms. Doreen - Court Assistant.**