



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL CASE NO. 1 OF 2016

THE TRIDENT INSURANCE CO. LTD.....APPLICANT

VERSUS

PHILIP ETYANGARESPONDENT

RULING

1. This is an *ex-parte* application seeking leave to file for a declaratory suit brought under certificate of urgency under sections 1A, 1B, 3A and section 63 (e) of the Civil Procedure Act as read with Order 37 Rule 6, Order 51 Rule 1 of the 2010 Civil Procedure Rules and under sections 27 and 31 of the Limitation of Actions Act and under all other enabling provisions of the law. There is a supporting affidavit of Fancy Catherine Lubanga in support of the application which has been brought by way of an originating summons.
2. The matter was certified urgent and was heard on 14th April 2016. According to the supporting affidavit, the applicant instructed the firm of M/S Mose, Mose, Millimo & Co Advocates to file a declaratory suit. This was not done within the prescribed time because the applicant's clerk inadvertently misfiled the file back to the docket and failed to bring it to the attention of Fancy Catherine Lubanga for the appropriate action. It is her further affidavit evidence that it was not until 4th January 2016 that she realized that the suit had not been filed. According to her, she accidentally came across the file which had been misfiled in another docket. A declaratory suit according to her was necessary in respect of the claimants in Embu SRMCC No 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 153 & 174 of 2015 which had already been filed in the main suit on 12th August 2015. And for that reason, it was imperative to seek leave to file the suit out of time.
3. Furthermore, it is also her affidavit evidence that she was advised by Martin Bett (a legal officer from the applicant's company) that as at the time when the accident occurred on 5th April 2015, the subject motor vehicle KAZ 317K had already been sold by the applicant's insured to a third party. And by virtue of that sale, the policy of insurance had terminated on the date of sale namely on 6th November 2014. The applicant annexed the sale agreement as annexure "FCL 2".
4. Finally, the applicant stated that the application is meritorious and it is only just and fair that the applicant be allowed to file the suit as no prejudice will be caused to the respondents.
5. I have perused the affidavit evidence and I find that the only annexures which are annexed to the application are a letter of instructions from Trident Insurance Co. Ltd being annexure "FCL 1" and the sale agreement being annexure "FCL 2" together with another supporting affidavit of one Richard Achachi Onchwari. It is this Onchwari who had been instructed by Ms Fancy Catherine Lubanga to file a declaratory suit and who had misfiled the file in the wrong docket.

6. I further find that there is an essential document that was not annexed to the application. This is a statutory declaration which must be served on the insurance company by an intending plaintiff or claimant in terms of section 10 (2) of the Insurance (Motor Vehicles Third Party Risks) Act, (Cap 405) Laws of Kenya. That section provides as follows:

“10 (2) No sum shall be payable by an insurer under the foregoing provisions of this section

(a) in respect of any judgement, unless before or within fourteen days after the commencement of the proceedings in which the judgement was given, the insurer had notice of the bringing of the proceedings;”

7. It is clear from the foregoing provisions that an intending plaintiff or claimant is required to serve notice of his intention to file proceedings upon the insurance company. The requirement is mandatory and that explains why the provisions are couched in mandatory language. It is my considered opinion that failure to serve such a notice absolves the insurance company from satisfying any decree or order that the intending plaintiff or claimant may recover in the proceedings.

8. In the circumstances, I find that the failure to annex the notice that is mandatorily required by section 10 (2) of the Act renders this application fatal. As a result, this application is dismissed with no orders to costs.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this 25th day of April **2016**.

In the presence of Mr Ombachi holding brief for for Ms Fancy Catherine Lubanga for the Applicant and in the absence of the Respondent

Court clerk Njue

J. M. BWONWONGA

JUDGE

25.04.16