

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

HCCC 9 OF 2016

TRIDENT INSURANCE CO. LTD.....APPLICANT

VERSUS

PHILIP ETYANG.....RESPONDENT

RULING

1. The applicant seeks an order to be granted leave to file a suit out of time under section 10 of the Insurance (Third Party Risks) Act (Cap 405) Laws of Kenya against the respondent. Additionally, he seeks that the costs of this application be costs in cause. The applicant's application is supported by the grounds on the face of the originating summons which is expressed to be brought under Article 159 (2) (d) of the 2010 Constitution of Kenya, sections 1A, 1B and 3A of the Civil Procedure Act (Cap 21) Laws of Kenya and under all other enabling provisions of the law.

2. In ground 1, the applicant has stated that the respondent had no insurable interests at the time of the alleged accident because he had sold the subject motor vehicle to a 3rd party. In ground 2, it has stated that the information concerning the sale was not known to the applicant. In ground 3, it has stated that the failure by the applicant to file the suit within the prescribed time under Cap 405 was not intentional and/or willful but was due to matters outside its knowledge. Finally, it has stated that it is only just and fair that the orders sought be granted to enable it have the issues raised determined substantively.

3. Furthermore, the applicant's application is anchored in the 11 paragraph supporting affidavit of Martin Bett who is a legal officer in the employment of the applicant. He has deponed amongst other matters that the applicant had insured motor vehicle registration No. KAZ 317K which belonged to Philip Etyang, the respondent. He has also deponed that the insurance policy covered the period between 6th August 2014 to 5th August 2015. Furthermore, he has deponed that the respondent sold the subject motor vehicle to one Duncan Ndung'u on 6th November 2014 and relinquished all his interests in that motor vehicle. In this regard, he has annexed to his affidavit an agreement of sale marked "MB-1".

4. He has further deponed that by virtue of that sale, the respondent lost insurable interests in the subject motor vehicle and the cover issued to him lapsed. He has also deponed that the plaintiffs in the cases cited on the face of this application directly forwarded the summons to enter appearance to the applicant. Furthermore, he has deponed that the applicant was not aware that its insured person, the current respondent, had sold the subject motor vehicle and had thereby lost his insurable interests. He has also deponed that the applicant was not able to file the suit seeking an order of declaration that it was entitled to avoid claims arising out of the accident within the time prescribed under **section 10 of the Insurance Act**.

5. Finally, he has deponed that its failure to file the suit within the time prescribed was not wilful but was due to circumstances that were not within its knowledge and it is for that reason that it now seeks leave of the court to file for a declaratory order out of time.

6. The proceedings were conducted in the absence of the respondent, whom I find was duly served with notice of hearing and had adequate notice of it. This is clear from the affidavit of service dated 5th September 2016.

7. In the light of the affidavit evidence and the applicable law, I find that the affidavit evidence of the

applicant is credible. I find that there is no way he could have known that the respondent had sold the subject motor vehicle to one Duncan Ndungu. Furthermore, I also find that the applicant is prepared to serve the intended application if granted leave on the claimants who have filed recovery compensatory claims against it within 14 days of the filing of the said suit. This is clear from the applicant's submissions. I find that it is only fair that the applicant be granted leave to file for a declaratory order out of time and thereafter it may proceed to serve notices of the intended application for a declaratory order on the claimants whose particulars appear in the applicant's further affidavit in paragraph 2.

8. In the light of the foregoing, I find that the application is well merited and no prejudice will be caused to any concerned party including the respondent. I find that the submissions of counsel for the applicant are sound in principle and for these reasons the applicant's application is allowed in terms of prayer 3 and 4 of the *ex-parte* originating summons.

9. Costs of this application will be costs in cause.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **14th** day of **DECEMBER, 2016**

In the presence of Mr. Andande holding brief for Mr. Morara for the applicant and in the absence of the respondent.

Court clerk Njue

J.M. BWONWONGA

JUDGE

14.12.16