



REPUBLIC OF KENYA



Pacis Insurance Company Limited v Intercity Secure Homes Limited (Civil Suit E045 of 2024) [2025] KEHC 8691 (KLR) (12 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8691 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E045 OF 2024
J NGAAH, J
JUNE 12, 2025**

BETWEEN

PACIS INSURANCE COMPANY LIMITED PLAINTIFF

AND

INTERCITY SECURE HOMES LIMITED DEFENDANT

RULING

1. The plaintiff has filed this suit against the defendant primarily praying for:
 - “ a) A declaration that it is not bound to pay and/or satisfy any existing or non-existing Judgments or liabilities arising from any potential suits and/or indemnify the Defendant against any claim in respect of any bodily injuries and/or material damage/losses incurred as consequence of the accident which allegedly occurred on 18/05/2024 along Miritini - Mombasa Road when at Madukani area; involving the Defendant's motor vehicle registration number KDN 232Z and Motor cycle Registration Number KMEK 561 J.”
2. According to the plaint dated 26 July 2024, the plaintiff is an insurance company and at all times material to this suit, it was the insurer of the defendant's motor vehicle registration number KDN 232Z under policy no. 040/0080/008078/2024/COMP.
3. It was a term of the insurance policy that the plaintiff would indemnify the defendant in the event of loss or damage or claims arising from a road traffic accident caused or arising from the use of the defendant's motor vehicle as long as the accident occurred “within the contractual use of the motor vehicle” and in accordance with the terms or conditions stipulated in the insurance policy. Further, the policy excluded the plaintiff from liability for accidents caused by the defendant's driver's own negligence, such as driving under the influence of alcohol.



4. On or about 18 May 2024, the defendant's motor vehicle is said to have been involved in a road traffic accident, along Miritini - Mombasa Road at Madukani area. The defendant's authorised driver or agent or servant is said to have controlled the vehicle in such a manner that he lost control and collided with motorcycle Registration number KMEK 561 J.
5. As a result of the accident, the rider of the motor cycle and a passenger riding pillion sustained serious bodily injuries. Investigations by the police established that the defendant's driver was driving the defendant's motor vehicle under the influence of alcohol or other intoxicants.
6. The plaintiff apprehends that the motor cycle rider and his passenger may institute proceedings against the defendant seeking compensation for the injuries sustained. Its case against the defendant is that, "...it is neither legally nor contractually liable to indemnify the defendant or compensate the rider and passenger on board motorcycle registration KMEK 561 J, as that would go against the inherent terms existent in the insurance contract between the plaintiff and defendant and beyond the scope of a mandatory insurance cover within the meaning of Sections 4 and 5 of the Insurance (Motor Vehicle Third Party Risk) Act, CAP 405 of the Laws of Kenya."

The suit is basically seeking this Honourable Court's declaration to that end.

7. The defendant contests this suit and has gone further to file an application to have the suit struck out or dismissed. The application is by way of a motion dated 8 November 2024 expressed to be brought under sections 1A, 1B, 3A, and 4 of the Civil Procedure Act, cap. 21 and order 2 rule 15 and order 51 rule 1 of the Civil Procedure Rules.
8. It is this application that is the subject of this ruling. The application is supported by the affidavit Duncan Mwenda Jackson who has sworn that he is the managing director of the defendant/applicant company.
9. According to Mwenda, the respondent has filed a declaratory suit under Section 10(4) of the Insurance (Motor Vehicle Third Party Risks) Act, seeking to avoid liability for a potential judgment from an accident claim that has not been filed.
10. As at the date of filing his affidavit, no suit or any judgment had been entered against the defendant as a result of the road traffic accident in issue. In summary, it is Mwenda's position that, in the absence of any suit or judgment against the defendant/applicant, there is no legal obligation on the part of the plaintiff to justify this suit. The suit, according to him, is rather speculative or pre-emptive and, in the circumstances, the applicant urges that the suit does not disclose any reasonable cause of action and should, therefore, be dismissed.
11. In any event, it is urged, the respondent has failed to issue any notice to "potential plaintiffs" and neither have they been joined to the plaintiff's suit.
12. The plaintiff has opposed the motion and, to this end, filed a replying affidavit. The affidavit has been sworn by Morine Munene who has introduced herself as a legal officer of the plaintiff. The depositions in the affidavit are, more or less, what has been pleaded in the plaint. I see no reason for rehashing them.
13. Having considered the application and the submissions filed by the respective parties, I am of the considered opinion that although, as contended by the defendant, the suit appears speculative and intended to pre-empt prospective claims against the defendant, it is the sort of a suit that is sustainable under section 10 of the Insurance (Motor Vehicles) Third Party Risks Act, cap. 405.
14. This appears to be the position taken by the Court of Appeal in *Blueshield Insurance Co. Ltd v Raymond Buuri M'rimberia* [1998] KECA 280 (KLR). Considering that the decision of the Court



of Appeal in this case directly answers the question of the viability of the plaintiff's suit, it is necessary that I dwell on it a little bit longer.

15. In that case, Raymond Buuri M'rimberia's wife sustained fatal injuries in a road traffic accident involving motor vehicle registration no. KRY 56 belonging to one Salesio Majau. At the time of the accident, the vehicle was under an insurance cover provided by Blueshield Insurance Company Limited.
16. In 1987, M'rimberia sued Salesio under the *Law Reform Act*, cap. 26 and the *Fatal Accidents Act*, cap. 32 on behalf of the estate of the deceased and on behalf of himself and his 7 children for special and general damages. The suit was filed and registered in this Honourable Court as Civil Case No. 1136 of 1987.
17. Prior to M'rimberia's suit, and more particularly on 20 August 1986, Blueshield Insurance Company Limited had sued Salesio in this Honourable Court's civil case no. 2976 of 1986 for a declaration that, at all material times, the insurance company had been entitled to avoid the policy of insurance issued by it on the ground that the said policy was obtained by the insured by non-disclosure of material facts or by representation of facts which were false in material particular. The insurance company also sought a further declaration that it is not liable to satisfy any third party claims in respect of or arising out of the insurance policy.
18. On June 24, 1993 M'rimberia obtained judgment against Salesio in the running down case for the sum of Kshs.469,040/= with costs and interest. M'rimberia requested Blueshield Insurance Company Limited to satisfy the judgment but the insurance company declined. In the face of this refusal, M'rimberia filed a declaratory suit against the insurance company in this Honourable Court as civil suit no. 2118 of 1994 for a declaration that the appellant was bound to honour or satisfy the judgment and also prayed for a judgment against the appellant for Kshs. 571,324/80 with costs and interest in pursuance of the judgment.
19. In opposing the claim, the insurance pleaded in its defence, inter alia, that:
 - “ 4 In answer to paragraph 6 of the plaint the defendant states that the policy of insurance covering the insured's motor vehicle was a motor commercial policy which excluded liability to passengers in the motor vehicle. The defendant further states that the risk insured was not a third-party risk within the meaning of the Insurance Motor Vehicle (3rd Party Risks) Act and that the liability for the same is excluded under s.5(b)(ii) of the said Act.
 5. In answer to paragraph 8 of the plaint, the defendant denies that the plaintiff is entitled to a sum of Shs.469,040/= or costs and interest on the same for the reason stated hereinabove.”
20. By a chamber summons filed on October 26, 1994, under Order VI r 13(1)(b)(c) and (d) and Order XXXV r.1 of the Civil procedure Rules, M'rimberia sought to strike out the insurance company's defence as being vexatious, frivolous and an abuse of the process of the court and for a judgment for the plaintiff in terms of the plaint. Alternatively, he sought an order for summary judgment for Shs.469,040/= together with costs and interest.



21. The court allowed M'rimberia's application and while striking out the insurance company's defence, Ole Keiuwa, J. as he then was, held as follows:

"I am satisfied that there are no triable issues to go to trial in the defence. I am also satisfied that the Plaintiff herein was suing in respect of the third party involved and irrespective of what becomes of the insured and the insurer, the claim of this third party has to be met by the defendant. I accordingly strike out the defence and enter judgment as prayed in the plaint with costs of the suit and the application."

22. Aggrieved by this judgment, the insurance company appealed to the Court of Appeal. In its judgment, the Court of Appeal considered section 10(1) and (4) of the Insurance (Motor Vehicles) Third Party Risks Act on the obligation of an insurance company to satisfy a judgment entered against an insured and the exclusionary clauses in the insurance policy instrument. Section 10(1) reads as follows:

"If after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph(b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section pay to the person entitled to the benefit of the judgment any sum payable thereunder in respect of the liability including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments."

23. In interpreting the efficacy of this section, the court of Appeal held:

"Thus once statutory liability under s.5(b) is covered by the terms of the policy, which in the instant case was, and is not denied by the appellant, the insurer is obliged under s.10(1) of the Act to satisfy the judgment obtained against the insured and pay to the person entitled to the benefit of that judgment all sums payable thereunder with costs and interest, notwithstanding that the insurer may be entitled to avoid or cancel the policy vis a vis the insured or may have even avoided or cancelled it.

24. More pertinent to the instant application, the Court of Appeal held:

"But then the liability under s.10(1) is subject to the following provisions of s.10(4) of the Act which reads: -

" (4) 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."

25. The court noted that despite the fact that the insurance company had not pleaded in its defence in the declaratory suit against it, that it had already sued the insured in High Court Civil Case No.2976 of 1986 for a declaration that it was entitled to avoid the policy and that the said suit was still pending for determination, this particular fact had been deposed to in the affidavit in reply to the application to strike out the defence. Nonetheless, the court held that, in itself, the allegation that there was a pending suit against the insured could not count as a triable issue in the M'rimberia's suit against the insurance company. The court held that:

"Under s.10(4) the liability of the insurer to satisfy the judgment under s.10(1) is excluded only if, not only that the insurer had commenced an action within the time scale prescribed thereunder, but also that it has obtained a declaration that it is entitled to avoid its liability under the insurance policy."

26. In dismissing the appeal, the court held that although the insurance company had filed its own declaratory suit "some 12 years ago" no declaration had been obtained. The court also held that:

"Moreover, there is no evidence that a mandatory notice as envisaged by the proviso to s.10(4) had been ever given. The effect of that omission is that even if the appellant has obtained the said declaration which it has not so far, it may still not be entitled to the benefit of that declaration as against the respondent."

27. As far as it is relevant to the instant application, it emerges from this decision that an insurance company may file a declaratory suit to resile from what would otherwise be its obligation under an insurance policy if there are grounds to file such a declaratory suit. Subject to the prescribed timelines, the suit may be filed before or after a claim, by a third party, arising out of the insured event. For the avoidance doubt, the declaratory suit by Blueshield Insurance Company Limited was filed in 1986 long before the third party sued the insured in 1987.

28. It follows that there is nothing untoward in the respondent filing the instant suit despite the fact that no judgment has been obtained against the insured or that no claim or claims have been raised against the insured as a result of the road traffic accident.

29. What matters is whether the plaintiff complied the pre-requisites for filing such a suit which are prescribed in section 10(4) of the Insurance (Motor Vehicles) Third Party Risks Act. For emphasis it is necessary that I reproduce the subsection here; it reads as follows:

(4) 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."

30. One of the requirements is, of course, filing the suit before the suit for compensation of damages by a third party is filed or, if not, whether the suit is filed within three months of the filing of the suit by the third party.
31. It is apparent from the evidence before court, and indeed there is no dispute that, in this suit, the insurance company has moved, first in time, and sought for a declaration from this Honourable Court that it is not liable under the insurance policy given to the defendant, Intercity Secure Homes limited. To the extent that the suit has been timeously filed, it would be viable.
32. As far as the requirement of service of the notice of the suit is concerned, the proviso to subsection (4) is to the effect that, where an insurance company succeeds and obtains a declaration, it can only benefit from such a declaration, if a notice of the suit from which it has obtained the declaration was served to the third party 14 days before the suit for the declaration was filed or within 14 days after the suit was filed.
33. On the face of it, and as I understand this provision, the notice is only necessary where a suit for compensation by the third party was filed prior to a declaratory suit by the insurance company. Once served, the third party who, ordinarily, would be the plaintiff in the suit against the insured, would then be at liberty to join the insurance company's declaratory suit.
34. The logic in the requirement of a notice appears to me to be that it is only where a third party suit has been filed that a plaintiff or plaintiffs to be served with the notice can be identified as such. Without a suit there is neither a plaintiff (to be served with the notice) nor a defendant. If the notice was to be served before a third-party claim has been lodged against the insured, the insurance company would only be speculating as to who the "potential plaintiff" or plaintiffs are. Yet the proviso to section 10(4) is express that the notice is to be served "onto the person who is the plaintiff" and not to persons the applicant has described as "potential plaintiffs".
35. In the instant case, there is no evidence and, indeed it is common ground, that no third party suit or claim has been filed against the insured and, therefore, the requirement for the issue and service of notice would not apply. I am minded that in the *Blueshield Insurance Co. Ltd v Raymond Buuri M'rimberia* (supra) despite the fact that the insurance's declaratory suit having been filed long before the suit by the third party for compensation, the court still held that:

"Moreover, there is no evidence that a mandatory notice as envisaged by the proviso to s.10(4) had been ever given. The effect of that omission is that even if the appellant has obtained the said declaration which it has not so far, it may still not be entitled to the benefit of that declaration as against the respondent."
36. The conclusion I can make from the Court of Appeal's reasoning is that where an insurance's declaratory suit precedes a third party's suit, as was the case in the case of *Blueshield Insurance Company Limited* case, the insurance company is under obligation to serve the notice of its suit to the third party once the third-party files his or her suit. I reiterate that the third party only attains the status of a plaintiff, eligible to be served by the notice under section 10(4) of the Act, only after he or she has filed a suit.
37. If after the plaintiff filing this suit, a claim for compensation had been lodged by all or any of the victims of the road traffic accident involving the defendant's motor vehicle, it would have been incumbent



upon the plaintiff to serve them with the notice of the existence of the instant declaratory suit. In the absence of such a suit for compensation, there is no “plaintiff” upon whom the insurance company can serve the notice in compliance with section 10(4) of the Act.

38. As I understand the Court of Appeal judgment, if the suit for compensation is filed during the pendency of this suit, and peradventure the insurance company does not serve the notice to the plaintiff or plaintiffs in the suits for compensation, a declaration subsequently obtained in this suit would be rendered inconsequential. Strictly speaking, the plaintiff may not even secure the declaration for the suit would be bound to fail for want of service of the notice.
39. It follows, therefore, that, for the reasons I have given, the plaintiff’s suit is properly before court. The answer to the question whether the suit will succeed or not will emerge after the suit has been determined but for now, there is no sufficient ground to strike it out or dismiss it solely on the ground that it discloses no reasonable cause of action. In the circumstances, the applicant’s application is dismissed. Costs will abide the outcome of the suit. It is so ordered.

SIGNED DATED AND CIRCULATED ON THE CTS ON 12 JUNE 2025

NGAAH JAIRUS

JUDGE

