



REPUBLIC OF KENYA



**Geminia Insurance Company Limited v Ondari (Civil Miscellaneous  
E007 of 2024) [2024] KEHC 7055 (KLR) (11 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7055 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CIVIL MISCELLANEOUS E007 OF 2024**

**KW KIARIE, J**

**JUNE 11, 2024**

**BETWEEN**

**GEMINIA INSURANCE COMPANY LIMITED ..... APPLICANT**

**AND**

**JOSEPH MOMANYI ONDARI ..... RESPONDENT**

**RULING**

1. The applicant moved the court through a Notice of Motion dated the 30<sup>th</sup> day of January 2024. It was premised under Order 51 of the Civil Procedure Rules, sections 26, 27, and 28 of the Limitation of Actions Act, sections 1A, 1B, 3A, and 63(e) of the Civil Procedure Act, and Article 159 (1) (d) of the Constitution of Kenya. The applicant is seeking the following orders:
  - a. The application must be certified urgent and fit for hearing on a priority basis.
  - b. The honourable court grants the applicant leave to file a declaration suit against the respondent out of time.
  - c. Upon grant of leave, there be a stay of proceedings in Oyugis SPMCC Nos.E087 & E088 of 2023 pending filing, hearing, and determination of the intended declaratory suit.
  - d. Costs hereof to abide by the outcome of the intended declaratory suit.
2. The application is premised on the following grounds:
  - a. The applicant is the insurer of the respondent's motor vehicle registration Number, KCG XXXX. It has been established that the said motor vehicle was involved in a traffic accident on March 6, 2023, along the Oyugis-Kisumu road.
  - b. At the time of the accident, the respondent acted in breach of the contract's terms under that insurance policy by permitting an unqualified and unlicensed person to drive, manage, and



control the said motor vehicle. In the premises, the applicant is entitled to avoid any liability under the insurance policy arising from the traffic accident by obtaining such declaration in the declaratory suit.

- c. The provisions of Section 10(4) of the *Insurance (Motor Vehicle Third Party Risks Act* (Cap. 405) require the applicant to bring an action before or within three months after the commencement of proceedings for claims of compensation arising out of the said accident to avoid the policy. That period has expired, and the applicant is legally required to seek leave of court to file a declaratory suit out of time.
  - d. The delay in bringing the action within the period prescribed under the law was caused by the lack of material information concerning the traffic accident necessary to commence the suit. The applicant had to engage a private investigator to uncover the acts of breach committed by the respondent, which took some time.
  - e. If leave is not granted, the applicant will suffer extensive irreparable loss since it will be liable to pay any judgment sums awarded in Oyugis SPMCC Nos. E087 & E088 of 2023, whereas it is entitled to avoid the policy.
  - f. The applicant will suffer irreparable losses if proceedings are in Oyugis SPMCC Nos. E087 & E088 OF 2023 do not stay since the cases may be heard and determined before the hearing and determination of the intended declaratory suit, which will render the declaratory nugatory.
  - g. The respondent will suffer no prejudice if the orders sought in the application are granted.
  - h. It is in the interest of justice that the applicant be allowed to be heard and ventilate its claim in the intended suit.
  - i. The application is made in good faith.
3. The respondent opposed the application and contended that the applicant's delay was undue.
  4. Section 10(4) of the *Insurance (Motor Vehicle Third Party Risks Act* (Cap 405) provides:

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.
  5. The applicant should have obtained a declaration that they are entitled to avoid the Respondent's claim for non-disclosure of material facts based on that provision. However, this was not done, and no notice was given to the Respondent specifying the non-disclosure or false representation.



6. The applicants received the Notice of Institution of the suit on 27th July 2023, which was dated 24th July 2023. The statutory provisions were mandatory, and they cannot claim that they were investigating the matter. Asking the court to extend the time is like asking the court to amend the provisions under the Act.
7. In the case of *Mary Osundwa v Sugar Company Limited* [2002] eKLR, the Court of Appeal held:

This section clearly lays down the circumstances in which the court would have jurisdiction to extend time. The action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the plaintiff as a result of the tort. The section does not give jurisdiction to the court to extend the time for filing suit in cases involving a contract or any other causes of action other than those in tort.
8. The applicant intends to file a declaratory suit based on an alleged breach of an insurance policy contract. Consequently, the court lacks jurisdiction to extend the time for filing the suit.
9. The application is dismissed with costs.

**DELIVERED AND SIGNED AT HOMA BAY THIS 11<sup>TH</sup> DAY OF JUNE 2024.**

**KIARIE WAWERU KIARIE**

**JUDGE**

