



**Takaful Insurance of Africa Ltd v Affey (Civil Case E003 of 2022)
[2024] KEHC 7094 (KLR) (13 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7094 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL CASE E003 OF 2022
RK LIMO, J
JUNE 13, 2024**

BETWEEN

TAKAFUL INSURANCE OF AFRICA LTD PLAINTIFF

AND

ABDI DAKANE AFFEY DEFENDANT

RULING

1. This is a ruling on a Preliminary Objection dated 12th October 2023 raised by the defendant herein against the entire suit filed herein.
2. A little bit of background will bring out a clear perspective about the Preliminary Objection raised by the defendant herein.
3. The suit herein was instituted by the plaintiff against the defendant who was at all material times the registered owner of Motor Vehicle Registration KBR 818H. The plaintiff avers that it had insured that motor vehicle under a comprehensive insurance policy vide policy cover number P/EST/2019/101/115521 TPO with a commencement date of 16th July 2019 and expiry date of 15th July 2020. The plaintiff's position is that it is not liable to settle any claims which may arise from the accident which resulted in deaths and injuries of certain passengers in the vehicle.
4. The reason fronted by the plaintiff is that the defendant's vehicle was insured as a private car but the defendant breached the terms of his policy and carried fare paying passengers. He pleads that a serious accident occurred and a claim has been filed against the insured (defendant). The plaintiff is now seeking a declaration that it is not bound to satisfy any judgment that may arise out of Mwingi PMCC No. E009 of 2020- Kimanzi Sula & Kavithe (suing as the administrators and/or legal representatives of the estate of Erick Mwangangi Kimanzi-deceased) v Abdi Dajane Affey. He is seeking the following prayers in the suit herein:



- i. A declaration that the Plaintiff is not liable and/or duty bond under the policy and/or by contract to compensate and/or settle to pay or satisfy any judgement arising out of the accident of 4th August 2019 of the defendant's motor vehicle registration number KBR 818H.
 - ii. A declaration that the provisions of section 10 (4) of the *Insurance (Motor vehicle Third Party Risk Act)* cap 405 Laws of Kenya absolve the Plaintiff from liability in respect to the aforementioned accident.
 - iii. Cost of this suit.
 - iv. Any other or such further orders as this Honourable Court may deem fit and just to grant.
5. In response and upon leave by this court, the defendant filed a statement of defence and denied the allegation that he was carrying fare paying passengers when the accident occurred. The defendant's position is that the plaintiff received premiums from him and is obligated to pay or settle claims arising from the accident.
6. The defendant then filed a Preliminary Objection dated 12th October 2023 on the entire suit on the following grounds namely:
- i. This suit is premised on section 10 (4) of the *Insurance (motor vehicle third party risk Act)* (Cap 405) Laws of Kenya
 - ii. The suit was filed outside the set timelines of section 10 (4) of the *Insurance (motor vehicle third party risk Act)* (Cap 405) Laws of Kenya and therefore time barred
 - iii. The suit is therefore bad in law, fatally defective and incompetent.
7. The defendant submits through counsel that the law (Section 10(4) of the *Insurance (Motor Vehicle Third Party Risk) Act*, required the plaintiff to file this suit within 90 days of filing of Mwingi PMCC No. E009 of 2020. The suit in Mwingi P.M Court was filed in 2020 while this suit was filed on 30th May 2022. He submits that the 90 days requirement is stipulated in mandatory terms which makes the present suit time barred. He also submits that Section 27 of the *Limitations of Actions Act* which relates to extension of time does not apply to insurance contracts adding that the defect in filing the suit out of time, the suit is not curable under Article 159 of *the Constitution*.
8. The plaintiff has filed a response to the Preliminary Objection vide submissions dated 14th November 2023. It concedes that the suit was filed outside the set timelines under Section 10(4) of the *Insurance (Motor Vehicle Third Party Risk) Act* Cap 405 Laws of Kenya but contends that the delay is a procedural technicality which should be disregarded by this court. It attributes the delay to a blunder stating that it was not informed of the statutory timelines of filing a suit. It urges this court to exercise its discretion and dismiss the preliminary objection.
9. This court has considered the Preliminary Objection raised by the defendant and the response thereto. The Preliminary Objection is premised on the provisions of Section 10(4) of the *Insurance (Motor Vehicle Third Party Risk) Act* hereinafter to be referred to as the Act for ease of reference. He contends that this suit is time barred and should be struck out.
10. The provisions of Section 10(4) of Act provides as follows:

“Duty of insurer to satisfy judgments against persons insured

No sum shall be payable by an insurer under the foregoing provisions of this section if 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.”

11. The provision provides for three requirements to be met for an insurer to avoid satisfying judgments against insured persons as follows:
 - i. That the insurer should file the suit before or within three months of the filing of the suit by the third parties. (primary suit)
 - ii. Notice with details of grounds of disclaimer is given before or within 14 days of the commencement of the declaratory suit to the plaintiff in the primary suit
 - iii. The person to whom notice of action is so given shall be entitled to be made a party in the declaratory suit.
12. It is not contested that the suit herein was filed way out of time as it was filed on 30th May 2022 while the primary suit was filed sometime in 2020. The position taken by the plaintiff is that the delay is a technicality curable under Article 159 of *the Constitution* but is it?
13. Section 27 (1) of the *Limitation of Actions Act* provides for extension of limitation period in case of ignorance of material facts in actions for negligence as follows;

“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 written law independently of contract or written law; and
 - b. the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consists of or include damages in respect of personal injuries or 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.”
14. The above statutory window for extension of time applies in cases of ignorance of material facts in actions for torts for negligence, nuisance or breach of duty. A declaratory suit as in the present instance is excluded and the plaintiff cannot invoke the provision for extension of time because the cause of action is based on contract and not tort. It is therefore not just a mere technicality. It is covered well by the statute cited above. The anomaly in this suit as pointed out is that it is time barred. It is not a



question of procedure but the action is time barred. Article 159 of *the Constitution* in such situation cannot be applied to breathe life into such actions which are statutorily time barred.

15. In *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others* [2013] eKLR, the Court of Appeal Kiage, JA held as follows on invocation of Article 159 of *the Constitution*:

“... I am not in the least persuaded that Article 159 of *the Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules.

I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned...”

16. In *Anaclet Kalia Musau v Attorney General & 2 Others* [2020] eKLR, the Court of Appeal that a suit that is statute barred affects the jurisdiction of a court to handle it in the sense that a court cannot entertain it. The appellate court held as follows;

“The solitary issue in this appeal is, whether the suit before the High Court was statutorily time barred. To demonstrate that time limitation is a jurisdictional question and that if a matter is statute-barred a court has no jurisdiction to entertain it, we cite the decision of the Supreme Court in the case of *Nasra Ibrahim Ibren v Independent Electoral and Boundaries Commission & 2 others*, Supreme Court Petition No. 19 of 2018, where that court stressed the fact that jurisdiction is everything and that a court may even raise a jurisdictional issue suo motu. It said:

“40 A jurisdictional issue is fundamental and can even be raised by the court suo motu as was persuasively and aptly stated by Odunga J in *Political Parties Dispute Tribunal & another v Musalia Mudavadi & 6 others Ex Parte Petronila Were* [2014] eKLR. The learned Judge drawing from the Court of Appeal precedent in *Owners and Masters of The Motor Vessel “Joey” v Owners and Masters of The Motor Tugs “Barbara” and “Steve B”* [2008] 1 EA 367 stated thus:

“25. What I understand the Court to have been saying is that it is not mandatory that an issue of jurisdiction must be raised by the parties. The Court on its own motion can take up the issue and make a determination thereon without the same being pleaded...” (Emphasis supplied)



We fortify that view by quoting yet another passage from the East African Court of Appeal *In The Matter of Iga v Makerere University* (1972) E.A 62, where it was stated that;

“The Limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time-barred, the court cannot grant the remedy or relief..... The effect then is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the plaint, and no grounds of exemption are shown in the plaint, the plaint must be rejected.” The learned Judge in this appeal, no doubt did not err when she determined whether, by operation of the law, she had to down tools for want of jurisdiction.”

17. In light of the above discourse, this court finds merit in the Preliminary Objection raised the same is sustained and the suit herein is hereby Struck Out with costs for being incompetent and bad in law.

DATED, SIGNED AND DELIVERED AT KITUI THIS 13TH DAY OF JUNE, 2024

HON. JUSTICE R. K. LIMO

JUDGE

