



**Fidelity Shield Company Limited v Njathi (Civil Case 11
(B) of 2022) [2024] KEHC 8755 (KLR) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8755 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL CASE 11 (B) OF 2022
MA ODERO, J
JULY 19, 2024**

BETWEEN

FIDELITY SHIELD COMPANY LIMITED APPELLANT

AND

FLORENCE NYAMBURA NJATHI RESPONDENT

JUDGMENT

1. Before this court are two applications for determination as follows:-
 - i. Exparte Originating Summons dated 30th January, 2021.
 - ii. Notice of Motion dated 9th April, 2021.
2. The court directed that the two applications be heard and determined together. The court further directed that parties file and exchange written submissions. The Applicant filed the written submissions dated 30th January, 2024. The Respondent despite being granted the opportunity to do so did not file any written submissions.
 1. Ex Parte Originating Summons dated 30th January, 2021 filed by the Applicant Fidelity Shield Insurance Company Limited seeking the following orders:-
 - “ 1. That leave be granted to the Appellant herein Fidelity Shield Insurance Company Limited to file a declaratory suit out of time against Florence Nyambura Njathi after the limitation period.
 2. That the suit herein be deemed as duly filed.
 3. That costs of this application be provided for.



3. The summons which was premised upon Sections 27, 28, 29 of the *limitation of Actions Act*, Section 10 of the Insurance (Motor Vehicles Third Party Risks), Order 51(1) of the Civil Procedure Rules 2010, Article 159 (2) (d) of *the Constitution* of Kenya 2010, Sections 1A, 1B and 3A of the *Civil Procedure Act* Cap 21, Laws of Kenya and all other enabling provisions of the law was supported by the Affidavit of even date sworn by Sammy Wanjiku Kamau the Claims Manager for the Applicant.
4. The Respondent Florence Nyambura Njathi opposed the application through an undated Replying Affidavit.
5. Notice of Motion dated 9th April, 2021 by which Umazi Nyale Nyawa & Miriam Kambi Mwachala as Administratrixes of the estate of the late Juma Kambi Mwachala sought the following orders.
 - “ 1. That the court be pleased to grant leave to Umazi Nyale Nyawa and Miriam Kambe Mwachala (Administratrixes of the estate of the late Juma Kambi Mwachala) to be enjoined as Interested Parties in the suit herein.
 2. That consequent to prayer 1 above, leave be granted to the Interested parties to respond to the Originating Summons dated 30/01/2021.
 3. That costs be in the cause.
6. The application was premised upon Article 50 and 159(2)(d) of the Constitution Section 10(h) of the Insurance/Motor Vehicle and Party Risks), Act Cap 405, Laws of Kenya, Order 1 Rule 10 (2), Order 51 Rule 1 of the Civil procedure Rules, Sections 3A of the *Civil Procedure Act* and all other enabling provisions of the law and was supported by the Affidavit of even date sworn by Umazi Nyale Nyawa.
7. The Applicant Fidelity Shield Insurance Company Limited opposed this application through the Grounds of Opposition dated 15th April, 2021.

Background

8. The Respondent Florence Nyambura Njathi is the registered owner of motor vehicle Registration Number KBS 744Q Toyota Fielder (hereinafter ‘the vehicle’). On or about 10th September, 2018 the Respondent approached the Applicant and sought to be issued with a comprehensive Insurance Cover for the said vehicle. The Respondent indicated that the motor vehicle was to be used for social domestic and pleasure purposes only.
9. In reliance on the representations and declarations made by the Respondent in the proposal form, the Applicant issued her with an Insurance Policy Cover No. THK/P/503/002917/18 (hereinafter the ‘Insurance cover’) for the said vehicle which cover commenced on 10th November, 2013 and was due to expire on 9th October, 2019.
10. The Policy Cover specifically stipulated that the vehicle would not be used for hire and/or reward and that the Applicant would indemnify the Respondent in the event of an incident arising contrary to the terms of the cover.
11. On the 28th September, 2019 the vehicle was involved in an accident along Kenyatta Highway within Nyeri Town. Following said accident a report was made to the Insurance Company and the Respondent wrote to them a demand letter dated 11th June, 2020.
12. The Applicants hired a private investigator to investigate the circumstances of the alleged accident. The Applicants claim that they later came to the knowledge that the Respondent had misrepresented facts and that in fact the vehicle was being used for hire when the accident occurred.



13. The Applicants aver that by the time they received the report from the investigator revealing the misrepresentations made by the Respondent the three (3) month period allowed for filing suits to repudiate the Insurance and their liability to pay any third party claims policy had lapsed. The Applicants now seek the leave of the court to file the suit for declaratory orders against the Respondent out of time.
14. As stated earlier the application was opposed. The Respondent concedes that she had procured a comprehensive Insurance Cover for her vehicle from the Applicants.
15. However the Respondent vehemently denies the allegation that the said vehicle was being used for hire at the time the accident occurred. She states that on the material day a friend had requested to use the vehicle and that she had authorized the said 'friend' to drive the same without any payment being made and/or received.
16. The Respondent contends that there is no provision in law for extension of time for a claim based on contract. Further that the Applicant was guilty of laches in failing to file the suit within the required legal timelines. The Respondent urged the court to dismiss the application.
17. The only issue for determination is whether the prayer seeking extension of time is merited. The Applicant claims that it did not file suit seeking to repudiate the Insurance Contract within the three (3) months limitation period provided for by law because they only came into possession of the material facts after the expiry of the three (3) month period.
18. Section 10 (4) of the Insurance (Motor Vehicle Third Party Risk) Act provides 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 in 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”
19. The Applicant relied upon Section 31 of the Limitation of Actions Act Cap 22 Laws of Kenya which provides that

“Where a period of limitation is prescribed for any action or arbitration by any other written law, that written law shall be construed as if part III of this Act were incorporated in it”



20. Part III of the Act provides for instances where extension of the limitation period may be allowed i.e
- Disability
 - Acknowledgement and part payment.
 - Fraud
 - Mistake
 - Ignorance of material facts.
21. In support of their allegation that the Respondent misrepresented material facts, the Applicants have annexed the statement dated 29th September, 2019 written by the person who was driving the vehicle when the accident occurred one KELVIN WAMBUGU MUREITHI. In his statement ‘Kelvin’ indicates that he was driving a hired vehicle Registration KBS 744Q (Annexure SWK ‘2’ to the Supporting Affidavit dated 30th January 2021)
22. The Applicants have also annexed an Investigation Report dated 9th March, 2020 (Annexure ‘SWK-4’) which report reveals that at the material time the motor vehicle was being used a PSV Taxi. The Applicants claim that they received this investigation report after the three (3) month limitation period had expired. However this is not entirely correct.
23. The Complaint indicates that the main suit being Nyeri CMCC No. 36 of 2020 seeking damages for the accident was filed by the victims on 21st July, 2021. [see Annexure ‘UNN3’]
24. There is also a demand letter dated 11th July, 2020 issued by the law firm of S. N. NGARE & COMPANY representing the accident victims as well as the statutory notice dated 21st July 2021 to Fidelity Insurance Co. Ltd notifying the Applicants of the filing of the suit.
- Therefore the period of time began to run from 21st July 2021 when the Applicants were notified of the existence of the suit. By this time the Applicants had already received the investigation report revealing the alleged misrepresentation.
25. Instead of moving to repudiate the Insurance contract the Applicants entered appearance in the suit and filed a defence to the suit which defence is dated 21st January, 2021.
26. The documents on record indicate that by January, 2021 the Applicants were already in possession of the facts which they now seek to rely upon to repudiate the contract. The investigation report had been received way back in March, 2020 over one (1) year before the suit was filed.
27. In the case of Nicholas Kiptoo Arap Koriri Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR establishing the principles to guide the Courts when entertaining applications for extension of time the Supreme court of Kenya held as follows:-
- “(i) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
 - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
 - iii. Whether the court should exercise the discretion to Extend time, is a consideration to be made on a case to case basis;



- iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
- v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
- vi. Whether the application has been brought without undue delay; and
- vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

28. Similarly in *Edith Gichugu Koine v Stephen Njagi Thoithi* [2014] eKLR Justice ODEK (Deceased) stated that:-

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, among others – See *Fakir Mohamed V Joseph Mugambi & 2 Others, Civil Application No. 332 OF 2004* (unreported). There is also a duty now imposed on the Court under Sections 3A and 3B of the *Appellate Jurisdiction Act* to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the Court.”

- 29. It is baffling why having received this investigation report in March, 2020 the Appellants simply sat on the same and took no action. Even when the suit was filed in July 2021, the Applicants still made no use of the information contained in said report.
- 30. The argument that the information on misrepresentation came into the Applicants knowledge after the three (3) month period had elapsed is not true. The Applicants are simply guilty of laches. This application seeking extension of time to file a declaratory suit is in my view unmerited. Accordingly the Summons dated 30th January, 2021 is hereby dismissed in its entirety with costs to the Respondent.
- 31. Having dismissed the application seeking extension of time, the Notice of Motion dated 9th April, 2021 seeking enjoinder to the suit becomes moot and as such I will not consider the same.

DATED IN NYERI THIS 19TH DAY OF JULY, 2024.

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MAUREEN A. ODERO

JUDGE

