



REPUBLIC OF KENYA



**KENYA LAW**  
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**Jubilee Insurance Limited v Mugadi (Civil Case 6 of 2019)  
[2023] KEHC 18150 (KLR) (5 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18150 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CIVIL CASE 6 OF 2019  
GL NZIOKA, J  
JUNE 5, 2023**

**BETWEEN**

**JUBILEE INSURANCE LIMITED ..... PLAINTIFF**

**AND**

**MILLICENT WAMBUI MUGADI ..... DEFENDANT**

**JUDGMENT**

1. By a plaint dated 27<sup>th</sup> March 2019, the plaintiff is seeking for judgment against the defendant as follows:
  - a. A declaration that the Plaintiff is not bound to pay and/or satisfy judgment in potential judgment that may arise from any suit for compensation in relation to Jeremiah Mupe (deceased) and/or indemnify the Defendant against any claim in respect of death of the driver of the Defendant's Motor Vehicle Registration Number KCA 254M Honda or satisfy any claim whatsoever arising out of the said road accident which allegedly occurred on 9<sup>th</sup> April 2017, along Naivasha – Gilgil road near Railway Flyover in relation to Jeremiah Mupe (deceased).
  - b. Costs of this suit.
  - c. Interest of (b) above at court rates.
  - d. Any other or further relief that this honourable Court may be deemed just, expedient and fit to grant.
2. The plaintiff's case is that the plaintiff insured the defendant's motor vehicle KCA 245M Honda CRV vide policy number P/NRBI/2010/2015/150346 for a period commencing on 22<sup>nd</sup> December 2016 to 2<sup>nd</sup> February 2017. That, it was a term of the policy that the plaintiff would indemnify the defendant in the event of an accident arising from use of the said motor vehicle as a private vehicle or in connection with her business dealings.



3. However, the policy did not cover all third party risks for personal injuries or death of passengers and specifically the defendant's employees and/or driver aboard the subject motor vehicle.
4. That, on or about 9<sup>th</sup> April 2017, the subject motor vehicle was involved in a road accident along the Naivasha-Gilgil road near Railway Flyover, involving two motor vehicles. That after investigation the defendant's driver was held to blame for causing the accident.
5. Be that as it may, the defendant's driver Jeremiah Mupe suffered fatal injuries as a result, his estate has served the plaintiff with a statutory notice dated; 15<sup>th</sup> October 2018. But it is plaintiff's case that, it is not bound to pay or satisfy the potential judgment that may arise from the suit filed and/or indemnify the defendant against any claim for compensation in relation to the death of the deceased Jeremiah Mupe arising from the road accident, in that, the defendant indicated in the Motor Accident Claim Form that, the deceased was her employee and therefore not covered under the policy.

That notice of repudiation of the policy has been issued to the defendant.

6. However, the defendant vide a statement of defence dated 15<sup>th</sup> July 2019, and amended on 10<sup>th</sup> March 2021, and avers that the defendant will raise a preliminary objection to the plaintiff's suit as it offends the provisions of Order 4 rule 1 (4) and (6).
7. That the defendant was never issued with a policy document but only the policy sticker and that contrary to the averments in paragraph 5 of the plaint, the terms of the contract were never clearly spelt out to her and it was her understanding that the plaintiff would indemnify her in case of an accident.
8. That while the accident is admitted, she denies that the deceased Jeremiah Mupe was her employee, but avers that even then the plaintiff is liable to compensate all third parties who were in motor vehicle at the time of the accident.
9. The defendant further avers that the plaintiff's suit is moot as there is no known adverse claim and/or judgment against the defendant in respect to the deceased Jeremiah Mupe and therefore the orders sought are untenable and cannot be granted.
10. The case proceeded to full hearing wherein the plaintiff's case was supported by the evidence it's the legal officer, Patience Mirara, who adopted and relied on her witness statement filed on 13<sup>th</sup> May 2019, which reiterates the averments in the plaint.
11. However, she laid emphasis on the fact that, when the defendant filed the claim form she listed the deceased Jeremiah Mupe as her driver and that, by a letter dated 6<sup>th</sup> November 2018, the plaintiff gave the defendant notice that the deceased was an employee and therefore he is not covered under the policy.
12. On the other part the defendant testified in support of her defence and adopted and relied on her witness statement dated 6<sup>th</sup> July 2016. She too reiterated the averments in her amended defence save to state that four of the passengers in the motor vehicle sustained fatal injuries and she was the only survivor.
13. That she is a member of the County Assembly of Ziwani Kariokor Ward within Nairobi County and has a designated official driver by the name Kevin Bwire, since 2013. That, the deceased Jeremiah Mupe who was driving her motor vehicle was not her employee and was only assigned to her on that day following private arrangement with her official driver.
14. Further, at the time of recording her statement with the police she had not fully recovered and that, the plaintiff is taking advantage of her vulnerable state to avoid liability. That, Dr. L. N. Gakuu, has



- confirmed that she was not in the right state of mind at the said time and that she has suffered memory loss for two (2) years and to date cannot recall her signature.
15. That, she was asleep when the accident occurred and only learnt about the accident three weeks later when she woke from a comma. Furthermore, someone from Brands Insurance Agency, the insurance Brokers who introduced her to the plaintiff, filed the claim form without her authorization and at the time she was in and out of consciousness and therefore she did not know the contents of the same and/or indication that the deceased Jeremiah Mupe was her driver.
  16. The defendant testified that she took an insurance cover to cushion her against claims as herein and that the plaintiff is obliged to compensate all passengers in the car. Further, the families of the other passengers who died sued the defendant and were paid. However, the family of the deceased Jeremiah Mupe has never sued her. As such, the plaintiff's case is mischief and a ploy to run away from its duty as they compensated the other passengers who were employees but are refusing to pay the estate of the deceased Jeremiah Mupe.
  17. At the conclusion of the case parties filed written submissions. The plaintiff in submissions dated 3<sup>rd</sup> November 2022, identified three issues for determination namely:
    - a. What was the extent and scope of the cover between the plaintiff and the defendant?
    - b. Was the deceased Jeremiah Mupe the defendant's employee?
    - c. Whether the plaintiff is entitled to the prayers sought
  18. On the first issue it was submitted that the defendant was bound by the insurance contract and that section II of the policy that deals with: Liability to Third Parties states that, the policy does not cover death of or bodily injury to any person in defendant's employment arising out of and in the course of such employment.
  19. Further, reliance was placed on section 5 (b) (ii) of the *Insurance (Motor Vehicle Third Party Risks) Act* which deals with requirements in respect of insurance policies. Similarly, the case of; *Gateway Insurance Company limited v Sudan Mathews* [2003] eKLR was cited where the court held that section 5 stipulates that a third party cover does not extend to the risk of death or bodily harm to employees but to the 3<sup>rd</sup> parties carried for reward or hire or by reason of a contract of employment or contractual liability.
  20. On whether the deceased was the defendant's driver it was submitted that the plaintiff's investigator's report indicate that the defendant stated the deceased was her personal driver who she would engage from time to time on a need basis.
  21. That despite the defendant knowledge that the deceased would be driving her on the day of the accident, she did not prevent him from driving the motor vehicle and by virtue of the deceased acting in the capacity of the defendant's employee, he fell into the category of an employee being a sub-contracted driver. Reliance was placed on the case of; *Kenya Orient Insurance Co. Ltd v Benjamin Ochina* [2013] eKLR where the court held that in a compulsory third cover, if an insured wanted his employees to be covered it had to reflect on the contract signed.
  22. It was further submitted that the defendant admitted in cross-examination that her driver/employee would not be covered unless she took out a different cover for him and that the subject deceased was not covered by the insurance, a fact the deceased was well aware of.
  23. The plaintiff relied on the principle of estoppel and argued that it is not bound to indemnify the defendant from claims arising from the accident herein, and cited the case of *Century Automobile Ltd*



*v Hutchings Biemer Ltd* (1965) EA 305 where the Court of Appeal cited the case of *Nurdin Bandari v Lombank Tanganyika Ltd* [1963] EA 304 and stated that before estoppel can arise one party must have made a clear and unequivocal representation relating to the enforcement of a legal right that it should be acted upon and was acted upon.

24. Further, that the defendant's contention she suffered from mental incapacity or memory loss is not adequately proved since the report from Dr. L. N. Gakuu is not a medical report. That a neurologist report should have been availed. Further that issue has never been communicated to the plaintiff.
25. Furthermore, it was indispensable that the defendant was cleared to hold public office from 2017 to date yet she claims not have the right mental capacity for purposes of the suit and when she signed the accident claim form.
26. Finally the plaintiff submitted section 10 of the *Insurance (Motor Vehicle Third Party Risks) Act* provides that an insurer must satisfy a judgment entered against its insured except where the insured has obtained a declaration to the contrary before or within three months of commencement of the proceedings.
27. Therefore, the orders sought are deserving and that although no pleadings have been filed yet, the firm of Bill Simba & Associates issued the plaintiff with a statutory notice dated 15<sup>th</sup> October 2018 of the intention to institute civil proceedings against its insured, the defendant herein for compensation arising from the accident. As such the plaintiff filed this suit as a matter of caution and deserves the orders sought.
28. However, the defendant in submissions dated 18<sup>th</sup> November 2022 identified three issues for determination being:
  - a. What is the place of declaratory suit under sections 10 (2) and 10 (4) of the *Insurance (Motor Vehicle Third Party) Act*?
  - b. Can the prayers pleaded by the Plaintiff be granted in the absence of an ongoing suit?
  - c. Was the deceased in the Defendant's employment?
29. On the first issue, it is argued under section 10 (2) of the *Insurance (Motor Vehicle Third Party) Act*, the absence or failure to serve the requisite notice on the insurer before commencement of a suit is an outright ground for non-payment of the claim by the insurer.
30. That under section 10 (4) of the Act an insurer can avoid judgment made in favour of a third party if in an action commenced or within three months after the commencement of the primary suit the insurer has obtained a declaration that he was entitled to avoid the policy.
31. Thus, section 10 (4) of the Act envisages that there must be an ongoing suit and/or claim before a court to warrant the court to intervene and grant declaratory orders. That, in absence of such a claim the court cannot grant such orders.
32. On the second issue, the defendant submitted that despite the plaintiff being served with a statutory notice dated 15<sup>th</sup> October 2018, the Estate of the deceased has not filed a claim three (3) years later. That, in the circumstances, it is not clear upon who the orders sought, if granted will be served or what will happen if no claim is filed at all.
33. The defendant argued that the plaintiff suit is based on speculation and innuendos that are not factual and evidentiary and therefore raises no cause of action against the defendant. Reliance was placed on the cases of *YH wholesalers & Another v Kenya Orient Insurance Co Ltd & Another; Poeth Kavindu*



Mutinda (Suing as the Legal Representative of the Estate of Nzyoki Mutinda) (Interested Party) [2020] eKLR where it was stated that the court will not hear a case that is abstract or purely academic and speculative in nature and where no underlying facts in contention exist as it amounts to an abuse of the court process.

34. Finally, the defendant submitted that, the deceased was not her employee nor did she authorize him to drive her motor vehicle as it was her driver, Kevin Bwire that delegated his duties to the deceased. She relied on the case of; Morgans v Launchbury and Others [1971] 2 All ER 606 where it was stated that in order to find liability against the owner of a car, it was necessary to show that the driver was the owner's servant or acting on their behalf, or using the car at the express or implied request of the owner or was performing a task or duty delegated by the owner.
35. That as regards her state of mind the plaintiff's advocate not being a medical doctor cannot controvert the opinion of an expert. That section 48 of the Evidence Act (Cap 80) laws of Kenya provides circumstances when the opinions of an expert are admissible in court. Further the plaintiff has failed to discharge his burden of proof under section 107 and 108 of the Evidence Act and therefore the suit must be dismissed with costs.
36. That, while section 27 of the Civil Procedure Act that gives the court unfettered discretion to grant cost, it is trite that costs shall follow the event unless the court for good reason otherwise orders.
37. Having considered the arguments by the parties I find that the first issue to determine is whether the suit before the court is pre mature and/or untenable. To answer this question reference is made to the provisions of section 10(2) and (4) of the Insurance (Motor Vehicle Third Party) Act, which states:

“

- “(2) No sum shall be payable by an insurer under the foregoing provisions of this section—
- (a) in respect of any judgment, unless before or within thirty days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings; or
  - (b) in respect of any judgment, so long as execution thereon is stayed pending an appeal; or
  - (c) in connexion with any liability if, before the happening of the event which was the cause of the death or bodily injury giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provision contained therein, and either—
    - (i) before the happening of the event the certificate was surrendered to the insurer, or the person to whom the certificate was issued made a statutory declaration stating that the certificate had been lost or destroyed; or
    - (ii) after the happening of the event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer, or the person to whom the certificate was issued made such a statutory declaration as aforesaid; or
    - (iii) either before or after the happening of the event, but within a period of twenty-eight days from the taking effect of the cancellation of the policy, the insurer has notified the Registrar of Motor Vehicles and the Commissioner of Police in writing of the failure to surrender the certificate.



“(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 judgement was given he has obtained a declaration that apart from any provisions 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”

(emphasis added).

38. The afore provisions have been a subject of interpretation in various court decisions. In the Court of Appeal in *Intra Africa Assurance Company Limited v Simon N. Njoroge & another* [1997] eKLR stated that: -

“Under s.10(1) if, after a policy of insurance has been effected, judgement in respect of any such liability as is required to be covered by s.5 of the Act, is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel the policy or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of that section, pay to the person so entitled to the benefit of the judgement any sum payable thereunder in respect of the liability. However, section 10(4) (herein above set out) is an exception to the above general rule enunciated by s.10 (1) of the Act. Plain meaning of s.10 (4) is that no sum shall be payable by an insurer under the earlier provisions of s.10 if (a) he has filed an action either before, or within three months after, the commencement of proceedings in which the judgment for damages was given and (b) has obtained a declaration that apart from any provisions contained in the policy he is entitled to avoid it on the ground that the policy was obtained by the non-disclosure of a material particular or by a representation which was false in some material fact. With respect to the learned trial Judge this sub-section cannot be interpreted as laying down a pre-condition that the aforesaid declaration must be obtained either before or within 3 months of the commencement of the proceeding in which the judgment sought to be enforced was given.”

39. Similarly, the Court of Appeal in *Blueshield Insurance Co. Ltd v Raymond Buuri M’rimberia* [1998] eKLR thus 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”.



40. In the same vein, the court in *UAP Insurance Co. Ltd v Patrick Charo Chiro* [2021] eKLR stated that: -

“The import of the above provision of the law is that for liability to accrue under section 10 of the *Insurance (Motor Vehicle Third Party Risks) Act* CAP 405, there is a 4-fold test to be met. Firstly, that the motor vehicle in question was insured by the appellant; Secondly, that the respondent has a judgement in his favour against the insured; Thirdly, that statutory notice was issued to the insurer either at least 14 days before the filing of the suit wherein judgement has been obtained or within 30 days of filing the suit where judgement has been obtained and finally the respondent was a person covered by the insurance policy. See; *Roseline Violet Akinyi v Celestine Opiyo Wangwau* (2020) eKLR and *Stephen Kiarie Chege v Insurance Regulatory Authority & Another* (2009) eKLR.

41. Similarly, in *Britam General Insurance Company(K) Limited v Simon Benjamin Njoroge Karanja & another* [2021] eKLR it was held that: -

“That having been done, the plaintiff here as the insurer who had issued a policy in terms of the Act, was obligated under section 10(4) to have instituted the suit not later than three months from the date the suit was filed.

Even though the provision is quite long and capable of losing one on its true dictates and meaning, I do read it, in line with the decisions by the court on it to only mean that, a suit seeking to protect the insurer from being liable must be brought before or within 3 months after the primary suit has been filed. I consider the provisions to erect firm and definite timelines for bringing such a suit”.

42. Pursuant to provisions of section 10 (4) and the decisions above the key words under section 10(4) are; “in an action” and “after the commencement of proceedings in which the judgment was given”. The logical interpretation in my considered opinion is that, the insured cannot initiate a declaratory suit in “anticipation of the primary suit” where judgment may be given against it.

43. As rightfully argued by the defendant the court cannot hear a case in abstract or purely academic and/or speculative in nature. Further, the service of a statutory notice per se is not a guarantee that a suit will follow. In fact, a statutory notice is not envisaged under section 10(4) herein. What happens if no suit is not filed? What purpose will the orders issued in a declaratory exempting the insurer from liability serve?

44. The plaintiff seems to be live to the fact that; it is prudent and practical for all intent and purpose that the primary suit be in place before seeking for the orders herein. The plaintiff concedes to the same by submitting that; “it filed the suit herein as a matter of caution as to satisfy any judgment that may arise”. As already observed assuming there is no judgment?

45. The upshot of the aforesaid is that, I find the suit herein is premature and anticipatory in nature. No remedy can be granted to remedy an anticipated future harm or loss. If that were the case the entire justice system will not only be clogged with unnecessary litigation but a clear lane for abuse of process of court. In the given circumstances, I find that, the order that will serve the interest of justice herein is that, this suit be marked struck out on the ground that it is filed prematurely with liberty to the plaintiff to file a proper suit at the appropriate time if need arises.

46. However, the plaintiff having initiated the suit as aforesaid and brought the defendant to court prematurely are liable to pay the defendant costs of this suit as it is settled law costs follow the event.

47. It is so ordered,



**DATED AND DELIVERED AND SIGNED ON THIS 5<sup>TH</sup> DAY OF JUNE 2023.**

**GRACE L NZIOKA**

**JUDGE**

In the presence of:

Ms. Chelule for the plaintiff

Mr. Chandaria for the defendant

Ms. Ogutu court assistant

