



REPUBLIC OF KENYA



Jubilee Insurance Company Limited v Panal Freight Limited (Miscellaneous Application E007 of 2020) [2023] KEHC 20160 (KLR) (13 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20160 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
MISCELLANEOUS APPLICATION E007 OF 2020**

GMA DULU, J

JULY 13, 2023

BETWEEN

JUBILEE INSURANCE COMPANY LIMITED APPLICANT

AND

PANAL FREIGHT LIMITED RESPONDENT

RULING

1. Before me is an originating summons dated September 28, 2020 filed by Jubilee Insurance Company Kenya Ltd through Counsel M/s Mwangangi Nzisa & Associates Advocates.
2. The application was filed under section 10 of the *Insurance Motor Vehicles Third Party Risks Act* (cap 405) and section 3A of the *Civil Procedure Act* (cap 21); and has six (6) prayers some of which have been spent as follows:-
 1. (Spent).
 2. The applicant be granted extension of time to file a declaratory suit.
 3. There be a stay of proceedings in Kilungu Civil Case No 184 of 2019 pending hearing and determination of this matter.
 4. The respondents herein be served by way of registered post via their last known postal address being P O Box 41458 – 80100 Mombasa, and via their last known email address being info@panalfreighters.com
 5. The applicant/plaintiffs' annexed draft plaint be deemed as duly filed upon payment of the requisite court fees.
 6. Costs incidental to this matter be catered together with the costs in the intended declaratory suit.



3. The application has grounds on the face of the originating summons that the respondent was the insured in Kilungu Magistrate’s Civil Case No 184 of 2019 for compensation for the death of Jackson Mackenzie Kitungu for an accident which allegedly occurred on August 18, 2018 and suit filed on August 19, 2019, that the applicant was the insurer of motor vehicle KBR 070E/ZC 496O through a 3rd party motor commercial insurance policy which does not cover passengers, that upon being notified of the alleged accident the applicant commissioned investigators to investigate the accident who were Speed Chase Services, that the applicant received a report in May 2020 with a finding that the insured was carrying a passenger at the time of the accident who was the deceased in the suit at Kilungu, that the insurer ought to have notified the insured of the intention to repudiate the policy within 14 days of notice of commencement of suit but that such notice could not have been issued prematurely before completion of investigations, that further due to the disruption caused by Covid-19 this present application could not be filed in time.
4. The application was filed with a supporting affidavit sworn by Philomena Theuri the Legal and Claims Manager of Jubilee Insurance company Kenya Ltd on September 28, 2020 amplifying the grounds of the application and annexing several documents, including the draft plaint filed on August 19, 2019.
5. The application is opposed through a replying affidavit sworn on February 15, 2022 by Basil Chola Mjomba the Legal and Insurance Officer of Panal Freight Ltd in which it was deponed that there was an illegal and inordinate delay in bringing this application in relation to Kilungu CMCC 184 of 2019, that the application is an afterthought and should be dismissed as the applicant has deliberately omitted giving specifics as to the time and date when instructions to investigate were given.
6. The application was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Mwangangi Nzisa & Company Advocates for the applicant as well as the submissions filed by Andrew Makundi & Company Advocates for the respondent. I have to acknowledge here that both sides cited decided court cases.
7. Having considered the application, the documents filed and submissions on both sides, in my view this application is not merited and is for dismissal.
8. The first reason for lack of merit of the application is that, as correctly stated by the applicant and their counsel, section 10(4) of the *Insurance Motor Vehicle Third Party (Risks Act)* has a specific timeframe within which proceedings for declaratory judgment to avoid obligations in a policy insurance are to be taken or filed against the insured, which the applicant did not comply with. For clarity, section states as follows:-

“10(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 is given, he 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.”
9. It follows therefore from the above, in my view that though there might be other legal ways of an insurer avoiding the obligations in the insurance policy, if the said insurer opts to pursue avoidance of the policy through a declaratory judgment, the declaratory proceedings must be commenced before the filing of the liability suit or latest, within three months after the liability proceedings were filed and pleadings served.



10. The applicant in fact acknowledges in ground 6 of the originating summons that they were legally bound to inform the respondent within 14 days of commencement of proceedings of their intention to repudiate. In particular, ground 6 states as follows:-
 6. The applicant is aware that they ought to have notified the insured of the intention to repudiate the policy within 14 days of being notified of the commencement of the suit. However, owing to the need for investigations to establish the circumstances of the case, such notice would be premature and impossible to issue save after investigations. It is the investigations that informed the cause of action to seek the repudiation of the said policy.”
11. It is of note also that the applicant does not disclose the date when they were informed of commencement of proceedings, the date they appointed the investigators, the date investigations commenced, and the date they received the investigation report. In my view, that amounts to none disclosure of material information to assist this court in making a merit decision.
12. Thus even assuming that this court had powers to extend time to file suit, and I have not been referred to such powers by any of the parties, in my view this application seeking exercise of discretionary orders by this court must fail for non-disclosure of material facts as to what caused the delay.
13. Lastly, in my view, it will be an injustice for this court to allow this application which was filed on October 2, 2020 for a suit that was filed more than a year earlier on August 19, 2019 in a situation where the applicant neither gave the notice of intended avoidance of the policy within 14 days of being notified of the commencement of the suit, and where the same applicant has also deliberately failed to disclose, even in submissions, details on when they were notified of commencement of suit, date of appointment of investigator, and date of receipt of the investigation report.
14. I find no merits in the application. I dismiss the application and decline to grant any of the orders sought. The applicant will pay the respondent the costs of the application.

DATED, SIGNED AND DELIVERED THIS 13TH DAY OF JULY 2023 AT VOI VIRTUALLY.

GEORGE DULU

JUDGE

IN THE PRESENCE OF:-

WANZA HOLDING BRIEF FOR MS. MWANGANGI FOR APPLICANT

MR. OTOLO COURT ASSISTANT

