



Britam General Insurance (K) Company Limited v Kigen (Miscellaneous Civil Application E031 of 2024) [2024] KEHC 13696 (KLR) (7 November 2024) (Ruling)

Neutral citation: [2024] KEHC 13696 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
MISCELLANEOUS CIVIL APPLICATION E031 OF 2024
JK SERGON, J
NOVEMBER 7, 2024**

BETWEEN

BRITAM GENERAL INSURANCE (K) COMPANY LIMITED APPLICANT

AND

RONALD KIPROTICH KIGEN RESPONDENT

RULING

1. The application coming up for determination is a notice of motion dated 26th July, 2024 seeking the following orders;
 - (i) That the applicant be granted leave to file a declaratory suit out of time against the respondent in respect to an accident that occurred on 29/9/2023 involving motor vehicle registration number KDG 202J belonging to the respondent.
 - (ii) That the court be pleased to grant an order for stay of proceedings in civil suit being Kericho CMCC No. 387 of 2023; John Kiptoo Koech v Ronald Kiprotich Kigen, pending hearing and determination of the intended declaratory suit.
 - (iii) That the costs of this application be provided for.
2. The application is supported by grounds on the face of it and the supporting affidavit of Aligula E. Millian the Legal Assistant Manager of the applicant herein hence duly competent to swear the affidavit.
3. He avers that the applicant had insured the respondent's motor vehicle registration number KDG 202J and that during the pendency of the insurance cover the respondent's motor vehicle was involved in an accident on 29/9/2023 along the Tengecha-Kalenjin Road within Kericho Township.
4. He avers that the insured reported the said accident to the applicant and the applicant initiated investigations to ascertain the circumstances surrounding the occurrence of the accident.



5. He avers that upon receipt of the investigation report the applicant noted that the respondent had sold the subject motor vehicle to one Alice Ngetich in December, 2021 and that the applicant immediately issued a repudiatory/declining letter on the respondent, declining to take up any claim arising from the subject accident.
6. He avers that the applicant was served with summons to enter appearance on or about 23/5/2024 in respect to Kericho CMCC No. 387 of 2023; John Kiptoo Koech v Ronald Kiprotich Kigen.
7. He avers that the three months limitation period to file the intended declaratory suit against the respondent had already lapsed since the suit was filed on 4/12/2023.
8. He avers that the respondent breached the express terms and conditions of the insurance policy since he did not disclose that he had sold the motor vehicle before the accident had occurred and allowed the buyer to continue using the policy cover, therefore, the insured/respondent has no insurable interest in the suit motor vehicle.
9. He avers that failure to institute the suit within the prescribed period in law was not deliberate since by the time the applicant received the summons to enter appearance the three months limitation period to file the repudiatory suit against the respondent had already lapsed thereby necessitating the instant application to file the suit out of time.
10. He avers that it is therefore in the interests of justice that the applicant be granted leave to file suit out of time to enable the applicant to ventilate triable issues raised in the draft plaint.
11. He avers that no party will be prejudiced if the orders sought in the application are granted.
12. He avers that unless the orders sought are granted the applicant would suffer irreparable loss.
13. The respondent filed a replying affidavit in response to the application.
14. The respondent avers that he reported the road traffic accident involving motor vehicle registration no. KDG 202J to the applicant.
15. The respondent avers that the applicant instructed M/S Third Eye Assessors who are private investigators who investigated the said accident, prepared a report dated 29th November, 2023 and submitted it to the applicant.
16. The respondent avers that there are no reasonable grounds that have been adduced as to why it took the applicant 10 months to file the instant application.
17. The respondent avers that the victim filed a suit pending in the trial court on 4th December, 2023 and that the respondent was subsequently served with court documents.
18. The respondent avers that there are no grounds exhibited in the supporting affidavit as to why the applicant did not file the intended suit before or within the three months after 4th December, 2023 the applicant having finalised its investigation and received statutory notice by 13th October, 2023.
19. The respondent avers that he settled the case subject matter of the intended declaratory suit and awaits appearance in court on 17th October, 2024 to have the case marked as fully settled.
20. The court directed the parties to canvas the instant application vide file written submissions, however at the time of writing this ruling none of the parties had complied and filed their submissions on the Case Tracking System, however, this Court relied on the material on record to arrive at a fair and just determination.



21. This court has considered the application and the replying affidavit on record and finds that the issue(s) for determination is whether this court should allow the applicant to file a declaratory suit out of time and whether this court should stay proceedings in Kericho CMCC No. 387 of 2023; John Kiptoo Koech v Ronald Kiprotich Kigen.
22. On the issue as to whether to allow the applicant to file a declaratory suit out of time against the respondent in respect to an accident that occurred on 29/9/2023 involving motor vehicle registration number KDG 202J belonging to the respondent. Declaratory suits are premised on the provisions of section 10(4) of the *Insurance (Motor Vehicle Third Party Risks) Act* which provides as hereunder:

“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 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 action shall not, thereby, become entitled to the benefit of this subsection as respects any judgement 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.”

This court notes that the applicant has not given a plausible explanation for the delay in filing the declaratory suit within the three months stipulated by the relevant statute. However, given the import of the declaratory suit, this court will exercise its discretion in favour of the applicant and enlarge time thereby allowing the applicant the opportunity to institute the declaratory suit, the statutory timelines notwithstanding.

23. On the issue as to stay proceedings in Kericho CMCC No. 387 of 2023; John Kiptoo Koech v Ronald Kiprotich Kigen, an application for stay of proceedings portends serious impediment to the right to fair hearing, access to justice and the expeditious disposal of cases. Courts of law zealously guard against imposing such impediments except for good cause. The sole question is whether it is in the interest of justice to order a stay of proceedings.
24. The applicant’s main reasons for seeking stay of proceedings in Kericho CMCC No. 387 of 2023; *John Kiptoo Koech v Ronald Kiprotich Kigen* is that the defendant/insured breached fundamental warranties, terms and conditions of Insurance Policy thus entitling the applicant herein to avoid the obligations under policy and that upon the determination of the suit the applicant herein will be held liable to settle the claims under the provisions of Cap 415, *Insurance (Motor Vehicle Third Party Risk) Act*, despite having filed this suit albeit belatedly seeking a declaration that it is entitled to avoid the policy.
25. This court in a bid to balance the rights of the parties finds that there is no reason to stay proceedings in the case by third parties as no judgement has been obtained against the insured.



26. Consequently, the order for stay of proceedings in Kericho CMCC No.387 of 2023, *John Kiptoo Koech v Ronald Kiprotich Kigen* is refused. The proper order to give in these circumstances therefore, is that the declaratory suit by the insurer be fast-tracked.
27. In the end, the chamber summons dated 26th July, 2024 is partially succeeds. The same is allowed giving rise to issuance of the following orders;
- i. The applicant be and is hereby granted leave of 15 days to file a declaratory suit out of time against the respondent in respect to an accident that occurred on 29/9/2023 involving motor vehicle registration number KDG 202J belonging to the respondent.
 - ii. Costs of the application to abide the outcome of the declaratory suit

DELIVERED, SIGNED AND DATED AT KERICHO THIS 7TH DAY OF NOVEMBER, 2024.

J.K. SERGON

JUDGE

In the Presence of:-

C/Assistant – Rutoh

No Appearance for the Respondent

Miss Muresya for the Applicant

