



**Onkoba v APA Insurance Limited (Civil Appeal E263 of 2023)
[2024] KEHC 14007 (KLR) (Commercial and Tax) (11 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14007 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E263 OF 2023
JWW MONG'ARE, J
NOVEMBER 11, 2024**

BETWEEN

REBECCA KERUBO ONKOBA APPELLANT

AND

APA INSURANCE LIMITED RESPONDENT

(Being an appeal from the Ruling and Order of Hon. B.M. Cheloti, PM dated 15th September 2023 at the Magistrates Court, Milimani in Civil Case No. E403 of 2023)

JUDGMENT

Introduction and Background

1. Before the court for determination is an appeal filed by the Appellant that is grounded on her Memorandum of Appeal dated 9th October 2023 where she seeks to set aside the Ruling by the subordinate court dated 15th September 2023 (“the Ruling”) that dismissed her Preliminary Objection (“the Objection”). In the subordinate court, the Respondent has filed a suit in which it is seeking for a declaration that it is entitled to avoid the policy of insurance it had issued to the Appellant on the ground of non-disclosure and/or misrepresentation of material facts and therefore, it was of no effect.
2. In response to the suit, the Appellant filed the Objection claiming that the suit is time barred pursuant to section 10(4) of the Insurance (Motor Vehicle Third Party) Risks Act(Chapter 405 of the Laws of Kenya) and that no leave to file the suit out of time was sought by the Respondent. In its response, Respondent stated that the suit was filed after it received an internal investigations report which was presented after the filing of a suit against the Appellant by a third party. The subordinate court, in the Ruling, accepted this explanation by the Respondent and set down the matter for hearing and consequently dismissed the Appellant’s Objection hence the present appeal. The court directed that



the appeal be canvassed by way of written submissions which are on record and which I will make relevant references to in my analysis and determination below.

Analysis and Determination

3. In determining this appeal, I am cognizant that the learned magistrate in the Ruling made a discretionary decision to dismiss the Objection and allow the suit to proceed for hearing. It is now trite that as an appellate court, this court will not interfere with the Ruling unless it is satisfied that the subordinate court in exercising its discretion misdirected itself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the subordinate court has been clearly wrong in the exercise of its discretion and that as a result there has been an injustice (see *Mbogo v Shah* [1968] EA 93 and *United India Insurance Co Ltd v East African Underwriters (Kenya) Ltd (Civil Appeal 36 of 1983)* [1985] KECA 39 (KLR)).

4. Section 10(4) of the Insurance (Motor Vehicle Third Party) Risks Act provides that:

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“(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 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.”

5. I am in agreement with the Appellant’s submission that a simple and contextual interpretation of the above provision is that a suit like the one presented before the subordinate court should be commenced within three months from the date a suit is commenced against the insured and that the insurer is obligated to serve a 14 days’ notice before commencement of the suit to the Plaintiffs (third parties) in the proceedings filed against the insured. There is no dispute that the subject accident occurred on 12th October 2021, the suits filed by the third parties against the Appellant were filed on 5th May 2022 and 4th August 2022 and the Respondent filed the declaratory suit on 9th February 2023. It is obvious that the Respondent was out of time in its filing of the declaratory suit and as such, it ought to have sought leave of the subordinate court if at all it intended to proceed with the suit. However, no such leave was sought by the Respondent and it was only prompted to offer an explanation after the Appellant filed the Objection. There is also no indication that it issued any notice of the declaratory suit to the third parties who had sued the Appellant. All these were infractions of the procedure set out in section 10(4) of the Insurance (Motor Vehicle Third Party) Risks Act above and I am persuaded by the authority cited by the Appellant in *Britam General Insurance Co ((Kenya) Limited v Josephat Ondiek* [2018] KEHC 2877 (KLR) that by filing a plaint outside the 3-month period, the Respondent lost its right to rely on the aforementioned provision.



6. A suit filed out of time, without notice to the third parties and continued without leave is inoperative, fatally defective and non-suited by statute (see *Madison Insurance Company Kenya Ltd v Caroline Wanjiru Njoroge* [2020] KEHC 7169 (KLR)). It is therefore my finding that the learned magistrate erred in dismissing the Objection by the Appellant when the Respondent had not sought leave to file the suit out of time and that it had also not presented any notices about the suit to the third parties that had sued the Appellant. This was a misapprehension and misapplication of discretion by the subordinate court that warrants the interference of the court. Whereas the Respondent submits that it provided a similar explanation that was provided in *Jubilee Insurance Company Of Kenya Ltd v Nelson Njenga Munene, Majaliwa Kassim Billo, Zawadi Mohammed Gamuda, Rashid Ali Tapha, Rajab Hassan Kisuse, Mutuku Maundu, Masoud Ngala, Hamisi Ali Kodi, Jackson Kamuya Kinyae & Ali Abdalla Mwakugula* [2014] KEHC 1339 (KLR) that was accepted by the court, that case can be distinguished from this matter as in the former, leave was sought by the Applicant therein and this is what the court ruled on.

Conclusion and Disposition

7. In conclusion, I find merit in the Appellant's appeal and find that the subordinate court ought to have allowed her Objection and struck out the suit for being filed out of time and without leave of the court. Therefore, I subsequently set aside the Ruling of the subordinate court dated 15th September 2023 and substitute it with an order allowing the Objection and striking out the Respondent's suit with costs. The Appellant is awarded costs of this appeal which are assessed at Kshs. 20,000.00/=.

DATED, SIGNED AND DELIVERED VIRTUALLY at NAIROBI this 11TH DAY OF NOVEMBER 2024

J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Ms. Chepkorir for the Appellant.
2. Mr. Ochieng for the Respondent.
3. Amos - Court Assistant

