



**Takaful Insurance of Africa v Badar Hardware Limited (Miscellaneous Civil Application E10 of 2024) [2024] KEHC 13753 (KLR) (6 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13753 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**MISCELLANEOUS CIVIL APPLICATION E10 OF 2024**

**JRA WANANDA, J**

**NOVEMBER 6, 2024**

**IN THE MATTER OF THE INSURANCE (MOTOR VEHICLES  
THIRD PARTY RISKS) ACT, CHAPTER 405, LAWS OF KENYA**

**AND**

**IN THE MATTER OF POLICY OF INSURANCE NUMBER P/MSA/2016/102/99874**

**AND**

**IN THE MATTER OF AN APPLICATION TO FILE A DECLARATORY SUIT OUT OF TIME**

**BETWEEN**

**TAKAFUL INSURANCE OF AFRICA ..... APPLICANT**

**AND**

**BADAR HARDWARE LIMITED ..... RESPONDENT**

**RULING**

1. The Application before this Court is the Notice of Motion dated 31/01/2024 filed by the Applicant through Messrs Eboso & Co. Advocates. The same seeks the following orders:
  - i. [.....] spent.
  - ii. That this Honourable Court do grant leave to the Applicant to file a declaratory suit against the Respondent out of time.
  - iii. That pending the hearing and determination of the intended declaratory suit, the proceedings in Eldoret CMCC No. E085 of 2022; *Shadrack Misik (Suing as Personal Representative of the Estate of Caroline Jeruto Chumba) v Badar Hardware Ltd and Another* and any other suit arising from the road traffic accident of 5/03/2019 involving motor vehicle registration number KCJ xxxP be stayed.



- iv Cost of the application be provided for.
2. The Application is expressed to be brought under Order 50 Rule 6 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act and Section 10(4) of the Insurance (Motor Vehicle Third Party Risks) Act and “all other enabling provisions of the law”. The grounds of the Application are as set out on the face thereof and it is supported by the Affidavit sworn by one Dolphine Moindi, who described herself as the Applicant’s Legal Officer.
  3. In her Affidavit, Dolphine Moindi deponed that at all material times, the Applicant was the insurer of the motor vehicle registration number KCJ xxxP owned by the Respondent under Policy Number P/MSA/2016/102/99874, and that the Respondent was the registered beneficial owner thereof. She deponed further that on or about 5/03/2019, the Applicant instructed Mirox Insurance Investigators to carry out investigations in respect to the circumstances of the accident the subject herein, that on 6/05/2019 after the Investigations Report was received, the same was inadvertently misplaced and misfiled thereby the aspect of breach of policy was overlooked at that time and was never forwarded to the Legal Department for review and action.
  4. She deponed further that a suit was filed on 1/02/2022, to wit; Eldoret CMCC No. E085 of 2022; *Shadrack Misik (Suing as Personal Representatives of the estate of Caroline Jeruto Chumba) v Badar Hardware Ltd & Another* in which the Plaintiffs therein seek special damages, damages under the Fatal Accidents Act and the Law Reform Act, costs and interest thereof, and that on 28/03/2022, Summons, Plaint and other pleadings filed in the suit were forwarded to the Applicant who thereafter, and being unaware of the aspect of breach, appointed Advocates to defend the suit. She deponed that the oversight was only realised in mid-January 2021 when the Applicant was conducting a status review of its files ending the year 2023 when the Investigations Report resurfaced, that the investigations carried out had concluded that the Respondent’s driver had breached the Insurance Policy in allowing the said motor vehicle to carry unauthorized passengers, thereby entitling the Applicant to repudiate liability. She added that by that time, the statutory 14 days under Section 10 of the Insurance (Motor Vehicles Third Party Risk) Act within which the Applicant would have repudiated liability had passed and so were the 3 months within which it would have filed a declaratory suit against the Respondent.
  5. It was her contention that the Policy which the Respondent had with the Applicant was motor commercial in nature, which did not cover death or bodily injuries to any person other than a passenger carried by reason of or in pursuance of a contract of employment. She deponed further that the failure to file a declaratory suit within the stipulated timelines was not deliberate nor was it maliciously contrived to delay or interfere with the Court process, that the same was as result of an inadvertent error on the Applicant’s part, and the Applicant is desirous of filing a declaratory suit but now the 3 months period provided under the Act has lapsed.

### **Preliminary Objection and Replying Affidavit**

6. In opposition to the Application, the Respondent filed the Notice of Preliminary Objection dated 9/02/2024, together with the Replying Affidavit sworn on 24/02/2024 by one Omar Ahmed Yussuf, who described himself as the Respondent’s Managing Director. The same are filed through Messrs Ernest Mogaka & Associates Advocates.
7. The Notice of Preliminary Objection is premised as follows:
  - i. That the application is incompetent, offensive to Sections 2 and 19 of the Civil Procedure Act (Cap 21) and bad in law inter-alia for reasons that; -



- ii. That there is no suit before the Honourable Court instituted in such manner as prescribed by the Civil Procedure Rules upon which the Court may make determination of any issue of law or express itself on questions of facts.
  - iii. That further, the instant Application and any contemplated suit are time barred under the provisions of Section 10(4) of the *Insurance (Motor Vehicle Third Party Risks) Act* and no extension of time is provided for within the statute.
  - iv. That this Honourable Court does not have jurisdiction to enlarge time on a cause of action founded on contract.
  - v. That the instant Application is misconceived, bad in law and an abuse of the Court process.
8. In the Affidavit, it is deponed that the accident occurred on 5/03/2019, that the Respondent's Heavy Commercial Prime Mover & Trailer fleet was insured by the Applicant to whom they reported the accident, that the Respondent has a policy of making all necessary reports within 7 days in its insurance related matters, that the Applicant was served with Summons to enter appearance in the said Eldoret Case No. E085 of 2022 on or about the 28/03/2022 which they forwarded to the Applicant as their insurer and who then instructed the firm of Onyinkwa & Co. Advocates to enter appearance and protect their interests. It was deponed further that the accident having occurred on 5/03/2019, it is now over 4 years, that matters relating to issuance of Notice to repudiate a claim as well as the timeline for filing of a suit to repudiate a claim as set by statute are absolute and the intended declaratory suit is already stale.
9. It was contended that if the Applicant was keen on repudiating the claim, then it had all the time from 6/03/2019 to 28/05/2022, that the Application has been brought late in the day, and no cogent reasons have been disclosed or sufficiently explained. It was also deponed that the suit, Eldoret Case No. E085 of 2022, has a third party who is not a party herein and that it will not be appropriate to stay the matter without hearing the third party. It was further contended that Eldoret Case No. E085 of 2022 involves the parties named in that suit and the Applicant herein is not a party thereto, that therefore there is no immediate risk to the Applicant as a decree has not issued therein to warrant the filing of a declaratory suit by a third party, and that the assessment of damages does not pose any risk to the Applicant and thus orders of stay of proceedings are not necessary.

### **Hearing of the Application**

10. It was then agreed that the Application be canvassed by way of written submissions. Pursuant thereto, the Applicant filed its Submissions on 4/03/2024, while the Respondent filed on 12/03/2024.

### **Applicant's Submissions**

11. Regarding jurisdiction, Counsel submitted that the Applicant has grounded the Application under the Court's inherent powers pursuant to Section 1A, 1B and 3A of the *Civil Procedure Act* as opposed to seeking extension of time under the *Limitation of Actions Act* which does not allow for leave to be sought out of time for actions founded on contracts. He cited the decision in the case of *Jubilee Insurance Company of Kenya Ltd v Nelson Njenga Munene & 9 Others* [2014] eKLR and also the case of *Mary Osundwa v Nzoia Sugar Company Limited* [2002] eKLR. He submitted that this Court is conferred with jurisdiction over the subject matter and that the same should be exercised in favour of the Applicant for purposes of reaching a just determination and ensuring that the ends of justice are met.



12. In regard to whether the Applicant should be granted leave to file the declaratory suit out of time, Counsel cited Section 10 of the *Insurance (Motor Vehicles Third Party Risks Act)* and particularly, Section 10(4) thereof and submitted that Courts have relied on Article 159 (2)(d) of the *Constitution*, Sections 1A, 1B and 3A of the *Civil Procedure Act* to exercise inherent powers to extend time for filing declaratory suits where reasonable explanations for delay have been given. He cited the case of *Trident Insurance Company Ltd v Amos Njenga Gitau t/a Young Achievers School* [2019] eKLR. He argued that the Applicant has given a solid explanation for the failure to institute the declaratory suit within the 3 months and the failure to repudiate the claim with the 14 days. According to her, the Respondent will not suffer any breach since it will have a chance to defend the intended declaratory suit hence no prejudice will be suffered by it if leave is granted to the Applicant to file the suit. He urged the Court to find that the circumstances and the reasons given for failing to file the suit on time are excusable and grant it leave to file the same.
13. In regard to whether stay of proceedings should be granted pending the hearing and determination of the intended declaratory suit, Counsel submitted that the Plaintiff attached reveals that the Applicant has a strong legitimate cause of action against the Respondent. He cited the case of *UAP Insurance v John Mwaita Mwendandu; Edward Kibiko Waguru (Interested Party)* [2021] eKLR and urged the Court to maintain the orders of stay of proceedings in Eldoret CMCC No. E085 of 2022 and any other suit arising from the said road traffic accident involving the said motor vehicle otherwise the Applicant will be engaging in an exercise whose end goal is futile.
14. In regard to whether the Applicant has moved the Court promptly without delay, Counsel submitted that the Applicant has offered reasonable explanation for the delay. He reiterated that the investigations were completed in 2019 while the suit was filed almost 3 years later in 2022, that considering the time it took before the suit was filed, it was very likely, due to human fallibility that one might have forgotten about the Investigations Report, that when the issue came to the attention of the Applicant in mid-January 2024, it promptly moved to Court and filed the instant Application. Counsel maintained that the mistake is excusable even by statute under Section 26 (c) of the *Limitation of Actions Act* Cap 22.

### **Respondent's Submissions**

15. Regarding the principles to be applied in Applications of this nature, Counsel for the Respondent cited the case of *APA Insurance Company Limited v Vincent Nthuka* in which Odunga J (as he then was) stated that “the object of a limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand to protect a defendant after he had lost evidence for his defence from being disturbed after a long lapse of time”
16. Counsel then submitted that there is no substantive suit before the Court since what is filed is a Miscellaneous Application. According to him therefore, the Application is incompetent as it is not premised on any suit where substantive issues of law and fact can be considered and a determination made thereon. He cited Section 19 of the *Civil Procedure Act* and Order 3 Rule 1 of the *Civil Procedure Rules*. Counsel added that as a general rule, a suit can be instituted by a Petition, a Complaint, an Originating Summons or a Statement of Claim, that a Notice of Motion in a Miscellaneous Application is not a recognized suit and that therefore, the Motion before Court is not anchored on any suit. He also cited the case of *Joseph Kibowen Chemior v William C Kisera* (2013) eKLR and also the case of *Rajab Kosgei Magut v Nuru Jepleting Choge* [2020] eKLR
17. On the issue of statutory bar, Counsel submitted that the central question is whether the timelines for issuing a notice under Section 10 and filing of a declaratory suit under the *Insurance Motor Vehicle Third Party Risk Act* can be extended. He urged that the statutory timelines are not extendable by the



Court especially when the statutes creating such timelines fail to provide for exceptions. He cited the case of *Madison Insurance Co. Kenya Ltd v David Kibe Mathenge* [2017] eKLR. He added the Court does not have jurisdiction to extend time on a cause of action founded on contract and cited the case of Madison Case (supra), the case of *Mary Osundwa v Nzoia Sugar Company Limited* [2002] eKLR and also Section 27 of the *Limitation of Actions Act*. He maintained that the timelines set by statute must be strictly construed, that once a Court establishes that the timelines have not been adhered to then the only recourse would be to dismiss the Motion. He also cited the case of *Pacis Insurance Company Limited v Mohamed F. Hussein* (2017) eKLR, the case of *APA Insurance Company v Vincent Nthuka* [2018] eKLR.

18. In the end, Counsel submitted that no reasonable explanation has been given as to why the declaratory suit has not been filed from the year 2019 when the accident occurred and maintained that if the Investigation Report was the basis for the attempt to file the suit, then, if the investigation report was misplaced, the Applicant could easily call for a duplicate copy. Counsel, urged that in the present circumstances, an attempt to file a declaratory suit after (4) years is way belated and no reasonable justification of time can be made out.

### Determination

19. The issues that arise for determination herein are, in my view, the following:
- i. Whether the challenge raised by the Respondent meets the threshold for a Preliminary Objection.
  - ii. Whether there is a competent action before this Court within which the Application herein can be entertained or determined.
  - iii. Whether this Court has the jurisdiction under its inherent powers to extend the time for filing an insurance declaratory suit out of time and if so, whether this Court should grant such extension.
20. I now proceed to analyze and determine the said issues.

#### **i. Whether the challenge raised by the Respondent meets the threshold for a Preliminary Objection**

21. Basically, the objections raised by the Respondent are threefold, namely, (i) that there is no suit before the Court instituted in such manner as prescribed by law upon which the Court may make determinations, (ii) that there is no provision under Section 10(4) of the *Insurance (Motor Vehicle Third Party Risks) Act*, or in any other law, for extension to file a declaratory suit out of time, and (iii) that the Court does not have jurisdiction to enlarge time on a cause of action founded on contract.
22. The law pertaining to Preliminary Objections was well set out in the locus classicus case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696, in which the Court of Appeal for Eastern Africa, stated (Law JA) in part as follows:

“So far as I’m aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”



23. In the same case, Sir Charles Newbold, President of the Court went on to state as follows:

“a Preliminary Objection cannot be said to be such if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

24. Further, the Supreme Court in the case of *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others* [2015] eKLR, made the following observations as relates to Preliminary Objections:

“... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

25. Applying the above principles to the facts of this case, I am satisfied that the matters raised constitute pure points of law which clearly arise by implication out of the pleadings, and which, if argued as preliminary points have the potential to dispose of the Application in its entirety. I am therefore satisfied that the objections raised perfectly meet the Mukisa Biscuit case threshold. I will now therefore proceed to determine the same.

**ii. Whether there is a competent action before this Court within which the Application herein can be entertained or determined**

26. I find this objection to be misconceived. The Applicant has not filed a declaratory suit as yet since its claim is out of time. It is for this reason that it has approached the Court and sought enlargement of time and allow it to file the intended suit out of time. Only if the Court grants such leave would the Applicant then have been conferred with the legal right to file the suit. The moment this Court grants such leave, it at all, this Miscellaneous Cause shall then stand spent and finally determined. The Applicant shall then use such order granted herein to institute the substantive suit out of time.

27. There is therefore obviously a competent action before this Court, at this stage, under which this Court can make determinations on the prayers made to it. For this reason, this limb of the Preliminary Objection is overruled.

iii. Whether this Court has the jurisdiction under its inherent powers to extend the time for filing an insurance declaratory suit out of time

28. The duty of an insurer to satisfy or settle decrees against an insured is a statutory duty which emanates from the provisions of Sections 10(1) of the *Insurance (Motor Vehicle Third Party Risks) Act* which prescribes as follows:

“ 10. Duty of insurer to satisfy judgments against persons insured

1. If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of Section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the



policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.”

29. However, Section 10(4) of the [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 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.

30. While therefore Section 10(1) aforesaid compels an insurer to satisfy a judgment against the person insured, that burden is removed, under Section 10(4), from an Insurer who obtains a declaration that it can avoid the Policy of Insurance. To benefit from this exception however, the Insurer must have served a Notice of Repudiation and filed a declaratory suit seeking confirmation of such repudiation, before a personal injury suit against the insured person has been commenced by or on behalf of a third party injured or killed in an accident contemplated in the insurance policy. If, however, the personal injury suit has already been commenced, then the insurer must have served the Notice of Repudiation within 14 days after the filing of such personal injury suit and also filed the declaratory suit within 3 months after the filing of such personal injury suit.

31. In the instant case, it is the Applicant’s case that the Respondent breached the terms of the Insurance Policy. The Respondent claims that after the accident, it commissioned investigations into the circumstances surrounding the accident, that however, the Investigations Report was inadvertently misplaced and the oversight was only realized in mid-January 2024 by which time, the statutory 14 days window under Section 10(4) aforesaid within which the Applicant would have repudiated liability had passed and so were the 3 months within which the Respondent would have filed a declaratory suit against the Respondent. It is on this basis that the Applicant now seeks leave to file the declaratory suit out of time.

32. Enlargement of time permitting a statutory-barred suit to be filed out of time is ordinarily sought or granted under Section 27 of the [Limitation of Actions Act](#). The parties herein are however, correctly



in my view, in agreement that under that provision, the causes of action expressly mentioned and in respect to which such enlargement or extension of time can be granted do not include a cause of action founded on contract, which an insurance declaratory suit is definitely one. Indeed, this was the holding reached by the Court of Appeal in the case of *Mary Osundwa v Sugar Company Limited* [2002] eKLR where in respect to Section 27 aforesaid, it stated as follows:

“This section clearly lays down the circumstances in which the court would have jurisdiction to extend time. The action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the plaintiff as a result of the tort. The section does not give jurisdiction to the court to extend time for filing suit in cases involving contract or any other causes of action other than those in tort. Accordingly, Osiemo, J. had no jurisdiction to extend time as he purported to do on 28th May, 1991. That the order was by consent can be neither here nor there; the parties could not confer jurisdiction on the judge by their consent. ....” [emphasis mine]

33. The Applicant submitted that it is in appreciation of the above position that it has deliberately not grounded the Application under the *Limitation of Actions Act* and has, instead, brought it under the Court’s inherent powers donated under Section 1A, 1B and 3A of the *Civil Procedure Act*. The question is therefore whether, as argued by the Applicant, this Court, indeed, has the jurisdiction under its inherent powers, to grant the extension sought, to allow the Applicant to file the declaratory out of time.
34. I note that in arguing that the Court has such jurisdiction, the Applicant has relied on the decision of Kemei J in the case of *Trident Insurance Company Ltd v Amos Njenga Gitau t/a Young Achievers School* [2019] eKLR in which enlargement of time was granted to file a declaratory suit out of time. I have read that decision and find that it may not be of much assistance to the issue at hand herein since the issue of the Court’s jurisdiction, under its inherent powers, to grant the extension was never raised nor canvassed therein. The provisions of law under which Application was grounded were also not disclosed and it is not therefore clear whether in allowing the filing of the suit out of time, the Court invoked its inherent powers.
35. The Applicant has also relied on the decision of Bwonwo’nga J in the case of *Trident Insurance Co. Ltd v Philip Etyang* [2016] eKLR in which, similarly, enlargement of time was granted. I have also read that decision and again, I find that it may also not be of much assistance to the matter herein since, although the Application was brought under the Court’s inherent powers, the Application was undefended and further, the Court did not make an express determination or make any analysis on the Court’s jurisdiction to grant such extension under its inherent powers.
36. The Applicant has also cited the decision of Kasango J in the case of *Xplico Insurance Company Ltd v Simon Mkalla Ndegwa & 2 Others* [2014] eKLR. Again, that was an ex parte Originating Summons and the provisions of law under which the same was brought were also not disclosed in the Judgment. The issue of the Court’s jurisdiction, under its inherent powers, to allow the declaratory suit to be filed out of time was also never canvassed or determined.
37. On its part, the Respondent has relied on the decision of P.J. Otieno J in the case of *Madison Insurance Co. Kenya Ltd v David Kibe Mathenge* [2017] eKLR. This particular case is aptly relevant to the



matters herein since it deals squarely with the issue, as herein, whether inherent powers of the Court can be invoked to extend time for filing a declaratory suit out of time. This is what the Judge stated:

“ 1. The applicants, Madison Insurance Company Kenya Ltd has brought the originating summons dated 7<sup>th</sup> January 2016 and expressed to be under the provisions of the overriding objectives of the court, inherent powers of the court as well as the Provisions of section 95 and Orders 37 and 50 Rule 6. The substantive prayer in the summons is for the grant to the Applicant leave to file a declaratory suit under section 10(4) of the Insurance (Third Party Motor Vehicle Risks) Act; out of time.

.....  
.....

20. To grant the orders sought would be to extend time limited by the statute and in a cause based on contract .....

21. This court finds that it has no jurisdiction to entertain the application seeking to extend to file a declaratory suit grounded upon a contract of insurance between the Applicant and the Respondent.

22. That being so the court can only do what the law dictates – down its tools. I down my tools and dismiss the application with costs to the Respondent who opposed it. Without jurisdiction there is no justification to consider the other two issues.”

38. On my part, I have, in the course of my research, come across more decisions on the issue of the Court’s powers under its inherent jurisdiction to extend time for the filing of an insurance declaratory suit. I however pick out the decision of Odunga J (as he then was), in the case of *APA Insurance Company v Vincent Ntbuka* [2018] eKLR which the Respondent herein also relied upon. In that case, Odunga J (as he then was), too, adopted the same position as P.J. Otieno J above, In an even more elaborate analysis, he stated as follows:

“ 19. As stated at the beginning of this ruling, the applicant’s application is grounded the provisions of section 3A of the *Civil Procedure Act*, Order 50 Rule 6 of the *Civil Procedure Rules*, section 10(4) of the *Insurance (Motor Vehicle Third Party Risks) Act* and all other enabling provisions of the law.

20. Section 10(4) of the *Insurance (Motor Vehicle Third Party Risks) Act* provides as hereunder:

.....

21. It is clear that this section does not provide for extension of the said period for commencing proceedings seeking declaratory orders. Further, the applicant has not addressed me on any other provision in the said Act that permits such a procedure and I am aware of none.

22. As regards section 3A of the *Civil Procedure Act*, the provision simply reserves the Court’s inherent jurisdiction. It must however be noted that the Court’s inherent jurisdiction is not a substitute for the jurisdiction conferred upon the Court under the Constitution or by statute. The Court’s inherent jurisdiction



is a reserve upon which the Court draws to ensure the ends of justice are met and to prevent abuse of its process. As was held in *Industrial & Commercial Development Corporation v Otachi* [1977] KLR 101; [1976-80] 1 KLR 529, section 3A is not a panacea for all ills. It was therefore held in *Elephant Soap Factory Ltd v Nabashon Mwangi & Sons* Nairobi HCCC No. 913 of 1971 that the court will not invoke its inherent jurisdiction when there is an express provision dealing with the matter since the court may not nullify an express provision by invoking its inherent powers. Similarly, it is my view that where the Court has been deprived of jurisdiction it will not draw upon its reserve under the inherent jurisdiction to confer upon itself such non-existent jurisdiction.

23. The applicant also relied on Order 50 rule 4 of the *Civil Procedure Rules*. That provision provides:

.....

24. It is however clear that Order 50 rule 4 only applies to situations where computation of time is provided under the said Rules or by an order of the Court. In this case, the limitation is neither provided by the *Civil Procedure Rules* nor by an order of the Court but by section 10(4) of the Insurance (Motor Vehicle Third Party Risks) Act which Act however does not provide for extension of time. This position was appreciated *Mokombo Ole Simel & Others v County Council of Narok & Others* Nairobi HCMA No. 361 of 1994 where the Court expressed itself as follows:

“If the limited time is prescribed under the *Civil Procedure Rules* or by an order of the court or by summary notice, the court could enlarge the period. But here the absolute period of six months has been laid down by a different statute namely the *Law Reform Act*. Order 49 rule 5 of the *Civil Procedure Rules* cannot be invoked to supersede the express provisions of the Act ... Order 49 rule 3A is similarly a piece of delegated legislation and cannot have the effect of amending the express provisions of section 9(2) and (3) of the Act. The said provisions can only be altered or amended by an Act of the Parliament...The long established tradition in commonwealth countries is that we look in the main to the legislature rather than to the courts for the development of our law. Moreover it is a different thing if a statute is ambiguous and capable of different interpretations. Here in this case the legislation is clear and certain and not open to any conflict on interpretations. The duty of the court is to expound what the law is and not what in view of social changes it should be. To change the law according to social dictates of society is the function of legislature. The court cannot strike down or disregard the express provisions of section 9 of the *Act* and therefore the applicant’s application for leave to apply for an order of judicial review to quash the resolution is rejected ... But a copy of the ruling should be forwarded to the Honourable the Attorney General since the provisions of section 9 should be amended so that



the court is given jurisdiction to enlarge the period of six months in deserving cases.”

25. In its submissions, the applicant also alluded to the spirit and letter of the Constitution. Although no specific provision was cited, I take it that the applicant was referring to Article 159(2)(d) of the *Constitution* which provides that:

In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

.....

- (d) justice shall be administered without undue regard to procedural technicalities.

26. In my view the failure to apply within the time prescribed by the law cannot be ignored pursuant to the provisions of Article 159 of the *Constitution*. It is my view Article 159(2)(d) of the *Constitution* cannot be a panacea for all ills. It cannot be relied upon to revive a claim which is expressly extinguished by statute since the provision does not give rise to a cause of action. In my view it is not meant to destroy the law but to fulfil it. It is meant to ensure that the path of justice is not clogged or littered with technicalities. Where, however, a certain cause of action is disallowed by the law, the issue of the path of justice being clogged does not arise since in that case justice demands that that claim should not be brought. Justice, it has been said time without a number, must be done in accordance with the law. ....

27. An issue that goes to jurisdiction cannot, in my view be termed a mere technicality. To the contrary the issue goes to the root of the matter since without jurisdiction the Court has no option but to down its tools.

28. The Court of Appeal for East Africa dealing with the policy behind statutory limitation periods in *Dhanesvar V Mehta v Manilal M Shah* [1965] EA 321 expressed itself as follows:

“The overriding purpose of all limitation statutes is based on the maxim interest reipublicae ut sit finis litium, and it has been the policy of the courts to lean against stale claims. There is no reason why the legislature in this particular instance should enlarge the time within which the personal representative of a deceased plaintiff should have himself brought on the record. Such a construction as canvassed by counsel for the respondent would not only make article 175A nugatory or redundant in the 1877 Act, but would also operate to the prejudice of a defendant who has been lulled into a false sense of security and who would have lost all evidence for his defence ...The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand to protect a defendant after he had lost the evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of



the merits of the particular case. It is most desirable that legislation which prejudicially affects the rights of citizens should be readily accessible”.

29. It follows that this Court has no jurisdiction to extend the period prescribed under section 10(4) of the *Insurance (Motor Vehicle Third Party Risks) Act*.
39. I am wholly persuaded by the above very sober and detailed elucidation of the applicable legal principles, as dissected by Odunga J (as he then was) above and I am convinced, without hesitation, that indeed, it advances the correct position of the law. Like Odunga J, I, too, take the position that a Court cannot invoke its inherent jurisdiction to address an issue when there is an express and specific statutory provision dealing with the same issue. It will be wrong for the Court to disregard such express statutory provision and purport to invoke its inherent powers to grant that which the statute does not. This is because the limitation period the subject hereof is not prescribed by the *Civil Procedure Rules* but by the *Insurance (Motor Vehicle Third Party Risks) Act* which, in the wisdom of its drafters, does not provide for any extension of time. The *Civil Procedure Rules*, being delegated or subsidiary legislation, cannot by any stretch of imagination, be invoked to “sneak in”, introduce or confer a benefit which the applicable statute, the *Insurance (Motor Vehicle Third Party Risks) Act* does not. If Parliament intended to grant the Courts the power to enlarge time to allow insurance declaratory suits to be filed out of time, then nothing would have stopped it from expressly stating so within that same Act.
40. In view of the foregoing finding, my conclusion is that this Court does not possess the jurisdiction to extend time to allow an insurance declaratory suit to be filed out of time. For this reason, the remaining issue of whether the delay to institute the suit within time is excusable no longer arises and I will not therefore belabour it.
41. The upshot of the above is that the Applicant’s Notice of Motion dated 31/01/2024 is hereby dismissed with costs to the Respondent.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 6<sup>TH</sup> DAY OF NOVEMBER 2024.**

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**WANANDA J. ANURO**

**JUDGE**

Delivered in the presence of:

Osino for Applicant

Mokaya for Respondent

Court Assistant: Brian Kimathi

