



REPUBLIC OF KENYA



**Britam Insurance Company Limited v Ajiki (Miscellaneous Civil Application
E038 of 2024) [2024] KEHC 15415 (KLR) (5 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15415 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
MISCELLANEOUS CIVIL APPLICATION E038 OF 2024**

JK SERGON, J

DECEMBER 5, 2024

BETWEEN

BRITAM INSURANCE COMPANY LIMITED APPLICANT

AND

GEOFFREY AJIKI RESPONDENT

RULING

1. The application coming up for hearing is a notice of motion dated 26th August, 2024 seeking the following orders;
 - (i) Spent
 - (ii) Spent
 - (iii) That there be a stay of proceedings of the subordinate suit in *Kericho CMCC No. E243 of 2022, Vincent Kiprono Ngeno v Acini Driving School, Geoffrey Ajiki*, pending the inter partes hearing and final determination of the intended disclaimer suit.
 - (iv) That the Honourable Court be pleased to grant the Applicant leave to lodge a disclaimer suit out of time.
 - (v) That the costs of this application be provided for.
2. The application is supported by the grounds on the face of it and the supporting affidavit of Egehiza Aligula an Advocate of the High Court of Kenya and serving as a legal officer with M/s Britam Insurance Company Limited and therefore seized with the facts appertaining to the instant application.
3. He avers that vide *Kericho CMCC No. 243 of 2022, Vincent Kiprono Ngeno v Acini Driving School, Geoffrey Ajiki and Benson Gego* was instituted against the Respondents herein seeking damages for



injuries sustained due to a road accident on 18th May, 2021 involving the Respondents motor vehicle registration number KCW 214A which has progressed to hearing stage.

4. He avers that the Applicant has uncovered new developments that substantiate the filing of a disclaimer suit in respect to *Kericho CMCC No. 243 of 2022, Vincent Kiprono Ngeno v Acini Driving School, Geoffrey Ajiki and Benson Gego* and that these developments, if properly presented within a disclaimer suit, possess substantial merit and a high probability of success, fundamentally challenging the underpinnings of the current proceedings.
5. He avers that the recent developments following thorough investigations conducted by the Applicant, revealed that the Respondent intentionally concealed material facts critical to the resolution of the matter at hand, in violation of the policy agreement between the Respondent and Applicant. This concealment undermines the integrity of the judicial process and contractual obligations stipulated in the policy schedule.
6. He avers that the Respondent concealed critical information, namely, that at the time of the incident, the instructor purportedly instructing a learner driver was under the influence of alcohol, thereby compromising the safety of other road users and violating safety protocol and legal standards.
7. He avers that the deliberate non-disclosure of material facts, constitutes a breach of a contractual policy between the Applicant and Respondent and this breach is of a fundamental nature, warranting judicial scrutiny and remedy, as it impacts the enforceability and the terms of the said policy.
8. He avers that the request for enlargement of time to file a disclaimer suit is justifiable and necessary given the intricate nature of the investigations required to uncover the material facts that were initially concealed by the Respondent. He further avers that allowing the enlargement of time would facilitate the complete and fair adjudication of the issues at hand, ensuring that all relevant facts and arguments are thoroughly considered by the court.
9. He avers that if *Kericho CMCC No. 243 of 2022, Vincent Kiprono Ngeno v Acini Driving School, Geoffrey Ajiki and Benson Gego* proceeds any further and determination rendered, it will render the intended disclaimer suit moot and thereby cause substantial loss to the Applicant as the Plaintiff in *Kericho CMCC No. 243 of 2022, Vincent Kiprono Ngeno v Acini Driving School, Geoffrey Ajiki and Benson Gego* will be entitled to execute against the Applicant who is the Respondent's insurer.
10. He reiterated that this court is espoused with wide and unfettered discretion to enlarge time to file a disclaimer suit and to allow the Applicant to prosecute the intended disclaimer suit to finality.
11. Geoffrey Ajiki the Respondent herein filed a replying affidavit.
12. He avers that he is one of the defendants in *Kericho CMCC No. 243 of 2022, Vincent Kiprono Ngeno v Acini Driving School, Geoffrey Ajiki and Benson Gego* and that he took out a motor vehicle insurance cover for motor vehicle registration number KCW 214A.
13. He avers that the power to declare the contract void and order cancellation of the policy only exists where the contract is voidable by reason of some defect existing at the inception of the contract which was not the case between him and the applicant.
14. He avers that the instant application is scandalous, vexatious and an afterthought meant to delay the hearing and disposal of the suit, the applicants have been aware of the existence of *Kericho CMCC No. 243 of 2022, Vincent Kiprono Ngeno v Acini Driving School, Geoffrey Ajiki and Benson Gego* and that according to section 10 (4) of the [CAP 405](#) Laws of Kenya, the insurer is required to file a declaratory suit within thirty (30) days from the filing of the suit against the insure or fourteen (14) days upon being served with a statutory notice and that the said provision is coached in mandatory terms.



15. He avers that *Kericho CMCC No. 243 of 2022, Vincent Kiprono Ngeno v Acini Driving School, Geoffrey Ajiki and Benson Gego* was filed in 2022 and the instant application filed two (2) years after the event, the delay is inordinate and there is no plausible explanation for the delay, therefore the instant application and the intended declaratory suit is time barred.
16. He avers that *Kericho CMCC No. 243 of 2022, Vincent Kiprono Ngeno v Acini Driving School, Geoffrey Ajiki and Benson Gego* has been heard substantially and therefore a stay of proceedings will be prejudicial to the parties.
17. 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. 243 of 2022, Vincent Kiprono Ngeno v Acini Driving School, Geoffrey Ajiki and Benson Gego*.
18. On the issue as to whether to allow the Applicant to file a declaratory suit out of time against the Respondent in respect to the accident that occurred on 18th May, 2021 involving motor vehicle registration number KCW 214A belonging to the Respondent, this court wishes to point that 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.

19. On the issue as to stay proceedings in *Kericho CMCC No. 243 of 2022, Vincent Kiprono Ngeno v Acini Driving School, Geoffrey Ajiki and Benson Gego* 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. In the case of [Kenya Wildlife Service v James Mutembei](#) (2019) eKLR, Gikonyo J held that: “Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on the right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceedings is high and stringent.” The sole question is whether it is in the interest of justice to order a stay of proceedings. The applicant’s main reason for seeking stay of proceedings in *Kericho CMCC No. 243 of 2022, Vincent Kiprono Ngeno v Acini Driving School, Geoffrey Ajiki and Benson Gego* 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. This court in a bid to balance the rights of the parties finds that there is no reason to stay the case by the third parties as no judgement has been obtained against the insured.

20. The proper order to give in these circumstances therefore, is that the declaratory suit by the insurer be fast-tracked.
21. Consequently, the notice of motion dated 26th August, 2024 is hereby partially allowed giving rise to issuance of the following orders;
 - i. The applicant be and is hereby granted leave to file a disclaimer suit out of time against the respondent in respect to an accident that occurred on 18th May, 2021 involving motor vehicle registration number KCW 214A belonging to the respondent.
 - ii. Each party to meet their own costs.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 5TH DAY OF DECEMBER, 2024.

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J.K. SERGON

JUDGE

In the Presence of:-

C/Assistant – Langat

Karanja holding brief for Rabala for Respondent

No Appearance for the Respondent

