



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

MISCELLANEOUS CIVIL APPLICATION NO. 43 OF 2021

UAP INSURANCE COMPANY LIMITED.....APPLICANT

VERSUS

JOSEPH MBOGO KARISA.....INTENDED 1ST DEFENDANT

FENUS CHARO ROBERT ALIAS

FENUS CHARO.....INTENDED 2ND DEFENDANT

CORAM: Hon. Justice Reuben Nyakundi

Mogaka Omwenga & Mabeya Advocates for the Applicant

Wambua Kilonzo Advocates for the Defendant

R U L I N G

On 20th May, 2021, the applicant UAP Insurance Company filed a Notice of Motion expressed to be brought under section 27 & 28 of the Limitations Act section 3, 3A of the Civil Procedure Act and Article 48 of the Constitution seeking the following Orders; -

- a) Leave of the Court to the applicant to file a declaratory suit out of time.***
- b) That upon extending time and granting of leave the Honourable Court be pleased to direct the applicant to file suit be extended within 14 days.***
- c) That the Costs of the application be in the cause.***

The originating summons is also supported with an affidavit sworn by Erick Ondari. In the affidavit the deponent avers that the subject matter vehicle KAT 996W Toyota Probox was insured by the respondents for private use only. That any other participated use in all aspects would be in contravention of the policy of insurance with the applicant. In opposition to the prayers in the originating summons was a replying affidavit by Mr Wambua Kilonzo as a legal counsel for the respondents. He deposed that the Court lacks jurisdiction to extend time. In any event learned counsel averred that any such orders would be prejudicial to the respondents. In addition to affidavit evidence both counsels filed brief submissions on the issues for leave to be determined by this Court.

Determination

What is at stake are the key provisions under section 10 (4) of the Insurance (Motor Vehicle Third Party Risk Act) it provides *inter - alia*;-

“That 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 if he has covered the policy on that ground. That he was entitled so to do a part from why provision contained in it.”

My starting point is that the applicant is calling upon this Court to read and interpret section 10 of the Act in a manner which is to grant the relief of enlargement of time to file the declaratory suit out of time as stipulated in the Act.

In the context and structure of section 10 (4) of the Insurance Motor Vehicle Third Party Risks, the applicant was entitled to invoke the jurisdiction of this Court within three months after the commencement of the proceedings in which the judgment was given provided that an insurer who has obtained such a declaration, as aforesaid in an a claim shall not thereby become entitled to the benefit of the 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 this text under section 10 of the Act should be construed as a whole. A legal provision like this one typically contains many interrelated parts, and the entirety of the document provides the context for each of its parts. This statute being referred to by the applicant is on the same subject matter insurance policy and claims. This legislation is a purposive Act governing insurance contracts, therefore this Court ought to construe it to execute that legislative intent and purpose.

The supremacy of the text under section 10 of the Act is to convey in their context the said importance of the principle on timeline. Implicit to this provision are the principles in R(on the application of *West Minister City Council V National Asylum Support Service*[2002]1 WLR 2956 where the Court said;-

“The starting point is that language shall legal texts convey meaning according to the circumstances in which it was used. It follows that the context must always be identified and considered before the process of construction or directing it. It is therefore wrong to say that the Court may resort to evidence of the contextual scene when an ambiguity has arisen.”

From my reading of section 10 of the Act and the statute as a whole it was designed to facilitate insurance contracts under the category of Third-Party Motor Risks therefore interpreting section 10 in the way proposed by the applicant does run counter to the letter and spirit of the statute. This Court concludes that as a matter of law section 10 of the Act does not give the Court a discretion to grant a party leave to file a declaratory suit outside the stipulated statutory timelines. There is no purposeful approach to interpret these provisions in context of the Civil Procedure Rules or Limitation of Actions Act to grant the so desired leave in favour of the applicant. This Court agrees with the objection taken by the respondent legal counsel on grounds that my jurisdiction as clearly ousted as expressly stated the *Owners of Motor Vessel Lilian V Caltex Oil Kenya [1989] KLR and Samwel Kamau Machina V Kenya Commercial Bank & 2 Others Civil Appeal No. 2 of 2011* to extend time for the application. Further to file a declaratory suit in *Pinner V Everett [1969] 3 AllER 257*; -

“In determining the meaning of any word or phrase in a statute the first question to ask always is the natural or ordinary meaning of that word or phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature, that it is proper to look for some other possible meaning of the word or phrase. We have been warned again and again that it is wrong and dangerous to proceed by substituting some other words for the words of the statute.”

It follows that the originating summons lacks merit whether importing section 1A, B of the Civil Procedure Act on overriding objective or Article 159 (2) (D) on substantive justice.

For this reason, the same stands dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT VIA EMAIL MALINDI THIS 14TH DAY OF OCTOBER, 2021.

.....

R. NYAKUNDI

JUDGE

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