



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPLICATION NO. 1 OF 2017

BETWEEN

APA INSURANCE COMPANY.....APPLICANT

AND

VINCENT NTHUKA.....RESPONDENT

RULING

Applicant's Case

By a Notice of Motion dated 24th January, 2017 expressed to be brought under 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, the applicant herein, **APA Insurance Company Limited**, in substance seeks an order that this Court be pleased to grant it leave to file a declaratory suit against the Respondent herein, **Vincent Nthuka** (also referred to as the insured), out of time.

2. According to the applicant, on 23rd December, 2015, it issued the Respondent with a comprehensive motor vehicle cover for a private motor vehicle KCF 138S. Under the said cover, the said vehicle was to be used purely for private and social purposes. However on 18th January, 2016, the said vehicle was involved in an accident and one **Elizabeth Saveta**, a passenger therein was injured.

3. According to the applicant, it investigated the circumstances of the said accident and discovered that the subject vehicle had been put to use contrary to the terms of the policy, thereby entitling the applicant to repudiate liability. However, in order to do so, the applicant is required, pursuant to section 10(2) of the *Insurance (Motor Vehicle Third Party Risks) Act*, to file a declaratory suit against its insured within 3 months after the suit giving rise to liability under the policy the is filed against its insured.

4. In this case it was averred that **Elizabeth Saveta** filed a suit against the Respondent herein on 25th May, 2016 at Kithimani Law Courts being PMCC No. 159 of 2016 and that it was not until 23rd August, 2016 that the applicant became aware of the existence of the said suit when it was served with summons and pleadings therein. This, according to the applicant was three months after the said it had been filed hence out of time for filing the declaratory suit. According to the applicant, it could not therefore file the declaratory suit without leave of this court.

5. It was the applicant's position that this Court has the power to extend time for doing so in the exercise of the Court's discretionary power.

6. In support of its case the applicant submitted that extension of time is a question of exercise of the Court's unfettered discretion and that where an applicant presents cogent evidence in support of the application for extension of time, the Court should exercise its discretion in the applicant's favour in the interest of justice.

7. In support of its submissions the applicant relied on **Hassan Nyonje Charo vs. Khatib Mwashetani & 3 Others [2014] eKLR**, **Fahim Yasin Twaha vs. Timany Issa Abdalla & 2 Others [2015] eKLR**, **Mwangi vs. Kenya Airways Ltd, Edward Njane Nganga & Another vs. Damaris Wanjiku Kamau & Another [2016] KLR**, **Monica Malel & Another vs. Republic Eldoret Civil Appln. No Nai 246 of 2008** and **Haywood vs. Cope [1858] 25 Beav 14** for the principles guiding extension of time and submitted that going by the said principles and the intervening circumstances it had met the threshold and discharged its burden of proof to warrant the granting of the orders sought for the reason that it did not become aware of the existence of the primary suit until the lapse of the statutory timelines.

Respondent's Case

8. The application was however opposed by the Respondent.

9. According to the Respondent insured, the orders sought herein are not capable of being granted in view of the law governing limitation of

actions.

10. The Respondent averred that his vehicle Reg. No. KCF 138S Toyota Probox was comprehensively insured by the applicant and was being used within the limit, and for the purpose for which it was insured as articulated in the policy document. It was averred that the Respondent had one passenger at the time of the accident who filed the said suit against the Respondent. Upon being served with the suit documents, the Respondent forwarded the same to the applicant who admitted to having been aware of the suit on 23rd August, 2016. It was the Respondent's case that by that time, the matter was within three months from the date of the suit and the applicant has not explained why the declaratory suit was not filed within the prescribed time. In any case the applicant has not demonstrated that it became aware of the suit on 23rd August, 2016 and not earlier and why it took the applicant five months after becoming aware of the said suit to file this application.

11. It was therefore the Respondent's position that the orders sought herein are not available to the applicant as a matter of law hence this Court cannot exercise its discretionary powers in favour of the applicant.

12. In support of the Respondent's case, the Respondent submitted that the Court's attention has not been drawn to any provision of the *Insurance (Motor Vehicle Third Party Risks) Act* indeed any other law under which this Court can extend time for filing declaratory suits under the aforesaid Act. While appreciating that this Court has unfettered discretion to give orders as may be in the interest of justice, the Respondent maintained that this should be done within the confines of the relevant laws. In this case however, the Respondent's case was that of the *Insurance (Motor Vehicle Third Party Risks) Act* does not have any provision for extension of time.

13. As regards Order 50 rule 6 of the *Civil Procedure Rules*, it was submitted that the said provision relates to enlargement of time limited to an order of the court or by the *Civil Procedure Rules*.

14. It was reiterated that from the applicant's own documents, the applicant was aware of the fact of the accident within than three months of the occurrence of the accident.

15. As regards the cases elide upon it was submitted that the same were in respect of matters where there were express provisions for extension of time.

Determination

16. I have considered the issues raised in this application. The Respondent objects to the application on, *inter alia*, this Court's want of the jurisdiction to grant the orders sought. As was held by Nyarangi, JA in *The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1*:

"By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

17. Similarly in *Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367* the same Court expressed itself as follows:

"The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado."

18. Lastly, on the same issue, the Supreme Court in the case of *Samuel Kamau Macharia -vs- Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011*, observed that:

"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the

issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings... Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”

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:

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.

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 vs. 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 vs. Nahashon 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:

Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act:

Provided that this rule shall not apply to any application in respect of a temporary injunction.

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 vs. 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. Dealing with the said Article of the Constitution, the Supreme Court in Petition No. 5 of 2013, **Raila Odinga versus Independent Electoral and Boundaries Commission & Others [2013] eKLR** expressed itself as follows:

“.....Our attention has repeatedly been drawn to the provisions of Article 159(2)(d) of the Constitution which obliges a court of law to administer justice without undue regard to procedural technicalities. The operative words are the ones we have rendered in bold. The Article simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law. In the instant matter before us, we do not think that our insistence that parties adhere to the constitutionally decreed timelines amounts to paying undue regard to procedural technicalities. As a matter of fact, if the timelines amount to a procedural technicality; it is a constitutionally mandated technicality.”

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 vs. 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***.

30. However even if the Court had such powers, the report which the applicant relies on as the basis for its decision to seek declaratory orders is dated 4th March, 2016. The summons in the Kithimani Suit were issued on 26th May, 2016. My understanding of section 10(4) of the ***Insurance (Motor Vehicle Third Party Risks) Act*** is that declaratory proceedings may be commenced even before the suit in which an injured person seeks damages is filed. There is clearly no reason advanced why the declaratory proceedings could not have been commenced as soon as the applicant received the report from its investigators that it was not liable.

31. In **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65** the Court set out the factors to be considered in deciding whether or not to grant such an application and these are (i). the explanation if any for the delay; (ii). the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; (iii). Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.

32. As already indicated hereinabove there is no reason advanced why the suit seeking declaratory orders could not have been instituted even before the claimant's suit was filed. Similarly, there is no reason why it took the applicant 5 months from the alleged date of the discovery of the said suit to file the instant application. In other words, there is no reason for the delay, at all.

33. In the premises the application dated 24th January, 2017 fails and is dismissed with costs.

34. What then should the Court do in those circumstances? The Court of Appeal in the case of **Hunker Trading Company Limited vs. Elf Oil Kenya Limited Civil Application No. Nai. 6 of 2010** held inter alia that:

“...the applicant cannot be allowed to invoke the “O2 principle” and at the same time abuse it at will...All provisions and rules in the relevant Acts must be “O2” compliant because they exist for no other purpose. The “O2 principle” poses a great challenge to the courts in both the exercise of powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In the court's view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail redesigning approaches

to the management of court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day.”

35. It would therefore be pointless sustaining the suit whose substratum no longer exists. It therefore follows that this suit is incompetent and is struck out with costs.

36. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 12th day of June 2018.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr B N Nzei for Mrs Nzei for the Respondent

CA Geoffrey