



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 72 OF 2017**

**CORPORATE INSURANCE CO. LTD.....APPLICANT**

**- VERSUS -**

**REUBEN MURIGI MWANGI.....RESPONDENT**

**RULING**

The Applicant herein brought an originating summons dated the 14<sup>th</sup> May, 2018 under Section 10 of the Insurance (Motor Vehicle Third Party Risk Act) Cap. 405 Laws of Kenya, Section 3A of the Civil Procedure Act and Section 28(1) of the Limitation of Actions Act Cap. 22 Laws of Kenya seeking the following orders:-

- 1. That leave be granted to the applicant CORPORATE INSURANCE COMPANY LIMITED to file a declaratory suit against REUBEN MURIGI MWANGI after the limitation period.*
- 2. That the suit herein be deemed as duly filed.*
- 3. That there be a stay of execution and all consequential orders in judgment delivered on 3<sup>rd</sup> February 2017 in Civil Suit No. Milimani CMCC No. 1904 of 2015 and any other suit arising from the road traffic accident of 15<sup>th</sup> Augusts 2014 involving motor vehicle registration number KAJ 170A pending the hearing and determination of the intended declaratory suit.*

The originating summons is premised on the grounds set out in the body of the same and it's supported by the annexed affidavit sworn by Tiberius Nyang'au sworn on the 14<sup>th</sup> day of May, 2018.

In the supporting affidavit, it is deponed that a road accident occurred on the 15<sup>th</sup> day of August, 2014, along Magadi Road at Olooseos area involving motor vehicle registration number KAJ 170A which is insured by the Applicant under the Commercial Cover policy number COI/080/903376/2014.

That the said motor vehicle was to be used exclusively for carrying own commercial goods but contrary to the policy of insurance, the Respondent was using it to carry passengers and/or for hire and reward at the time of the said accident and therefore breached the terms of the insurance policy.

That the Applicant only became aware of the breach by the Respondent upon receiving details of the said accident which included among others; accident report form and police Abstract with details of the injured persons who were travelling in the said motor vehicle at the material time.

That, on 10<sup>th</sup> April, 2015 **Civil Suit No. Milimani CMCC. No.1904 of 2015 (Joseph Achieng Mutula Vs. Samuel Kariuki & others** was filed and documents relating to the accident were received by the Applicant on 11<sup>th</sup> August, 2015. That, at the time the suit was filed, the Applicant did not realize that the Respondent was using the said motor vehicle contrary to the provisions of the insurance policy until the accident report form together with the police abstract were received. That, by this time, the statutory fourteen (14) days under section 10 of the Insurance (Motor Vehicles Third Party Risk Act) Cap. 405 within which the Applicant would have repudiated liability had passed, and so were the three months within which, he would have filed a declaratory suit against the Respondent.

It was deponed that before the conclusion of the suit mentioned above, the applicant filed an application for extension of time in Milimani CMCC Misc. 781/2015 (Corporate Insurance Company Limited –vs- Reuben Murigi) and leave was granted on the 25<sup>th</sup> January, 2017 by Hon. P. Muholi (Resident Magistrate). That on 3<sup>rd</sup> February, 2017, judgment was delivered in CMCC No. 1904/2015 and the defendants were held jointly and severally liable at 100% and the plaintiff was awarded Kshs.500,000 in general damages. The Applicant averred that the Respondent will not suffer any prejudice if the application herein is allowed as he will have an opportunity to defend the suit.

The Respondent filed grounds of opposition on the 5<sup>th</sup> July, 2018. The grounds are that;

- 1. The plaintiff's originating summons cannot be ex-parte because it contains a separate and distinct prayer for stay of execution which is defended.*
- 2. The application is fatally defective because the law does not contemplate a party filing an originating summons within an existing suit.*
- 3. Prayers 1 and 2 in the originating summons are incapable of being granted and are therefore redundant because the suit has already been filed. In any event, the plaintiff has not satisfied the conditions for leave in section 28(2) of the Limitations of Actions Act.*
- 4. The prayer for stay of execution is not genuine because there is no declaratory judgment against the plaintiff in respect of which execution can lawfully proceed.*

In its submissions, the Appellant submitted that the Applicant in filing the originating summons herein was acting under the principle of abundance of caution as he had filed an application for extension of time in Milimani CMCC Misc. No. 781 of 2015 in which leave was granted on the 25<sup>th</sup> January, 2017 by the magistrate court. That, it is subsequent to the said court order that the applicant filed the suit herein to which the Respondent has also filed a defence.

It was further submitted that in view of the foregoing, it is only proper and in the interest of justice as provided in Article 159(2) (d) of the Constitution for this Honourable Court to allow the originating summons because pleadings have already been filed.

Responding to the Respondent's grounds of opposition that the Applicant has not satisfied the conditions for leave in Section 28(3) of the Limitation of Actions Act, the applicant submitted that the provisions of Cap. 22 are not applicable in this case because the limitation of Actions that the applicant is faced with, falls under Section 10 of the Insurance (Motor vehicles Third party Risk Act) The Applicant relied on the case of **Jubilee Insurance Company of Kenya Limited Vs. Nelson Njenga Munene & others (2018) eKLR** where the High Court held that provisions under Cap. 22 are not applicable where the Applicant is faced with limitation under Section 10 Cap. 405 and also the case of **Xplico Insurance Company Vs. Simon Mkalla Ndegwa & 2 others (204) eKLR** where the court allowed extension of time and held that the plaintiff had given adequate explanation on why it did not file a declaratory suit within the stipulated time.

On its part, the Respondent urged the court to dismiss the Application and submitted that the originating summons is misconceived as the law does not allow for an originating summons to be filed within an

existing suit given that an originating summons is a way of initiating an action in court. That section 27 of the Limitation of Actions Act excludes a case such as this one from among those in respect of which leave to file suit out of time can be granted. The Respondent argued that the Applicant cannot invoke this section because its action is based on contract and not tort and this does not include a personal injury. The Applicant urged that leave is not allowable in this case under the law.

In support of this contention, the Respondent relied on the case of **Willis Onditi Odhiambo Vs. Gateway Insurance Company Limited (2014) eKLR** in which, the court dealt with an Appeal from an order refusing to extend time within which to file a declaratory suit. The court noted that an action in furtherance of a judgment becomes time barred after twelve years and concluded that the superior court was right in dismissing an application brought after the expiry thereof. The case of **Mary Osundwa Vs. Nzoia Sugar Company Limited (2002) eKLR** was also relied on, in which, the court held that section 27 of the limitation of Actions Act does not give jurisdiction to the court to extend time for filing suits in cases involving contract or any other causes of action other than those in tort.

It was also argued that the prayers sought in respect of leave are redundant because a suit has already been filed. The Applicant referred to prayer 1 that seeks leave to file a declaratory suit yet there is already a suit and prayer 2 that seeks that suit be deemed as duly filed yet it is already filed.

On the prayer for stay of execution, it was submitted that the Defendant has actually commenced satisfying the decree in the lower court. He urged the court to dismiss the application.

The applicant herein has moved the court by way of an originating summons under the provisions of Section 28(1) of the Limitation of Actions Act and Section 10 of the Insurance (Motor Vehicles Third Party Risk Act) Cap 405 Laws of Kenya. Section 10(4) provides 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, or, if he has avoided the policy on the 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.**

Going by that provision, the applicant ought to have obtained a declaration that, it is entitled to avoid the claim for non disclosure of material facts by the Respondent. This was not done and no notice was given to the Respondent specifying the non-disclosure or false representation.

The Applicant has sought leave to file the said declaratory suit out of time and has invoked the provisions of Limitations of Actions Act Section 27 of Cap. 22 provides for the extension of limitation period but only in cases of ignorance of material facts in actions for negligence, nuisance or breach of duty, where damages are claimed in respect of personal injuries of any person. A declaratory suit as the one herein, is not included among them. As rightly submitted by the Respondent, the Applicant cannot invoke this section because its action is based on contract and not tort. As the court found in the case of **Mary Osundwa (supra)**, 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.

The Respondent also contended that the prayers sought in the originating summons are redundant because a suit has already been filed and especially prayers 1 and 2 of the originating summons. I am persuaded by that argument as there is already a filed suit.

The court has also noted that the Applicant waited for too long before bringing the Application herein. It has been submitted by the Respondent that, the Applicant has already commenced satisfying the decree in the lower court.

At paragraph 8 of the supporting affidavit, it has been deponed that the applicant learnt about the non-disclosure of material facts by the Respondent, shortly after the Civil Suit No. 1904/2015 was filed. The said suit was filed on the 10<sup>th</sup> April, 2015 while the accident that gave rise to the suit occurred on 15<sup>th</sup> day of August, 2014. The court has not been told why the application had not been filed earlier. The contention by the Applicant that it sought leave to extend time in Misc. 781 of 2015 does not hold any water because the leave was sought in the lower court and it cannot bide this court.

In the end, I find that the originating summons dated 14<sup>th</sup> day of May 2018 has no merits and the same is hereby dismissed with costs to the Respondent.

Dated, Signed and Delivered at Nairobi this **5th** day of **November, 2018**

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**L. NJUGUNA**

**JUDGE**

In the presence of:-

..... For the Applicant

..... For the Respondent