REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

MISCELLENEOUS CIVIL APPLICATION NO. 18 OF 2016

KENYA ORIENT INSUTANCE LTD……….….……….…..APPLICANT

Versus

SENENERRO OLE KURRARO & 7 OTHERS…...…...RESPONDENT

RULING

SUMMARY: Leave to file suit out of time under Section 27 and 28 of the Limitations of Actions Act, under Section 10 of the Insurance Motor Vehicle Third Party (Risk Act) Cap 405 and Order 37 Rule 6 (1) of the Civil Procedure Rules and Section 3A of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

The applicant Kenya Orient Insurance Company Ltd hereinafter referred as the applicant vide exparte originating summons dated 18/3/2016 filed in court on 7/4/2016 under Section 10 of the Insurance Motor Vehicle Third Party (Risk Act) Cap 405, Section 27 and 28 of the Limitations of Actions Act, and Order 37 Rule 6 (1) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeks the following orders:

> **(1) That leave be granted to the applicant to file a declaratory suit against the respondent after the expiry of the limitation period.**
>
> **(2) That the draft plaint be deemed as duly filed within time and be admitted as a plaint for purposes of the intended suit.**
>
> **(3) That costs of this application abide the results of the intended suit.**

The application is premised on five grounds on the face of the notice of motion crafted in the following terms:

> (a)That an alleged road accident occurred on 3rd September, 2011 along Ngong – Kiboko road involving motor vehicle registration No. KBM 887H which was attributable to the negligence of the driver, servant and/or agent of the 1st Respondent.
>
> (b) That the 2nd, 3rd, 4th, 5th, 6th and 7th Respondents filed a claim for compensation in suit referenced PMCC No. 21, 22, 23, 24, 25 and 26 all of 2014 at Kajiado against the 1st Respondent in respect of the alleged personal injuries suffered as a result of the accident.

(c)That the 8th Respondent is the registered owner of motor vehicle registration number KBM 887H and the 1st respondent in PMCC No. 21, 22, 23, 24, 25 and 26 all of 2014 at Kajiado Law Courts.

(d) That the applicant had insured the said motor vehicle registration No. KBM 887H under a comprehensive policy under policy No. KTD/102/014860/011 which policy did not cover passengers.

(e) That at the time of the accident, the said vehicle was being used in total breach of the terms and conditions of the said policy.

(f) That the delay in filing a declaratory suit was caused by lack of material information necessary to do so as the applicant had contracted a private investigator to investigate the circumstances of the alleged accident and the investigations were still undergoing hence the applicant could not decide conclusively without the investigation report. In furtherance of the application an affidavit by **SARAH WERU** – a Legal Officer with the applicant dated 18/3/2016 was sworn and attached to support the notice of motion.

The Background:

The plaintiff/applicant's case by virtue of the draft plaint is such that the 1st defendant requested to be issued with a commercial vehicle carriage with an insurance policy in respect of motor vehicle registration number KBM 887H belonging to him as described in the proposal form.

Pursuant to the proposal form a contract of insurance was agreed upon both the 1st respondent. As a result and on payment of premium by the 8th defendant/respondent a Third Policy of Insurance Number KTD/02/014860/011 was issued commencing on 16/6/2011 – 15/6/2012.

The policy was to indemnify the 8th respondent for loss as provided therein. During the existence of the policy motor vehicle registration KBM 887H was involved in an accident along Ngong – Kiboko Highway.

The 8th defendant has been sued by claimants seeking compensation under the policy. The applicant has approached the court pursuant to exparte originating summons seeking leave to file suit to repudiate the policy out of the stipulated limitation period of three months provided under Cap 405 of the Laws of Kenya.

Analysis and Resolution:

I have considered the notice of motion, the affidavit in support by the legal officer of the applicant. It is pertinent at this stage to set out the provisions of Section 10 of Insurance (Motor Vehicles Third Party Risks) Act which the relief in the draft plaint is based.

Section 10 provides:

"(1) If after a policy of insurance has been effected, judgement in respect of any such liability as is required to be covered by a policy under paragraph 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 judgement any sum payable there under in respect of the liability, including any amount payable in respect of lost and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgement.

(4) No sum shall be payable by an insurer under the foregoing provisions of this Section if, in

an action commenced before, or within time mention after the commencement of the proceedings in which the judgement was given, he has obtained a declaration that, apart from any provisions 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 declaration as a foresaid in an action shall not thereby become entitled to the benefit of this sub-section 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 to."

The scope of Section 10 therefore places the duty over an insurer to such judgements arising within the subsistence of the policy. That being the case under Section 10 and provisions of Section 4 (2) of the Limitations Act which limits the time to bring an action founded on contract to six years from the date the action occurred.

The issue under consideration is whether the court has jurisdiction to extend time the cause of action by the application which is stature barred? The jurisdiction and procedure to extend time is provided for under Section 27 of the Limitations Act Cap 22 of the Laws of Kenya. Under Section 27 of the Limitations of Actions Act Provides that Section 4 (2) does not afford a defence to an action founded on tort where;

(a) The action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of contract or of a written law or independency of a contract or written law; and

(b) The damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and

(c) The court has whether before or after the commencement of the action, granted leave for the purposes of this section; and

(d) The requirements of subsection (2) are fulfilled in relation to the cause of action.

Section 4 (1) of the Limitations Act limits the time of filing actions founded on contract to 6 years from the date the cause of action arose.

By virtue of Section 28 (1) of the Act it mandates that the proposed application to seek leave to file the suit out of time be made exparte. This provision is reinforced by Order 37 rule 6 (1) of the Civil Procedure Rules.

The rule provides that an application under Section 27 of the Limitations of Actions Act made before filing of a suit shall made exparte by originating summons supported by affidavit.

I recognize that under Section 30 (1) the Act references situations in which the cause of action in issue is to be considered for extension of time.

"Section 30 (a) The fact that personal injuries resulting from the negligence, nuisance or breach of duty constituting that cause of action.

(b) The nature or extent of the personal injuries resulting from the negligence, nuisance or breach of duty.

(c) The fact that the personal injuries so resulting were attributable to that negligence, nuisance or breach of duty or the extent to which any of those personal injuries were so attributable."

Section 27 of the Act sets out conditions which must be satisfied before such leave donated by the Act may be granted to file a suit out of time. It would appear that under the provisions of Section 27 and 28 of the Limitations Act, the plaintiff or applicant can only be entitled to the extension in claims falling under tort.

The court has taken an interpretation of Section 27, 28 and 30 of the Act. In ***Rawal v Rawal [1990] KLR 275*** it was held thus:

> **"The object of any limitation enactment is to present a plaintiff from prosecuting stale claims on one hand, and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after acting lapse of time. It is not to extinguish claims."**

This same issue on limitations of actions and leave to extend time was discussed in the case of ***Iga v Makerere University [1972] EA*** where the court held:

> **"A plaint which is barred by limitation is a plaint barred by law. A reading of the provisions of Section 3 and 4 of the Limitations Act Cap 70 together with Order 7 Rule 6 of the *Civil Procedure Rule of Uganda which has same provisions with Limitations Act of Kenya*. Seems clear that unless the applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption the court shall reject his claim. The Limitations Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred the court cannot grant the remedy or relief."**

A further consideration of the law of limitation was well captured in ***Hilton v Sultan S. Team Laundry [1946] 1KB 61, 81 Lord Greene Mr*** held thus:

> **"But the statute of limitation is not concerned with merits, once the axe falls, it falls and a defendant who is fortunate enough to have acquired the benefit of the statute of limitation is entitled to insist on his strict rights".**

The applicant‘s application can only succeed if it falls only on the ambits founded on tort. Even in claims falling under tort an in depth Inquiry has to be conducted from the evidence to satisfy the criteria under Section 27, 28, 29 and 30 of the Act.

I am afraid from the draft plaint and affidavit in support of the application for extension of time. The cause of action is based entirely on breach of contract and not on alleged negligence.

Under Section 31 of the Limitations Actions Act it provides for applications to other laws of limitation. It provides:

> **"Where a period of limitation is prescribed for any action or arbitration by any other written law, that written law shall be construed as if part (iii) were incorporate in it."**

On this jurisdiction issue under Section 27 (1) of the Limitations Act the Court of Appeal has pronounced itself in the case of ***Mary Osundwa v Nzoia Sugar Co. Ltd [2002] eKLR*** the court held thus:

> **"This section clearly lays down the circumstances in which the court would have jurisdiction to extend time. That action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and 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 28/5/1991 that the order was by consent can be neither here nor there, the parties could not confer jurisdiction on the judge by consent."**

In the case of ***Oadi Odhiambo v Gateway Insurance Co. Ltd Civil Appeal No. 37 of 2013 eKLR*** the Court of Appeal faced with the same set of circumstances observed:

> **"Under Section 27 (1) of the Limitations Act, time to file a suit can only be extended where the action is founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages accorded should be in respect of personal injury to the plaintiff as a result of the tort."**

By virtue of the above legal principles the jurisdiction to the court to extend time for filing suit involving contracts is ousted by statute.

DECISION

Having considered the notice of motion, affidavit in support and applying the dictates of the Limitations Act, I find this court has no power nor the jurisdiction to condone non-compliance with the provisions of Section 10 (4) of the Insurance Motor Vehicle Third Party (Risk Act) Cap 405 of the Laws of Kenya.

There was a contract of insurance between the applicant and the 8th respondent. The alleged policy of insurance issued to the 8th defendant is intended to be the subject of adjudication as per the draft plaint. The applicant's claim against the 8th respondent to seek declarations on the policy is statute barred under Section 27 (1) as read together with Section 28, 29 and 30 of the Act. This is not a matter of discretion. Clearly it must be shown by the exparte applicant that the requirements of the Act are satisfied in order to invoke the jurisdiction of the court.

That burden has not been discharged as can be demonstrated from the legal principles in the cases cited more particularly ***Odhiambo v Gateway Insurance (Supra) Mary Osundwa v Nzoia Sugar Co. Ltd (Supra), Makerere University (Supra),*** the exparte application has failed the test provided for under the statute of Limitations Act Cap 22 of the Laws of Kenya to be availed the remedy to extend time in an action based on contract.

Accordingly the application is lost and hereby dismissed. The costs of the application be borne by the applicant.

It is so ordered.

Dated, delivered at Kajiado on 7th day of October, 2016.

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R. NYAKUNDI

JUDGE

Representation:

Mr. Kimeu for Itonga for the Applicant present

Mr. Mateli Court Assistant