



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 319 OF 2014

XPLICO INSURANCE COMPANYPLAINTIFF

VERSUS

SIMON MKALLA NDEGWA 1ST DEFENDANT

SALIM KHALIF AHMED 2ND DEFENDANT

BENSON LUBANDO LUVI 3RD DEFENDANT

JUDGMENT

1. The Plaintiff **XPLICO INSURANCE COMPANY** by its ex parte Originating Summons seek the following orders-
- **That this Honourable Court do grant leave to the Applicant/Plaintiff to file a declaratory suit against the Respondents out of time.**
- **That all the proceedings in Civil Suit No. Mombasa CMCC No. 674 of 2014 and any other suit arising from the road traffic accident of 18th day of October 2013 involving motor cycle Tuk Tuk Registration No. KTW A 648R be stayed pending the hearing and determination of the intended declaratory suit.**

BACKGROUND

2. Plaintiff is the Insurer of Tuk Tuk Registration No. KTW A 648R (hereinafter referred to as Tuk Tuk). The Insurance cover was from 24th September 2013 upto 23rd September 2014. The insured is the second Defendant herein. That the said Tuk Tuk has a sitting capacity of three persons. It was also a provision of the Insurance Policy that the Insured or any other person with his permission could only ride the Tuk Tuk in compliance with the Licensing Laws of Kenya.
3. The 1st Defendant herein sued the 2nd Defendant in **Mbsa CMCC No. 674 of 2014**, as the registered owner of the Tuk Tuk, and the 3rd Defendant as the rider of the Tuk Tuk for an accident that occurred on 18th October 2013 whereby he was injured. The Plaintiff, as the Insurance Company has instructed a firm of Advocates to defend that suit.
4. An investigation, carried out by Shield Wise Loss Assessors which was completed on 21st August

2014 and which concluded that the 2nd Defendant had breached the Insurance Policy in allowing the 3rd Defendant to ride the Tuk Tuk without a valid licence and in allowing the 1st Defendant to ride seated at the front driver's seat of the Tuk Tuk.

THE PRAYERS SOUGHT IN THE ORIGINATING SUMMONS

5. The Plaintiff herein in the affidavit in support to the Originating Summons and in the further affidavit of Vivianne Onyino of 7th October 2014 stated that it is desirous of filing a declaratory suit but now that the three months period provided under the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 have lapsed it sought leave to file that suit out time.
6. Section 10 of Cap 405 provides that the Insurer has a duty to satisfy a judgment against the person insured. That obligation however is removed from an Insurer who obtains declaration that he can avoid the Policy of Insurance. Section 10(4) of Cap 405 provides-

“S.10(4) 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.”

7. The Plaintiff has given adequate explanation, in my view, why it did not file the declaratory suit within the period provided under Section 10(4). It is for that reason that I find the order sought is deserving.
8. I grant the following orders-
 - a. **Leave is hereby granted to the Plaintiff to file a declaratory suit against the Respondents within fourteen (14) days from this date hereof.**
 - b. **Stay of Mombasa CMCC No. 674 of 2014 is hereby granted pending the hearing and determination of the intended declaratory suit. For the avoidance of doubt such stay shall automatically be lifted/ vacated if the Plaintiff shall not file the intended declaratory suit within fourteen (14) days from today's date.**
 - c. **Costs of this suit shall abide with the outcome of the intended declaratory suit.**

DATED and DELIVERED at MOMBASA this 6TH day of NOVEMBER, 2014.

MARY KASANGO

JUDGE