



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Madison General Insurance v Thuo; Kyalo (Interested Party) (Civil Appeal E306 of 2024) [2025] KEHC 15951 (KLR) (7 November 2025) (Judgment)

Neutral citation: [2025] KEHC 15951 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E306 OF 2024
BM MUSYOKI, J
NOVEMBER 7, 2025**

BETWEEN

MADISON GENERAL INSURANCE APPELLANT

AND

ALLAN BABU THUO RESPONDENT

AND

STANLAUS MUTUA KYALO INTERESTED PARTY

(Being an appeal from judgment and decree of Honourable Charles Mwaniki PM in Ruiru Chief Magistrate's Court civil case number E084 of 2024 dated 16-10-2024)

JUDGMENT

1. The appellant had insured motor vehicle registration number KBD 905Z which was owned and registered to the respondent. The said vehicle was involved in an accident with the interested party on 23-09-2023 while the policy of insurance was in force following which the interested party sued the respondent for compensation in Ruiru small claims court case number E019 of 2023. The said suit was determined in favour of the interested party on 26-01-2024 for Kshs 205,550.00 plus costs and interest.
2. Following the judgment in the Ruiru Sccc E019 of 2023, the appellant filed a suit vide Ruiru Cmcc number E084 of 2024 seeking the following orders;
 1. A declaration that Madison General Insurance is not bound to pay/or satisfy judgment and/or decree in Ruiru SCCC No. E019 of 2023.
 2. A declaration that Madison General Insurance is not bound to pay/or satisfy and/or indemnify the defendant against any claim in respect of bodily injury to any person, damage to property or satisfy any claim whatsoever arising out of the accident which allegedly occurred on 22nd



September, 2023 along Ruiru - Githunguri Road involving the defendant's motor vehicle registration number KDB 905Z under the insurance Policy No. CTY/701/243368/2023.

3. Costs of this suit.
 4. Interest on (b) above at Court rates.
 5. Any other or further relief, which this Honourable Court may deem fit and just to grant.
3. It would appear that there was a mix-up of the dates in the pleadings since some parts of the pleadings indicated 22nd September 2023 while others had 23rd September 2023 but there is no dispute that the accident occurred on 23rd September 2023. The suit was dismissed by the trial court on 16-10-2024 following which the appellant has preferred this appeal citing the following grounds;
1. That the learned trial Magistrate erred in law and fact in dismissing the appellant's suit, without properly considering the evidence tendered by the appellant.
 2. That the learned trial Magistrate erred in law and fact by failing to analyse the substantive legal issues raised by the appellant herein during trial and instead engaged in making a determination without considering the evidential weight of the appellant's testimony and documents.
 3. That the learned trial Magistrate erred in law and fact by failing to appreciate the legal principles applicable to the case, leading to an unjust decision and prematurely dismissing the suit.
 4. That the learned trial Magistrate erred in law and fact by relying on misleading information to dismiss the appellant's suit.
 5. That the learned trial Magistrate erred in law and fact in failing to consider and/or sufficiently evaluate the submissions and authorities cited by the appellant.
 6. That the learned trial Magistrate erred in law and fact in dismissing the appellant's case without proper justification, thus occasioning a miscarriage of justice.
4. The appeal was canvassed by way of written submissions. I have carefully read and considered submissions of the appellant dated 15th August 2025 and those of the interested party dated 15th August 2025 alongside the advanced grounds of appeal. The respondent just as in the lower court did not participate in these proceedings.
5. At the center of the appeal and as it is clear to me from the parties' submissions, is the interpretation of Section 10(4) of the Insurance (Motor Vehicle Third Party Risks) Act Chapter 405 of the Laws of Kenya (hereinafter referred to as 'the Act') which states 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 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.’

6. The cause of action which is the subject of this appeal was based on the argument that the respondent’s motor vehicle was at the time of the accident in question being driven by a person who did not hold a driving licence. There was no contestation to this fact as the respondent did not defend the suit. The appellant produced an investigation report alleging that John Njuguna Wanjiru who was the driver at the time of the accident did not possess a valid driving licence. There having been no evidence to controvert this version, it is my opinion that there was proof on balance of probabilities that the said driver was not licenced.
7. However, having read the appealed judgment, my understanding is that the trial court did not make a finding on whether or not the appellant was entitled to avoid the policy on account of lack of driving licence or any other breach of the insurance policy. The court’s finding was centred on and restricted to the appellant’s compliance with the timings and qualifications set by Section 10(4) of the Act. In deciding on this issue, the trial court held that the appellant had demonstrated that notice of intention to avoid liability was issued to the respondent but there was no notice shown to have been issued to the interested party and therefore repudiation was incomplete. The court also held that the declaratory suit was filed outside the three months provided in the aforesaid Section. This is the part this court should be concerned with.
8. I have considered the circumstances of this case and the holding in *Kenya Alliance Insurance Company Limited v Naomi Wambui Ngira & Another (Suing as the Legal Representatives and Administrators of the Estate of Nelson Machari Maina (Deceased) (2021) KEHC 7044 (KLR)* which was cited by the Honorable Magistrate and which I hold to be the correct position in law thus;

‘ This Court has analyzed the provisions of Section 10 (4) of the Act. According to this Court, the said section requires of an insured who wants to deny liability to obtain a declaration either before or not more than three (3) months following commencement of the primary suit. The way to obtain such declaration is by filing a declaratory suit in Court. Furthermore, this action would only be valid if the said insured had within fourteen (14) days of the filing of the primary suit, had given notice to the Plaintiff in that matter that it was not liable. In essence, repudiation of liability is two-fold, first, by way of giving notice to the Plaintiff in the primary suit, and secondly, by way of filing a declaratory suit.’
9. The above position was restated by Honourable Lady Justice T. Wendoh in *Jubilee Allianz General Insurance (K) Ltd v Nyamabe; Oliech & another (Interested Parties) (Suing as the Legal Reps of the Estate of Jeremiah Oliech Oula- Deceased (2023) KEHC 22706 (KLR)* thus;

‘ Section 10 (4) of the Insurance (Motor Vehicles Third Party Risk) Cap 405 provides that if an insurer is entitled to avoid a claim, the insurer should file a declaratory suit within three months before or within three months after commencement of the proceedings suing the insured. Another aspect is that the insurer should give notice to the plaintiff in the said proceedings notifying the plaintiff of the intention to avoid the claim.’
10. In view of the position and the holdings in the above cited authorities which I agree with, I am of the view that to dispose this appeal, this court only needs to do a simple inquiry; that is, whether there was evidence that the appellant had served the interested party with the notice of its intention to avoid the policy and whether the suit was filed within the period provided in the Act.



11. The appellant has submitted much on whether the respondent breached terms of the policy and whether it was entitled to avoid the policy. With respect, I do not think that the trial court even addressed this issue. Its judgment was on the service of intention to repudiate the policy and the timing of filing of the declaratory suit. In its submissions, the appellant does not say much on the timing save its argument that Section 10(4) allows an insurer to file for declaration at any time before and after judgment. I do not think that this is the correct position. The same is misdealing or misinterpretation of the said clear provision of the law and I hold that it has no basis.
12. The appellant adds that filing of the disclaimer suit and service of the plaint and summons on both the respondent and the interested party was adequate. Of course, it would have been adequate if the suit was filed and papers served in time. I have noted that the interested party was enjoined in the declaratory suit on 24-06-2024 which was six months after judgment in the primary suit. The joinder was through application by the interested party and not the appellant. It was the duty of the appellant to prove that the service upon the interested party was within the time stipulated in the Act which I find it failed to do. To the contrary, I do agree with the finding of the trial court that the suit was filed out of time.
13. Section 10(4) of the Act is couched in a way that allows the insurer to file a declaratory suit after it has been served with a statutory notice under Section 10(2)(a) of the Act or it becomes aware of the attachment of the risk. The letter from the appellant to the respondent communicating the intention to avoid liability was done on 8-12-2023 while the investigations report it sought to rely on in avoiding liability was dated 19-10-2023 which means that the appellant was aware of the position of claim within the period required by the law to file declaratory suit since the accident occurred on 23-09-2023. However, there is no explanation why a similar notice was not done to the interested party or a declaratory suit filed within the statutory period.
14. In view of the above, it is my holding that the declaratory suit was not filed within the period specified in Section 10(4) of the Act and the trial court was correct in dismissing the suit. Consequently, the appeal has no merits and it is dismissed with costs to the interested party.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF NOVEMBER 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT

Judgment delivered in presence of Mr. Ouma holding brief for the Mr. Okoyo for the appellant and Mr. Muriuki holding brief for Mr. Macharia for the respondent.

