Fidelity Shield Insurance Company Limited v Musembi (Miscellaneous Civil Case E145 B of 2023) [2024] KEHC 5825 (KLR) (24 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5825 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

MISCELLANEOUS CIVIL CASE E145 B OF 2023

JRA WANANDA, J

MAY 24, 2024

BETWEEN

FIDELITY SHIELD INSURANCE COMPANY LIMITED ..... PLAINTIFF

AND

STELLA SYOKAU MUSEMBI ..... DEFENDANT

JUDGMENT

1. This is a declaratory suit by an Insurer.

2. This matter was initially filed in Nairobi on 29/05/2023 as Milimani Civil Suit No. E105 of 2023. However, by the order made therein on 14/06/2023, the same was transferred to Eldoret and assigned the present case number, namely, Eldoret High Court Miscellaneous Civil Case No. E145 of 2023.

3. By the Plaint filed herein through Messrs Onyinkwa & Co. Advocates, the Plaintiff seeks orders against the Defendant in the following terms:

    a. A declaration that the Plaintiff is not liable and/or duty bound under the policy of insurance no. CBD/P/503/153661/22 for the period between 1/07/2022 and set to expire on 11/04/2023 and/or bound by contract to compensate and/or settle any claims arising from the accident that occurred on 3/12/2022 involving motor vehicle registration number KCH 471E.

    b. A declaration that the provisions of section 10(4) of the Insurance (Motor Vehicle Third Party Risk) Act Cap. 405 Laws of Kenya absolves the Plaintiff to settle any claims in relation to an accident on 3/12/2022 involving motor vehicle registration number KCH 471E.

    c. Costs of this suit.

    d. Any other relief that this Honourable Court may deem fit and just to grant.

4. In the Plaint, the Plaintiff pleaded that at all material times, the Defendant was the registered owner of the said motor vehicle and as such owner, took out a comprehensive private insurance cover with the Plaintiff vide the said policy for the period stated above, that the Defendant took out the said policy of insurance indicating that the motor vehicle was for private use, that on 3/12/2022 during the pendency of the cover, the motor vehicle was involved in a road accident along the Eldoret-Nakuru Road at Makutano area, and that in accordance with the contract, the accident was reported and upon which the Plaintiff commissioned investigations. The Plaintiff pleaded further that the investigations revealed that the motor vehicle was owned by one Pollyene Kamundi Kiende having bought the same from the Defendant in the year 2021 at Kshs 700,000/- and after the initial payment, the purchaser took the possession and custody of the motor vehicle, that after expiry of the first policy cover, the purchaser renewed the cover using the name of the Defendant as the policy holder, and that the Defendant was duly compensated by the Plaintiff for the damage occasioned to the motor vehicle

5. The Plaint pleaded further that the Defendant has no insurable interest in the motor vehicle as she had sold the same way before occurrence of the accident and that the Defendant was in breach of the policy terms. Such breaches were then cited as being that the Defendant, inter alia, misrepresented and wilfully concealed material facts concealing ownership of the motor vehicle thus bringing into question the issue of insurable interest, and allowed and/or authorized the purchaser to renew the policy in the Defendant's name and acted against the principle of "uberimae fides". The Plaintiff contended that in view of the foregoing, it is entitled to seek an order repudiating liability against any claims that may arise from 3rd parties pertaining to the said accident. It was pleaded further that indeed suits have been filed which is likely to obligate the Plaintiff to settle them in the event judgment is entered against the Defendant. 7 such suits already filed at the Small Claims Court were then listed.

6. Together with the Plaint, the Plaintiff filed the Witness Statement made by one Chrispus Maina who described himself as a Claims Analyst with the Plaintiff and in which he reiterated the matters set out in the Plaint. The Plaintiff also filed its bundle of supporting documents.

7. The Defendant filed its Statement of Defence together with a Witness Statement on 28/07/2023 through Messrs ALP Kenya Advocates. In the Defence, it was stated that at the time of the accident, the motor vehicle, though owned by the Defendant, was in lawful possession of an authorized agent of the Defendant, the Defendant's cousin, one Pauline Kiende. It was then stated that the said Pauline Kiende had expressed intention to purchase the motor vehicle but that the sale process had not been fully met and the vehicle therefore remained the Defendant's property as of right with the insurable interest still being with the Defendant until she fully received the purchase price, that the Defendant, noting her interest in the motor vehicle, maintained the insurance cover over the vehicle in her name, that at the time of the accident, the authorized operator had lawfully given the motor vehicle to her cousin, Joseph Mungatia to operate on her behalf, and that being the registered and beneficial owner of the vehicle, the Defendant renewed the insurance policy on 1/07/2022.

8. The Defendant stated further that upon the accident occurring, she lodged a claim with the Plaintiff in regard to which the Plaintiff carried out investigations leading to the Defendant being compensated. She added that recently, in acknowledgment of the fact that the Defendant was the owner of the motor vehicle, the Plaintiff instructed the Defendant to transfer the motor vehicle to one Evelyne Wachuka, the purchaser of the motor vehicle from the Plaintiff's exercise of its subrogation rights. The Defendant pleaded further that it is malicious and in bad faith for the Plaintiff to approbate and reprobate having investigated and found compensation due to the Defendant only to turn around and deny her rights to the motor vehicle.

9. She insisted that at time of the accident, she was the registered owner of the motor vehicle and had an insurable interest thereon, that the log-book is the conclusive evidence to ownership of a motor vehicle and the same was in the Defendant's name at the time of the accident, that the accident occurred when the motor vehicle was having a valid comprehensive policy thus the Plaintiff is responsible to defend and compensate any claim arising from the accident.

10. In conclusion, the Defendant averred that this suit is premised on a misunderstanding of the concepts of possession and ownership, and is a mala fide devise by the Plaintiff to escape liability arising from the ongoing civil disputes that arose from the accident. She insisted that having taken out a valid insurance cover with the Plaintiff, she was under the legitimate expectation that the Plaintiff would rise to the occasion and defend her in those suits arising from the accident and attempting to run away from that obligation of an insurer through this suit is unprofessional and a breach of an insurer's duty.

11. By the notice filed in Court on 3/10/2023, Messrs Kitiwa & Partners Advocates came on record for the Plaintiff in place of Messrs Onyinkwa & Co.

12. Subsequently, vide the consent order recorded on 31/10/2023, 8 Plaintiffs who had sued the Defendant in respective suits before the Small Claims Court were joined into the suit as Interested Parties. They were represented by Messrs Morgan Omusundi Law Firm.

13. By the further consent recorded on the same date, the parties agreed to dispense with oral viva voce evidence and to proceed by way of the pleadings and documents on record.

14. The Interested Parties then on 7/11/2023 filed the "Affidavit Statement" sworn by the 1st Interested Party, Michael Oketch and of the same date. The 1st Interested Party deponed that he had the authority of the rest of the Interested Parties to swear the Affidavit.

15. He then deponed that their Advocates served demand and statutory notices upon the Plaintiff and the Defendant before filing the suits before the Small Claims Court, that upon filing of the suits, the Plaintiff instructed Messrs Onyinkwa & Co. Advocates to come on record for the Defendant, that the firm did so but later withdrew citing instructions from the Plaintiff, that the matter then proceeded for hearing ex parte and Judgment was delivered in favour of the Interested Parties.

16. He deponed further that thereafter the Interested Parties Advocates served notice of entry of Judgment and Notice of Intention to Sue upon the Plaintiff and who failed to either admit liability or repudiate liability as required under the Insurance (Third Party Motor Vehicle) Act, Cap. 405. He then added that a policy document is a contract between the Defendant and the Plaintiff and the Interested Parties are not privy to it, that the motor vehicle operated with a valid insurance sticker and/or policy and was operating on the system and lawfully covering third parties.

17. He contended further that the Plaintiff and the Defendant have had conflicts and/or issues for the longest time since the inception of the primary suits but failed to bring it to the attention of the Court and therefore any issue belatedly brought up at this juncture is a gimmick. He prayed that the Court orders the Plaintiff to honour its statutory obligation of settling the valid Judgment and submitted that the issue of the policy violation are matters to be settled between the Plaintiff and the Defendant

18. Thereafter, it was agreed, and I directed, that the parties file and exchange written Submissions. Pursuant thereto, the Plaintiff filed its Submissions on 21/11/2023 while the Defendant filed on 12/12/2023. Subsequently, with the leave of the Court, the Plaintiff filed Further Submissions on 22/01/2024.

19. The Interested Party does not seem to have filed specific Submissions in regard to the suit. I say so since the only Submissions on record from the Interested Party dated 22/11/2023 relate to an Application for stay of proceedings which Application was however long disposed of. I have nevertheless perused the same and note that it basically reiterates the matters already set out in the Interested Party's "Affidavit Statement".

Plaintiff's Submissions

20. Counsel for the Plaintiff submitted that after the occurrence of the accident, the Defendant filled in the claim form wherein she purported to be the owner of the motor vehicle, that since the vehicle was insured, the Plaintiff paid to the Defendant Kshs 600,000/- as compensation but after paying out the sum, the Plaintiff's attention was drawn to the suits that had been filed against the Defendant by persons who were seeking compensation for injuries sustained in the accident, that the Plaintiff out of caution instructed Advocates to defend the suits and at the same time commissioned an investigation on the circumstances surrounding the accident and which unearthed the matters stated in the Plaint.

21. Counsel referred to the Defendant's claim that the said Pollyne Kiende had only expressed an intention to purchase the motor vehicle and that the sale process had not been concluded and observed that this statement is contrary to the statements given to the investigators by the Defendant, the said Pollyne Kiende and also by the said Joseph Mungata Murianki, the driver of the vehicle at the time of the accident. Counsel observed that the Defendant, in her statement to the investigator, stated that she had sold the vehicle and parted with possession to the said Pollyne Kiende at the time of entering into a sale agreement, that Pollyne Kiende, in her statement to the investigator stated that she took possession of the vehicle in May 2021 and was using it for business and that she paid for the insurance premiums but in the name of the Defendant, and that the driver, too, in her statement, stated that the vehicle belonged to Pollyne Kiende, who had given him the same to go to a function in Eldoret.

22. According to Counsel, the above is clear manifestation that the Defendant is acting in bad faith and contrary to the terms of the insurance policy, that the Defendant did not share or disclose material information with the Plaintiff and was not therefore acting in good faith. He cited various cases as authorities and submitted further that the Defendant sold the motor vehicle in May 2021 to a third party to whom she gave possession but continued to lie to the Plaintiff that she was the owner thereof and continued receiving premiums from the third party which she thereafter paid to the Plaintiff whereas she was not the owner and had no control over its use.

23. She added that when the Defendant was compensated for the loss of the vehicle, she paid out the money to the third party and that is contained in the Defendant's statement to the investigators. According to Counsel therefore, the Defendant had no insurable interest in the motor vehicle as she was not in possession or control over it and was consequently in breach of the terms of the policy that placed a duty on her to act in utmost good faith and make full disclosure to the Plaintiff.

24. Counsel submitted further that the Plaintiff only came to learn that the Defendant was not the owner of the vehicle after receipt of Summons to enter Appearance served in relation to the suits filed against the Defendant before the Small Claims Court, that by that time, the Defendant had already been compensated for the loss of the vehicle after she had misrepresented facts, that the Plaintiff, upon realization of the misrepresentation, filed this suit and instructed the Advocates appointed by it to act for the Defendant in the said suits to cease acting. He contended further that for the above reasons, Section 10(4) of the Insurance (Third Party Motor Vehicle) Act, Cap. 405 absolves the Plaintiff from compensating the Interested Parties and urged the Court to allow this suit with costs.

Defendant's Submissions

25. On his part, Counsel for the Defendant submitted that what the Plaintiff seeks is to repudiate the insurance contract way after the risk insured against has occurred. He submitted further that the cover the subject herein is not the first time that the vehicle was being insured by the Plaintiff and that the same was a renewal of an existing cover, that upon occurrence of the accident, the Defendant notified the Plaintiff which appointed an investigator who carried a comprehensive investigation and rendered a Report which then informed the Plaintiff's decision to compensate the Defendant for the insured value of the vehicle, that no claim of fraud or misrepresentation was stated in the Report.

26. It was contended further that in exercising its right of subrogation, the Plaintiff directed the Defendant to transfer the vehicle to the new owner who bought it after the accident, that upon personal injury suits being filed by third parties, the Plaintiff appointed Advocates to act for the Defendant and defend the case, that while the case was ongoing, the Plaintiff instructed the Defendant to transfer the vehicle to the new owner, and that the Plaintiff later instructed the Advocates to cease acting.

27. Counsel submitted further that in the course of preparing for the hearing of this matter, it has come to the attention of the Defendant that this suit, being a declaratory suit, is time-barred under the time-limit stipulated in Section 10 of the Insurance (Motor Vehicle Third Party Risk Act), Cap. 405. He submitted further that a perusal of the Plaintiff's own evidence herein shows that the Small Claims Court suits were filed on 19/01/2023 which means that the Plaintiff had 3 months from the said date, to commence declaratory suit proceedings and which 3 months lapsed by 18/04/2023, that the Plaintiff brought this suit on 26/05/2023, nearly 2 months after expiry of the limitation period, and that further, a notice was not issued within 14 days as envisaged in the said provision.

28. Counsel contended further that even if this Court were tempted to consider possibility of enlarging time to accommodate this suit, the same should fail because the Plaintiff has not acknowledged that it filed the suit out of time nor has it sought extension of time and that the limitation of time under Section 10 aforementioned is not one that can be cured under Section 28 of the *Limitation of Actions Act*. He cited several authorities and submitted further that in any case, and for argument's sake, even if the Plaintiff were to invoke the Court's inherent powers to seek for extension of time, the same will be calling the Court to sanction an illegality as they filed the suit out of time before seeking extension.

29. It was Counsel's further contention that even though the defence of limitation of time was not expressly pleaded, it is an issue of law that can be raised at any point and even suo motu by the Court provided that both parties have had an opportunity to address it. He cited further authorities and submitted that that in this case, the Plaintiff has an opportunity to address the issue in its rejoinder Submissions. He also submitted that the issue of limitation need not necessarily be pleaded under Order 2 Rule 4 of the Civil Procedure Rules and can even be taken judicial notice of by the Court in terms of Section 59 and 60(1) of the *Evidence Act*.

30. Regarding "insurable interest", Counsel began by defining the term and cited several authorities in support. He then submitted that based on the definition, the Defendant had an insurable interest at the time that she renewed the policy. Regarding the sale agreement exhibited by the Plaintiff, he submitted that the same is blank in terms of date and signatures of the parties, that in any case, the agreement provides that the consideration would be paid by 29 equal instalments of Kshs 6,000/- starting from 7/15/2021 and which means that the earliest date that the sale would be complete would be November 2023, that therefore if the agreement is anything to go by, then the time that the insurance cover was renewed on 12/07/2022, consideration was not paid and the vehicle still belonged to the Defendant which therefore means that she had insurable interest.

31. He argued further that insurable interest is not said to have been transferred at the point when a buyer expresses interest in the vehicle but upon completion of sale or transfer.

32. Counsel submitted further that the Defendant made a claim which was investigated leading to a settlement, that on 10/01/2023, the Plaintiff wrote a letter to the Defendant confirming receipt of the Investigations Report and proposed to settle the same at Kshs 600,000/- and it is therefore not true that there were any investigations that were conducted after settlement. He added that even a National Transport & Safety Authority (NTSA) search showed that the Defendant was still the registered owner. Counsel therefore submitted that the Defendant adhered to the principle of utmost good faith as no information was withheld from the Plaintiff. In conclusion, he urged the Court to dismiss the suit with costs.

Plaintiff's Further Submissions

33. In his Further Submissions, regarding the issue of whether the suit is time-barred, Counsel for the Plaintiff submitted that when the primary suits were filed, the Plaintiff was not aware that the Defendant had sold the motor vehicle to the third party, that the Plaintiff only came to learn of the sale sometime in May 2023 upon receipt of the Investigations Report, that by that time, the statutory 14 days within which the Plaintiff would have repudiated liability had passed and so were the 3 months within which they would have filed a declaratory suit, that the Plaintiff then filed this declaratory suit on 23/05/2023 immediately after receiving the investigations Report and that this is the time when the cause of action arose and therefore the suit is properly filed.

34. Counsel submitted further that the delay in filing this declaratory suit was caused by lack of material information necessary as the investigations were still ongoing hence the Plaintiff could not decide conclusively to file a declaratory suit without the investigations Report. He urged the Court to invoke its discretionary power to enlarge time as well as its inherent powers under Article 159(2)(d) of *the Constitution* as read with Section 3A of the *Civil Procedure Act*. Counsel argued that in any case the Defendant neither pleaded in her defence nor raised any Preliminary Objection that the suit is barred, that although a Court may in some circumstances determine a suit based on an unpleaded issue, such determination will not extend to determining or awarding a relief that was not specifically sought in the pleadings. He cited several authorities.

35. Regarding the issue of "insurable interest", Counsel contended that the Defendant gave contrary statements to the investigator and has not filed any Affidavits from the said Pollyne Kamundi Kiende and Joseph Mun'gata Murianki denying recording statements with the investigator. He cited Section 94 of the *Insurance Act*, Cap. 487. Regarding ownership of the motor vehicle, he submitted that the presumption that the person registered as owner of a motor vehicle is the actual owner is rebuttable where there exists compelling evidence to prove otherwise, that the Defendant knew that she had sold the motor vehicle but chose not to disclose this fact to the Plaintiff and that if she was acting in good faith, she ought to have shared the information so that the Plaintiff could decide whether or not to assume the risk and issue the cover.

Determination

36. The issue in this Application is "whether the Plaintiff is entitled to repudiate liability to satisfy the Court judgments obtained by the decree-holders as compensation for injuries suffered by them as a result of the road accident that involved the motor vehicle insured by the Plaintiff".

37. The duty of an insurer to satisfy or settle decrees against an insured is a statutory duty which emanates from the provisions of Sections 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act which provides as follows:

> " 10. Duty of insurer to satisfy judgments against persons insured
>
> If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of Section 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 judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments."

38. However, Section 10(4) of the Act provides as follows:

> " 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:
>
> 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.

39. In this case, the Defendant's Counsel has submitted that while preparing for the hearing of this case, it came to the attention of the Defendant that this suit is time-barred since this declaratory suit was filed outside the 3 months statutory limit stipulated in Section 10(4) above and that also, no notice of repudiation was served. The Defendant however concedes that it did not, in its statement of defence plead this fact.

40. The Plaintiff's Counsel, in his Further Submissions, although he has conceded that indeed the suit is time-barred, averred that the Defendant, not having pleaded or raised the issue of limitation of time in its Defence, cannot now be allowed to bring it up at this late stage. He also urged, in the alternative, that the Court do invoke its discretionary power to enlarge time as well as its inherent powers under Article 159(2)(d) of *the Constitution* as read with Section 3A of the *Civil Procedure Act*.

41. On this issue of determining an unpleaded issue, in the well-known Court of Appeal case of Odd Jobs vs. Mubia (1974) EA 476, which the same Court followed in the latter case of Eastern Africa in Vyas Industries v Diocese of Meru [1976] eKLR, it was stated as follows:

> " With respect to the learned Judge, that issue does not flow from the pleadings. However, that notwithstanding, a court may base a decision on an unpleaded issue where, as here, it appears from the course followed at the trial, that the issue has been left to the court for decision - see Odd Jobs vs. Mubia (1974) EA 476."

42. The Court of Appeal in the subsequent case of Ann Wairimu Wanjohi v James Wambiru Mukabi [2021] eKLR, upon considering both the above two authorities, held as follows:

(26) As we have endevoured to demonstrate above, the issue of mistake was not pleaded by Mukabi. However, from the issues identified by the learned Judge, it is evident that the issue of mistake was central to her analysis and determination. The question is whether the learned Judge erred in addressing and determining the suit on the unpleaded issue of mistake.

(27) In Odd Jobs vs Mubia (supra), the Eastern Africa Court of Appeal held that a court may base its decision on an unpleaded issue, if it appears from the course followed at the trial that the issue has been left to the court for determination. In Vyas Industries vs Diocese of Meru [1976] eKLR, the Eastern Africa Court of Appeal applied and approved Odd Jobs vs Mubia (supra), holding that, as the advocate for the appellant had led evidence during the trial and addressed the court on the unpleaded issue, the trial court could base its decision on the unpleaded issue, as the issue had been left for the court's decision during the trial.

.....

[30] It is noteworthy that the Court in Nairobi City Council vs Thabiti Enterprises Limited (supra), considered Odd Jobs vs Mubia (supra), but followed Sheikh vs Sheikh & Others [1991] LLR 2219 (CAK); and Sande vs. Kenya Cooperative Creameries [1992] LLR 314 (CAK) in holding that:

> " A Judge had no power or jurisdiction to decide an issue which had not been pleaded unless the pleadings were suitably amended."

(31) In Sheikh vs Sheikh & Anor (supra), the following passage from Bullen & Leake on pleadings, 12th Edition was relied upon:

> " The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It does serve the twofold purpose of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time, informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial, and which we the court will have to determine at the trial."

(32) The following passage by this Court in David Sironga ole Tukai vs Francis Arap Muge & 2 Others (Civil Appeal No. 76 of 2014) [2014] eKLR is also instructive:

> " It is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense."

(33) We take the view that parties should specifically state their claim by properly pleading the facts relied upon and the relief sought, as the pleadings are the primary documents that guide the court and the parties concerning the claim and the contesting positions of the parties.

In accordance with the Civil Procedure Rules, the parties should also either provide a list of agreed issues, or if there is no agreement, each provide their own list of issues so that the court can settle the issues. Although it is desirable that where necessary the pleadings should be amended to bring in all the issues, Odd Jobs vs Mubia (supra) remains good law, that in limited circumstances where an unpleaded issue is crucial to the matters in issue the court may determine a suit on the unpleaded issue, provided both parties have clearly addressed the unpleaded issue in their evidence or submissions, and left the matter for the determination of the court. However, such determination will not extend to determining or awarding a relief that was not specifically sought in the pleadings."

43. Coming back to this instant case, as aforesaid, the parties by consent opted to dispense with oral viva voce hearing and left the matter to be determined on the basis of documentary evidence only. In view thereof, some of the considerations set out in the above authorities such as whether the issue of limitation of time arose during evidence-in-chief or in cross-examination would not apply herein. Be that as it may, upon considering the guidelines given in the above authorities and applying them to the facts of this case, I am satisfied and hold and find that the issue of time-limitation goes hand in hand with the Plaintiff's cause of action herein - repudiation of liability under the provisions of Section 10(4) of the Insurance (Third Party Risks) Act. The time-limitation having been stipulated right within the same Section 10(4), it is clearly crucial to the matters in issue herein with which it is so intertwined. For that reason, the issue of limitation of time cannot be really said to be a totally new issue that was not anticipated by the Plaintiff.

44. As observed in Ann Wairimu Wanjohi v James Wambiru Mukabi (supra), in limited circumstances where an unpleaded issue is crucial to the matters in issue the court may determine a suit on the unpleaded issue, provided both parties have clearly addressed the unpleaded issue in their evidence or submissions, and left the matter for the determination of the Court. In this case, the Defendant raised the issue of the time-limitation in its Submissions after the Plaintiff had already filed its Submissions. In view thereof, upon the Plaintiff's request, this Court granted the Plaintiff leave to file Further Submissions to specifically respond to that issue, which the Plaintiff very exhaustively did. For the said reasons, I find that this Court can and should admit the matter of time-limitation. I am also satisfied

that determining the issue of limitation of time does not in any way amount to determining or awarding a relief that was not specifically sought in the pleadings.

45. Having made the finding above, I now proceed to determine whether this suit can still be entertained despite the Plaintiff's admission that it was filed outside the timelines stipulated in Section 10(4) aforesaid, and also despite the Plaintiff's admission that that no declaration was obtained entitling the Plaintiff to avoid the claim nor was any notice served upon the Defendant or the Interested Parties to that effect.

46. In the case of Corporate Insurance Co. Ltd v Reuben Murigi Mwangi [2018] eKLR, faced with a similar scenario as hereinabove, Hon. Lady Justice L. Njuguna in reaching a finding that she had no jurisdiction to enlarge time, held as follows:

> " 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;
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> .....
>
> 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.
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> .....
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> 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 10th April, 2015 while the accident that gave rise to the suit occurred on 15th day of August, 2014. The court has not been told why the application had not been filed earlier. .....
>
> In the end, I find that the originating summons dated 14th day of May 2018 has no merits and the same is hereby dismissed with costs to the Respondent."

47. Similarly, in the case of Britam General Insurance Co (Kenya) Limited v Josephat Ondiek [2018] eKLR, Hon. Justice R. Nyakundi pronounced himself thus:

> " I have considered the evidence on this matter and submissions by both the plaintiff and the defendant counsel there are many issues as determination as deduced from the pleadings. However, to me the contract issue is whether on assessment of the claim brought by the plaintiff the suit is statute barred. The written law of governing this contract of insurance is found in the Act.

Insurance (motor vehicles third party risks cap. 405) to determine the property or otherwise of this suit I have to set out the relevant section in this Act. In section 10 (1) and (4) of the Act it provides as follows

.....

Exception to section 10(4) provide interalia that the insurer shall not be liable to pay or satisfy any judgement in respect of accident loss, damage or liability caused, sustained or incurred while the insured is guilty of non-disclosure of a material fact or by a representation of a fact which is false in some material particulars.

The procedure provided under Section 10(4) of the Act as I understand it presents the following scenarios, first, it creates an obligation on the part of the insurer to avoid the policy in respect of liability and anything arising from the accident which is in breach of the policy agreement. Secondly, it creates a condition precedent to the insurer right of action to the in breach by bringing an action within 3 months of the claim against the insured being instituted. Thirdly, the claim to indemnify the insured or third party insurance which falls within the exceptions provided in the policy of insurance. Fourthly, the proviso that Section 10(4) stipulates that the insurer shall not be liable in respect of the accident, loss or liability unless before or within the days he gives notice to the insurer in the said proceedings.

In the present case the accident occurred on 3rd April, 2015 and by 11th May, 2015 the plaintiff had already received the investigators report from Pw2 on the findings on the occurrence and cause of the accident. The defendant filed the motor accident report in a clear form received by the plaintiff on 27th April, 2015.

As I have already stated the defendant and third parties filed suit referenced as CMCC No. 625 of 2015 on 15th December, 2015. There is no evidence that the plaintiff made an application before the respective court for stay of proceedings for leave to file this declaratory suit. It is in this suit the plaintiff seeks to repudiate the claim. The conditions for commencement of a declaratory suit are time bound as stipulated in Section 10(4) of the Act.

In the case of Techra v. United Insurance Co. Ltd 2005 KLR the court stated as follows on this issue. "At this time of the institution of the suit, the plaintiff had given the defendant notice dated 8th August, 1997. Was it valid and in conformity with section 10(2) of the Insurance Motor Vehicles Third Party Risks Act. The Act requires the insurer to have had notice of institution of the suit. Section 10(2) focuses on receipt of the notice by the insurer. From the evidence captured by the plaintiff and defendant witnesses there had been no application made to seek a declaration to avoid the policy.

In this connection I refer to the decision and dicta on the case of Rawal v Rawal 1990 KLR 275 where the court held "the object of any limitation enactment is to present a plaintiff form pursuing stale claims on one hand, and on the other protect a defendant after he had lost evidence for his defence from being disturbed and after a long lapse of time. It is not to extinguish claims".

The subject of this suit is governed by Section 10(4) of the Act. It is not clear to me whether the plaintiff in safeguarding of their interest had made attempts of secure the declaration within the three months' period upon receipt to the notice.

As was held in Iga v Makerere University (1972) EA time was of essence where the statute sets a limitation period. Further as a matter of construction the court held as follows: "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"

Applying these principles to the present case I am of the view that this is one of those cases which the relief respect to the plaintiff is statute barred. I have no hesitation to rule that section 10(4) of the Act was not complied with as to limitation period. While I agree with the claim on the matter by the plaintiff I cannot accept the submission that the party relying on provisions of the law can circumvent the same statutory requirement to apply for a declaration to repudiate and avoid the policy.

In the present claim if the plaintiff wished to take the benefit of section 10(4) of the Act. It was mandated to apply for a declaration after receiving notice of the claim from the defendant and upon delivery of the notice of the suit. By filing a plaint outside the 3-month period the plaintiff lost its right to rely on the statute.

On the basis of this section the failure not to file the same within 3 months before or within the commencement of the proceedings has not been explained by the plaintiff. The section is couched and worded in mandatory terms. I also note that on 11th May, 2015 the plaintiff became and aware the defendant had concealed some material factor during the time he filed the accident claim form. This was a finding made by the investigating officer. However, there was no notice issued to the defendant that at the time of the accident the vehicle was being driven by unauthorized driver and it was also being used for purposes of hire and reward in breach of the policy by virtue of section 10(4) of the Act. The plaintiff did not seek for leave of the superior court for the proposed suit to be filed outside the stipulated period of 3 months.

Indeed, the facts presents a picture of the plaintiff who has been aware of the proceedings and claims way back on 27th April, 2015. They took the defendant in circles in respect to material damage of the vehicle and only brought this suit after being served with the summons in CMCC 624 of 2017.

I am quite clear that this suit is inoperative within the provisions of Section 10(4) of the Act. Further I am of the conceded view that notwithstanding the provisions of Section 10(4) of the Act the plaintiff went ahead to seek a declaration to repudiate the policy. It would be contrary to the letter and spirit of the provisions of Cap. 405 to allow the plaintiff to have his way of setting aside the contract without complying with Section 10(4) of the Act.

I am therefore satisfied that the plaintiff has not discharged the balance of proof on a balance of probabilities and more specifically the requirements of section 10(4) of the Act to stand on the way of the relief sought against the defendant. It follows therefore that the suit dated 15th August 2017 is fatally defective and non-suited by statute.

Accordingly, it is struck out with costs to the defendant."

48. There is however the contrary holding of Hon. Lady Justice Ngetich in the case of *Muchai v Xplico Insurance Co. Ltd (Civil Appeal E020 of 2019)* [2023] KEHC 24164 (KLR) (25 October 2023) (Judgment) in which she expressed herself as follows:

> " 26. I have perused the record of appeal and the submissions by counsels. The issue for determination is whether this court should interfere with ruling delivered by the trial court. There is no dispute that under section 10(4) of cap 405 LOK,

the insurer is required to file declaratory suit with 30 days from the date of filing suit against the insured or with 14 from the date of being served with statutory notice.

27. It is not dispute that in the instant case, the respondent failed to comply with section 10(4) of cap 405. The argument given is, they were not informed of the suits until the time they were served with judgment. Further that no statutory notice was served and the appellant did not disclose that the vehicle which was insured to carry goods carried passengers and the primary suits relate to passengers who sustained personal injuries in the accident which is the subject matter of the primary suits.

28. The appellant has not demonstrated that the respondents were aware of the primary suits. I take note of the finding by the trial magistrate to the effect that the appellant would have opportunity to defend the declaratory suits and therefore no prejudice would be occasioned to the appellant.

29. I have perused and considered authorities cited; however, in the instant case, the respondent has indicated that they were not aware of the existence of primary suits until when they were served with judgments. They have also indicated that the vehicle was in breach of the insurance contract and were therefore entitled to repudiate the contract but were kept in the dark until when they were served with judgment; that the primary suits proceeded undefended.

30. In my view the trial magistrate rightfully, exercised discretion by granted extension of time to the respondent to file declaratory suits. Further the appellant in my view will not suffer any prejudice as he has opportunity to defend the declaratory suits. From the foregoing, I see no merit in the appeal herein and procced to dismiss."

49. Upon review of the above cases, among several others, and considering the logic and reasoning therein, my own view is that where there are justifiable reasons given by an insurer on why it failed to comply with the timelines stipulated under Section 10(4) above, nothing bars the Court from invoking its inherent powers to render justice. In such case, the Court will be within its mandate to salvage the suit. In my view, a Court should never declare itself powerless when called upon to cure an obvious injustice. Indeed, this was the position that informed the holding of Hon. Lady Justice Ngetich in the case of Muchai v Xplico Insurance Co. Ltd (supra) where she found that the insurer was never made aware of the suits filed by the injured third parties and thus could not be expected to have filed the declaratory suit. Of course, where no justifiable reasons are given, as was held in the cases of Corporate Insurance Co. Ltd v Reuben Murigi Mwangi (supra) and Britam General Insurance Co (Kenya) Limited v Josephat Ondiek (supra), no enlargement of time should be granted and the declaratory suit should accordingly be struck out.

50. The question now is therefore whether the Plaintiff has given justifiable reasons why it failed to meet the statutory timelines and therefore whether declining to entertain this suit on that ground will amount to an injustice.

51. In his Further Submissions, regarding the issue of whether the suit is time-barred, Counsel for the Plaintiff submitted that when the primary suits were filed, the Plaintiff was not aware that the Defendant had sold the motor vehicle to the third party, that the Plaintiff only came to learn of the sale

sometime in May 2023 upon receipt of the Investigations Report, that by that time, the statutory 14 days within which the Plaintiff would have repudiated liability had passed and so were the 3 months within which they would have filed a declaratory suit. He contended further that the Plaintiff then filed this declaratory suit on 23/05/2023 immediately after receiving the investigations Report, and that therefore, the delay in filing this declaratory suit was caused by lack of material information necessary as the investigations were still ongoing hence the Plaintiff could not decide conclusively to file a declaratory suit without the investigations Report.

52. It is true that the Investigations Report presented to this Court by the Plaintiff is dated 13/04/2023. However, the Defendant has in turn produced a copy of the letter dated 10/01/2023 from the Plaintiff addressed to the Defendant and which is premised as follows:

> " We are in receipt of our Investigations Report on the subject vehicle.
>
> We therefore propose to settle the claim Kshs 600,000/- ..... and the beneficiary surrendering the salvage of motor vehicle Reg. KCH 471E to us for disposal of our credit together with the following documents:
>
> ....."

53. From the foregoing, Counsel for the Defendant is therefore right to argue that by the above letter dated 10/01/2023, the Plaintiff expressly confirmed to the Defendant that by that date, the Plaintiff had already received the Investigations Report. Counsel is also right to submit that from the letter, it is evident that it is on the basis of that Investigations Report that the Plaintiff offered to settle the loss at Kshs 600,000/- and which the Defendant accepted and the payment duly made.

54. The Plaintiff has not stated that the Investigations Report dated 13/04/2023 that it has presented to the Court was different from the one referred to in the letter dated 10/01/2023. Further, in its wisdom, the Plaintiff opted not to share a copy of the Investigations Report referred to in its said letter dated 10/01/2023 and as such, has denied this Court the opportunity to scrutinize it and reach an independent assessment on whether the findings thereof were merely preliminary and therefore inconclusive and incapable of enabling the Plaintiff to make a decision on whether to repudiate liability. I also observe that the Investigations Report dated 13/04/2023 which is the only one that the Plaintiff has presented to this Court, does not even allude to there having been an earlier Preliminary Investigations Report. I believe that if there were two different Reports, a Preliminary one and a subsequent Final Report, then the Final Report would have at least made reference to the Preliminary Report. The Court is therefore left in a position where it cannot establish whether that there were any investigations that were conducted after settlement of the loss.

55. If the Investigations Report referred to in the Plaintiff's letter dated 10/01/2023 existed but the Plaintiff, in its wisdom, chose not to produce it for the Court's scrutiny, then I find that, considering the importance thereof, the inference to be drawn is that had the same been produced, it would have been adverse to the Plaintiff's case. The drawing of adverse inference by a Court was well-explained by Mabeya J in the case of Kenya Akiba Mero Financing Ltd vs Ezekiel Chebii & Others [2012] eKLR where he stated as follows.

> " Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho –vs- KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."

56. In the circumstances, I do find that the evidence on whether or not the contents of the Investigations Report referred to in the Plaintiff's letter dated 10/01/2023 were insufficient for the Plaintiff to commence declaratory proceedings to repudiate the claim was specially within the knowledge of the Plaintiff. It is therefore the Plaintiff who had the evidentiary burden to prove its reasons for delaying to act within the timelines set out in Section 10(4) of the Insurance (Motor Vehicle Third Party Risks) Act and when crucial evidence in regard thereto, though in the Plaintiff's possession, has not been produced, then it follows that the burden lying on the Plaintiff was not discharged.

57. The Plaintiff's failure to produce such crucial evidence as the Investigations Report referred to in the Plaintiff's letter dated 10/01/2023 leaves the Court with a lot doubts over the truthfulness of the explanations given by the Plaintiff for the failure to file declaratory suit this within time. It also leaves the Court with no option but to draw the inference that the evidence contained in the withheld Investigations Report was not in support of the Plaintiff's case but detrimental thereto.

58. In light of the contents of the Plaintiff's said letter dated 10/01/2023, this Court is not convinced on, or persuaded with, the truthfulness of the Plaintiff's explanation that when the primary suits were filed, the Plaintiff was not aware that the Defendant had sold the motor vehicle to the third party, or that the Plaintiff only came to learn of the sale sometime in May 2023 upon receipt of the Investigations Report.

59. Indeed, the Supreme Court in the case of Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others [2014] eKLR, guided as follows:

> "(1) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.
>
> (2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
>
> (3) .....
>
> (4) Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court."

60. In the circumstances, I make the finding that the personal injury cases filed by the third parties at the Small Claims Court having been filed on 19/01/2023, it means that the Plaintiff had 3 months from that date to institute a declaratory suit and which 3 months lapsed on or about 18/04/2023. The Plaintiff having filed this suit on 29/05/2023, filed it more than 2 months after expiry of the limitation period and therefore out of time, and further, never served the statutory notice within 14 days as stipulated under the Section 10(4) of the Insurance (Motor Vehicle Third Party Risks) Act.

61. More importantly however, the Plaintiff has failed to discharge the burden of sufficiently explaining why it failed to comply with the statutory timelines. For the reasons stated above, I am not satisfied that the Plaintiff only came to learn of the alleged "sale" of the motor vehicle only after it had already compensated the Defendant for the loss of the vehicle. Even if this Court were to therefore consider enlarging time, there is no sufficient or convincing material before the Court to exercise that power or discretion.

Final Orders

62. The upshot of my findings above is therefore that this suit is dismissed with costs to the Defendant.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 24TH DAY OF MAY 2024

.....

WANANDA J.R. ANURO

JUDGE

Delivered in the Presence of:

Mr. Chumba h/b for Mr. Kitiwa for Applicant

Ms Wambuta h/b for Mr. Amol for Defendant

Mr Omusundi for Interested Party