



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 73 OF 2018**

**MADISON INSURANCE COMPANY KENYA LTD....PLAINTIFF**

**-VERSUS-**

**CAROLINE WANJIRU NJOROGE.....DEFENDANT**

**RULING**

1. This ruling determines the Defendant/Applicant's Notice of Motion Application dated 26/4/2019 and filed in court on the even date. It has been brought under Sections 1A, 1B, 3A, & 63 of the Civil Procedure Act and Orders 2 Rule 9, 15(10) (b), (c) and (d) and Order 51 Rule 1 of the Civil Procedure Rules, 2010. The application seeks for orders that:-

- a. This Honourable Court be pleased to dismiss this suit with costs
- b. That the costs of this application be provided for

2. The application is predicated on grounds (1-6) on its face and further supported by an affidavit sworn by the Applicant herein on 26/10/2019. The Applicant's case is that she took out a comprehensive insurance policy with the Plaintiff insurance company for motor vehicle KCJ 108F Toyota Ractis for the period between 13/2/2017 to 12/02/2018. The vehicle was involved in a fatal road traffic accident on 24/01/2018 along airport road Mombasa, while being driven by the Defendant/Applicant's authorized driver by the name Charlse Kiriah Mutugi. The Applicant alleges that she immediately informed the Plaintiff but vide a letter dated 9/4/2018, the Plaintiff sought to repudiate the claim allegedly on the grounds that the subject vehicle was generally used commercially for hire and reward contrary to the limitations of use clause of the policy. The Applicant denied the allegations and asserts that she uses the vehicle to supervise her business and private purposes and that on the date of accident the vehicle was transporting her friend to the airport for free.

3. According to the Defendant/Applicant, the Respondent can only avoid the insurance policy on grounds of non-disclosure and misrepresentation of material facts.

4. The Defendant/Applicant deposed that a suit was instituted against her on 3/05/2018 that is; **CMCC 859 OF 2018 Zaituni Said Baya & Chengo Mwaro Baya** (suing as the personal representatives of the Estate of Swabrina Zuberi (Deceased)-vs-Caroline Wanjiru Njoroje but the Plaintiff refused to provide her with legal representation. According to the Defendant/Applicant the Plaintiff's unilateral actions to repudiate the policy were not administratively fair because she was not consulted prior to the decision.

5. The Defendant/Applicant further asserts that this suit was filed out of time, that is, four months after the commencement of **CMCC 859 OF 2018** (supra) and therefore in contravention of Section 10(4) of the Insurance (Motor Vehicle Third Party Risk) Act Cap 405. It is submitted that the Plaintiff/Respondent was under duty by virtue of the said Act to issue notice of the suit herein to the representatives of the victim of the road traffic accident before or within fourteen (14) days of the commencement of **CMCC 859 OF 2018**. It is therefore the Defendant/Applicants position that the suit herein is filed in bad faith and merely to avoid liability for the pending traffic case namely **CMCC 859 OF 2018** and thus the victim therein will not be compensated. It is for those reasons that the Defendant/Applicant seeks this court to dismiss this suit.

6. The Defendant/Applicant's application is opposed by the Plaintiff/Respondent through a replying affidavit sworn on 18/07/2019 by Lilian Muniyiri, the Plaintiff's Legal Manager. The Plaintiff contends that it was an express and/or implied term of the aforesaid policy that the Applicant's motor vehicle would not be used commercially for hire and reward and further that the said motor vehicle would be used by herself in the course and in connection with her day to day activities and that the policy was to be subject to the standard terms of the policy used for that class of car. That the Defendant/Applicant breached clause No. MOTO03 of the policy by using the subject motor vehicle for hire and reward contrary to the terms of policy number MSA/701/0056908/2013. It is averred that there was material non-disclosure since the Applicant did not inform the Respondent that the suit motor vehicle was to be used for commercial purposes.

7. According to the Plaintiff/Respondent, the provisions of Section 10(4) of Motor Vehicle Third Party Risks Act do not apply as alleged by the Applicant since the Judgment in **CMCC 859 of 2018** has not been delivered or any declaration made to be served to the Plaintiff. It is therefore argued that this application has been prematurely brought before this court.

8. The application was canvassed by way of written submissions. The Defendant's submissions which have erroneously been titled as the "Plaintiff's Submissions" are dated 20/7/2019 and filed on the 26/7/2019. It was submitted therein that this suit is time barred as it was filed more than three months after the filing of the road traffic accident suit; **CMCC 859 OF 2018, Zaituni Said Baya & Chengo Mwaro Baya** (suing as the personal representatives of the Estate of Swabrina Zuberi (Deceased)-vs-**Caroline Wanjiru Njoroge** and in contravention of Section 10(4) of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405. It is the Applicant's case that Section 10(4) requires the insurer to seek a declaration from the court to avoid liability and it must be filed before the commencement of the road traffic accident case or within three months after the commencement thereof. It is submitted that the suit herein was filed 4 months and 10 days after the commencement of the road traffic case and therefore it cannot attract any court orders. In support of this line of argument, the Applicant relied on the cases of; **Facis Insurance Ltd -vs-Mohamed F. Hussein HCC 92 of 2015; Gateway Insurance Company Ltd-vs-Tham Njenga Gitau & Another [2014] eKLR**, and **Britam General insurance Co. Ltd-vs-Josephat Ondiek HCC 14 of 2017 [2018]eKLR**.

9. It is further submitted that pursuant to Section 10(4) of the Insurance (Motor Vehicle Third Party Risks) Act, Plaintiff was to issue a notice to the Plaintiffs in the road traffic accident case which was not done. The Plaintiff cannot therefore avoid liability in the lower court traffic case. This argument is supported by excerpts from the case of **Britam General insurance Co. Ltd-vs-Josephat Ondiek [2018]eKLR**. The Plaintiff reiterates the position that the suit herein is void ab initio for failure to adhere to Section 10(4) of the Insurance (Motor Vehicle Third Party Risks) Act.

10. The Plaintiff/Respondent on the other hand filed its submissions on 21/11/2019. It is submitted that the Plaintiff/Respondent's suit present factual and legal questions that warrant to be determined by this honourable court as a matter of right and cannot be said to be an abuse of the court process. This court was invited to consider the authority in **Kenya Commercial Bank -vs-Suntra Investment Bank Ltd [2015] eKLR** where Gikonyo, J cited the case of **Saudi Arabia Airline Corporation -vs-Premium Petroleum Company Limited** stressing on the legal principles to be adhered to before a court of law exercises its discretion to strike out pleadings.

11. It is submitted that the Defendant/Applicant breached the terms of the policy by using the subject motor vehicle for hire and reward which is evidenced in a copy of investigating report attached to the Plaintiff's replying affidavit. It is the Plaintiff's case that it was not notified of the commencement of the traffic case being; **CMCC 859 OF 2018, Zaituni Said Baya & Chengo Mwaro Baya** (suing as the personal representatives of the Estate of Swabrina Zuberi (Deceased)-vs-**Caroline Wanjiru Njoroge** and that the statutory notice was addressed to the Defendant/Applicant who failed to serve it to the Plaintiff/Respondent, therefore the mistakes of the Defendant should not be visited upon the Plaintiff whose suit is bonafide and with merit.

#### **Analysis and Determination**

12. I have considered the application, the replying affidavit, the submissions by both parties as well as the statute law and authorities relied on. There many issues for determination as deduced from the pleadings. However, at this stage, to me the contract issue is whether on assessment of the claim, brought by the plaintiff the suit is statute barred.

13. The relevant Section to consider in the circumstances is Section 10(1) and (4) of the Insurance (motor vehicles third party risks) Act cap. 405. It provides as follows:-

**(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 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 provide 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 of 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"**

14. I am in agreement with the holding in **Britam General insurance Co. Ltd-vs-Josephat Ondiek [2018]eKLR** that The procedure provided under Section 10(4) of the Act presents the following scenarios; **firstly** 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 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 for 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.

15. In the instant case, the third parties filed suit referenced as **CMCC 859 OF 2018 Zaituni Said Baya & Chengo Mwaro Baya** (suing as the personal representatives of the Estate of Swabrina Zuberi (Deceased)-vs-**Caroline Wanjiru Njoroge**. The accident occurred on 24/01/2018

and according to the Defendant/Applicant she informed the Plaintiff through Equity Insurance Agency Ltd. The Plaintiff then replied via a letter dated 9<sup>th</sup> April, 2018 signed by its claims manager Moses Maina, purporting to repudiate the claim allegedly on the ground that the subject motor vehicle had generally been used commercially for hire and reward contrary to the limitations in the clause of the policy. The Plaintiff was also served with the Pleadings in **CMCC 859 OF 2018 (supra)** but returned the pleadings to Equity Insurance Agency Ltd (the Plaintiffs insurance brokers) vide a letter dated 18/5/2018 and advised the Defendant to secure her own legal representation.

16. The Plaintiff has not disputed the correspondences in the preceding paragraph and as such it would be untrue for the Plaintiff to allege it was not informed of the traffic case being **CMCC 859 OF 2018**. 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.

17. As earlier noted, the conditions for commencement of a declaratory suit as stipulated in Section 10(4) of the Insurance (motor vehicles third party risks) Act, cap. 405 are time bound. The subject of this suit is therefore governed by Section 10(4) of the Act. It is not clear to me whether the plaintiff in the safeguarding of their interest had made attempts of secure the declaration within the three months' period upon receipt of the notice and pleadings.

18. Where a Statute sets a limitation period time it is of essence. Therefore a Plaint which is time barred by limitation is also barred by law unless the Plaintiff shows grounds upon which he can claim exemption. 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. This suit was filed 4 months and 10 days after the commencement of the lower court traffic case which is outside the 3-month period. If the court is satisfied that the Plaintiff was properly served with notice under Section 10(2) of the Insurance (motor vehicles third party risks) Act cap. 405 then the plaintiff would lose its right to rely on the statute.

19. In the instant case, the Plaintiff did not dispute its correspondences with the Defendant/Applicant through Equity Insurance Agency. More the Defendant/Applicant annexed a letter dated 18<sup>th</sup> May, 2018 addressed to Equity Insurance Agency Ltd by the Plaintiff. The subject of the said letter is **Mombasa CMCC No.859 of 2018**; where the Plaintiff herein acknowledged receiving the summons, Plaint and other supporting documents in **Mombasa CMCC No.859 of 2018**. The Plaintiff in the said letter advised the Defendant/Applicant to arrange to secure her own legal representation on ground that there was material non-disclosure since at the time of accident the subject motor vehicle was being used for hire and reward. The Plaintiff cannot therefore allege that it was not notified of the proceedings in **CMCC No.859 of 2018**. The facts present an undoubted picture of the Plaintiff who has been aware of the Proceedings and claims before 18<sup>th</sup> May, 2018.

20. In view of the foregoing, this court finds that the failure not to file a declaratory suit within 3 months before or within the commencement of the proceedings has not been explained by the plaintiff. Section 10(4) is couched and worded in mandatory terms. The plaintiff did not seek for leave of the court to file this suit outside the stipulated period of 3 months.

21. In my view this suit is inoperative within the provisions of Section 10(4) of the Act. It would therefore 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. It follows therefore that this suit is fatally defective and non-suited by statute.

22. In light of the foregoing, I allow the application dated 26/4/2019 and proceed to strike out the Plaintiff's suit. There shall be no orders as to costs.

It is so ordered.

**Dated, signed and delivered this 10<sup>th</sup> day of February, 2020**

**D. O CHEPKWONY**

**JUDGE**