



**Kenya Orient Insurance Limited v Otieno (Civil Appeal
E166 of 2023) [2024] KEHC 7637 (KLR) (25 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7637 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E166 OF 2023
RE ABURILI, J
JUNE 25, 2024**

BETWEEN

KENYA ORIENT INSURANCE LIMITED APPELLANT

AND

GEORGE OTIENO RESPONDENT

(An appeal arising out of the Ruling of the Honourable G.C. Serem in the Chief Magistrate's Court at Kisumu delivered on the 12th September 2023 in Kisumu SCCC No. E242 of 2023)

JUDGMENT

Introduction

1. The respondent instituted a declaratory suit against the appellant vide a statement of claim filed on the 3rd August 2023 seeking orders to compel the respondent to pay Kshs. 467,490 in general damages plus costs and interest as declared in Kisumu SCCC No. E043 of 2023.
2. In response, the appellant filed a preliminary objection stating that the Small Claims Court had no jurisdiction to hear a suit seeking declaratory orders.
3. The trial adjudicator held that it was seized with jurisdiction to entertain declaratory suit subject to their respective monetary jurisdiction and thus proceeded to dismiss the Preliminary Objection with costs.
4. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 5th May 2020 raising the following grounds of appeal:
 - a. The honourable adjudicator erred in law and in fact in failing to find that the small claims court's jurisdiction does not extend to suits for enforcement of judgement.



- b. The honourable adjudicator erred in law and in fact in failing to have regard to section 12 of the [Small Claims Court Act](#) that limited the nature of claims that the court had jurisdiction to determine.
 - c. The honourable adjudicator erred in law in holding that it had jurisdiction to determine a suit seeking orders for enforcement of a judgement when it had no such jurisdiction under the [Small Claims Court Act](#).
 - d. The honourable adjudicator erred in law and in fact in holding that by virtue of being a subordinate court the small claims court had jurisdiction to entertain a declaratory suit subject only to monetary jurisdiction thus disregarding the limitation as to nature of claims the court can determine under section 12 of the [Small Claims Court Act](#).
 - e. The honourable adjudicator erred in law in failing to realize that a court under the [Small Claims Act](#) established under section 4 thereof does not have the [Civil Procedure Act](#).
 - f. The honourable adjudicator erred in law in holding that Corporate Insurance Company Limited v Elias Okinyi Offere, CACA No. 12 of 1998 which decided that a magistrate's court has jurisdiction to hear declaratory suits subject only to their monetary jurisdiction applied to the Small Claims Court whose jurisdiction is not only limited monetarily but also by subject.
 - g. The honourable adjudicator disregarded and failed to take into account the submissions made before her, and the authorities cited, as the law required her to do.
 - h. The honourable adjudicator ignored a cardinal principal of law that a court's jurisdiction is as given by law and cannot be assumed through judicial craftsmanship and innovation.
 - i. The honourable adjudicator made a decision that is plainly wrong on its jurisdiction.
5. Only the appellant filed submissions in support of the appeal. The respondent never participated in the appeal despite service.

The Appellant's Submissions

6. The appellant submitted that the claim before the adjudicator was not a claim under the subject matters provided in section 12 (1) (a) to (e) but rather a fresh suit brought to enforce a judgement in an earlier suit. Reliance was placed on the case of [Christoffersen v Kavneet Kaur Sermi t/a The Random Shop](#) (Civil Appeal E036 of 2022) (2022) KEHC 14035 (KLR) (Commercial and Tax) (18 October 2022) (Judgement) where it was held inter alia that a claimant must fit his claim in the five categories set out under Section 12 (1) of the [SCC Act](#).
7. The appellant further submitted that the claim brought by the respondent was not one for compensation for personal damages but rather a declaratory suit to enforce a judgement and/or decree and thus the SCC lacked jurisdiction under section 12 of the [SCC Act](#).

Analysis and Determination

8. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, bear in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In [Abok](#)



eKLR, the court stated as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

9. I have considered the record herein and it is my view that the only issue for determination is whether the Small Claims Court has the jurisdiction to entertain a declaratory suit. In *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd.* (1989) EA, the Court held that:

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

10. It follows that the issue of jurisdiction must be raised at the onset of the suit and the court may, on its own motion, examine whether it has jurisdiction to hear and determine the suit and should it find that it has no jurisdiction, it must down its tools and say no more.

11. In the Matter of Advisory Opinions of the Court under Article 163 of *the Constitution (Constitutional Application No. 2 of 2011* at para. 30), the Supreme Court stated:

“...a court may not arrogate to itself jurisdiction through the craft of interpretation or by way of endeavors to discern or interpret the intentions of Parliament, where the legislation is clear and there is no ambiguity.”

12. In *Samuel Kamau Macharia & Another vs. Kenya Commercial Bank & 2 Others*, Supreme Court Civil Appeal (Application) No. 2 of 2011, the Supreme Court rendered itself as follows regarding a Court’s jurisdiction:

“A court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law. Where *the Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”

13. The jurisdiction of the Small Claims Court is set out in section 12 of the *Small Claims Court (the Act)*. The same provides as follows:

“Nature of claims and pecuniary jurisdiction

- (1) subject to this *Act*, the rules and any other law, the court has jurisdiction to determine any civil claim relating to—
- (a) a contract for sale and supply of goods or services;
 - (b) a contract relating to money held and received;



- (c) liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of movable property;
 - (d) compensation for personal injuries; and
 - (e) set-off and counterclaim under any contract.
- (2) Without prejudice to the generality of subsection (1), the court may exercise any other civil jurisdiction as may be conferred under any other written law.
 - (3) The pecuniary jurisdiction of the court shall be limited to one million shillings.
 - (4) Without prejudice to subsection (3), the Chief Justice may determine by notice in the Gazette such other pecuniary jurisdiction of the court as the Chief Justice thinks fit.
14. Under section 13 of the Act, there are certain exclusions to the jurisdiction of the Small Claims Court. It also provides for transfer of claims by a higher court to the small claims court subject to section 12(3), that is the limit of pecuniary jurisdiction for not more than 1,000,000/=.

15. The said section 13 provides as follows; -

“ 13. Exclusion of jurisdiction

- (1) If a claim has been lodged with the court, no proceedings relating to the same course of action shall be brought before any other court except where the—
 - (a) proceedings before that other court were commenced before the claim was lodged with the Small Claims Court; or
 - (b) claim before the other court has been withdrawn.
- (2) A claim shall not be brought before the court if proceedings relating to that claim are pending in or have been heard and determined by any other court.
- (3) Subject to section 12(3), a higher court may transfer a claim to a Small Claims Court.
- (4) For the purposes of this section, a claim is deemed to have been lodged with the court in any case where section 23 has been complied with.
- (5) A claim shall not be brought before the court if the cause of action is founded upon defamation, libel, slander, malicious prosecution or is upon a dispute over a title to or possession of land, or employment and labour relations.”



16. The procedure for the court is also exclusive. In section 17 of the act, the law requires that the court exercises its own procedure, having regard to principles of natural justice. The said section states as doth: -

“Procedure of Small Claims Court Subject to this Act and Rules, the court shall have control of its own procedure in the determination of claims before it and, in the exercise of that control, the court shall have regard to the principles of natural justice.”

17. The effect of the foregoing is that the Civil Procedure Act and rules does not apply to the Small Claims Court except in specific or special cases. Indeed, even the application of the Evidence Act is severely restricted by section 32 of the Act which provides:-

“Exclusion of strict rules of evidence

- (1) The court shall not be bound wholly by the rules of evidence.
- (2) Without prejudice to the generality of subsection (1), the court may admit as evidence in any proceedings before it, any oral or written testimony, record or other material that the court considers credible or trustworthy even though the testimony, record or other material is not admissible as evidence in any other court under the law of evidence.
- (3) Evidence tendered to the court by or on behalf of a party to any proceedings may not be given on oath but that court may, at any stage of the proceedings, require that such evidence or any part thereof be given on oath whether orally or in writing.
- (4) The court may, on its own initiative, seek and receive such other evidence and make such other investigations and inquiries as it may require.
- (5) All evidence and information received and ascertained by the court under subsection (3) shall be disclosed to every party.
- (6) For the purposes of subsection (2), an Adjudicator is empowered to administer an oath.
- (7) An Adjudicator may require any written evidence given in the proceedings before the court to be verified by statutory declaration.”

18. The appellant impugns the trial adjudicator’s decision on account that it was made without jurisdiction on account that the suit filed by the respondent is a declaratory suit not provided for and covered by the SCC Act.

19. The subject matter of the suit herein is a declaratory suit, brought under the provisions of the Insurance (Motor Vehicles Third Party Risks) Act, seeking to have the Defendant, an insurance company settle the decree. The decree was for an award of damages of Kshs 467, 490 entered against the Appellant’s insured by the appellant herein.

20. The Court considers that Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act provides for the duty of an insurer to settle a decretal amount as follows:-

10. Duty of insurer to satisfy judgments against persons insured



- (1) 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.

Provided that the sum payable under a judgment for a liability pursuant to this section shall not exceed the maximum percentage of the sum specified in Section 5 (b) prescribed in respect thereof in the Schedule.

21. Upon entry of judgment in such accident claims where the Defendant was insured, the above provisions require the insurer to settle the decretal amount as awarded and in accordance with the provisions of the Act. It is however not always the case that the insurers willingly settle the claim and this necessitates the filing of a declaratory suit to compel the insurer to settle the decree. Ordinarily, such declaratory suits may be filed by the Defendant and/or Judgment Debtor in the primary suit.
22. However, that can only happen if there is jurisdiction conferred on the court to hear such claims albeit they are claims arising from or as a consequence of a judgment and in effect, to give effect to a judgment or decree in those specific cases.
23. What then is a declaratory suit? Relevant to this case, a declaratory suit is one that seeks to compel a judgement debtor's insurer to settle the decree passed against the insured. This kind of claim is not provided for under Section 12 of the SCC Act.
24. In the circumstances I find that declaratory suits do not fall within the mandate of the Small Claims Court. I thus find and hold that the Adjudicator erred in law in dismissing the preliminary objection raised by the appellant. I set aside the order dismissing the preliminary objection and substitute it with a finding that the Small Claims Court has no jurisdiction to hear and determine declaratory suits relevant to the matter before this court. Consequently, the declaratory suit before the Small Claims Court is hereby struck out with an order that each party shall bear their own costs of the said suit and of this appeal.
25. I so Order.
26. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 25TH DAY OF JUNE, 2024

R.E. ABURILI

JUDGE

