



Directline Assurance Company Limited v Kitwe & another (Suing as Administrators ad litem of the Estate of Moses Ndunda - Deceased) (Civil Appeal E453 of 2022) [2024] KEHC 7690 (KLR) (24 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7690 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E453 OF 2022
WM MUSYOKA, J
JUNE 24, 2024**

BETWEEN

DIRECTLINE ASSURANCE COMPANY LIMITED APPELLANT

AND

ALICE NDINDA KITWE 1ST RESPONDENT

DOUGLAS KITONGA 2ND RESPONDENT

**SUING AS ADMINISTRATORS AD LITEM OF THE ESTATE OF MOSES
NDUNDA - DECEASED**

(An appeal arising from orders made in a ruling by Hon. AN Makau, Principal Magistrate, PM, delivered n 24th June 2022, in Milimani CMCCC No. E11342 of 2021)

JUDGMENT

1. The suit at the primary court was initiated by the respondents, against the appellant, and another, for a declaratory order that the appellant and the other were liable to settle the decretal sum, awarded in Milimani CMCCC No. 2264 of 2011, to be referred hereafter as the primary suit, together with interests and costs. The respondents had alleged that the court, in the primary suit, had made a total award of Kshs. 835,765.28, against the owners of motor-vehicles registration marks and numbers KAP 367L, insured by the appellant, under policy number 3002641, and KAZ 934T, insured by the other, under policy number 05/21/000060/COMP. The respondents asserted that, under the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405, Laws of Kenya, the appellants were bound to settle the entire decretal amount. The appellant and the other filed separate defences, in which they denied covering the accident motor-vehicles. It was also averred that the accident was never reported by the insured, and that the relevant statutory notices were not served.



2. Upon the filing of the statements of defences by the appellant and the other, the respondents filed a Motion, dated 26th November 2022, seeking that the 2 defences be struck out, and that judgment be entered against the appellant and the other as per the plaint, essentially stating that there were no triable issues raised in the defences. A copy of a statutory notice, dated 7th June 2011, was attached, as proof of service thereof, on the appellant and the other, as the official stamps of both were embossed, as acknowledgement of receipt. A copy of the police abstract, serial number 600135, is attached, which indicates the policy number issued by the appellant. The other defendant did not contest the application, and orders were made against it, on 7th April 2022. The appellant opposed the application, in which it denied issuing the policy in question. In the end, the application was allowed, on the basis that the impugned insurance policy number was indicated in the police abstract, and the appellant could not possibly walk away from that fact.
3. The appellant was aggrieved, hence the instant appeal. The grounds in the memorandum of appeal, dated 27th June 2022, revolve around the appellant being denied a chance to canvass the defence at a full trial; the defence was not vexatious scandalous or it raised triable issues in law; the issues raised in the replying affidavit were not considered; and the trial court failed to find that the appellant had not covered the accident vehicle.
4. Directions were given on 20th December 2023, for disposal of the appeal by way of written submissions. There has been compliance. Both sides have filed written submissions.
5. The appellant has collapsed its 2 grounds of appeal into 1, whether the defence in question raised triable issues that deserved ventilation at the trial. It cites *DT Dobie & Company (Kenya) Limited vs. Muchina & another* [1980] eKLR (Madan, Miller & Potter, JJA) and *Kenya Trade Combine Ltd vs. NM Shah* [2001] eKLR (Omolo, Bosire & O’Kubasu, JJA), on the principles that govern striking out of pleadings, with emphasis that the defence which raises triable issues does not mean that defence would necessarily succeed. The triable issues, identified by the appellant, are that the appellant had not insured the accident vehicle, whether there was a judgment for Kshs. 835,765.28, there was no service of the statutory notice on the appellant, the appellant was a stranger to the primary suit, the primary suit was prosecuted ex parte, and the primary suit was against individuals who were strangers to the appellant.
6. The respondents cite section 10 of the Insurance (Motor Vehicle Third Party Risks) Act, to argue that an insurer is bound to settle a judgment obtained against its insured. The insurer can only avoid liability, or a summary judgment, in the circumstances discussed in *Blueshield Insurance Co. Ltd vs. Raymond Buuri M’Rimberia* [1998] eKLR (Gicheru, Akiwumi & Pall, JJA), *Africa Merchant Assurance Co. Ltd vs. Confas Maranga Ntabo* [2016] eKLR (Okwany, J), *John Karanja Njenga vs. Invesco Assurance Co. Ltd* ((Kiambu HCCC No. 84 of 2016)) and *Edwin Ogada Odongo vs. Phoenix of East Africa Assurance Co. Ltd.* (Kisumu-HCCC No.132 of 200). *APA Insurance Company Limited vs. George Masele* [2014] eKLR (Mabeya, J) is cited for the point that the police abstract is sufficient proof of insurance unless disproved.
7. I agree with the appellant, there is only 1 issue for determination, whether the defence filed by the appellant raised a triable issue.
8. In the defence, the appellant denied having had insured the accident vehicle, and it described the alleged insured persons as strangers. I have very closely perused through the record of appeal, and all the documents therein, and I have not seen in it an averment where the appellant admitted a relationship with any of the defendants sued in the primary suit. In its pleadings, it has not conceded at all, whether vaguely or directly, that it had ever issued the policy number in question. The case by the appellant



is not one where it has admitted the policy, and sought to avoid it, for one reason or other, but one where it has denied the claim throughout. No document, such as an insurance policy instrument, or any other, issued by the appellant, was placed on record. The only document bearing the impugned policy number emanates from the police. Taking all that into account, the defence would appear to have raised an issue that was triable: whether a policy number 3002641, issued by the appellant, in favour of one of the defendants in the primary suit, ever existed. That ought to have been taken into account by the trial court, considering that the respondents were not the alleged insured persons, neither were they alleged to be privy to that impugned insurance contract.

9. An insurer can only be liable to settle a judgment, such as that made in Milimani CMCCC No. 2264 of 2011, if there was an insurance policy in place in the first place. That policy has been denied, and that should make the existence of that policy a triable issue. An insurer can only avoid liability with respect to a policy which actually exists. The existence of the policy is denied in this case, and, therefore, before liability can be discussed, it has to be demonstrated that the policy existed in the first place, making that a triable issue. The only document which links the impugned policy number to the appellant is the police abstract. A police abstract can be evidence of existence of a policy, unless disproved. It can only be disproved through a trial, where the insurer gets a chance to lead evidence to disprove it. In this case, the policy is denied, by the person or entity that allegedly issued it. The police abstract cannot, then, be taken at face value. A trial has to be conducted, to give a chance to the appellant, the alleged insurer, disprove the police abstract.
10. The other issues were secondary, that is as to whether statutory notices were issued, and whether the judgment in the primary suit existed.
11. I find merit in the instant appeal. The trial court ought to have considered the principal issue raised by the appellant, that it never issued the policy in question. I hereby allow the appeal. Each party shall bear their own costs.

DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA THIS 24TH DAY OF JUNE 2024

WM MUSYOKA

JUDGE

Ms. Veronica, Court Assistant, Milimani, Nairobi.

Mr. Arthur Etyang, Court Assistant, Busia.

Advocates

Ms. Kahiti, instructed by COOTOW & Associates, Advocates for the appellant.

Mr. Kaburu, instructed by Nelson Kaburu & Company, Advocates for the respondent.

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