



**Njagi v Occidental Insurance Company Limited (Civil Appeal
77 of 2023) [2024] KEHC 9633 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9633 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL 77 OF 2023
LM NJUGUNA, J
JULY 31, 2024**

BETWEEN

PETER GITHAKA NJAGI APPELLANT

AND

OCCIDENTAL INSURANCE COMPANY LIMITED RESPONDENT

*(Appeal arising from the decision of Hon. H. S. Ouko in Runyenjes
MCCC No.83 of 2021 delivered on 16th November 2023)*

JUDGMENT

1. The appellant has filed a memorandum of appeal dated 13th December 2023 seeking that the judgment of the trial court be set aside and judgment be entered as prayed in the plaint. He also sought for costs of the appeal. The appeal is premised on the grounds that the learned trial magistrate erred in law and fact:
 - a. By disregarding the evidence by the appellant that he had filled the insurance claim through the agent who issued the insurance cover and proceeded to dismiss the plaintiff's claim;
 - b. By relying on the letter dated 12th July 2021 which clearly was in support of the plaintiff's claim and used it to dismiss the plaintiff's case;
 - c. By dismissing the appellant's case while there was no evidence tendered against the plaintiff and the respondent's agent, Bridgelink Insurance Agency did not testify to counter the appellant's assertions that he had reported the accident to the agent and fully filled the required claim forms;
 - d. By passing judgment against the weight of evidence before her;
 - e. By placing excess reliance on section 203 of the *Insurance Act* which does not take liability away from the insurance for non-reporting of an accident and/or claim; and



- f. By ignoring the principle that no act or omission or commission by the insured after the accident can take away liability from the insurer.
2. Vide plaint dated 30th August 2021 and amended on 21st July 2023, the appellant sought judgment against the respondent for orders that the respondent is under obligation to settle the entire decretal amount and subsequent execution expenses in Runyenjes Civil Case no. 109 of 2019 and in default, execution be levied against it within 14 days of the order plus general damages for breach of the policy agreement. He also sought for costs of the suit and interest.
 3. It was the appellant's case that his motor vehicle KAK 627W was insured by the respondent through a third-party cover which was to expire on 14th December 2019. That he paid the premium in full. That on 24th April 2019, the said motor vehicle was involved in an accident where a third party, Meshack Kimathi was injured. That the appellant reported the incident to the respondent through its agent and judgment was entered against him in the sum of Kshs.453,000/= through Runyenjes Civil Case no. 109 of 2019.
 4. The respondent filed a statement of defense dated 21st September 2021 and amended 25th July 2023 in which it denied that it was under obligation to settle the decretal amount in the said case since it was never served with a notice of entry of judgment. It also denied that it insured the appellant's motor vehicle and that it was involved in an accident involving a third party. It urged the court to dismiss the plaint with costs. In his reply to defense, the appellant reiterated his position as stated in the amended plaint.
 5. At the hearing, the appellant testified as PW1 and produced copies of proceedings in Runyenjes Civil Case no.109 of 2019 and stated that he settled the decretal amount in that case and he provided receipts for the same. That he was insured by the respondent through its agent known as Bridgelink Insurance Agency and that he paid the premium in full but he does not know if the agent remitted the premium to the respondent. He stated that he is involved in the construction business and the same has since gone down because his lorry KBK 529J was taken by auctioneers for 7-8 months and he incurred storage charges of Kshs.8,000/= daily. That the said motor vehicle did not work every day but he made about Kshs.100,000/= monthly which he proved. He asked the court to award him damages. On cross-examination, he stated that the policy document was produced in court and that he filled a claim form and gave it to the insurance agent. That when he filled the claim forms, he sent them to the insurance agent through G4S courier. That he was not given a policy document when he paid his premium.
 6. The trial court found in favour of the respondent and stated that the insurance company wrote a letter to the appellant notifying them of the intention to repudiate the claim on the ground that it was never informed of the accident. The suit was dismissed, thus the appeal herein.
 7. The court directed that the appeal be canvassed by way of written submissions but none of the parties filed their submissions.
 8. The issue for determination is whether the judgment of the trial court should be set aside.
 9. As a first appellate court, it is this court's duty to re-examine the evidence adduced before the trial court. In the case of *Williamson Diamonds Ltd and another v Brown* [1970] EA 1, the court held that:

“The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion.”



10. The contentious issue is that the respondent denied having insured the appellant's motor vehicle and, in any event, it stated that it was not aware of any third-party proceedings involving the appellant's motor vehicle. The appellant, on the other hand, stated that he filled insurance claim forms and sent them to the insurance agent. He produced proof that his motor vehicle was insured by the respondent. Part of the documents he produced was a copy of cheque number XXXXXXXX made out in favour of the respondent by Bridgeline Insurance Agency for the sum of Kshs.25,286/=.
11. According to the document dated 01st September 2019, this amount was for insurance policy premiums paid by 5 individuals including the appellant who paid a premium for his motor vehicle to be insured for the period between 10th April 2019 and 14th December 2019. He also produced the certificate of insurance indicating that the motor vehicle was insured by the respondent. The appellant also produced receipts for Kshs.80,000/= and another for Kshs.150,000/= paid out to Ngigi Karomo & Associates being auctioneer's fees.
12. From the available evidence, it is clear that the respondent indeed insured the appellant's motor vehicle. At the hearing, he testified that following the accident, he notified the respondent of the accident through the agent. The respondent did not testify, neither did it call any witnesses to controvert this position. The respondent, through a letter dated 12th July 2021, informed the appellant that the accident was not reported to them and that they did not have any records of having insured the appellant's motor vehicle at the time of the accident. The appellant's motor vehicle was involved in an accident on 24th April 2019, during which period, documentary evidence showed that he was insured by the respondent between 10th April 2019 and 14th December 2019
13. In my view, there existed a valid insurance contract between the appellant and the respondent and it ought to have been enforced. In the case of *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd & another* Civil Appeal No. 95 of 1999 (2001) KLR the court clearly clarified the consensus theory of contract on the need for a meeting of minds that:

“a Court of Law cannot rewrite a contract between the parties once ascertained that the intention was to enter into a valid contract. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”
14. The law provides that the insurer is under an obligation to settle a claim regardless of the fact that it has a right to avoid the same (even if it has already avoided). Section 10(1) of the *Insurance (Motor Vehicle Third Party Risks) Act* provides thus:

“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.”



15. When faced with similar circumstances, the court in the case of *James Akhathioli Ambundo v Lion of Kenya Insurance Co Limited* [2021] eKLR allowed the appeal on the strength of this provision of the law. The appellant stated that he incurred auctioneer's charges and legal fees in his quest to have the judgment of the third-party claim set aside. There is documentary proof through receipts.
16. Therefore, I find that the appeal has merit and it is hereby allowed with orders as follows:
- a. The judgment of the trial court is hereby set aside;
 - b. A declaration is hereby issued, that the respondent is in breach of the insurance policy with the appellant and is under a statutory obligation to settle the entire decretal amount, subsequent execution expenses incurred in settling the claim in Runyenjes Civil Case Number 109 of 2019 and the incidental expenses all totaling to Kshs.843,000/-.
 - c. Each Party to bear its own costs of the appeal.
17. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 31ST DAY OF JULY, 2024.

L. NJUGUNA

JUDGE

..... for the Appellant

..... for the Respondent

