



**Nyaga v Sanlam General Insurance Limited (Civil Appeal
E013 of 2023) [2024] KEHC 9649 (KLR) (30 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9649 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E013 OF 2023
LM NJUGUNA, J
JULY 30, 2024**

BETWEEN

DAVID NYAGA APPELLANT

AND

SANLAM GENERAL INSURANCE LIMITED RESPONDENT

*(Appeal arising from the decision of Hon. H. Nyakweba in
Embu CMCC No.138 of 2019 delivered on 23rd January 2023)*

JUDGMENT

1. The appellant has filed a memorandum of appeal dated 30th March 2023 challenging the decision of the trial court and seeking the following orders:
 - a. That the appeal be allowed;
 - b. That the lower court judgment dismissing the suit be set aside and the appellant's claim be allowed with costs; and
 - c. Costs of the appeal be awarded to the appellant.
2. The appeal is premised on the grounds that:
 1. The learned trial magistrate erred in law and fact by dismissing the appellant's case while there was no defense to the same;
 2. The learned trial magistrate erred in law and fact by failing to appreciate that the respondent had admitted the existence of the insurance policy with the appellant;



3. The learned trial magistrate erred in law and fact by placing excess emphasis on production of the policy document while insurance policy produced indicates that it was a “3rd party policy” which covers third parties injured by the insured motor vehicle;
 4. The learned trial magistrate misdirected himself by purporting to tender defense for the respondent who had not questioned the existence of the policy document in their defense;
 5. The learned trial magistrate erred in law and fact by raising the standard of proof in civil cases to almost that of criminal cases; and
 6. The learned trial magistrate misdirected himself by dismissing the appellant’s case exposing him to payment of a claim which now stands at over two million shillings.
3. The appellant sued the respondent through a plaint dated 31st July 2019 seeking a declaration that the respondent is under statutory duty to pay the decretal amount in Embu CMCC No. 6 of 2013 and in default, execution be issued against it. According to the plaint, on or about 31st January 2010, the appellant was driving motor vehicle registration number KXG 307, Toyota Station Wagon, which is insured by the respondent when the said motor vehicle was involved in a road traffic accident in which one Samuel Kithinji (the interested party in the suit) was injured and he sustained bodily injuries. The appellant stated that the accident was not his fault since it occurred due to factors beyond his control. The appellant stated that following the accident, he promptly informed the respondent about the accident and the outcome of Embu CMCC No. 6 of 2013.
 4. In its defense, the respondent stated that indeed the appellants motor vehicle was insured under policy number 011/070/1/092480/2007/07 and the policy document required that in the event of an accident, the insured was to inform the respondent as soon as possible. That the respondent received summons to enter appearance in relation to a road traffic accident case involving the appellant’s motor vehicle 9 years after the incident. That the appellant neglected his contractual duty to notify the insurer as soon as the accident occurred, therefore, the appellant was not liable for the settlement.
 5. The respondent claimed that the appellant was negligent with regards to the case against the third party while the appellant raised the issue of breach of contract against the respondent. The respondent also counterclaimed for a declaration that it is entitled to avoid the insurance policy on the ground of breach and that it is not liable to make any payments to the interested party based on the insurance policy. The respondent also claimed damages for breach of contract and costs. The appellant filed a reply to defence reiterating the facts deposed in the plaint and denying those alleged in the defence.
 6. At the hearing, PW1, the appellant, reiterated his evidence as stated in his statement. He stated that in Embu CMCC No. 6 of 2013, judgment was entered against him in the sum of Kshs.608,200/= which was to be paid by the respondent. That after the accident, he notified the insurer of the same but he did not have any evidence to that effect. That he relayed the information through an insurance agent who later closed shop. That he engaged the services of his advocate after the decree in Embu CMCC No. 6 of 2013. The respondent closed its case and did not call any witnesses.
 7. In its judgment, the trial court held that the policy document adduced as evidence in support of the fact that the appellant’s motor vehicle was insured by the respondent, was not complete, thus it is not a valid policy. That the respondent cannot be compelled to settle the decretal sum in Embu CMCC No. 6 of 2013.
 8. The appeal was canvassed by way of written submissions.



9. The appellant submitted that the respondent confirmed through its pleadings that it was the appellant's motor vehicle insurer and it provided the policy number. He urged the court to re-examine the evidence adduced in the trial court as was stated in the cases of *Gitobu Imanyara & 2 others v. Attorney General* (2016) eKLR and *Mursal & Another v. Manese* (suing as legal administrator of Daphine Kanini Manesa) (2022) KEHC 282 KLR. He further relied on the cases of *APA Insurance Co. Ltd v. George Masele* (2014) eKLR, *Joel Muna opija v. East African Sea Food Ltd* (2013) eKLR and *Kenya Alliance Insurance Co. Ltd v. Thomas Ochieng Apopa* (2020) eKLR for his argument that his motor vehicle details were captured in the insurance policy document as proof that it was insured by the respondent.
10. He relied on section 10(1&2) of the *Insurance Act* which places an obligation on the insurer to settle a claim following judgment in favour of the beneficiary. This provision was reiterated by the court in the cases of *Joseph Mwangi Gitundu v. Gateway Insurance Co. Ltd* (2015) eKLR, *Billiah Matiangi v. Kisii Bottlers Limited & Another* (2021) eKLR, *Muthui v. Directline Insurance Company Ltd & 2 others* (2022) KEHC 392 KLR and *John Njogu v. Invesco Assurance Co. Ltd*; *Joseph Ouma Nyachoko (Interested Party)* (2022) eKLR. He urged the court to allow the appeal.
11. In its submissions, the respondent relied on section 7(1) of the Insurance (Motor Vehicle Third Party Risks) Act and the case of *Richard Makau Ngumbi & Another v. Canon Assurance Company Limited* (2016) eKLR and argued that for it to be liable for the settlement, there has to be a valid insurance policy. That in this case, the policy referred to is not valid and so it urged the court to dismiss the appeal.
12. From the foregoing, the issues for determination are:
 - a. whether the respondent was the appellant's motor vehicle insurer; and
 - b. whether the respondent should pay the decretal sum awarded to the interested party in *Embu CMCC No. 6 of 2013*.
13. 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.”
14. From an examination of the plaint, the amended statement of defence and counterclaim, the reply to defence and the witness statements, it is evidence that there was a contractual relationship between the appellant and the respondent. The contract is in the nature of an insurance policy. The respondent sought to avoid the contract citing breach by the appellant by failing to notify it of the accident promptly. On the other hand, the appellant sought to enforce the contract such that the respondent is compelled to pay the 3rd party who was injured as a result of the accident involving the insured motor vehicle.
15. As part of the documentary evidence, the appellant produced the certificate of insurance which indicates the policy number 011/070/1/092480/2007/07 valid for the period 19th October 2009 to 18th October 2010. The accident occurred during the validity of the policy of insurance. He also produced police abstract which captures the details of the accident. The respondent, in its defence did not deny the fact that it had insured the appellant's motor vehicle. In fact, it indicated the policy number and acknowledged the contractual relationship between them. The respondent produced a copy of the



insurance contract which was not signed. It is on this basis that the trial court found that the same was invalid.

16. In my view, it is important that the parties to a contract both have the intention to enter into it on the terms provided. In this case, none of the parties deny that there is an insurance contract between them. 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.”

17. In the policy document, there is a clause on conditions to the effect, inter alia, that the appellant will inform the respondent of any incident as soon as reasonably possible but not later than 12 hours from the happening. The appellant testified that he informed his insurance agent about the accident but he did not do so in writing. The respondent based his counterclaim on the fact that the appellant failed to prove that he informed it of the accident and it has a right to avoid the contract.

18. Whilst the respondent has a right to avoid the contract as it has argued, there is a limitation regarding the application of the conditions set within an insurance contract. The courts have held that the conditions are not to be such that they deny the claimant the very thing he paid for, that is insurance. In the case of *Watson Stipack Fire Marine Insurance Co. v House* 315, 328, 352 [1989] quoting the case of *Cooper v Government Employees Insurance Ltd* [1968] NJ 237, 873 – 874 the court observed thus:

“Although the policy may speak of the notice provisions in terms of condition precedent, nonetheless what is involved is a forfeiture for the carrier seeks, no occurrence of a breach of that provision, to deny the insured the very thing paid for. Thus viewed, it becomes unreasonable to read the provision unrealistically or to find that the carrier may forfeit the coverage, even though there is not likelihood that it was prejudiced by the breach.”

19. In the book *Warranties in Marine Insurance Ltd* in UK Cavendish Publishing Ltd pg 2, conditions are defined as:

“A condition in an insurance policy is a term which would entitle an insurance company to claim damages in the event of a breach but not to disclaim liability under the policy where a term in a policy is a condition or condition precedent is a matter of contraction. The mere fact that an insurer has labeled a term as a condition precedent does not turn that term as a condition precedent unless the context in which the term appears is capable of making the term a condition or precedent.”

20. Moreover, the law provided 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.”

21. When faced with similar circumstances, the court in the case of *James Akhatioli Ambundo v Lion of Kenya Insurance Co Limited* [2021] eKLR allowed the appeal on the strength of this provision of the law. From the foregoing arguments and in determination of both issues herein, I hold the view that the respondent is bound to settle the insurance claim in Embu CMCC No. 6 of 2013.
22. Therefore, the appeal has merit and it is hereby allowed as prayed.
23. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 30TH DAY OF JULY, 2024.

L. NJUGUNA

JUDGE

