



Vision in Christ Church (Suing through its representatives Kahindu Njanguu (Chairman), David Kairu Kinuthia, (Secretary) & Samuel Kamau Thagana (Treasurer)) v Kenya Alliance Insurance Co Ltd (Civil Appeal E517 of 2023) [2024] KEHC 9983 (KLR) (Civ) (30 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9983 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E517 OF 2023

S MBUNGI, J

JULY 30, 2024

BETWEEN

**VISION IN CHRIST CHURCH APPELLANT
SUING THROUGH ITS REPRESENTATIVES KAHINDU NJANGUU
(CHAIRMAN), DAVID KAIRU KINUTHIA, (SECRETARY) & SAMUEL
KAMAU THAGANA (TREASURER)**

AND

THE KENYA ALLIANCE INSURANCE CO LTD RESPONDENT

JUDGMENT

1. The Appeal arises from the appellants suit in Milimani Commercial Courts Civil Suit No E4028 of 2020. The trial Court suit was a Declaratory Suit against the respondent, in which the appellant sought to have the respondent reimburse it for the amounts incurred in settling a series of accident claims that arose from an accident that occurred along Njabini Engineer Road on 25th November 2024, involving the appellant's motor vehicle kae 134X and kay 311A. The Appellants motor vehicle had been insured by the respondent. As a result of the accident the appellant was sued in;
 1. Spmcc No 123 of 2017 judgment was entered against the appellant in the sum of Kshs.835,000/- together with the costs of the suit and interest at court rate.
 2. Spmcc No 124 of 2017 judgment was entered against the appellant in the sum of Kshs.1,135,000/- together with the costs of the suit and interests at court rate.
 3. Spmcc No 125 of 2017 judgment was entered against the appellant herein in the sum of Kshs.835,000/- together with cost of the suit and interest at court rate.



4. Spmcc No 126 of 2017 judgment was entered against the appellant herein in the sum of Kshs.1,145,000/- together with costs and interest at court rate.
2. The total decretal sum against the appellant was Kshs.3,950,000/- exclusive of legal fees, cost of the suit and interest on the judgment sum and cost of the suit.
3. After the respondent failed to pay, he filed a declaratory suit in Milimani Commercial Courts Civil Suit No E4028 of 2020, praying for the following reliefs:
 1. An order directing and compelling the defendant to effect payment of Kshs.5,960,000.00, being the decretal sum together with related costs incurred by the plaintiff with interest thereon at court rates from 23rd January 2019 till payment in full.
 2. Costs of this suit and interest thereon from the date of judgment until payment in full
 3. Any other reliefs that the honorable court may deem fit.
4. The trial court dismissed the appellants suit saying, “The proposal and policy indicate the motor vehicle was insured to the tune of five passengers including the driver. From the evidence it appears apparent that at the time of the accident, the motor vehicle was carrying more than five passengers, six of which were fatally injured and there were three minors. The foregoing tilts the liability. I find that the plaintiff did not exhibit his case on a balance of probability. I am unable to find in favor of the plaintiff for having contravened express provisions of the policy.”
5. The Appellant filed the memorandum of appeal dated 19th June 2023 and the record of appeal dated 10th February 2024. The appellant being dissatisfied with the judgment of Hon.l.m. Njora delivered on 19th May 2023 in Milimani Commercial following orders:
 1. That the appeal be and is hereby allowed
 2. That the entire judgment and/or Decree of the Honorable Lucy Nora (spm) delivered at Nairobi on 19th of May,2023 in Nairobi Chief Magistrate’s Court, in Milimani Commercial Courts Civil Suit No E4028 of 2020 be wholly set aside, and the Appellants suit contained in the plaint dated 22nd July 2022 be allowed with costs to the Appellants.
 3. That the costs of this appeal be awarded to the Appellants.

The Appeal was premised on the following grounds:

1. That the learned trial magistrate erred in law and in fact by failing to appreciate the fact that the respondent’s defence to the effect that it was entitled to avoid the insurance policy amounted to a declaratory/disclaimer suit under section 10(4) of the *Insurance (Motor vehicle Third Party Risk) Act*, Cap 405 of the Laws of Kenya, which disclaimer suit was statute barred having been filed after the prescribed three month period, hence the trial court had no jurisdiction to entertain the said respondent’s defence as it was time barred.
2. That the learned trial magistrate erred in law and in fact, and completely misapprehended and/or disregarded Section 10 (4) of the *Insurance (Motor Vehicle Third Party Risk) Act* by finding that the respondent was entitled to avoid the insurance policy on account of an alleged breach of the contract by the Appellant, well after the statutorily prescribed period of three (3) months.



3. That the learned magistrate erred in law and in fact by failing to appreciate the fact that the liability of the respondent as an insurer to satisfy the judgment under Section 10 (4) of the *Insurance (Motor Vehicle Third Party Risk) Act* is only excluded if, not only had it commenced an action within the time scale prescribed thereunder, but also if it had obtained a declaration that it is entitled to avoid its ability under the insurance policy.
 4. The learned trial Magistrate generally misdirected herself, misconstrued and misapprehended the provisions of Section 10 (4) of the *Insurance (Motor Vehicle Third Party Risk) Act*, thereby arriving at an erroneous decision.
6. At the time of writing this judgment the respondents had not filed any submissions but the appellant filed.
7. I have looked at the Appellants submissions and the appellant isolated three issues for determination, and on each submitted as follows:
 - i. Whether the Appellant complied with Clause 9 of the insurance policy and whether the trial court had the jurisdiction to hear and determine the suit;

On this the appellant submitted that the court had jurisdiction to hear and determine the suit for the respondent filed a defence and participated in the proceedings. Therefore, the respondent cannot say the court had no jurisdiction. He cited the case of *Nanchang Foreign Engineering Company (K) Limited Versus Easy Properties Kenya Limited* (2014) eKLR. I have read the authority.
8. The Appellant also submitted that the respondent cannot hide behind the arbitration clause in the policy document to circumvent a clear statutory provision. (requirement). That is Sec 10 Cap 405 Laws of Kenya. To support this, he cited the case of *Mt. Kenya University Versus Step Up Holding(K)Limited* 2018 eKLR. I have read the authority.
9. I have looked at the policy document, Clause (9) nine titled disputes between you and us

‘If any dispute arises between you and us on any matter relating to this policy, such dispute will be referred to
 - a. A single mediator to be agreed between you and us within 30 days of the dispute arising and the mediation will be finalized not later than (30) days thereafter, or
 - b. A single arbitrator agreed between us, to be appointed within 30 days if the dispute arising, if we cannot agree either party will refer the dispute to the Chairman of Chartered Institute of arbitrators (Kenya Branch) whose decision will be binding on you and us. The arbitral award will be final. If the dispute is not referred to arbitration process within (12) months we will assume you have abandoned the claim.
10. The Appellants submitted that there was no dispute worthy referring to arbitration for when judgments were entered against the appellant on 23rd January 2019, the respondent was liable to indemnify the appellant for the respondent had not filed a declaratory/disclaimer suit against the appellant or the decree holders to avoid the insurance policy.



11. Under Section 10 of *CAP 4*, Laws of Kenya, the respondent was statutorily obligated to settle the decretal amounts, therefore there was no need to invoke Clause 9 of the insurance Policy for want of a dispute. The court was properly sized of the matter.

Determination

12. I will agree with the Appellant's counsel that there was no dispute which could be referred to mediation or arbitration as per Clause 9 of the Policy document, for the respondent was obligated by law to settle any claim instituted against the Appellant by a third party. Therefore, the appellant was entitled to be indemnified as of a right by the respondent. The respondent could only escape from this obligation if it invoked the defences provided by Section 10(4) *CAP 405*, Laws of Kenya.
13. A covenant or an agreement between parties in an agreement is inferior to clear provisions of a statute. Therefore the respondent's assertion that the policy of insurance cover had a clause exempting it from liability in case the motor vehicle got involved in an accident carrying excess passengers than it is authorized to carry it is immaterial.
14. Section 10(1) of *CAP 405*, Laws of Kenya provides;
- (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.
 - (2) No sum shall be payable by an insurer under the foregoing provisions of this section—
 - (a) in respect of any judgment, unless before or within thirty days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings; or
 - (b) in respect of any judgment, so long as execution thereon is stayed pending an appeal; or
 - (c) in connection with any liability if, before the happening of the event which was the cause of the death or bodily injury giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provision contained therein, and either—
 - (i) before the happening of the event the certificate was surrendered to the insurer, or the person to whom the certificate was issued made a statutory declaration stating that the certificate had been lost or destroyed; or
 - (ii) after the happening of the event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer, or the person to whom the certificate was issued made such a statutory declaration as aforesaid; or
 - (iii) either before or after the happening of the event, but within a period of twenty-eight days from the taking effect of the cancellation of the policy, the insurer has notified the Registrar of Motor Vehicles and the Commissioner of Police in writing of the failure to surrender the certificate.



- (4) No sum shall be payable by an insurer under the foregoing provisions of this section if in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision 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:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment 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 or 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 thereto.

From the above the insurer is exempted from satisfying the decree obtained against the insured if the insurer is able to come within those exemptions. I have read the respondents defence in the lower court, it did not plead such.

In the case of *Gerald Njuguna Mwaura Versus Africa Merchant Assurance Co. Limited* (2020) Eklr Justice E.C Mwita had this to say, ‘I have considered this appeal and the nature of the case before the trial court. the appellant had a decree in his favor issued by a court of competent jurisdiction, he filed a declaratory suit under Section 10(1) of the *Insurance (Motor vehicle Third Party Risks) Act* to enforce that judgment. so the issue before the trial court was not about the liability but rather whether the respondent was bound to settle the decree.’”

Lady Justice Wilfrida Okwany in the case of *ICEA Lion General Insurance Co Ltd V Board of Governors Rioma Mixed Secondary School & 24 Others* (2016) Eklr

‘...the defendant who is the owner of the suit motor vehicle had taken out a valid policy of insurance in compliance with the Act and in order to indemnify it in respect of liability to the third parties who may suffer any loss or injury resulting from an accident involving the suit motor vehicle. in my humble view Section 5b of the Act covered the defendants the owners of the suit as the owners of the suit motor vehicle, from any liability or claims by third parties arising from the use of the said motor vehicle on the road.

Under Section 8 of the Act the clause in the policy limiting the number of passengers to 51, is in my thinking immaterial. Section 4(1) of the Act provides that a person may not use or cause or permit a motor vehicle to be used on the road unless there is a policy in force covering the use of such a motor vehicle.

In this case the use of the suit motor vehicle was covered by a valid policy and the fact that the suit motor vehicle may have been overloaded at the time of the accident does not exempt the plaintiffs liability. to my mind Section 4 of the Act merely stipulates that a policy in compliance with the requirements of the Act must be in force. It is the user of the vehicle and not its current capacity that is required to be covered by a policy of insurance...”

Further in the case of *Joseph Mwangi Gitundu Vs Gateway Insurance Co Ltd* (2015) eKLR Gikonyoi J. had this to say in a similar issue, ‘...therefore under Section 10(1) of CAP 405 Laws of Kenya, the insurer has statutory obligation to pay the persons entitled to the benefit of the judgment..... The obligation is a statutory and a strict one it cannot be shifted or abrogated by a term in the contract of insurance.....”



The respondent's case is that he is not liable to satisfy the judgments entered against it's insured (Appellant) because the motor vehicle was carrying (9)passengers at the time of the accident thus four(4) passengers in excess. While the policy only covered five passengers inclusive of the driver.

whether the defendant is entitled to avoid the insurance policy for breach of contract.

15. The respondent cannot purport to avoid the policy at the time the declaratory suit was filed in view of clear provisions of Section 10(4) CAP 405.the provisions which I have reproduced elsewhere in this judgment.

Whether the respondent is liable and is statutorily obligated to satisfy the decretal sums, legal fees and attendant costs in civil cases spmcc 124,125, and 126 of 2017 as ordered by the principal magistrate's court at engineer.

16. Elsewhere in this judgment I have already found that by dint of Section 10(1) CAP 405 Laws of Kenya, the respondent is obligated to satisfy the judgments for there was a valid insurance cover in force at the time the accident occurred and the respondent had not avoided the policy by filing a declaratory/ disclaimer suit under Section 10(4) CAP 405, Laws of Kenya.

17. However pursuant to the provision of section 5(b) of CAP 405, the respondent is not obligated to satisfy the judgment entered against the appellant in respect of compensation of the death of the driver of the motor vehicle. The appellant confirmed that he was an employee. The law does not require the respondent to have filed the declaratory/disclaimer suit.to avoid liability in respect of the driver who was its employee.

Conclusion

18. The upshot of the above is that I find the appeal succeeds partially, the lower courts judgments is set aside for the trial magistrate did not address herself to the relevant provisions of the Insurance (Motor vehicle Third Party Risks) Act. Judgment entered in favor of the Appellant as prayed in the plaint in the lower court save that the respondent will not satisfy the judgment entered against the appellant in respect of the driver for he was its employee. The driver's claim lies under workman Compensation Act.

The appellant shall have 70% of the costs both at the lower court and of this appeal.

DATED, SIGNED AND DELIVERED THIS 30TH DAY OF JULY, 2024 AT KAKAMEGA HIGH COURT

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HON JUSTICE S. MBUNGI
JUDGE OF THE HIGH COURT

