Directline Assurance Company Limited v Mwangi (Civil Appeal E063 of 2023) [2024] KEHC 9887 (KLR) (29 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9887 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E063 OF 2023

DKN MAGARE, J

JULY 29, 2024

BETWEEN

DIRECTLINE ASSURANCE COMPANY LIMITED .... APPELLANT

AND

SAMUEL KAHURI MWANGI .... RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment and decree of N.W. Wanja, Resident Magistrate delivered on 31/8/2023 in Othaya PMCC No. E022 of 2022.
2. The Appellant was the defendant in the declaratory suit. The Memorandum of Appeal dated 25/9/2023 is based on the following grounds:
    a. The leaned magistrate erred in disregarding section 5(b) of the Insurance (Motor vehicle Third Party Risks) Act.
    b. The learned magistrate erred in ignoring Section 10(1) of the Insurance (Motor vehicle Third Party Risks) Act.
    c. The learned magistrate erred in failing to consider the submissions of the Appellant.
    d. The learned magistrate erred in misapprehending the doctrine of privity of contract.
    e. The learned magistrate erred in awarding costs and interest.

Pleadings

3. In the claim dated 6/9/2022, the Plaintiff sought a declaration that the Appellant is bound to indemnify the Respondent in the sum of Kshs. 459,100/=, costs and interest being the decretal sum in Othaya PMCC No. 16 of 2020.

4. The suit arose from judgment in the primary suit which was stated to have arisen from a road accident that occurred on 13/8/2017 while the Respondent was driving his motor vehicle registration No. KCC 698B along Muranga – Kiriaini road when Appellant's insured motor vehicle registration number KAS 452L was so negligently driven that it collided with the Respondent's motor vehicle causing it extensive damage.

5. The Appellant consequently filed the primary suit in Othaya PMCC No. 16 of 2020 in which judgment was entered for the Plaintiff at Kshs. 459,100/= plus costs and interest.

6. The Appellant filed a defence to the suit denying the averments in the plaint. The Appellant was categorical in its defence that the statutory notice was not applicable to the suit as the declaratory suit was outside the purview of Section 10(1) of the Insurance (Motor vehicle Third Party Risks) Act

Evidence

7. The Respondent testified as the plaintiff, PW1. He relied on his witness statement and bundle of documents dated 6/9/2022 as well as list of documents of the same date and further list of documents dated 18/1/2023 which he produced in evidence.

8. It was his stated case on cross examination that the statutory notice had no stamp of the Respondent. That the police abstract showed that Vincent Kamau Njuguna was the insured and as such he sued him. Further, that he had never heard of Teresia Njeri Nuguna.

9. On the part of the Respondent, they called DW1 one Kevin Ngure, the claims manager. He relied on his witness statement and documents dated 30/1/2023. It was his testimony that they were not served with a statutory notice but only received a demand notice. That the policy was repudiated after the insurance breached the terms of the policy. Further, he stated that there was no law that allowed declaratory suit in material damages claim.

Submissions

10. The Appellant submitted that there was no valid insurance cover between the Appellant and the plaintiff in the primary suit as the policy had been repudiated. They relied on Section 10(1) of the Insurance (Motor Third Party Risks) Act, Cap 405, as follows: -

> 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.

11. Further, that the liability was not covered under Section 5 of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 which stipulates as follows: -

    5. Requirements in respect of insurance policies

    In order to comply with the requirements of Section 4, the policy of insurance must be a policy which –

(a) Is issued by a company which is required under the *Insurance Act*, 1984 (Cap 487) to carry on motor vehicle insurance business; and

(b) Insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road:

Provided that a policy in terms of this section shall not be required to cover –

i) Liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or

ii) Except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arose; or

iii) Any contractual liability.

iv) Liability of any sum in excess of three million shillings, arising out of a claim by one person.

12. They cited authorities to support the Appellant's case including Republic v Commissioner of Insurance & 2 Others ex parte Martin K Ngari (2014) eKLR to support the submission that material damage claims were outside the purview of the (Insurance Motor vehicle Third Party Risks) Act

13. On the part of the Respondent, it was submitted that the impugned Act included claims for material damages and Third-Party injuries.

14. Further, that under Section 2, the Act described the risks to include death or bodily injury and damage to property. I was urged to dismiss the appeal.

Analysis

15. 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, keep at the back of its 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.

16. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

> " ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

17. Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, stated as follows:-

> " .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

18. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

19. In the case of Peters vs Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

20. The issue that falls for this court's determination is therefore whether the learned magistrate erred in allowing the Respondent's suit. The Appellant's case is that the lower court erred in allowing the Respondent's suit when material damages was not covered under the Insurance (Motor vehicle Third Party Risks) Act.

21. The requirements for an insurance policy are set under the law. I will reproduce in extenso the entire provisions of section 5 of the Insurance (Motor Vehicle Third Party Risks) Act CAP 405 which stipulates as follows: -

> " In order to comply with the requirements of Section 4, the policy of insurance must be a policy which –
>
> (a) Is issued by a company which is required under the *Insurance Act*, 1984 (Cap 487) to carry on motor vehicle insurance business; and
>
> (b) Insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road:
>
> Provided that a policy in terms of this section shall not be required to cover –
>
> i) Liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or
>
> ii) Except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons

being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arose; or

iii) Any contractual liability.

iv) Liability of any sum in excess of three million shillings, arising out of a claim by one person

22. On the other hand turning to the provisions of Section 10(1) of the Insurance (Motor Third Party Risks) Act, Cap 405, on the statutory notice, the same provides as follows: -

> " 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."

23. Section 10(2) of the Insurance (Motor Third Party Risks) Act, Cap 405 provides:

> " 10(2). No sum shall be payable by an insurer under the foregoing provisions of the section.
>
> (a) in respect of any judgment, unless before or within 14 days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings....."

24. I understand the import of the above provision of the law to be that for liability to accrue under Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405, there is a 4-fold test to be met. Firstly, that the motor vehicle in question was insured by the Appellant; Secondly, that the Respondent has a judgment in his favour against the insured; Thirdly, that statutory notice was issued to the insurer within 30 days of filing the suit where judgment has been obtained and finally the Respondent was a person covered by the insurance policy.

25. In my view, the purpose of the above provisions and the Insurance (Motor Vehicle Third Party Risks) Act Cap. 405 was to ensure that a third party who suffered injury or loss due to acts or omission on the part of an insured motor vehicle would be assured of compensation for their injury, loss or inconvenience in circumstances where the owner or driver of the insured motor vehicle has no means to settle the claim.

26. This view is supported by Sir Clement De Lestang, J.A. in New Great Insurance Co. of India Ltd – Vs - Lilian Everlyne Cross & Another (1966) EA, 90 at page 104 as doth:

> " Generally speaking the Act seeks to achieve that object (of making provision against third party risks arising out of the use of motor vehicle on the roads) not by placing the whole burden of compensating third parties injured in accidents on the insurers but by combination of two means namely:

1. by making it obligatory, on pain of punishment, for any person who uses or causes or permits any other person to use a motor vehicle on the road, to have in relation to the user of the vehicle a policy of insurance which satisfies the requirements of the Act, and

2. restricting the right of insurers to avoid liability to third parties."

27. It is not in dispute that the policy was an insurance cover. The Appellant however did not prove the fact of how Respondent's claim could be excluded from the application of the Insurance (Motor Vehicle Third Party Risks) Act CAP 405. The Appellant, having issued the accident motor vehicle policy cannot thus turn out to disclaim liability without evidence, on the basis that material damage was not an insurable interest. It is an evasive defence that cannot repudiate the policy under statute. Lord Denning in Escoigne Properties Ltd – Vs - I.R. Commissioners (15) [1958] A.C at 565 stated that,

> " A statute is not named in a vacuum, but in a framework of circumstances, so as to give a remedy for a known state of affairs. To arrive at its true meaning, you should know the circumstances with reference to which the words were used, and what was the object, appearing from those circumstances, which parliament had in view."

28. On my perusal of the record of appeal, I note that that Respondent did what he was supposed to do. He proved that there was a comprehensive policy that covered material damage and that a third party's motor vehicle was damaged in an accident in which the Appellant was the insurer of the tortfeasor.

29. In the case of Pius Kimaiyo Langat v the Kenya Commercial Bank of Kenya Ltd [2017] eKLR the Court of Appeal restated its decision in William Muthee Muthami v Bank of Baroda [2014] eKLR to the effect that:

> " In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the in breach."

30. On the other hand, the Appellant had the duty to show by way of evidence that the matters alleged were matters not covered under the policy. This is because the policy as produced supported the Respondent's case. The initial burden of proof lies on the Plaintiffs, but the same may shift to the Defendant, depending on the circumstances of the case. On the prove of the allegations of breach of contract in Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR the Court of Appeal stated thus:

> " When a party in any pleading denied an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum, or any part thereof, or else set out how much he received. And so, when a matter of fact is alleged with divers circumstances, it shall not be sufficient to deny it as alleged along those circumstances, but fair and substantial answer must be given."...
>
> ...First of all a mere denial is not a sufficient defence in this type of case there must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given."

31. The evidential burden of proof is captured in Sections 109 and 112 of the same Act as follows:

> " 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

32. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 as follows: -

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

33. In Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR, the judges of appeal held that:

> " Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -
>
> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."

34. I therefore find and hold that the Appellant did not provide evidence that could rebut the Respondent's overwhelming evidence that the policy insured material damage. There was no basis to exclude material damage. I am also fortified by the reasoning of this court in Jubilee Insurance Co Ltd v Walter Tondo Soita (2021)e KLR faced with similar circumstances as follows:

    If the Appellant wanted the Court to believe that material damage is not covered by the policy, it was duty bound to adduce evidence for the court to find in its favour.

35. Based on the foregoing, I find no reason to interfere with the finding of the lower court. The appeal is accordingly dismissed. As regards costs, section 27 of the *Civil Procedure Act* provides as follows: -

    (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any

action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

36. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh *Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012*; [2014] eKLR, as follows: -

> " (18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

37. The upshot of the foregoing is that I find that the Appellant's appeal lacks merit and is accordingly dismissed with costs of Ksh. 85,000/- payable within 30 days.

Determination

38. In the circumstances, I make the following orders.

a. The appeal lacks merit and is accordingly dismissed with costs of Ksh. 85,000/- payable within 30 days. In default execution do issue.

b. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 29TH DAY OF JULY, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Awino for the Appellant

No appearance for the Respondent

Court Assistant – Jedidah