



REPUBLIC OF KENYA



**Wanjiku v Mogo Auto Limited & another (Civil Appeal E816 of 2023)
[2024] KEHC 13479 (KLR) (Civ) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13479 (KLR)

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

CIVIL

CIVIL APPEAL E816 OF 2023

RC RUTTO, J

OCTOBER 31, 2024

BETWEEN

TRASICIO MAINA WANJIKU APPELLANT

AND

MOGO AUTO LIMITED 1ST RESPONDENT

OCCIDENTAL INSURANCE COMPANY LIMITED 2ND RESPONDENT

*(Being an appeal from the judgment delivered by Hon. C.W Ndumia
(Adjudicator) on 28th July 2023 in Nairobi SCCOMM No. E3734 of 2023)*

JUDGMENT

1. The Appellant, aggrieved by the decision of the adjudicator in SCCOMM NO. E3734 of 2023 that dismissed his claim with costs, lodged this appeal seeking that the judgment delivered on 28th July 2023 be set aside and the claim be allowed with costs.
2. The claim before the Small Claims Court was as follows: The Appellant entered into a financing arrangement with the 1st Respondent for the purchase of a motorcycle, Registration Number KMFx 040F, which was insured by the 2nd Respondent. On 16th January 2023, at around 10:00 p.m., the Appellant was robbed. He immediately informed the 1st Respondent's agent who on the next day, informed him that the motorcycle had been located in Dandora, along with details of its condition. On 21st January 2023, the Appellant retrieved the unrepaired motorcycle from the 1st Respondent's yard and incurred costs amounting to Kshs. 4,800/= to replace the stolen parts.
3. On 15th February 2023 the motorcycle was again stolen, the Appellant reported the matter to Kiamumbi Police Station and contacted the 1st Respondent agents. On the next day, the 1st Respondent's agent informed him that only the trackers had been located, but the motorcycle itself



had not been recovered. The Appellant was then advised to complete an insurance claim form at the 1st Respondent's headquarters to seek compensation for the lost motorcycle. The Appellant stated that he complied, and the 2nd Respondent issued a Discharge Voucher dated 6th March 2023, undertaking to pay the Appellant an amount of Kshs. 90,657/=.

4. The Appellant also stated that he was requested to provide various documents, which were in the possession of the 1st Respondent and were necessary for processing the insurance claim. According to the Appellant, he had fulfilled the obligation of the financing arrangement, having paid a total of Kshs. 136,908/=. However, despite this, he had neither been compensated for his insurance dues amounting to Kshs. 141,708/=. nor had he been provided with a suitable replacement motorcycle. Consequently, the Appellant filed a claim, seeking judgment of Kshs. 141,708/=.
5. The 1st Respondent filed its Response to the Statement of Claim, dated 26th June 2023, denying liability to the Appellant. It contended that the Appellant still owed a total of Kshs. 133,127/= and further stated that the motorcycle was insured to protect the 1st Respondent's financial interest, as it was the financier. Therefore, the 1st Respondent argued that it had paid for the insurance to cover its own interest in the asset, and the Appellant neither paid for the insurance policy nor had any insurable interest in the motorcycle. They also stated that the 2nd respondent acted on the request of the 1st Respondent to comprehensively insure the subject motor cycle at all times.
6. The 2nd Respondent filed its Response to the Statement of Claim, dated 23rd June 2023, denying the claim on the basis that it was not privy to the contract between the Appellant and the 1st Respondent. The 2nd Respondent stated that it had acted at the request of the 1st Respondent by comprehensively insuring the subject motorcycle. It further stated that, during the subsistence of the comprehensive insurance cover, the motorcycle was reported stolen and the 1st Respondent lodged a claim for compensation, leading to the issuance of a discharge voucher for Kshs. 90,657/=.
7. Further, prior to the payment, the 1st Respondent had caused the Appellant to execute a loss/discharge voucher issued on 6th March 2023, effectively discharging the 2nd Respondent from any further claims arising from the theft of the motorcycle.
8. After analyzing the evidence before the court, the learned Adjudicator delivered judgment on 28th July 2023, dismissing the Appellant's claim with costs on grounds that the Appellant had not taken out the insurance policy on the motorcycle and had failed to prove that he had paid any premiums to the 2nd Respondent. That the Appellant had not taken out any risk and was not privy to the said policy. As such, he had not proven his case on a balance of probabilities. The Adjudicator also noted that the Appellant averred paying Kshs. 136,908/- but this was towards paying the asset finance loan and not the policy.
9. The Appellant being aggrieved with the entire judgment, lodged this appeal on 18th August, 2023 setting out the following grounds of appeal:
 1. The Learned Magistrate erred in law in finding that the Appellant was not the insured.
 2. The Learned Magistrate erred in law in failing to holistically analyse the evidence on record and in particular Loss/Discharge Voucher dated 6th March 2023 which on the face of it shows the Appellant was the insured.
 3. That the Learned Magistrate erred in law in failing to consider that a valid contract to settle the Appellant's claim under the insurance policy was created by dint of the 2nd Respondent sending a Discharge Voucher and its subsequent execution by the Appellant.



4. That the Learned Magistrate erred in law in failing to contextualize the damage suffered by the Appellant.
 5. That the Learned Magistrate erred in law in failing to hold that the 1st respondent unjustly enriched themselves at the expense of the Appellant.
10. This appeal was canvassed by way of written submissions. The Appellant filed their submissions dated 5th June 2024, while the 2nd Respondent filed its submissions on 3rd July 2024, opposing the appeal. However, at the time of preparing this judgment, the 1st Respondent's submissions were not on the court record.

Appellant's Submissions

11. Despite raising five grounds of appeal, the Appellant condensed them into four issues, namely: (1) whether a valid contract to settle the Appellant's claim under an insurance claim was created by dint of the 2nd Respondent sending a discharge voucher and its subsequent execution by the Appellant, (2) whether the 1st Respondent unjustly enriched itself (3) what consequential declarations, orders and reliefs should his Honourable court grant and (4) who should bear the costs of the suit.
12. On the first issue, the Appellant submitted that the subject motorcycle was insured in his name, as evidenced by the insurance documents, including the discharge voucher and the loss/discharge voucher, both dated 6th March 2023. He contended that the 2nd Respondent sent the loss/discharge voucher to him for the purpose of settling his claim under the policy, which he executed in the presence of one Benjamin Kilonzo. In support of his argument, the Appellant relies on the case of *Lochab Transport Limited v. Kenya Arab Orient Insurance Limited* [1986] eKLR, asserting that the dispatch of the discharge voucher constituted an offer, and his subsequent execution of the voucher amounted to acceptance. He further cited the cases of *Trinity Prime Investment Limited v. Lion of Kenya Insurance Company* [2015] eKLR, *Coastal Bottlers Limited v. Kimathi Mithika* [2018] eKLR, and *Saimon Ntasikoi Nonkanas v. Resolution Insurance Limited* [2021] eKLR. The Appellant submitted that there is no evidence challenging the existence or validity of the discharge voucher and, therefore, invites the court to give effect to it.
13. On the second issue, the Appellant relied on the case of *Macharia Mwangi Maina & 87 Others v. Davidson Mwangi Kagiri* [2014] eKLR to submit that the 1st Respondent was unjustly enriching itself by retaining the insurance compensation without providing a suitable and viable replacement for the subject motorcycle. The Appellant argued that this is unconscionable. He further contended that the 1st Respondent was obligated to provide tracking services in the event of theft, which it failed to do. Consequently, that it is unjust and against the principles of equity for the 1st Respondent to benefit from its own wrongdoing.
14. On the third issue, the Appellant asserted that the loss of the motorcycle has severely impacted his ability to provide for his family. Regarding the fourth issue, it was submitted that if the court orders him to pay any costs, he would be unable to settle them, as he currently has no source of income following the theft of the motorcycle and is sustaining his family with financial assistance from well-wishers. In conclusion, he urged the court to allow the appeal with costs.

2nd Respondent's Submissions

15. The 2nd Respondent in rebutting the issues raised by the Appellant submitted on two issues that is; (1) whether the 2nd Respondent is liable to settle the Appellant's claim and (2) whether the 2nd



Respondent discharged its duty under the terms of the insurance contract under policy number COMP/MCB/549810/07.

16. On the first issue, the 2nd Respondent submitted that the court should reconsider the evidence, evaluate it, and draw its own conclusions, as outlined in the case of *Selle & Another v. Associated Motor Boat Co. Ltd & Others* [1968] EA 123. The 2nd Respondent argued that the Appellant has not demonstrated that the trial court failed to take into account and consider relevant factors, or was plainly wrong in its decision. They contended that its obligation to settle the Appellant's claim, by virtue of the discharge voucher, arises from the insurance contract under policy number COMP/MCB/549810/07 between the 1st Respondent and the 2nd Respondent. It relies on the case of *AIG Insurance Company Limited v. Bernard Kiprotich Kirui* [2022] eKLR, among others, to argue that the burden of proving the existence of an insurance contract lies with the Appellant, who did not discharge that burden.
17. The 2nd Respondent submitted that the negotiations leading to the issuance of the insurance cover for the subject motorcycle were solely between the 1st and 2nd Respondent. Upon receiving the requisite premiums from the 1st Respondent, the 2nd Respondent comprehensively insured the motorcycle under policy number COMP/MCB/549810/07.
18. On the issue of whether the 2nd Respondent discharged its duty under the terms of the insurance contract, the 2nd Respondent submitted that it fully met its obligations in relation to the claim arising from the theft of the motorcycle. This is evidenced by the letter dated 1st January 2023, the copy of the logbook, the credit note advice dated 26th April 2023, and the claim payment approval sheet. The 2nd Respondent reiterated that the Appellant's claim is centred on the enforcement of the financial agreement between the Appellant and the 1st Respondent, to which the 2nd Respondent was not a party. It further submitted that the purpose of an insurance contract is to operate on the principle of indemnity. In support of this, the 2nd Respondent relied on the case of *Madison Insurance Company Ltd v. Solomon Kinara t/a Kisii Physiotherapy Clinic* [2004] eKLR. In conclusion, it urged the court to dismiss the appeal with costs to it.

Analysis and Determination

19. This court has considered the grounds of appeal, the proceedings of the lower court, and the submissions filed by the Appellant and the 2nd Respondent. It is noted that as at the writing of this judgment, the 1st Respondent submissions were not on the court record. To begin with, the duty of this court as the appellate court squarely falls under Section 38 of the *Small Claims Court Act* which restricts the jurisdiction of the High Court on appeals from the Small Claims Court to matters of law only. Thus the 2nd Respondent's assertion that this court reconsider the evidence, evaluate it, and draw its own conclusions is untenable.
20. What constitutes, points of law, has been settled. In the case of *Peter Gichuki King'ara Vs IEBC & 2 Others*, Nyeri Civil Appeal No. 31 Of 2013, (Court of Appeal) (Visram, Koome & Odek, JJA) of 13.02.2014, the Court of Appeal stated as follows:

“ [I]t is trite law that the exercise of judicial discretion is a point of law and that the trial court in denying a prayer of scrutiny is exercising judicial discretion. The Court concluded that it would not be feasible for the Court of Appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court. The court further held that the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence – with the caveat that the appeal court did not see the witness demeanor – is an issue of law.”



21. Flowing from above the legal issue arising for determination is whether the Appellant had an insurable interest and if so, the extent thereof. The undisputed facts of the case are that the Appellant signed a financing agreement for the purchase of motor cycle KMFx 040F with the 1st Respondent. That the motor cycle was stolen and the Appellant reported to the 1st Respondent, who was only able to trace the motor cycle trackers and not the motor cycle. The 1st Respondent advised the Appellant to fill in the insurance claim forms for compensation of the motor cycle. An insurance contract existed which led to the 2nd Respondent indemnifying the 1st Respondent through discharge voucher dated 6th March, 2023. Thus, in order to address the issue before this court it is important to first address the question whether the Appellant had an insurable interest in the motor cycle.
22. From the record, the Appellant states that he paid a total of Kshs. 136,908/= to the 1st Respondent, but seeks a compensation of Kshs 141,708/= as insurance dues or in the alternative replacement of the motor cycle. Further, he claims having paid Kshs. 15,000/- on 6th January 2022 to the 1st respondent for tracking and insurance services to be offered by the 2nd respondent. As such, he claims the insurable interest since he was insured as evident in all the insurance documents including the discharge voucher dated 6th March 2023.
23. On the other hand, the 1st Respondent averred that the Appellant did not opt for the insurance premium financing consequently, it insured the said financed asset against risk by making a bulk payment being premiums to the 2nd Respondent. While the 2nd respondent averred that it acted at the instructions of the 1st Respondent who facilitated the procurement of the insurance cover for the subject motor cycle under policy no. COMP/MCB/549810/07 and later, through discharge voucher dated 6th March, 2023 indemnified Patex Insurance Agency in compliance with the 1st Respondent's standing instructions. In addition, the 2nd Respondent averred that it was not privy to the financing agreement or contract of sale and purchase of the motor cycle KMFx 040F.
24. It is well settled that every insurance contract requires an insurable interest in the property they insure for it to be valid; without it, the contract is void, unless it is lawfully waived. The concept of insurable interest was defined in the case of *Lucena vs. Crawford* (1806) 2 BOS PNR 269 at 302 where it was stated that an insurable interest is essentially the pecuniary or proprietary interest that the insured stands to lose if the risk attaches. Similarly, in *Anctol vs. Manufacture Life Insurance Company* (1899) AC 604, it was defined as:-

“That basic requirement of an insurance contract unless waived, that it generally means that the party to the insurance contract who is the insured or policy holder must have a particular relationship with the subject matter with the insurance whether that be ‘a life or property or a liability’ to which he might be exposed. Every insurance contract requires an insurable interest to support it, otherwise it is invalid.”
25. Therefore, for the Appellant to seek compensation from the 2nd Respondent, he must demonstrate to the court that an existing contract (insurance policy) was in place with the insurance company and that he possessed an insurable interest in the motorcycle for which compensation is sought.
26. The Appellant alleges that on 6th January 2022 he paid Kshs. 15,000/- to the 1st respondent for tracking and insurance services to be offered by the 2nd respondent. This court notes that the Asset financing loan agreement between the Appellant and the 1st respondent is dated 7th January 2022 a day after the alleged payment was made. A perusal of the agreement shows an acknowledgement of Kshs 15,000/- paid as deposit – the part of the asset price paid by the borrower discrediting the Appellant's submission that the same was paid as an insurance premium.



27. This court also notes that the 1st respondent made a bulk payment of Kshs 8,895,423/= being premiums for motor cycles, tuk tuk and motor vehicles which included the Motor cycle KMFx 040F. This assertion is further corroborated by the evidence of the 2nd respondent who confirmed receiving a request to facilitate issuance of insurance cover and payment of premiums for the comprehensive cover of motor cycle KMFx 040F. In addition, from the list of documents supplied, the Court notes that the Registered owner of motor cycle KMFx 040F as per the log book provided is Mogo Auto Limited, the 1st Respondent herein.
28. The above analysis shows insufficient evidence to establish any contractual relationship between the Appellant and the 2nd Respondent. At any rate, the 2nd Respondent maintained that it was not party to any contract with the Appellant and the dispute largely is between the Appellant and the 1st Respondent, a position that I agree with.
29. Besides, a perusal of the Asset financing loan agreement between the Appellant and the 1st Respondent shows that the parties executed a security agreement as part of the special provisions of the agreement. The execution of the agreements has not been contested. Clause 9 of the security agreement provides that in part that “the borrower hereby assigns and transfers all his/her rights title estate and interest in and to the secured asset to Mogo Auto by way of mortgage as a continuing security to secure the payment and satisfaction in full of the loan facility Thus, even if an interest/ relationship did exist, the Appellant had already relinquished all his rights to the 1st Respondent since it has not been shown that the Appellant completed the payments as per the hire purchase agreement.
30. The Appellant claims that the issuance of a discharge voucher by the 2nd respondent confirms the existence of an insurable interest. Notably, the Appellant accuses the 1st respondent of unjust enrichment when it failed to render the tracking services in the event of theft. While this may be so, the Court has not had the benefit of perusing the actual insurance contract in respect of which the voucher was issued. There are certain inconsistencies that have unfortunately remained unresolved.
31. For instance, if the insurance contract was strictly between the 1st and 2nd respondent, and the motor cycle was registered to the 1st respondent, what then occasioned the discharge voucher to be executed by the Appellant? The 1st Respondent averred in its Response to the Statement of Claim that its interest as a financier was noted on the insurance cover. What the Court can discern from the foregoing is that there are two facets of the cover. If I understood the Appellant, his claim is founded on the fact that the loss of the motor cycle was covered and once the motor cycle was lost as was the case herein, the insurance was to pay for the loss as it did. The Appellant does not contest that in view of the financier’s interest being noted, any payment would be made to the 1st Respondent as the financier.
32. The contestation is in what this payment related to. The Appellant submits that the payment was to either secure another motor cycle in his favour or offset his financial obligation. None of the two seem to have occurred as the Appellant, despite having paid part of the financial obligation while in possession and use of the motor cycle, he was expected to not only continue paying the loan but also do so without the motor cycle being replaced. All this was to happen while the 1st Respondent was at the same time paid for the lost motor cycle but never replaced the same for the Appellant. It is undoubtable that the Appellant was using the motor cycle for commercial purposes.
33. In the premises, the Court is persuaded that the obligation to explain the nature of the insurance cover, a term of the financing was balancing the interests of both the financier and the Appellant. Unfortunately, in the absence of the response from the 1st respondent, the Court is left in an awkward position as it is only then that the nature and extent of insurable interest between the Appellant and the 1st Respondent can be conclusively determined.



34. On the face of it, the 1st Respondent paid for the premiums entitling him to any insurable interest as the owner. However, with the financing arrangement and the obligation to the Appellant to take out an insurance cover noting the Appellant's interest and the assignment of such rights to the 1st Respondent can only confirm that the Appellant had an insurable interest, the details of which are scanty. What is not in doubt, however, is that whatever interest the Appellant had is tied to the financial obligation between him and the 1st Respondent. To this end therefore, the Court finds merit in the appeal to the extent that in the absence of the 1st Respondent replacing the Appellant's motorcycle under the terms of finance, the amount paid by the 2nd Respondent for the loss of the financed motor cycle should be used to offset any obligation that the Appellant had with the 1st Respondent.
35. From the evidence, the Appellant claims Kshs.141,708/= being the Kshs.136,908/= in repayments and Kshs.15,000/= paid upfront. On its part the 1st Respondent indicated that the Appellant still owed it Kshs.133,127/=. It is, however, unclear whether the 1st Respondent, in the said amount applied the amount of Kshs.90,657/= paid by the 2nd Respondent as per the Discharge Voucher in settlement of the claim. However, as this is an issue of fact, the same should be remitted for determination by the trial court.
36. Accordingly, the appeal is allowed, the judgment and decree of the Small Claims Court is set aside in entirety and substituted with an order allowing the claim with costs of the Small Claims Court subject to any offset against the amount paid to the 1st Respondent by the 2nd Respondent in settlement of the claim arising out of the loss of the motor cycle. As for costs of the appeal, the Court exercises its discretion and makes no order.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 31TH DAY OF OCTOBER 2024

For Appellant:

For 1st Respondent:

For 2nd Respondent:

Court Assistant:

