Wambugu v Kenya Orient Insurance Co. Ltd (Civil Appeal E027 of 2024)
[2024] KEHC 16062 (KLR) (19 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16062 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL E027 OF 2024

LM NJUGUNA, J

DECEMBER 19, 2024

BETWEEN

MAGDALINE WANJIRA WAMBUGU ..... APPELLANT

AND

KENYA ORIENT INSURANCE CO. LTD ..... RESPONDENT

(Appeal arising from the decision of Hon. R.G. Mundia (PM) in Embu CMCC No.164 of 2018 delivered on 07th March 2024)

JUDGMENT

1. The appellant has filed a memorandum of appeal dated 02nd April 2024 challenging the decision of the trial court and seeking the following orders:

    a. The Appeal be allowed and judgment be entered in favour of the Appellant and the judgment of the Learned Trial Magistrate's be set aside;

    b. The court do award costs of the suit to the Appellant; and

    c. Costs of the appeal be borne by the Respondent.

2. The appeal is premised on the grounds that:

    1. The Learned Trial Magistrate erred in law and in fact in reaching a judgment which was not supported by the evidence on record and failing to consider the evidence adduced by the Appellant and her witness;

    2. The Learned Trial Magistrate erred in law and in fact in totally ignoring all the evidence adduced by the Appellant and her witness in her pleadings and in particular that the Respondent's witness in cross examination confirmed that the proposal form indicated that

the accident motor vehicle had a sitting capacity of 8 passengers including the driver and it was the first Exhibit in the Defendant's List of Documents;

3. The Learned Trial Magistrate erred in law and in fact in failing to find that an insurance proposal is the actual contact between the Insurer and the Insured;

4. The Learned Trial Magistrate erred in law and in fact in completely ignoring the value of the proposal form in the insurance contract between the Appellant and the Respondent herein;

5. The Learned Trial Magistrate erred in law and in fact in failing to find that the Policy document produced by the Respondent as Exhibit was an afterthought and tailored by the Respondent to mislead the court because it did not incorporate the information filled by the insured in his Proposal form dated 20th July 2014 and further the said policy indicated that the insurance was from 18th June 2014 to 17th June 2015 which period was long before the insured filled the proposal form on 20th July 2014;

6. The Learned Trial Magistrate erred in law and in fact in failing to appreciate the fact that the Respondent herein had acknowledged that they had insured the passengers travelling in motor vehicle registration No. KBH085U because they compensated one of the passengers travelling in the accident motor vehicle who sued their insured in Embu Civil Case No.273 Of 2015 Joseph Thuku Wanjiru v. Jinaro Namu Njamumo and the Respondent herein paid the Claimant Joseph Thuku Wanjiru Kshs.593,470/-the vide a cheque No.11277 which cheque was produced as Exhibit 9 in the Appellant's (Plaintiff's) Amended List of Documents dated 2nd February 2021;

7. The Learned Trial Magistrate erred in law and in fact in failing to appreciate the fact that the Appellant had issued to the Respondent herein a statutory Notice dated 23rd October 2015 under the *Insurance (Motor Vehicles Third Party Risks) Act* Cap 405 Law of Kenya giving notice to the Respondent of her intention to commence legal proceedings against the Respondent's insured Njamumo Jinaro and the Respondent did not act on the said Statutory Notice to deny liability then;

8. The Learned Trial Magistrate erred in law and in fact in failing to appreciate the finding in the judgment delivered in Embu Civil Suit No.178 OF 2016 Magdalene Wanjira Wambugu v. Njamumo Jinaro & Hermic Murimi in which judgment the court found Respondent's insured Njamumo Jinaro liable to compensate the Plaintiff for general and special damages as a result of injuries sustained from the said accident which occurred while travelling in motor vehicle registration No.KBH085U insured by the Respondent; and

9. The Learned Trial Magistrate erred in law and in fact in finding that the Appellant did not prove her case against the Respondent on a balance of probabilities and consequently dismissed the Appellant's suit.

3. In a declaratory suit filed through plaint dated 15th August 2018, the appellant sought judgment against the respondent for a declaration that the respondent is entitled to pay the decretal amount emanating from Embu CMCC No. No.178 of 2016 Magdalene Wanjira Wambugu v. Njamumo Jinaro & Hermic Murimi where the court had awarded Kshs.1,678,571.76/= as general and special damages together with costs and interest. In the plaint, the appellant stated that she was involved in an accident while travelling in the respondent's insured's motor vehicle registration number KBH085U and she sustained injuries on 21st January 2015. That she issued statutory notices dated 23rd October 2015 and 23rd June 2018 to the respondent under the *Insurance (Motor Vehicles Third Party Risks) Act* but it refused to settle the decretal amount.

4. The averments made in the plaint were denied through the respondent's statement of defense and it denied having been served with any statutory notices. It was its case that the *Insurance (Motor Vehicles Third Party Risks) Act* does not impose strict liability on the insurer but it set the legal framework for fulfillment of decrees once all the prerequisite conditions are met. In her reply to defense, the appellant reaffirmed her averments as made in the plaint and confirmed the statutory notices were duly served as there was proof of such service.

5. PW1 was the appellant who stated that following the accident, the respondent was notified and then the civil suit claiming negligence on the insured was instituted. That the said suit culminated into a decree in the sum of Kshs.1,916,115/=, which amount the respondent has since refused to settle. As evidence, she produced, the decree arising from Embu CMCC No. No.178 of 2016, a statutory notice dated 23rd October 2015, a police abstract and decree of certificate of posting. On cross-examination, she stated that the statutory notice does not have a stamp to show that it was received by the respondent.

6. PW2 was Njamumo Jinaro Namu, the registered owner of motor vehicle registration number KBH085U who stated that he paid the insurance premium for the vehicle to the respondent through a cheque for the sum of Kshs.41,436/= and Kshs.10,000/= through Mpesa. That the motor vehicle was comprehensively insured. That the motor vehicle carries 8 passengers including the driver and all of them were insured upto Kshs.3 million. That he signed the proposal form and that after the accident, the respondent paid some of the passengers who sustained injuries thus it should pay the appellant too. On cross-examination, he stated that he paid the premiums according to the proposal given by the respondent and, according to him, all the passengers were insured. That the motor vehicle was used for carrying caskets and deceased persons and sometimes it would be hired out.

7. DW1 was Benson Kiama, an employee of the respondent who testified that a proposal form is not a policy document. That the motor vehicle was insured to carry only 1 passenger and the casket of the deceased. That it did not have any seats. That this arrangement was explained to PW2 before he was given a sticker and the payment schedule. That the insured did not comply with the insurance cover and there were excess passengers. That the respondent was only liable to pay one passenger who has since been paid.

8. On cross-examination, he stated that he did not have any proof of issuance of the insurance cover to the insured but the motor vehicle was insured based on the proposal form he filled. He was referred to the proposal form which indicated that the motor vehicle had a carrying capacity of 8. He stated that the respondent did not sign a policy document but he was given an insurance sticker and he was paying premiums based on the policy schedule.

9. The trial court found that the appellant had failed to prove that there was a valid policy document upon which the claim was premised. That the proposal form was not sufficient to establish a contract with the respondent such that it should pay the decretal amount in the appellant's case.

10. The appeal was canvassed by way of written submissions.

11. The appellant relied on the proposal form issued to the insured and the policy schedule. She stated that the proposal form clearly indicated that the motor vehicle was cleared to carry upto 8 passengers through the proposal form while it could only carry one passenger under the policy schedule. She relied on section 80(1) of the *Insurance Act* and stated that the respondent misled the insured by providing 2 sets of information at the same time regarding the same transaction.

12. That the insured was never issued with the policy schedule and the policy document which explains why his signature was not on the schedule. She relied on the case of Direct Line Assurance Co. Ltd v Peter Micheni Muguo [2018] KEHC 3010 (KLR) where an insurance contract was implied in the

absence of a policy document. She urged the court to construe the policy schedule in favour of the insured and find the respondent liable to settle the decretal amount and she relied on the case of Blueshield Insurance Co. Ltd v Raymond Buuri M'rimberia [1998] eKLR.

13. The respondent submitted that a policy document is a legally binding contract that should include the premium amount paid. That PW2 did not explain how he paid premiums based on a document other than a policy document. That the proposal form was indeed signed by the insured but it only forms the basis for the policy contract but alone, it is not binding. It relied on the case of Blueshield Insurance Co. Ltd v Raymond Buuri M'rimberia [1998] eKLR and argued that at the time of signing the policy form, the insured did not check the box specifying whether he would be carrying passengers in the said motor vehicle.

14. That the seat capacity of the motor vehicle does not automatically mean that all the passengers are insured, thus the vehicle was never intended to carry passengers. That the respondent was only liable to compensate one passenger who was paid via cheque. Further reliance was placed on the case of Solomon Okeyo Okwama & Phoebe Anyango Okeyo V Kenya Alliance Insurance Co. Limited [2009] KEHC 3664 (KLR) and it urged that section 5(b) of the Act does not automatically impose liability on an insurance company to settle claims arising from an accident.

15. 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.

16. 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."

17. The contentious issue is whether the respondent is bound to pay the decretal sum in Embu CMCC No. No.178 of 2016. According to it, the insured did not hold a valid insurance cover, thus not insured. On the other hand, the appellant, who was injured through an accident involving the insured's motor vehicle, contends that the respondent gave the insured documents in exchange for a premium, which documents amount to policy documents or equivalents thereof. PW2, the owner of the motor vehicle, stated that he did not have a policy document and that he was only given a proposal form which he signed but the respondent did not sign. The proposal contains information about the insured motor vehicle and the conditions for the comprehensive insurance being offered.

18. DW1 produced a document known as policy schedule which is signed by the respondent alone and which was not given to PW2. This policy schedule specifies the premium that was paid by PW2, and in exchange, the respondent gave PW2 an insurance sticker which was appended on the motor vehicle. The policy schedule states that the motor vehicle was insured to carry one passenger while the proposal form states that the motor vehicle could carry 8 people including the driver. PW2 produced proof that he paid the premium as indicated in the policy schedule, through a cheque. In his testimony DW1 stated that the respondent did not issue a policy document to PW2 but the premiums were paid and an insurance sticker was issued to him on the basis of the proposal form.

19. From this evidence, it is my understanding that the motor vehicle, was at all times insured because the premium was paid and the respondent acknowledged as much. The terms of the alleged insurance

have been captured in the proposal form, which the respondent has been quick to dismiss as a mere 'proposal'. There is no doubt that there is no insurance policy document between the respondent and PW2. However, from the evidence herein, the respondent relied on the proposal form and the policy schedule to collect an insurance premium from PW2, and even issued an insurance sticker.

20. The problem is that the number allowed passengers differs as provided between the 2 documents. From my perusal of the 2 documents, the proposal form was signed on 20th July 2014 while the policy schedule is undated but it indicates that the motor vehicle is covered for the period between 18th June 2014 to 17th June 2015. The policy schedule even has a policy number indicated as 'EMB/102/004892/2009'. My understanding is that the proposal was issued before the policy schedule which enabled and informed payment of the premium.

21. At the point of receiving the premium, the respondent knew that it was offering insurance and PW2 accepted to pay consideration based on the terms provided in the proposal and the policy schedule. None of the parties were coerced into entering the agreement and, in fact, after the accident, the respondent wrote a letter dated 25th February 2015 to PW2 telling him that the motor vehicle has been written off and that the respondent would be paying him KShs.682,500/=. This conduct between the respondent and PW2 suggests the existence of an agreement upon which both parties depended.

22. In law, the respondent and PW2 are both estopped from disclaiming the existence of an implied contract since their conduct suggests the existence of one. In other words, when the proposal form and the policy schedule were issued to PW2 by the respondent, and the respondent collected a premium based on these documents, there was a common assumption that the parties had entered into an insurance policy contract. According to Chitty on Contracts Vol. 1 General Principles, Twenty-Eighth Edition, 1999 at pages 222-224 the learned author stated as follows regarding estoppel by convention;

> " 3-100: estoppel by convention may arise where both parties to a transaction 'act on assumed state of facts or law, the assumption being either shared by both or acquiesced in by the other'. The parties are then precluded from denying the truth of that assumption, if it would be unjust or unconscionable to allow them (or one of them) to go back on it.
>
> 3-103: the effect of this form of estoppel is to preclude a party from denying the agreed or common assumption. One such assumption may be that a particular promise has been made"

23. There was a clear transaction between the parties and the transaction may be an implied insurance contract. In this transaction, the refined terms of the policy cover were captured in the proposal form, which the insurer relied on. Since it has been estopped from going back on this fact, it is my view that the number of insured passengers was 8 as written in the proposal. In the English case of Tinkler v. Commissioners for Her Majesty's Revenue and Customs (2021) UKSC 39 the court stated thus with reference to the doctrine of estoppel by convention:

> " It is also true that many statements of the doctrine refer to there being a transaction between the parties.....It is also correct that many of the statements of the doctrine by commentators, such as Chitty on Contracts, 33rd ed (2018), para 4-108 and Snell's Equity, 34th ed (2020), at 12-012, refer to there being a transaction between the parties."

24. Therefore, in determination of the issues, it is my view that the respondent is PW2's insurer and that he is liable to pay the decretal amount arising from the appellant's suit.

25. I find that the appeal has merit and it hereby succeeds with orders thus:

a. The trial court's judgment delivered on 07th March 2024 and the subsequent decree are hereby set aside;

b. The respondent is hereby ordered to pay the appellant the whole decretal amount in Embu CMCC No. No.178 of 2016 with interest as follows:

   i. General damages to be paid with interest from the date of the judgement of the trial court until payment in full; and

   ii. Special damages to be paid with interest from the date of filing of the plaint until payment in full.

c. The appellant is hereby awarded the costs of this appeal and the trial court with interest.

d. All interests at court rates

26. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 19TH DAY OF DECEMBER, 2024.

L. NJUGUNA

JUDGE

..... for the Appellant

..... for the Respondent