**CIC Insurance Group Limited v M'ibeere & another (Suing as the Administrators of the Estate of James Karithi M'ibeere – Deceased) (Civil Appeal 133 of 2021) [2023] KEHC 19711 (KLR) (24 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 19711 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CIVIL APPEAL 133 OF 2021**

**G MUTAI, J**

**APRIL 24, 2023**

**BETWEEN**

**CIC INSURANCE GROUP LIMITED ..... APPELLANT**

**AND**

**DAVID MITHIKA M'IBEERE ..... 1ST RESPONDENT**

**JESINTA KANGAI KARITHI ..... 2ND RESPONDENT**

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF JAMES KARITHI M'IBEERE – DECEASED**

## JUDGMENT

1. The appeal is a straight forward one. It is an appeal from the judgment of hon. Brenda Bartoo given on 27/5/2021 in CMCC 58 of 2020.

2. The Appellant is the insured of mort vehicle registration No. KBM 691H owned by Traneast Limited. In paragraph 8 of the plaintiff in the primary suit the respondents pleaded that the deceased was employed by Motstrick enterprises Limited earning a monthly salary. This is the repeated in all pleadings. The vehicle veered of the road and rammed into Motor vehicle registration KBS 416 F Prime Mover

### Evidence and pleadings

3. The respondent filed suit against the appellant seeking a declaration that the appellant was bound to pay for injuries suffered under policy no. 012/083/1/011171/2043 belonging to Mostrick enterprises ltd. This was arising from Machakos CMCC 146 of 2017. In that matter the court had awarded, 2,306,941 with interest and 185,555.28 as interest and costs of a265,668.53 together with further court fees of 68,217.

4. The Appellant filed 6 grounds of appeal. Basically, the appeal is on one ground. The main issue is whether, the court failed to consider the evidence and submissions tendered by the Appellant.

**Duty of the appellate court**

5. 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.

6. In the case of *Peters vs Sunday Post Limited* [1985] 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..."

7. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

> " ...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 retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

8. The duty of the 1st Appellant Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the *locus classicus* case of *Selle and another vs Associated Motor Board Company and Others* [1968] EA 123, where the law looks in their usual gusto, held by as follows;-

> " An appeal from the High 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."

9. The Court is to bear in now that if need her seen 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.

10. In *Fidelity & Commercial Bank Ltd v Kenya Grange Vehicle Industries Ltd* (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

> " Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed..."

**Analysis**

11. The question this court will ask, what is the value of a document, which has terms but is not signed by even the author. The trial court and this court will construct documents in a similar manner as there are no witnesses required to know the content of a document. However, an unsigned document is not a document.

12. Through their Submissions, the Respondent started deviating from their pleadings, parties are bound by their pleadings. This is the position that is held sacrosanct. In the case of *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* [2018] eKLR, it was held as doth: -

> "It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of *Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others* (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC* SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
>
> ".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....
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> ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

13. I will set out herein the entire Section 10 of the *Insurance (Motor Vehicles Third Party Risk Act*, Cap 405, which 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.
>
> 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.

14. Further, Section 5 of the *Act* provides as follows; -

    (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. [Act No. 46 of 1960, s. 48, Act No. 10 of 2006, s. 34.]

15. It is not in dispute that there was, insurance between the defendant and the insurer. The there was a pleading that the deceased was employed as a turn boy.

16. Under Section 5 (b) the policy of insurance shall not be required to cover injury of death while at work. The deceased died when he boarded the vehicle. Though employed as turn boy, he was not on duty. He was not being ferried as an employee on the material day. He took a lift. He was not a turn boy for that veicle. He was off duty. The only question is whether the contract of insurance excluded persons on at work on the particular place.

17. If a driver of a bus company, when off duty boards the company vehicle as a passenger, can he be said to be a driver for purpose of the policy.

18. My take is that unless being ferried for purpose of work or by virtue of work, the passenger is covered. The court found that the deceased was not an employee of the Insured. I have no evidence of the court misdirecting itself. 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."

19. The documents provide as policy is not signed or stamped (see page 69) consequently there was no evidence that the employees were excluded< especially when not being conveyed to or from work. Without such then the applicant was obligated to file a declaration suit within 3 months in terms of Section C of Cap 405 for a declaration that it is not to pay for any reason other than breach of policy.

20. In the case of *Kenyan Alliance Insurance Company Limited v Naomi Wambui Ngira & another (Suing as the Legal Representatives and Administrators of the Estate of Nelson Machari Maina (Deceased)* [2021] eKLR, the court, Edward M. Muriithi, stated as follows: -

36. This Court further observes that pursuant to Section 12 (1A) of the *Act* the insurer has an obligation to respond to a statutory notice. It states as follows: -

> (1A) The insurer shall, upon being served with the statutory notice and documents, admit or deny liability for the claim or judgment by a notice in writing to the person or persons presenting the claim or judgment.

37. It is said to be an offence to fail to so respond to such notice served. In the present case, the Respondents have argued that despite being served with the statutory notice in compliance with Section 10 (2) of the *Act*, the Appellants did not respond to the same. This assertion has not been controverted. Indeed, it would have been good practice to respond to the statutory notice and state why it deemed it was not liable. This would have saved the Respondent the trouble of filing the declaratory suit it so filed and this would also have saved judicial time and resources. But as to whether or not failure to respond implies that liability would be attached against the said insurer for all such claims against persons it has insured, this Court finds in the negative. Notably, under Section 12 (2), failure to respond to the statutory notice attracts liability for an offence. The Section does not say that failure to do so would make one automatically make one liable for settlement of Judgments entered against their insureds. Had the drafters of this law intended so, they would have expressly provided for the same."

21. The policy allegedly in issue has not been produced. The driver is definitely not covered notwithstanding anything he may posit. There is nothing to show that the deceased was excluded.

22. Regarding the policy document, it is the Appellant who has a copy of the policy. He chose not to produce the same. They picked an unsigned document and tendered it. It is not a document. The content of the policy are is within the Appellant's special knowledge to the Section 112 of the *Evidence Act* places a special duty om them. It provides as doth: -

> " 112. Proof of special knowledge in civil proceedings 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."

23. The Appellant did not discharge the duty of care placed on them. It is my take that had the proper policy been produced, it will have been against the Appellant. It is not a standard form contract but it has room for signing and it is not signed.

24. Consequently, I find no merit on this appeal and dismiss the same with costs of Ksh 225,000. The same be paid within 30 days in default execution do issue.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 24TH DAY OF APRIL 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**.....**

**GREGORY MUTAI**

**JUDGE**