



**Occidental Insurance Company Limited v Dulu (Civil Appeal  
03 of 2022) [2023] KEHC 20188 (KLR) (30 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 20188 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CIVIL APPEAL 03 OF 2022  
SM GITHINJI, J  
MAY 30, 2023**

**BETWEEN**

**OCCIDENTAL INSURANCE COMPANY LIMITED ..... APPELLANT**

**AND**

**ALPHONSE TUNU DULU ..... RESPONDENT**

*(Being an Appeal against the Judgment and decree of the Honourable DR. Julie Oseko,  
Chief Magistrate delivered on 15.12.2021 in CMCC No. E104 of 2020- Malind)*

**JUDGMENT**

**CORAM:** Hon. Justice S. M. Githinji

Kishore Nanji Advocate for the Appellant

Wambua Kilonzo & Co. Advocates for the Respondent

1. The appeal herein arises from the judgment of the trial court at Malindi in Chief Magistrate's Civil Suit No E104 of 2020. In the said suit the respondent who was the plaintiff moved the court vide a plaint filed in November, 20<sup>th</sup> 2020, in which he sought damages against the appellant following a road traffic accident that occurred in August 11, 2018 in Malindi CMCC No. 391 of 2018.
2. The Appellant aggrieved by the Ruling of the learned Chief Magistrate in Civil Suit No. E104 of 2020 dated December 15, 2021 set forth the following grounds in the Memorandum of appeal dated January 7, 2022;
  1. That the Learned Magistrate erred in law in allowing the Respondent's application dated January 29, 2021 to strike out the defendant's defence and to enter judgment for the plaintiff against the defendant as prayed in the Plaint.



2. That the Learned Magistrate erred in law in failing to appreciate the significance of various facts and documents referred to in the affidavit evidence placed before her and failing to make any proper findings on the defendant's affidavit evidence placed before her.
  3. That the Learned magistrate erred in law and in fact in holding that the defendant ought to have obtained a declaration under section 10(4) of the *Insurance (Motor vehicles Third Party Risks) Act* or that it ought to have repudiated the claim under the law.
  4. That the Learned Magistrate erred in law in holding that the Defendant's allegation that the motor vehicle registration number KCQ 374Q was not being used in accordance with the clause relating to 'limitation as to use' was an issue that ought to have been determined by obtaining a declaration that it was not bound to pay any claim under the policy.
  5. That the Learned Magistrate erred in law and in fact in holding that the Defendant's denial of liability came late in time and outside the time allowed under the Act.
  6. That the Learned Magistrate erred in law in failing to hold that where, as was the case here, it was alleged that an insured's motor vehicle was not being used in accordance with the clause relating to limitation as to use there was no obligation on the part of the insurer to file a declaratory suit under section 10 (4) of the Act.
  7. That the Learned Magistrate erred in failing to hold that the statutory notice was given to the defendant and the defendant did not take action to repudiate liability within the prescribed time and that did not necessarily make the defendant liable if in fact it was not liable under the Act.
3. In a nutshell, the facts giving rise to this appeal are that the Respondent filed a declaratory suit against the appellant in Malindi CMCC No. E0104 of 2020 seeking Judgment against the appellant in the sum of Kshs. 204, 262/- being an award in a judgment in the primary suit Malindi CMCC No. 391 of 2018 Alphonse Tunu Dulu v Ali Cars Limited and Crispas Mwundu Maina. The Appellant then filed a declaratory suit and a statement of defence dated 9<sup>th</sup> December, 2020 where he pleaded that the policy of insurance referred to in paragraph 3 of the plaint was a commercial vehicle insurance policy and was subject to the condition limiting use of the said motor vehicle.
  4. It was also averred that the motor vehicle was to be used in connection with the insured's business, for the carriage of passengers and for social domestic and pleasure purposes, and that the said policy did not cover use of the said motor vehicle for hire or reward. The statement of defence was eventually struck out in the Ruling of December 15, 2021 for being an abuse of the court process.

### **Appellant's Submissions**

5. Counsel in his submissions identified three issues for determination; whether the Learned Trial Magistrate misapprehended the law in holding that the Appellant ought to have obtained a declaration against the insured under section 10 (4) of the *Insurance (Motor Vehicles Third Party Risks) Act* to repudiate liability, whether the learned Trial Magistrate erred both in law and in fact in her finding that by the mere fact that the appellant had insured the subject motor vehicle, it was liable to satisfy



the judgment in the primary suit and whether the learned trial Magistrate erred both in law and in fact in striking out the appellant's written statement of defence on the basis that it did not raise any triable issues.

6. On the 1<sup>st</sup> issue for determination, counsel submitted that trial court misapprehended the law in her holding as under the law, the instances whereby an insurer is required to file a suit to obtain such a declaration against its insured are limited to the instances of non-disclosure of material facts or misrepresentation of material facts. According to him, the insured simply breached the express terms of the policy of insurance by putting to use the subject motor vehicle for a purpose for which it was not insured. He relied on the case of *Paul Mutisya v Jubilee Insurance Company of Kenya Limited* (2018) eKLR.
7. It is his submission that the provisions of section 10(4) of cap 405 should not be interpreted in isolation and the same ought to be read together with the provisions of sections 10(1) and section 5 (b) of the Act to establish the nature of liability in issue. He submitted that the Appellant having raised the issue that the subject motor vehicle was not being used in accordance with the express terms of the policy and particularly the clause relating to limitation as to use then had no obligation to seek a declaration to avoid the policy and/or repudiate liability as it was in fact entitled to avoid liability by express provisions of the insurance policy since such liability was not covered.
8. Counsel relied on the case of *Kenya Alliance Insurance Company Limited v Naomi Wambui Ngira & another (Suing at the Legal Representatives and administrators of the Estate of Nelson Macharia Maina) Deceased* (2021) eKLR. Counsel further added that the appellant had no obligation to file a declaratory suit to repudiate liability under section 10(4) of the Act as it was entitled to avoid the liability by express provisions of the insurance policy, its insured having breached an express term of the said policy. Counsel also relied on the case of *Madison Insurance Company Limited v Augustine Kamanda Gitau* (2020) eKLR on this heading.
9. On the second issue for determination, counsel submitted that the appellant was not liable to satisfy the said judgment by mere fact it insured the subject motor vehicle as the law only provided that an insurer is only obligated to satisfy a judgment which is in respect of a liability that is covered both under the Act and by terms of a policy. He relied on the case of *Corporate Insurance Company Limited v Elias Okinyi Ofire* (1999) eKLR and that of *Peris Wakesho Maghema & Francis Kaluyu Muyanga (as legal representatives of the estate of Bonface Mwakio Kaluvu) v The Heritage Insurance Company Limited* Mombasa HCCA No. 250 of 2019.
10. On the third issue for determination, counsel submitted that the appellant was under no obligation to obtain such declaration as the liability herein was not covered by the policy. Counsel directed the court's attention to Order 2 Rule 15 on striking out of pleadings submitting that the appellant's written statement of Defence before the trial court could only be struck out if it raised no triable or fairly arguable issues and such triable issues raised did not mean a defence that had to succeed.

### **Respondent's Submissions**

11. The Respondent identified two issues for determination; whether the Appellant being the insurer of motor vehicle registration No. KCQ 374Q can be exonerated from obligation to settle the claim having not repudiated liability in line with Section 10 (4) of the Insurance (Motor Vehicle Third Party Risks) Act and whether breach of insurance policy terms by the insured is a defence for the insurer in a declaratory suit. On the 1<sup>st</sup> issue for determination, counsel submitted that by the insurer issuing a policy of insurance, it automatically assures the rights of third parties. That defendant herein was the insurer of the motor vehicle as at the time of the accident and is therefore bound to settle the claim by



virtue of being the insurer. Counsel relied on section 10 (1) of cap 405 and the case of Siaya HCCA No.7 of 2020 [Kenya Alliance Insurance Co. Ltd v Thomas Ochieng Apopa](#) (2020) eKLR.

12. On the 2<sup>nd</sup> issue for determination, it is counsel's submission and admission that the motor vehicle was used for purpose that was not allowed in the insurance policy terms and that even if the insured breached the contract that in itself does not absolve the defendant from liability where it is found to had insured the motor vehicle at the time of the accident. He relied on the case of Kajiado HCCA No. 8 of 2015 [Imara Steel Mills Ltd v Heritage Insurance Co. Kenya Ltd](#) (2016) eKLR.

### **Analysis and Determination**

13. I have considered the appeal as well as the submissions and authorities filed by the counsels.
14. In my view, the issues for determination are Whether at the time of the accident, motor vehicle Reg. No. KCQ 374P was being used for the purposes outside the terms of the policy; whether the Defendant ought to have obtained a declaration under section 10 (4) of the [Insurance \(Motor Vehicles Third Party Risks\) Act](#) and whether the Defendant's defence disclosed triable issues.
15. It is the defendant's case that by the insurer issuing a policy of insurance, it automatically assumes the rights of third parties and that the rights and obligations of the insured automatically transfers to the insurer. According to him, the defendant herein was the insurer of Motor Vehicle Registration No. KCQ 374Q as at the time of the accident and is therefore bound to settle the claim by virtue of being the insurer. The appellant on the other hand contends that the policy of insurance referred to was a Commercial Vehicle (PSV) insurance Policy and was subject to the condition limiting use of the said motor vehicle in connection with the insureds' business and use for social domestic and pleasure purposes and that the said policy did not cover use of the said motor vehicle for hire or reward.
16. The respondent has admitted that the motor vehicle was being used for purpose that was not allowed in the policy terms as at the time of the accident, the motor vehicle was being used for hire to ferry fare paying passengers. He argues that even if the insured breached the contract, that by itself does not absolve the defendant from liability where it is found to had insured the motor vehicle at the time of the accident. In my view, if the insured put to use the vehicle for a purpose for which it was not insured, that would amount to a breach of the terms and conditions of the policy, and the insurance company would be absolved from liability.
17. The reason for this, was held in *The Motor Union Insurance Co Ltd v A K Ddamba* (1963) EA 271 in that, had the proposer disclosed all the relevant and material information in the proposal form, the plaintiff insurance company might very well have taken a different attitude to the risk. The facts of this case were similar to those of [Corporate Insurance Company Ltd v Elias Okinyi Ofire](#) (1999) eKLR wherein the Court of appeal found that:

"The respondent (plaintiff there) said: 'The vehicle was carrying passengers on the material day. I paid fare as I was charged. The vehicle had other passengers as well as some luggage on top.' There can be no doubt that the vehicle was being used as a "matatu". But was it insured as a "matatu" The policy of insurance produced as an exhibit by the appellant's witness one Mr. Zacharia who is a senior executive assistant employed by the appellant, shows that the same is a Commercial Vehicle Policy. It is described in the schedule to the policy as a Toyota pick-up with carrying capacity of one ton and carries the following limitation:

"Use in connection with insured's business. Use for the carriage of passengers in connection with the insured's business. (1) The policy does not cover use for hire or reward or for



racing, pacemaking, reliability, trial or speed testing. (2) Use while drawing a trailer except the towing (other than for reward) of any one disabled mechanically propelled vehicle."

18. The vehicle was therefore insured as a commercial vehicle for use in connection with the insured's business which business is described as "Farmer/Business." It is not the insured's business to run "matatus". If that was his business, he would have had to obtain a different insurance cover namely that of carrying passengers for hire and reward. If an insured after obtaining an insurance cover for a commercial vehicle for use in connection with his business changes the nature of the vehicle to that of a "matatu" the nature of the policy remains that of a commercial vehicle policy and such change does not and cannot make the insurer liable to the passengers who are thereafter carried in the vehicle for reward (fare). If this were the case most insurers would decline to issue a commercial vehicle policy."
19. On the second issue for determination, this Court has considered the provisions of section 10 (4) of the Act which provides as follows: -
  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:
20. 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.
21. The learned magistrate held that the applicant after filing of the primary suit served the defendant with a statutory notice which was received and stamped and according to her, respondent did not dispute the policy number by either reporting a case of forgery to the police and did not obtain a declaration that it was not bound to pay the claim. In her view, she went ahead to state that service of notices offered the first instance in which the respondent had to deny liability by obtaining a declaration. I wish to point out that by dint of Section 5 (b) (i) as read together with section 10 (1) of the Act, the requirement to repudiate liability by way of filing a declaratory suit does not apply since the liability in issue in this case was not one that was covered by the policy.
22. It is my view that the requirement for an insurer to file a declaratory suit is intended for only those liabilities for which the insurer is entitled to repudiate and/or avoid for reasons beyond the express provisions of the policy, specifically for non-disclosure of material facts or misrepresentation of material facts. The appellant in this case issues is that the subject motor vehicle was not being used in accordance with the terms of the policy and as such had no obligation to seek a declaration to avoid liability and/or repudiate liability as it was entitled to avoid it by the express provisions of the insurance policy.
23. I am of the position that the appellant had no obligation to file a declaratory suit as per Section 10 (4) of the Act, for the reason that the liability in question is not one covered by the Act and further, that



the avoidance of liability was on account of an express provision of the policy. In this case the Appellant was exempted from the requirement to obtain a declaration pursuant to the provisions of section 10 (4) of the Act by virtue of the provisions of section 5 (b) (i) as read together with section 10 (1) of the Act.

24. On the third issue for determination, the law on striking out pleadings is provided for under Order 2 rule 15 of the *Civil Procedure Rules*. The rule provides that a party may at any stage of proceedings apply to strike out pleadings for non-disclosure of reasonable cause of action; being scandalous, frivolous or vexatious; for being prejudicial or embarrassing, or for being an abuse of the court process. I have considered the application by the Plaintiff dated January 29, 2021 seeking to strike out the defence filed and dated December 9, 2020. From my reading of the application, I am not convinced that the applicant set out sufficient reasons to warrant striking out of the said defence. I have equally considered the Statement of defence dated December 9, 2020 and I am of the view that paragraphs 2, 3, 4, 5 and 7 required further interrogation by the trial court.
25. The jurisdiction to strike out pleadings is discretionary and must be exercised sparingly. In *Postal Corporation of Kenya v I. T Inamdar & 2 others* (2004) 1 KLR 359, the court stated that the law is now well settled that if the defence filed by a defendant raises even one bona fide triable issue, then the defendant must be given leave to defend.
26. Similarly, in *Yaya Towers Limited v Trade Bank Limited (In Liquidation)* (Civil Appeal No. 35 of 2000) the court expressed itself thus:

“A plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) can demonstrate shortly and conclusively that the plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved.”

27. The appellant’s defence in my view does not amount to an abuse of the court process. A careful consideration of the facts placed before this court reveals that the defendant’s statement of defence did not only comprise of mere denials as stated, but also contained the defence of limitation as to use. It states that the applicant was not liable to pay as the insured motor vehicle was not being used in accordance with the clause relating to limitation as to use and that it was accordingly not liable to satisfy the judgment obtained by the Respondent against its insured in the aforesaid primary suit. In my view, this is a triable issue. Whether the insured breached the terms of the policy or not is not an issue that can be summarily determined without weighing evidence on the same as was the case in the trial court.
28. Flowing from the foregoing, I find the appeal merited and is hereby allowed. Costs be in the cause.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 30<sup>TH</sup> DAY OF MAY, 2023.**

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**S.M. GITHINJI**

**JUDGE**

**In the Presence of; -**



Miss Nyambuto holding brief for Mr Kilonzo to the Respondent

Miss Nasimiyu is for the Appellant

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**S.M. GITHINJI**

**JUDGE**

**30/5/2023**

