



REPUBLIC OF KENYA



Muruli v Xplico Insurance Company Ltd; Humahuma (Interested Party) (Civil Suit 31 of 2020) [2023] KEHC 24474 (KLR) (31 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24474 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL SUIT 31 OF 2020
RN NYAKUNDI, J
OCTOBER 31, 2023**

BETWEEN

ISAAC WAKOLI MURULI PLAINTIFF

AND

XPLICO INSURANCE COMPANY LTD DEFENDANT

AND

GRACE SIRIYA HUMAHUMA INTERESTED PARTY

JUDGMENT

1. The plaintiff instituted this suit vide a plaint dated 9th September 2020 seeking the following reliefs;
 - a. A declaration that the 1st defendant is and has at all material times been liable under a statutory obligation under the insurance policy to satisfy the judgment and decree and all consequential orders that have arisen in Eldoret CMCC No. 1117 OF 2018 made in favour of the decree holder/interested party together with the auctioneer's costs and all the attendant costs that might have arisen therefrom.
 - b. Loss of user at Kshs. 1,000/= per day for a period the court deems fit and just to grant.
 - c. Costs and incidental to this suit.
 - d. Any other relief that the Honourable Court may deem fit and just to grant.
2. The defendant did not file any response to the suit or any documents.

Plaintiff's Case

3. The plaintiff's case is that he is the beneficial owner of motor vehicle registration number KBU 316E Toyota Wish registered in the name of Omar Odhiambo Kukuya. Further, that during the period of



24th January 2018 to 23rd January 2019, he had a valid insurance cover for the subject motor vehicle with the defendant herein vide policy number ELD/070/016048/2018/01 TPO as his insurers within the meaning of the *Insurance (Motor Vehicles Third Party Risks) Act*. During the pendency of the policy, the subject motor vehicle was involved in an accident with the interested party, who then instituted a suit being Eldoret CMCC No. 1117 OF 2018. The said accident occurred on 4th October 2018 and the interested party claimed damages. Upon being served with the pleadings in Eldoret CMCC No. 1117 of 2018 the plaintiff duly informed his insurers, the defendant herein of the same and they instructed the firm of Omwenga and company advocates to represent him in the said suit. Learned counsel submitted that the matter proceeded and judgment was entered against the plaintiff herein Exparte despite there being a counsel on record on 27.9.2019. Further, that the decree holder/interested party herein extracted a decree and certificate of costs as a result of the judgment entered against the plaintiff herein.

4. Counsel for the plaintiff submitted that despite the defendants entering appearance and filing a defence, they have never attended to this matter ever since its inception thus the plaintiff's testimony is uncontroverted and unassailable. He submitted that the defendant opted not to defend the matter and as such the plaintiff has proved his case to the required standard.
5. Learned counsel submitted that the motor vehicle was for his personal use and to ferry goods from the market. Further, that he pleaded loss of user for Kshs. 1000 per day from the date of attachment, 6th August 2020 to the date of release on 16th March 2021.
6. Counsel concluded by submitting that he seeks a declaration that the defendant is and has at all material times been under a statutory obligation under the insurance policy to satisfy the judgment and decree and all consequential orders that have arisen in Eldoret CMCC No. 1117 of 2018 made in favour of the decree holder/interested party therein. Further, that he prays that the judgment herein to act as a stay of execution in Eldoret CMCC No. 1117 of 2018 to avoid his property being attached by the interested party.

Defendant's Case

7. There are no responses on record for the defendant as it has not filed a defence or any submissions.

Analysis & Determination

8. Upon considering the pleadings filed and the submissions, the following issue emerges for determination;
 1. Whether there was breach of contract by the defendant
 2. Whether the declaratory orders should issue

Whether there was breach of contract by the defendant

9. The cause of action is based on the alleged breach of contract by the 1st defendant. The plaintiff claims that he had taken out an insurance cover of motor vehicle registration no. KBU 316E vide policy number ELD/070/016048/2018/01. In order for the defendant to be held liable for breach, the plaintiff must prove that there was the existence of a valid contract between the two parties.



10. I must state that the standard of proof in civil proceeding is on a balance of probabilities. The court of Appeal in *Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another* [2015] eKLR, held that:

Denning J, in *Miller –vs- Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say; -

- a. “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 a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
- b. This burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the 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 lose because the requisite standard will not have been attained.”

11. The first port of call in determining whether there was breach of contract in this instance is the insurance policy contract. The plaintiff has not produced the policy document and therefore the court cannot determine whether the defendant had entered into a valid insurance contract with the plaintiff. The duty of proving the averments contained in the plaint lay squarely on the Appellant. In *Karugi & Another V. Kabiya & 3 Others* [1987] KLR 347 the Court of Appeal stated that:

[T]he burdens on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff’s case is not controverted or is proved on a balance of probabilities by reason of the defendants’ failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant.... The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”

12. In the circumstances of this case, and in the absence of the said contract, the plaintiff has failed to prove breach of contract.

Whether the declaratory orders should issue

13. The declaratory orders sought by the plaintiff cannot issue as the court could is not in position to tell what the terms and conditions of the Policy were. The evidence of the Plaintiff and the declaratory orders are based on that Contract and his evidence is of no value without it. This court cannot issue declaratory orders in a vacuum.

14. It follows that the claim is dismissed in its entirety as the plaintiff has failed to prove liability. Each party shall bear its own costs.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 31ST DAY OF OCTOBER 2023

.....

R. NYAKUNDI



JUDGE

