UAP Insurance Co Limited v Nyawira & 4 others (Civil Appeal E005, E003, E004 & E006 of 2023 (Consolidated)) [2023] KEHC 24187 (KLR) (26 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24187 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CIVIL APPEAL E005, E003, E004 & E006 OF 2023 (CONSOLIDATED)

FN MUCHEMI, J

OCTOBER 26, 2023

BETWEEN

UAP INSURANCE CO LIMITED .... APPELLANT

AND

PAUL MWANGI NYAWIRA .... 1ST RESPONDENT

FLORENCE MWONGELI .... 2ND RESPONDENT

JOHN MBUGUA MWAURA .... 3RD RESPONDENT

MARY NJERI KINYANJUI .... 4TH RESPONDENT

MARY WANJIRU .... 5TH RESPONDENT

(Being an Appeal from the Judgment of Hon. D. M. Ireri (SRM) delivered on 23rd December 2022 in Baricho PMCC No. 106 of 2018)

JUDGMENT

Brief facts

1. These appeals arose from a test suit Baricho PMCC No. 101 of 2014 where judgment was delivered on 23rd December 2022 issuing a declaration that the appellant was liable to satisfy the judgment in Baricho PMCC No. 101 of 2014 in the sum of Kshs. 1,899,719/- plus interest thereon at the court rate from 27/2/2018 until payment in full. It was also ordered that the declaratory orders do apply to Baricho PMCC Nos. 107 of 2018, 110 of 2018, 111 of 2018 and 14 of 2018.

2. The appellant filed separate appeals Nos. 2 of 2023, 3 of 2023, 4 of 2023, 5 of 2023 and 6 of 2023 which were consolidated through an order made on 17th May 2023 with HCCA No. 5 of 2023 being the lead file.

3. Dissatisfied with the court's decision, the appellant lodged separate appeals against the respondents. The grounds in the five (5) appeals were similar and are hereby condensed as follows:-

    a. The learned trial magistrate erred in law and in fact in entering judgment against the appellant without having due regard to Section 156(1) of the *Insurance Act* Cap 487;

    b. The learned magistrate erred in law and in fact in finding that the non-payment of premiums was not a ground to invalidate an insurance contract;

4. Parties put in written submissions to dispose of the appeal.

Appellant's Submissions

5. The appellant submits that the cause of action emanated from a road traffic accident that occurred on 13th June 2014 whereby the 1st – 5th respondents, were travelling as passengers in the appellant's motor vehicle registration number KAV 514N which was being driven along the Sagana Makutano Road. The said individuals filed their claims for special and general damages being Baricho PMCC No. 96 of 2014, 101 of 2014, 102 of 2014, 100 of 2014 and 111 of 2018 against the defendant one J. Waithaka Wachira, in his capacity as the appellant's insured in respect of his vehicle registration number KAV 514N. The appellant contends that J. Waithaka Wachira trading in the name and style of Waithaka Wachira & Company Advocates acknowledging that he had no insurance cover from the appellant company, filed a memorandum of appearance, statement of defence and the suits proceeded to conclusion without their involvement. The respondents obtained judgment against the said J. Waithaka Wachira and sought declarations to compel the appellant to settle the decretal sums. The orders granted against the appellant were to apply to all the aforementioned suits.

6. It is the appellant's case that policy number 100/070/1/016475/2011 was not in force at the time of the occurrence of the subject accident and as such they cannot be held to have assumed risk under the policy as the intended insured had defaulted to make payment of premiums in respect of the said policy pursuant to Section 156(1) of the *Insurance Act*. The appellant argue that their advocates wrote to the respondent's advocates vide letter dated 14th November 2014 informing them that the insured had failed to discharge premiums payable under the policy. Consequently, this effectively terminated the appellant's liability under the policy as dictated by insurance law. Additionally, the appellant contends that the intended insurer was aware of and they further advised the respondent's advocates to directly take up the matter with the registered owner of the motor vehicle.

7. The appellant further submits that during the hearing of the case, they called a witness, DW1 an Assistant Underwriting Manager with Old Mutual General Insurance Kenya Limited formerly known as UAP Insurance Company Limited, who testified that the appellant intended to insure motor vehicle registration number KBP 766H belonging to J. Waithaka Wachira and issued policy number 100/070/1/016475/2011 on promise that he was to pay the agreed premiums to consummate the insurance contract. However the intended insured did not consummate the intended insurance policy since no consideration in the form of premiums were paid and thus the alleged insurance contract was void *ab initio*, capable of being cancelled or repudiated under the provisions of *Cap 405*.

8. The appellant further argues that DW1 testified that the intended insured was duly aware of the material breach of the terms of the insurance policy leading him to file a memorandum of appearance and defence directly by himself.

9. The appellant relies on the cases of *Insurance Company of East Africa v Marwa Distributors Limited* [2015] eKLR and *Liki River Farm Limited v Tausi Assurance Co. Ltd* [2018] eKLR and submits that from the policy document subject of the suit, the intention of the parties was that the insured must

have paid the premium for the period of insurance to be indemnified for any loss or damage that occurs during the period of cover. The appellant emphasizes that the policy document constitutes a contract to insure and the premium is the consideration for the promise to indemnify the insured if the event takes place. As such, since the intended insured did not consummate the intended insurance policy by paying premiums, the insurance contract was viod ab initio incapable of being cancelled through a cancellation notice or repudiated. To support this contention, the appellant relies on the case of *Insurance Company of East Africa v Marwa Distributors Ltd* [2015] eKLR.

10. The appellant argues that the omission by Mr. Waithaka violates Section 156 (1) of the *Insurance Act* and thus no obligation arose on their part in relation to settlement. Thus the policy which was issued was invalid and does not fall under the ambit of *Cap 405* for it to be repudiated by the procedure set out in Section 10 of the *Act*.

11. The appellant further submits that the subject insurance policy issued to the intended insurer specifically prohibited assumption of risk in case of breach of the conditions set therein as stipulated in the Exception to Section II Clause. The appellant further argues that they wrote to the intended insured's agent vide their email dated 26th September 2014 informing them that the intended insured had failed to discharge premiums payable under the policy and consequently due to this gross noncompliance of the premiums effectively terminated their liability under the policy as indicated by the *Insurance Act*. As such, the intended insurer acknowledged that there was a breach of terms and that is why he filed and entered appearance personally through his law firm, Waithaka Wachira & Company Advocates.

12. The appellant further submits that in their statement of defence dated 27th July 2018, they specifically pleaded that the intended insured had breached the terms and conditions of the policy which was issued to him on the promise to pay premiums which he failed thus occasioning the breach. The appellant relies on the case of *Abdulkadir Sharrif Abdirahim & Another v Awo Shariff Mohammed t/a A. S. Mohammed Investments NRB CA Civil Appeal No. 1 of 2008* [2014] eKLR and submits that the respondent did not extend any evidence to rebut the contention of breach of terms and conditions of the policy.

13. Moreover, the appellant submits that during the hearing in Baricho PMCC No. 101 of 2014, the respondent confirmed that the defendant, the intended insured was the one who conducted the matter to conclusion thus bolstering their argument that the intended insured was aware that he was in breach of the terms and conditions of the insurance policy and instead of involving the appellant as his insurer chose to represent himself. As such, the appellant submits that having proved that the policy issued by them was invalid for non-payment of the premium as at the time of accident, they cannot be found liable to honour any claims which arose from the said invalid policy and thus the learned trial magistrate erred in law and in fact in finding that non-payment of premium was not a ground to invalidate an insurance contract thus finding them liable.

The Respondent's Submissions

14. The respondent submits that he falls within the scope of persons covered under Section 5 of the *Insurance (Motor Vehicles Third Party Risks) Act* as he was a passenger in motor vehicle registration number KAV 514N when it violently collided with motor vehicle registration number KBP 766H whereas the liability of the insured is provided under Section 10(1) of the *Insurance (Motor Vehicle Third Party Risks) Act*. The respondent relies on the case of *Kenindia Assurance Co. Ltd v James Otiende* [1989] 2 KAR and submits that judgment has already been obtained and the appellant did not challenge the validity of the judgment obtained in the primary suit, thus the appellant's liability under Section 10 is not in question.

15. The respondent submits that the appellant had insured the suit motor vehicle at the time of the accident. PW1, Corporal Evelyn Muthengi confirmed that fact in her testimony as she stated that the appellant had insured the suit motor vehicle vide policy number 100/070/1/016475/2011 and had issued a certificate of insurance number 10276034. DW1 further admitted that the appellant had insured the suit motor vehicle and issued a certificate of insurance.

16. The respondent further submits that the validity of the insurance policy which relates to the period of insurance is not in question as the date of accident was on 13/6/2014, which was within the period of validity. From the police abstract, the period of insurance was from 11/11/2013 to 31/10/2014.

17. The respondent further submits that the appellant was duly notified of the primary suit in line with Section 10(2)(a) of the *Insurance (Motor Vehicles Third Party Risks) Act*. The respondent stated that he served the appellant with a demand letter and statutory notice which were received by the appellant on 13/10/2014 and 11/11/2014 respectively. Further, DW1 testified and confirmed that the appellant admitted receipt of the statutory notice.

18. The respondent argues that the appellant did not take any steps to repudiate liability as is provided in Section 10(4) of the *Act*, a fact confirmed by DW1.

19. The respondent further argues that the law in Section 10(2) of the *Insurance (Motor Vehicles Third Party Risks) Act* provides the only grounds that an insurer can refuse to honour a judgment against its insured. Additionally, the other way for the appellant to have escaped liability would have been to obtain a declaration to repudiate liability pursuant to Section 10(4) of the *Act*. To support his contentions, the respondent relies on the cases of *Joseph Mwangi Gitundu v Gateway Insurance Co. Ltd* [2015] eKLR, *Blueshield Insurance Co. Ltd v Samuel Nyaga Ngurukiri* [2008] eKLR, *APA Insurance Limited v Gabriel Opondo Ogenga (Suing as the legal representative of Jane Akinyi Saida (Deceased)* [2018] eKLR and *Blueshield Insurance Co. Ltd v Raymond Buuri M'Rimberia* [1998] eKLR. The respondent contends that the appellant did not comply with Section 10(4) of the *Act* as it has never filed a suit to repudiate liability. Thus by dint of the *Act*, the appellant is liable to satisfy the judgment in the primary suit.

20. The respondent submits that non-payment of premiums is not a ground to avoid liability under Section 8 of *Cap 405*. Thus even if the policy document had stipulated that the appellant's liability was conditional on payment of premiums, the respondent argues that such condition would not affect the appellant's liability. Further under Section 10(4) of the *Act*, the grounds under which a policy of insurance may be avoided are non-disclosure or misrepresentation of material facts. This was stipulated in *Pacis Insurance Company Limited v Mohammed F. Hussein* [2017] eKLR, *Pacis Insurance Company Limited v Malaki Odhiambo Dullo; Elias Mwailong Kiseu & Another (Interested Parties)* [2019] eKLR and *Blueshield Insurance Co. Ltd v Raymond Buuri M'Rimberia* (*supra*). The respondent argues that whether or not the insured paid premiums is a matter strictly between the appellant and its insured and cannot affect him as a third party.

21. The respondent relies on the cases of *Virani t/a Kisumu Beach resort v Phoenix of East Africa Assurance Company Ltd* [2004] eKLR and *Cannon Assurance (Kenya) Limited v Mohansons Food Distributors Limited* (2020) eKLR and submits that a contract of insurance is not void *ab initio* simply because of non-payment of premiums. The respondent further submits that it was incumbent upon the appellant to show that it was a term that the policy would be void for non-payment of premiums and that the insured actually failed to pay premiums. The respondent states that the policy document does not have any clause invalidating it on grounds of non-payment of premiums. The respondent argues that there is no clause on the effect of non-payment of premiums and further DW1 was unable to recite any. The policy document refers to a proposal and declaration form, documents which were not produced.

Moreover, the appellant did not tell the court what the premium amount was, when it was due for payment, whether the insured paid part or defaulted in the entire amount. Further the appellant did not produce any demand for payment of premiums addressed to the insured. Neither did it produce any notice of cancellation of the policy as stipulated under Clause 11 of the policy document.

22. The respondent further submits that DW1 stated that the documents referred to and not produced were in the appellant's possession. She did not however give any explanation why they were not produced. The respondent thus argues that the said documents would have been adverse to the appellant's case as stipulated in the case of *Central Microfilm Operators (1990) Ltd v Teachers Service Commission* [2015] eKLR.

23. The respondent submits that it is not in dispute that pursuant to the policy, the appellant issued the insured with a certificate of insurance, a fact admitted by DW1. Under Section 7 of *Cap 405*, such certificate is proof of a valid policy of insurance. Further, the respondent states that DW1 on cross-examination, stated that the appellant issues a certificate of insurance after payment of premiums. She further stated that it may be issued if there is an arrangement to pay the premiums however she did not tender any proof of such an arrangement, thus the respondent argues that the logical inference is that the insured paid the premiums. The respondent argues that if indeed the insured defaulted in any way, the appellant would have cancelled the certificate of insurance as provided for under Section 10(2) (c) of *Cap 405*. Thus by the appellant not cancelling the said certificate it is relying on its own wrongdoing to avoid liability. The respondent thus relies on the doctrine of ex.turpi causa.

24. The respondent further states that the appellant did not show any clause giving it unilateral authority to cancel the policy due to non-payment of premiums. DW1 admitted that the policy with the insured was borne out of a Memorandum of Understanding between Law Society of Kenya and the appellant. Under the memorandum, term 3 (d)(ii) LSK had the sole authority to determine the beneficiaries of the scheme and under term 3(d)(iii) the appellant would remove members upon receipt of such recommendation from LSK. Evidently, the respondent argues that even if the insured failed to pay premiums as claimed, the appellant did not have contractual right to cancel the policy by removing him from the scheme. The appellant could only do so upon notice and recommendation from the LSK. Thus the appellant did not show that it complied with the said memorandum. Consequently, any cancellation of the policy would be in breach of the said memorandum and thus in line with the principle of ex turpi causa, the appellant cannot benefit from its own wrong doing. To support his contention, the respondent relies on the case of *Kenya Airways Limited v Satwant Singh Flora* [2013] eKLR.

25. The respondent further submits that the appellant's cited decisions to support its position of non-payment of premiums are inapplicable to the case herein. The respondent states that both cases *Insurance Company of East Africa v Marwa Distributors Limited* [2015] eKLR and *Liki River Farm Limited v Tausi Assurance Co. Ltd* [2018] eKLR do not relate to declaratory (enforcement) suit. Both involve disputes between the insurers and their insured and no third party claim was involved. Further, in both decisions, there was evidence that the insured had not paid premiums and the policy documents specifically provided for the effect of non-payment of premiums.

26. The respondent thus submits that the appellant is liable to satisfy the judgment in Baricho SPMCC No. 106 of 2018.

Issue for determination

27. The main issue for determination is whether the appeal has merit.

The Law

28. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another v Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

> "…. 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. In particular,, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence."

29. It was also held in *Mwangi v Wambugu* [1984] KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.

30. Dealing with the same point, the Court of Appeal in *Kiruga v Kiruga & Another* [1988] KLR 348, observed that:-

> "An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand."

31. Therefore this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

Whether the appeal has merit.

32. The respondent herein instituted a declaratory suit against the appellant in Baricho SPMCC No. 106 of 2018 seeking for orders that the appellant be compelled to settle the sum in Baricho SPMCC No. 101 of 2014 in the sum of 1,899,719/- plus any accruing interest from 27/2/2018. In the primary suit which was filed against J. Waithaka Wachira, the insured, the respondent herein sought general and special damages arising out of a road traffic accident which occurred on 13th June 2014 along Sagana Makutano road involving motor vehicle registration number KAV 514N and KBP 766H (the subject motor vehicle) belonging to J. Waithaka Wachira. The respondents were passengers in the subject motor vehicle and sustained injuries as a result of the accident. The respondents then filed individual claims for damages in Baricho SPMCC Nos. 96 of 2014, 102 of 2014, 100 of 2014 and 111 of 2018 against the insured, Mr. Waithaka.

33. The respondent before the magistrate's court contended that the appellant herein had insured the subject motor vehicle vide policy insurance number 100/070/1/16475/2011 which was in force from 11/11/2013 to 31/10/2014. As such, the insurance cover was still in force when the motor vehicle was involved in an accident along Sagana Makutano road on 13/6/2014. The trial court heard and determined the primary suits and delivered judgments as well as issuing decrees against the defendant. Upon failure of the insured to settle the respective decretal sums, the claimants filed declaratory suits.

The trial court heard and determined the declaratory suits and issued a declaration that the appellant is liable to satisfy the respective judgments in the primary suits.

34. The appellant relies on Section 156 of the *Insurance Act* and maintains in this appeal and in the trial court that it was not liable to satisfy any liability by Mr. Waithaka as he did not pay the requisite premiums and at all material times he was aware of his breach and that is why he entered defence in the trial court by himself as opposed to seeking the counsel of the appellant as his insurance. The appellant further argues that the trial court erred by finding that non-payment of premiums was not a ground to invalidate an insurance contract.

35. Section 156 of the *Insurance Act* states:-

> No insurer shall assume risk in Kenya in respect of insurance business unless and until the premium payable thereon is received by an insurer. An intermediary shall not receive any premiums on behalf of an insurer.

36. It is the appellant's case that the they intended to insure motor vehicle registration number KBP 766H belonging to Mr. Waithaka and issued policy number 100/070/1/016475/2011 on the promise that he was to pay the agreed premiums to consummate the insurance contract between them. The appellant contends that however Mr. Waithaka did not consummate the intended insurance policy since no consideration in the form of premiums were paid and thus the insurance contract was void ab initio.

37. What then is the effect of non-payment of insurance premiums? In *Nizar Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Company Ltd* KSM CA Civil Appeal No. 88 of 2002 [2004] eKLR the Court of Appeal held that the law of Kenya is that non-payment of premium does not invalidate the insurance contract. It quoted and agreed with MacGilliyray (*Parkington on Insurance Law*, 7th Edition paragraph 861 which states as follows:-

> There is no rule of law to the effect that there cannot be a complete contract of insurance concluded until the premium is paid, and it has been held in several jurisdictions that the courts will not imply a condition that the insurance is not to attach until payment. It would seem to follow that if credit has been given for the premium, the insurer is liable to pay in the event of a loss before payment. Although, as has been held in a South African decision, the insurer would be entitled to deduct the amount of premium from the loss payable, at least where the period of credit had expired by that time, since the assured could not insist on payment when in breach of any obligation assumed on his part under the contract.

38. Further in the case of *Insurance Company of East Africa v Marwa Distributors Limited* [2015] eKLR Majanja J while relying on the above case held that:-

> In my understanding, the case does not set out a hard and fast rule that failure to pay premium does not invalidate the policy but underpins the general contract principle that parties are bound by their obligations recorded in the agreement. It means that if the parties do not make provision for the effect of non-payment of the premium, the court will not necessarily imply that the policy is invalid. The effect of non-payment of premium on the policy depends on the intention of the parties expressed in the contract.

39. Similarly in the case of *Cannon Assurance (Kenya) Limited v Mohansons Food Distributors Limited* [2020] eKLR the court relied on the Court of Appeal decision and held that:-

> I agree with the plaintiff, at least in this case, that Section 156(1) of the *Insurance Act* does not disentitle it from claiming unpaid premiums nor does it state that a contract of insurance

entered into by the parties shall become void. I also note that unlike the other provisions of Section 156, sub section (1) thereof does not lead to or prescribe penal consequences.

40. On perusal of the policy document on pages 43 to 58 of the Record of Appeal it is noted that there is nothing in the said policy to the effect that the policy would be cancelled in the event of non-payment of the premium. I have further perused the evidence of the appellant's witness, DW1 and noted that she confirmed that the policy between the appellant and Mr. Waithaka did not specifically provide that non-payment of premiums would lead to the cancellation or invalidation of the contract of insurance between it and the insured. In fact the witness testified that normally the insurance company accepts to take risk after the payment of the premium and in this case, the appellant had accepted to take up the policy. Therefore, several inferences could be made from DW1's statement and it was upon the appellant to prove that indeed there was a clause that indicated that upon non-payment of premiums, the insurance contract was cancelled. In the very least, the appellant could have led through evidence what premiums Mr. Waithaka was to pay, the extent of payments he made and what was outstanding in the payments he did not make. Moreover, the witness on cross examination stated that a certificate on insurance is issued after the premium is paid.

41. The appellant has further argued that the ordinary and untarnished meaning of the recital in the policy document is that the insured must have paid the premium for the period of insurance to be indemnified for any loss or damage that occurs during the period of the cover. The clause reads and I quote:-

> Whereas the Insured by a proposal and declaration which shall be the basis of this contract and is deemed to be incorporated herein has applied to the UAP Insurance Company Limited (hereinafter called the "Company") for the insurance hereinafter contained and has paid or agreed to pay the premium as consideration for such insurance.
>
> And whereas the company has accepted the said application.

42. Notably, the appellant's witness did not produce any proposal or declaration forms despite stating that the said documents were in the appellant's possession. Furthermore, the recital provides for has paid or agreed to pay the premium however, the appellant only gave oral testimony that the insured did not pay the premium. She did not adduce any evidence to show the extent of payments made or outstanding by the insured. Moreover, the witness testified that the appellant gave the insured a certificate of insurance which she stated they normally give after payment of premiums. And although she stated that one could be issued with a certificate of insurance if there is an arrangement to pay the premiums, she never produced any evidence of such arrangement. The appellant did not produce any proof that it cancelled the said certificate of insurance on the basis of non-payment of premiums. The witness only produced emails to the insured's agents to the effect that the appellant intended to cancel the policy but it is noted from the record that there was no evidence of cancelling the policy from the appellant. Accordingly, it is my view that the policy document and the certificate of insurance were valid at the time of the accident and in favour of the insured. As such, the contentions by the appellant that the insured filed a memorandum of appearance in his name does not exempt the insurance company from liability since they had been served with the statutory notice.

43. Having found that the policy and the certificate of insurance were valid as at the time of the accident, the provisions of Section 10(1) of the *Insurance (Motor Vehicle Third Party Risks)* Cap 405 on the obligation to satisfy the claim of the insured bind the appellant. The respondent herein has already obtained a judgment against the appellant and the duty of the appellant to satisfy or settle the decree is well founded.

44. Thus the respondents having been a passengers in the subject motor vehicle, were covered by the policy in place at the time of the accident. Moreover, any dispute between the appellant and the insured cannot affect the respondents as they were not privy to the contract of insurance between the appellant and the insured. Therefore the appellant was liable to settle any decrees against its insured unless the contract had been voided which was not the case here. The appellant did not obtain a declaratory judgment entitling them to avoid liability as per the provisions of the law. Section 10(4) of *Cap 405* provides:-

> No sum shall be payable by an insurer under the foregoing provisions of these section if 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 proviso n contained in the policy he has entitled to avoid it on that 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.
>
> 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 fir, to be made a party thereto.

45. These provisions were interpreted in *Cannon Assurance Company Limited v Peter Mulei Sammy* (2020) eKLR where the court stated:-

> Being guided by the above provisions and noting the fact that the appellant has never exercised its right by filing the requisite declaration to avoid the policy on any ground in the policy in the primary suit, I find that the time to do so in the proceedings before the trial court the subject of this appeal is not available at this stage.

46. It is on record that the appellant was served with a demand letter and statutory notice on 13/10/2014 and 11/11/2014 respectively. However, the appellant did not move the court under the above provisions to obtain a declaration that it was not duty bound to satisfy the decrees arising from the accident in respect of motor vehicle registration number KBP 766H. It is therefore my considered view that the appellant is legally bound to satisfy the judgments in the matters at hand in this appeal. As such, I find no fault with the judgment of the honourable magistrate delivered on 23rd December 2022.

47. I find no merit in this appeal and it is hereby dismissed.

48. The respondents are hereby awarded the costs of this appeal.

49. It is hereby so ordered.

DATED AND SIGNED AT KERUGOYA THIS 26TH DAY OF OCTOBER, 2023.

F. MUCHEMI

JUDGE

JUDGEMENT DELIVERED THROUGH VIDEO LINK THIS 26TH DAY OF OCTOBER 2023