



Lake Victoria North Water Services Board & another v Africa Merchant Assurance Co. Ltd (Civil Suit 19 of 2018) [2023] KEHC 26166 (KLR) (30 November 2023) (Judgment)

Neutral citation: [2023] KEHC 26166 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL SUIT 19 OF 2018
DK KEMEL, J
NOVEMBER 30, 2023**

BETWEEN

LAKE VICTORIA NORTH WATER SERVICES BOARD 1ST PLAINTIFF

NZOIA WATER SERVICE CO. LTD 2ND PLAINTIFF

AND

AFRICA MERCHANT ASSUARANCE CO. LTD DEFENDANT

JUDGMENT

1. The Plaintiffs herein brought this suit *vide* an amended Plaintiff (undated) and filed in Court on 28th May 2019 supported by the witness statements of Pamphill Oundo, the Legal Officer at the 1st Plaintiff. The Plaintiff seeks the following orders *inter alia*;
 - i. A declaration that the Defendant is liable to indemnify the Plaintiffs pursuant to policy of insurance number xxxx commencing on 26th January 2015 and expiring on 25th January 2016 in respect of the claims arising *vide* Sirisia SPMCC No. 5 of 2018 involving motor vehicle registration number xxxx Isuzu Fvz Lorry registered under the Plaintiffs herein.
 - ii. An order and subsequent judgement that pursuant to the judgement and/or decree entered against the Plaintiffs in Sirisia SPMCC No. 5 of 2018 together with all accrued interest to date, be made payable by the Defendant and in default execution be issued and/or levied directly against the Defendant herein.
 - iii. An order that the Defendant indemnifies and/or pays the Plaintiffs the decretal sum in Sirisia SPMCC No. 5 of 2018 being a sum of Kshs. 1,001,081/= plus Auctioneer's costs of Kshs. 327, 620/=.
 - iv. General/Pecuniary damages.
 - v. Costs of the suit and interest at Court rates.



- vi. Any other relief this Honourable Court deems fit and just to grant.
2. The Defendant was served with summons to enter appearance and all accompanying pleadings. They did enter appearance and filed a statement of defence dated 28th November 2018 and filed on 29th November 2018. The Defendant denied that it was the insurer of motor vehicle registration number xxxx Isuzu Fvz Lorry and put the Plaintiffs to strict proof. The Defendant denied that it was issued with any notice as per Section 10 of Cap 405 Laws of Kenya and a demand and notice of intention to sue. The Defendant urged this Court to dismiss the Plaintiffs suit with costs.
 3. In response to the Defendant's statement of Defence, the Plaintiffs reiterated that at all material times relevant to the suit they were the equitable legal, beneficial and/or registered owners of the suit motor vehicle registration number xxxx Isuzu Fvz Lorry and that the Defendant was the insurer. It was pleaded that the Defendant did issue an insurance policy that covered the risk in the accident caused by the suit motor vehicle as the Plaintiffs had a clear indemnity/insurance contract.
 4. According to the Plaintiffs, the Defendant is bound by the principle of indemnity under the insurance law and were to indemnify the Plaintiffs of the decretal sum of Kshs. 829,920/= as awarded by the Court in respect of the proceedings against the Plaintiffs in Sirisia SPMCC No. 5 of 2018, which accrued as a result of the accident caused by the suit motor vehicle insured by the Defendant.
 5. The Plaintiffs insisted that the Defendant cannot seek to deny liability to indemnify the Plaintiffs of the decretal sum awarded by the Court as there existed an insurance contract and that the same was never repudiated and/or set aside.
 6. The plaintiff requested that judgment be endorsed against the Defendant as pleaded in the amended Plaintiff.
 7. The matter proceeded for hearing on 20th July 2023 with the Plaintiffs calling one witness.

Plaintiffs Case

8. PW1 was Pamphill Oundo, who testified that he is the Legal Officer at Lake Victoria North Water Services Board and that he wished to adopt and rely on his witness statement dated 23rd May 2019 as his evidence in chief and further relied on the list of statements dated 16th October 2018 (1-4) and proceeded to produce them in Court as PEXH 1-4. He further wished to rely documents on the list dated 24th April 2023 and he produced as PEXH 5-8.
9. According to him, at the time the suit motor vehicle registration number xxxx Isuzu Fvz Lorry was involved in the accident, the same was insured by the Defendant under insurance policy number xxxx which was taken out by Nzoia Water Services Company Limited. The suit motor vehicle was under the care and maintenance of Nzoia Water Services Company Limited by virtue of the provisions of the *Water Act* 2002 (repealed) which mandated the 1st Plaintiff, a state agency and/or parastatal, to purchase and lease out water equipment and machinery to its affiliate and licensed water provision companies within Bungoma, Trans Nzoia, Busia and Kakamega Counties.
10. He testified that the Defendant received the respective insurance premium for the suit motor vehicle and undertook to indemnify the Plaintiffs against any 3rd party claims brought about by the insured risk. Having insured the same, the Defendant took over the conduct of the suit and even engaged Counsel who entered appearance for the Plaintiffs and diligently defended the suit to its conclusion. Upon judgement being entered against the Plaintiffs in Sirisia SPMCC No. 5 of 2018, the Defendant herein refused to settle the decretal sum leading to execution against the Plaintiffs. This led to the



Plaintiffs assets being attached by the auctioneers leaving them with no option than to settle both the decretal sum and auctioneers costs.

11. He told the Court that the Defendant was legally duty bound to indemnify the Plaintiff and settle all the claims that arose from the insured risk but the failure by the Defendant to do so led to the losses as particularized in the amended Plaintiff.
12. On cross-examination, he told the Court that the 1st Plaintiff was to purchase the equipment and then lease the same to the 2nd Plaintiff and that the lease was not filed as the *Water Act 2002* (repealed) spoke of handing over. Further, he testified that it was the duty of the 2nd Plaintiff to take out an insurance cover but the ownership of the suit motor vehicle is in the name of the 1st Plaintiff.
13. He testified that there was no document indicating that the 2nd Plaintiff was to take up the insurance cover and that the 2nd Plaintiff did alert the Defendant about the accident and that the Defendant proceeded to appoint counsel to take up the case.
14. He told the Court that he was not aware if a statutory notice was done by the Plaintiffs and if the receipts were sent to the Defendant but was aware that the Defendant declined to pay the claim. He admitted that the consent as recorded in Sirisia SPMCC No. 5 of 2018 was between the Claimant and the 1st Plaintiff.
15. On re-examination, he reiterated that the claim herein is by the insured and not a 3rd party hence the issue of a statutory notice does not arise. He testified that this claim arose after the 1st Plaintiff was harassed by execution. He told the Court that the Defendant herein entered appearance and was duly aware of the matter. The Defendant failed to settle the claim in the primary suit, Sirisia SPMCC No. 5 of 2018, and that the Defendant had sufficient time to settle the same but simply declined to settle the claim despite being expected to do so. He finally told the Court that the Defendant ought to reimburse the 1st Plaintiff for the monies paid to the 3rd Party.
16. The defendant opted not to tender evidence in defence and closed its case.
17. Up-on the close of the Plaintiffs case, the Plaintiffs filed their written submissions. No submissions were filed by the Defendant.

Plaintiffs Submissions

18. The Plaintiffs framed the following issues for determination;
 - i. Who bears liability?
 - ii. Quantum awardable.
19. On who bears liability, it was submitted that the Defendant insured the Plaintiffs suit motor vehicle and by doing so guaranteed the Plaintiffs a legitimate expectation to settle all 3rd party claims that will arise from the insured risks pursuant to the provisions of Sections 4(1), 5(b) and Section 10 (1) of the *Insurance (Motor Vehicle Third Party Risk) Act* thus making it clear that the Defendant ought to have settled all the claims arising from the accident involving the suit motor vehicle.
20. On the issue of quantum, the Plaintiffs submitted that the Court ought to grant their prayers as per the amended Plaintiff. Counsel relied on the case of *Muthui v Directline Insurance Company Limited & 2 others* (Civil Suit 88 of 2019) (2022) KEHC 392 (KLR) (CIV) (6th May 2022).
21. The Defendant did not file any written submission. This Court proceeded to set down the matter for judgement.



22. I have looked at the pleadings before me, the evidence and the comprehensive submissions by the Plaintiffs. I adopt the Plaintiff's issues for determination which I shall address as below.
23. Before I venture into the analysis of the issues for determination, I wish to handle the Plaintiffs allegation that the failure of the Defendant to file an amended Defence to the amended Plaint meant the suit herein is unopposed. I do not think that is the case. When an amended Plaint is served upon a party who has already filed a Defence, the Defendant is not obliged to amend his Defence. He can of course choose to amend his Defence, but if he does not do so, it will be deemed that he is standing by his earlier Defence. Order 8 of the *Civil Procedure Rules*, which deals with amendments, is not explicit on this, where the amendment is made with leave; but it will be seen that Order 8 Rule 1, which deals with amendment of pleadings without leave, does give the other party discretion to amend defence.
24. Moving on to the crux of this matter, on the issue of liability, it is essential for this Court to determine whether there was a valid insurance cover, whether the claim arose during the existence of the cover and whether the Defendant breached the insurance cover policy. Indemnity has several interlinked meanings in the insurance contract context inherent in the notion that an insurance contract should provide no more and no less than a full indemnity is the goal of preventing pitfalls to either party. This aspect is emphasized in *Castellain v Preston*. Brett LJ declared that:
- “The very foundation.....of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, an of indemnity only, and that this contract means the assurer, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it.....that proposition must certainly be wrong.”
25. The question of indemnity and a right to recover must be commensurate with the loss actually sustained by the insured. The problem before the Court is clarified as noted between the insured and the insurer from the analysis carried out according to the terms of the contract. I have considered this matter carefully and it resonates well with the principles in *Lucena v Craufurd*, 127 Eng. Rep 630, 642 (1805) in which the Court observed as follows:
- “The term ‘insurance contract’....shall....be deemed to include any agreement or other transaction whereby one party, herein called the insurer, is obligated to confer benefit of pecuniary value upon another party, herein called the insured or the beneficiary, dependent upon the happening of a fortuitous event in which the insured or beneficiary has, or is expected to have at the time of such happening of such event. A fortuitous event is any occurrence or failure to occur which is, or is assumed by the parties to be, to a substantial extent beyond the control of either party. In a general sense insurance is a contract to pay a sum of money upon the happening of a particular event or contingency, or indemnity for loss in respect of a specified subject by specified perils; that is, an undertaking by one party to protect the other party from loss arising from named risks, for the consideration and upon the terms and under the conditions recited”.
26. The *Evidence Act*, Cap 80 is clear on the aspect of the burden of proof. In this case, it lies squarely on the 1st Plaintiffs because the whole suit is pegged on whether the Defendant insured the suit motor vehicle which must be proved. Sections 107 and 108 of the *Evidence Act* provide as follows:-

Section 107.



- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Section 108

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

27. I note from the Court record that the Plaintiffs witness relied on documents filed on 16th October 2018 and one of them is the Abstract from the Police which clearly indicated that the owner of the suit motor vehicle xxxx Isuzu Fvz Lorry is the 1st Plaintiff and that the same was insured by Amco, the Defendant herein under insurance policy number xxxx which commenced on 26th January 2016 and was set to expire on 25th January 2016.
28. The upshot is that i find that the suit motor vehicle was under the insurance cover by the Defendant and that the same was liable for compensation. From my understanding, the lowest type of insurance accorded to a party is the 3rd Party insurance which caters for the 3rd party risks. This simply means that the Plaintiffs motor vehicle was insured against 3rd party risks. The defendant cannot now turn around and avoid liability when the insured risk has occurred.
29. On the issue of quantum, it is imperative for this Court to bear in mind whether the Plaintiffs claim was up to the liability limit. In respect of each loss, one has to take the approach, as illustrated in the case of *Crisp v Security Nat'l Ins. Co*, 369 S.W. 2d 326 (1963), the Court stated that

“Indemnity is the basis and foundation of insurance coverage not to exceed the amount of the policy, the objective being that the insured should neither reap economic gain or incur a loss is adequately insured.

...The measure of damage that should be applied in case of destruction of this kind of property is the actual worth of value of the articles to the owner for use in the condition in which they were at the time of the fire excluding any fanciful or sentimental considerations”
30. The question of indemnity and a right to recover must be commensurate with the loss actually sustained by the insured. A strong view in support of indemnity exist in the judgement/decree and the auctioneer’s costs in Sirisia SPMCC No. 50 OF 2018 plus costs and interest.
31. The evidence tendered before this Court, the 2nd Plaintiff took out an insurance cover with the Defendant first in the year 2015 for cover against 3rd party risks under Policy no. xxxx. The Defendant did not avail any contrary evidence that the 2nd Plaintiff dutifully failed to pay its premiums up to the year 2016 when the same was to lapse. On 30th March 2015, the 1st Plaintiff’s motor vehicle xxxx Isuzu Fvz Lorry was involved in a road accident and that the trial Court entered its judgement in favour of the Claimant. According to the Plaintiffs, the Defendant was notified of the accident and it proceeded to appoint a Counsel to defend the matter on behalf of the 1st Plaintiff only for it to jump ship when the matter was concluded in favour of the Claimant leaving the 1st Plaintiff at the mercy of auctioneers whose intention was to execute the decree obtained in Sirisia SPMCC No. 50 OF 2018.
32. Pursuant to Section 10 of Cap 405 Laws of Kenya, the Claimant proceeded to issue the required notice upon the Defendant but the Defendant failed to indemnify the 1st Plaintiff. I find that, as a result of



the mutual character of the insurance company on the basis of accepting the premium in advance and retaining it, a legitimate expectation operates as a bar for the Defendant to repudiate the policy. The defendant are bound by the terms of the contract and that they should attend to the risk that had been insured against and which has occurred. The defendant cannot run away from its responsibility. It is instructive that the defendant duly entered appearance for the plaintiffs in the suit at Sirisia and defended it till conclusion and hence they cannot leave the plaintiffs high and dry yet they had duly paid up the insurance premium under the insurance contract. Reciprocal duty demands that the defendant performs its part of the bargain by indemnifying the plaintiffs the sums already paid out to the third party.

33. On whether the Plaintiffs are entitled to damages for loss of business due to the Defendant's breach, it seems to me that the bottom line of the Plaintiff's case is whether general damages are payable in this claim. I find the Plaintiffs subject to any limitation which may be stated in the policy they have a right to damages based on their expected interest as measured by the loss in the value to them from the insurer as provided for in the contract of insurance. In this claim the approach taken by the 1st Plaintiff has been analyzed against the backdrop of the scope to be addressed under the circumstances required to be indemnified by the Defendant. The principle of full compensation requires that where an injured party has proven a breach of contract and it has suffered damages then he should be compensated in so far as it was foreseeable. It is noted that the plaintiffs were harassed by execution of decree by the tired party forcing them to settle the claim. Of course the plaintiffs must have suffered some sort of discomfort and embarrassment but are entitled to what is reasonable under the insurance contract and principles of insurance.
34. In the result, there is *prima facie* evidence as illustrated above of a right to indemnity by the Defendant. In the foregoing, I find merit in the plaintiffs suit and proceed to find that the award of damages in favour of the Plaintiffs shall be limited to the following declarations:
- i. A declaration that the Defendant is liable to indemnify the Plaintiffs pursuant to policy of insurance number Amc/080/1/000924/2006 commencing on 26th January 2015 and expiring on 25th January 2016 in respect of the claims arising *vide* Sirisia SPMCC No. 5 of 2018 involving motor vehicle registration number xxxx Isuzu Fvz Lorry registered under the Plaintiffs herein.
 - ii. It is hereby ordered that pursuant to the judgement and/or decree entered against the Plaintiffs in Sirisia SPMCC No. 5 of 2018 together with all accrued interest to date, be payable by the Defendant and in default execution be issued directly against the Defendant herein.
 - iii. It is hereby ordered that the Defendant indemnifies the Plaintiffs the decretal sum in Sirisia SPMCC No. 5 of 2018 being a sum of Kshs. 1,001,081/= plus Auctioneer's costs of Kshs. 327, 620/=.
 - iv. Costs of the suit and interest at Court rates be payable by the Defendant.

Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF NOVEMBER, 2023.

D. KEMEI

JUDGE

In the presence of:

Makori for Plaintiffs



No appearance Wafula for Defendant

Kizito Court Assistant

