



**Directline Assurance Company Limited v Muchiri & another (Civil Appeal  
157 of 2020) [2022] KEHC 14388 (KLR) (Civ) (21 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14388 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 157 OF 2020**

**CW MEOLI, J**

**OCTOBER 21, 2022**

**BETWEEN**

**DIRECTLINE ASSURANCE COMPANY LIMITED ..... APPELLANT**

**AND**

**MICHAEL NJIMA MUCHIRI ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH MWAI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment of Mmasi, SPM delivered on  
5th March 2020 in Nairobi Milimani CMCC No. 383 of 2014)*

**JUDGMENT**

1. This appeal emanates from the judgment delivered on March 5, 2020 in Nairobi Milimani CMCC No 383 of 2014. The suit was commenced 2017 by Michael Njima Muchiri the plaintiff in the lower court (hereafter the 1<sup>st</sup> respondent) against Directline Assurance Company Limited the defendant in the lower court (hereafter the appellant) *vide* a plaint filed on January 30, 2014 and subsequently amended on March 6, 2017. The sole prayer was a declaration that the appellant was liable as the insurer of the 1<sup>st</sup> respondent's motor vehicle KAY 306S to satisfy the decree obtained by Joseph Mwai (2<sup>nd</sup> respondent) against the 1<sup>st</sup> respondent in CMCC No 3498 of 2012 Joseph Mwai v Michael Njima Muchiri in relation to an accident involving the 1<sup>st</sup> respondent's vehicle.
2. It was averred that the 1<sup>st</sup> respondent was the owner of motor vehicle registration number KAY 306S whereas the appellant was the insurance company that had insured the 1<sup>st</sup> respondent's motor vehicle. That a result of an accident that occurred on or about January 2, 2010 a suit was filed against the 1<sup>st</sup> respondent being Milimani CMCC No 3498 of 2012 - Joseph Mwai v Michael Njima Muchiri (hereafter primary suit); that the appellant did not defend the said suit and a judgment and decree



followed by warrants of attachment were issued against 1<sup>st</sup> respondent's property in execution. It was further averred that appellant was at all material times bound to satisfy the decree in the primary suit pursuant to a contract of insurance and default on the part of the appellant amounted to a breach of the said contract.

3. The appellant filed a statement of defence dated May 20, 2014 and amended on August 17, 2018 denying the key averments in the plaint and liability, instead alleging that the 1<sup>st</sup> respondent was in breach of the terms of the policy of insurance for alleged neglect and or failure to pay the policy excess and accrued monthly penalties despite repeated requests from the appellant. The suit proceeded to full hearing during which the appellant and 1<sup>st</sup> respondent adduced evidence in support of their respective cases. The trial court entered judgment in the favour 1<sup>st</sup> respondent against the appellant in the sum of Kshs 214,275/- being the decretal amount in Milimani CMCC No 3498 of 2012 (the primary suit)
4. Aggrieved with the outcome, the appellant preferred this appeal which is based on the following grounds: -
  1. That the learned trial magistrate erred in fact and in law and further misdirected herself in failing to appreciate that the 1<sup>st</sup> respondent had materially breached the terms of the contract of insurance by failing to remit the policy excess and was therefore not entitled to benefit from the contract of insurance.
  2. That the learned trial magistrate misapprehended the evidence on record and thereby misdirected herself in holding that the 1<sup>st</sup> respondent had indeed remitted the policy excess to the appellant while on the contrary the 1<sup>st</sup> respondent witness admitted that he still held the policy excess.
  3. That the learned trial magistrate erred in law and in fact and further misdirected herself by failing to appreciate that the acts or omissions of the 1<sup>st</sup> respondent brokers – Messrs Kerin Insurance Agency – including the failure to remit the policy excess bound the 1<sup>st</sup> respondent.
  4. That the learned trial magistrate erred in fact and in law and further misdirected herself by misconstruing the oral evidence of the 1<sup>st</sup> respondent's witness and placing undue weight on the same despite its glaring inconsistencies while at the same time neglecting the appellant's evidence which was on record.
  5. That the learned trial magistrate erred in law and in fact and further misdirected herself by failing to find and or appreciate that the doctrine of estoppel was not applicable against express provisions of the law.
  6. That the learned trial magistrate erred in law and fact and further misdirected herself by failing to appreciate that the 1<sup>st</sup> respondent's suit was incapable of enforcement under the express provisions of the *Insurance (Motor Vehicle Third Party Risks) Act* cap 405 of the Laws of Kenya being a claim for property damage.
  7. That the learned trial magistrate erred in law and in fact by failing to consider the appellant's submissions and authorities and in doing so arrived at an erroneous decision.
  8. That the learned magistrate erred in law by failing to uphold the doctrine of precedence." (sic)
5. The appeal was canvassed by way of written submissions. Counsel for the appellant condensed its grounds of appeal into two broad issues. The appellant's counsel commenced submissions by citing the principles that govern the exercise of this court's appellate jurisdiction as spelt out in *Selle & another*



- v Associated Motor Boat Co Ltd & others* (1968) EA 123. Counsel asserted that the trial court erred in law by declaring that the appellant was liable to indemnify the 1<sup>st</sup> respondent.
6. Submitting on whether the 1<sup>st</sup> respondent was in breach of the contract of insurance by failing to remit the policy excess he argued that remittance of the policy excess was mandatory under the policy of insurance and that the court erred when it only relied on the 1<sup>st</sup> respondent's evidence without interrogating the entire evidence before the court on whether indeed excess premium had been paid. That the appellant was only entitled to indemnify the 1<sup>st</sup> respondent under the policy upon remittance of the third-party excess within the stipulated period of fourteen (14) days upon demand, pointing out that the subsequent attempt at remittance was done outside the stipulated time provided.
  7. While placing reliance on the decision in *Concord Insurance Company Limited v David Otieno Alinyo & another* [2005] eKLR he submitted that the trial court did not consider the reason why the appellant refused to accept the policy excess. He asserted that on account of the 1<sup>st</sup> respondent's breach, the appellant was not liable to settle the decree because the default vitiated the 1<sup>st</sup> respondent's contractual right to compensation for third party property damage claims. It was further asserted that the *Insurance (Motor Vehicle Third Party Risks)* cap 405 was inapplicable to the instant matter as it only contemplates liability arising from death or bodily injuries from use of a motor vehicle.
  8. On the second issue counsel cited the case of *Joseph Nguku v AON Minet Insurance Brokers Ltd & another* [2019] eKLR to submit that the trial court failed to consider the fact that the 1<sup>st</sup> respondent's insurance agency had retained and or failed to remit the policy excess to the appellant despite demand and reminders to do so. It was asserted that the any act of omission or commission by the 1<sup>st</sup> respondent's insurance broker while acting in the assured's behalf and within the scope of his actual or ostensible authority bound the 1<sup>st</sup> respondent. In conclusion it was argued that the trial court erred by failing to consider the appellant's submissions and authorities and in doing so arrived at an erroneous decision. The court was thus urged to allow the appeal with costs.
  9. The respondent defended the trial court's decision. Counsel restated the principles enunciated in *Akamba Public Road Services v Abdikadir Adan Galgalo* [2016] eKLR and *Francis Ndungu Wambui & 2 others v VK (minor suing through next friend) MCWK* [2019] eKLR as to the circumstances in which the appellate court an interfere on appeal with the decision or findings of a lower court. In response to the appellant's argument concerning the relationship between an insurer and insured, counsel citing *Law and the Life Insurance Contract* by Muriel L. Crawford 7<sup>th</sup> Edition argued that insurance brokers are recognized as agents for both the insurer and the insured involved *inter alia* in bringing the two parties together, collecting premiums, delivering policies, and relaying important information on behalf of the insurer and that in most cases the insured does not have direct communication with the insurer. As such brokers are inevitably agents of insurers. Counsel asserted that payment of the excess by the 1<sup>st</sup> respondent through the broker and therefore agent of the two parties was effective.
  10. Counsel further asserted that the appellant excluded the 1<sup>st</sup> respondent from the communication between itself and the 1<sup>st</sup> respondent's insurance agent opting to write directly to the agent in demand payment of the excess. Citing the decisions in *Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Company Ltd* [2004] eKLR and *Concord Insurance Company Limited v David Otieno Alinyo & another* [2015] eKLR counsel argued that failure by the insured to pay the excess does not vitiate the insurance contract but the insurer was in such situations entitled to settle the claim less the unpaid excess claimed. Moreover, that the failure to pay excess could not be a basis for repudiation of the contract about which no communication had been made to the 1<sup>st</sup> respondent by the appellant. Thus, the policy was still in force. The court was thus urged to dismiss the appeal with costs.



11. The 2<sup>nd</sup> respondent did not participate in the instant proceedings before this court.
12. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in *Selle v Associated Motor Boat Co* [1968] EA 123 in the following terms: -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High 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.

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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

13. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & another v Duncan Mwangi Wambugu* (1982 – 1988) 1 KAR 278. Upon review of the memorandum of appeal and submissions by the respective parties before this court, it is the court’s view that the appeal turns primarily on the one particular issue namely; whether trial court misdirected itself in holding that appellant should satisfy the decree issued in Milimani CMCC No 3498 of 2012 - Joseph Mwai v Michael Njima Muchiri as well as pay the costs of the suit and interest.
14. Pertinent to the determination of issues are the pleadings, which form the basis of the parties’ respective cases before the trial court. Hence a review thereof is apposite before dealing with evidentiary matters. In *Wareham t/a A.F Wareham & 2 others v Kenya Post Office Savings Bank* [2004] 2 KLR 91, the Court of Appeal stated in this regard that: -

“We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or court on the basis of those pleadings pursuant to the provisions of order xiv of the *Civil Procedure Rules*. And the burden of proof is on the plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.” (emphasis added).

15. The 1<sup>st</sup> respondent by his amended plaint averred at paragraph 3, 4, 5, 6, 7 & 8 that:



3. At all material times to the suit, the plaintiff was the owner of motor vehicle registration number KAY 306S whereas the defendant was the insurance company that the plaintiff had duly insured the said motor vehicle with full detailed particulars of which are well known to the defendant.
  4. The plaintiff avers that on or about the January 2, 2010 his motor vehicle registration number KAY 306S was involved in an accident with another motor vehicle registration number KAE 959B along Ronald Ngala Street Nairobi in a matter which he duly reported to the defendant as his insurer.
  5. Further, pursuant thereto, a suit was filed against the plaintiff being Milimani CMCC 3498 of 2012 where the plaintiff was sued for recovery of material damages to motor vehicle KAE 959B. The plaintiff forwarded the summons and the plaint to the defendant as his insurer who requested the plaintiff to pay excess fee so that they can take up the matter on his behalf which he did full and detailed particulars of which are well known to the defendant.
  6. That the defendant did not defend the said suit and neither did they let the plaintiff know that they did not defend the same as a result of which a decree was issued in that suit and warrants of attachment of the plaintiff's property to satisfy the decree issued thereon was issued by the court.
  7. That the defendant as the insurer to the plaintiff's motor vehicle registration number KAY 306S was at all material times bound to satisfy the decree in the said suit pursuant to the insurance contract they had with the plaintiff and failing to do so amount to a breach of the said contract.
  8. The plaintiff's claim against the defendant is therefore for a declaration of the court that the defendant as the insurer of the plaintiff's motor vehicle registration number KAY 306S should satisfy the decree issued in Milimani CMCC No 3498 of 2012 Joseph Mwai v Michael Njima Muchiri as well as pay the cost of the suit and interest." (Sic)
16. The appellant filed an amended statement of defence denying the key averments in the amended plaint meanwhile attributed breach of the policy agreement on part of the 1<sup>st</sup> respondent by stating at paragraphs 5A and 7 that:

“5A. In response to paragraph 3 of the plaint the defendant avers that at all times material to the suit there existed an insurance policy between the plaintiff and the defendant herein but the plaintiff was in breach of the policy conditions that lead to liability for the third party property damage claim in Milimani CMCC No 3498 of 2012 being repudiated.

6. ....

7. In breach of the terms of the policy schedule and motor vehicle insurance policy aforesaid, the defendant refused, neglected and or otherwise failed to pay the policy excess and despite repeated requests and or entreaties from the plaintiff failed to remit the policy excess and the accrued monthly penalties.

### **Particulars Of Breach**

- a. Failing to inform the defendant of the alleged accident.
- b. Failing to provide the defendant with the claim documentation for processing.
- c. Failing to pay the applicable policy excess of Kshs 30,000/=.



d. Failing to pay the monthly penalty of Kshs 10,000/= for each month that the plaintiff continued to be in default.” (sic)

17. From the pleadings and record of evidence at the trial, it was not in dispute that pursuant to an insurance contract the appellant had insured the 1<sup>st</sup> respondent’s vehicle in the material period and that a third party claim was made by the 2<sup>nd</sup> respondent against the 1<sup>st</sup> respondent and a decree given in that regard in the primary suit. The 1<sup>st</sup> respondent asserted that the appellant was duty bound to satisfy the decree in favour of the 2<sup>nd</sup> respondent. On its part, the appellant’s position before the trial court and on this appeal is that the 1<sup>st</sup> respondent was in breach of the policy agreement, hence absolving the appellant from the liability satisfy the decree in the primary suit. The trial court after restating and examining the said evidence by the respective parties in its judgment stated that:

“Upon considering the evidence tendered by the plaintiff and his witness and the evidence of the defendant assurance company it is my considered view that the plaintiff had a valid active insurance policy with the defendant assurance company. When the defendant was informed about the decree in CMCC 3498/13 they (defendant) insisted that Kshs 30,000/= (thirty thousands) excess premium be paid which the plaintiff duly paid as has been confirmed by PW2.

The broker trading as Kering Insurance Agency, it is evidence and there is no doubt that the plaintiff has proved his case on a balance of probability. Judgment is entered in favour of the plaintiff as against the defendant in the sum of Kshs 188,495/= (One hundred and eighty eight thousand four hundred and ninety five shillings only) plus costs and interest of Kshs 25,780/= (twenty five thousand seven hundred and eighty) being the decretal amount in CMCC 3498/13 due to the interested party herein. The defendant to pay costs of the suit.” (Sic).

18. The applicable law as to the burden of proof is found in section 107, 108 and 109 of the *Evidence Act*. The duty of proving the averments contained in the plaint lay squarely on the 1<sup>st</sup> respondent. See *Karugi & another v Kabiya & 3 others* (1987) KLR 347.

19. At the hearing the 1<sup>st</sup> respondent testified as PW1 and it was his evidence that on January 2, 2010 his vehicle was involved in an accident and he duly reported the occurrence to his insurance agent one Mugambi of Kerin Insurance Agency; that he completed the requisite claim processing forms as advised; that he was later asked to pay Kshs 30,000/- as policy excess which he did; and that he was issued with a receipt by Kerin Insurance Agency (P Exh1). It was his evidence further that in 2013 his motor vehicle was attached in execution of the decree (P Exh3) in the primary suit. He prayed for a declaration to issue to the effect that the appellant was liable to settle the judgment the primary suit. During cross-examination he stated that he settled the policy excess by paying the same to Kerin Insurance Agency who were his insurance brokers at the time, and he could not tell whether the appellant received the policy excess premium from Kerin Insurance Agency.

20. Clayford Mugambi testified as PW2 and adopting his witness statement stated that he was an insurance agent at Kerin Insurance Agency. He confirmed having received a report from the 1<sup>st</sup> respondent in respect of the accident and sending due notification to the appellant. He also confirmed that the 1<sup>st</sup> respondent settled the policy excess of Kshs 30,000/-, which sum was forwarded to the appellant, but they declined to receive it. Under cross-examination he asserted that he had been collecting premiums for the appellant regarding the 1<sup>st</sup> respondent’s insurance policy since 2002 and reiterated that he remitted the policy excess to the appellant who declined to receive it.



21. The appellant called one witness Kelvin Ngiro who testified as DW1. He identified himself as a claims manager of the appellant company. He adopted his witness statement as his evidence in chief and produced the documents in the appellant's list of documents filed on May 15, 2018 as D Exh (a) to (g). He contended that brokers had initially represented the company but, in this instance, they represented the 1<sup>st</sup> respondent and not the appellant, and asserted that the appellant was yet to receive the policy excess in respect of the 1<sup>st</sup> respondent's claim. He stated under cross-examination that the appellant had written the agency concerning the excess and accrued monthly penalties and advising them to ensure the 1<sup>st</sup> respondent settled the policy excess. That the 1<sup>st</sup> respondent failed to settle the excess despite receiving communication.
22. Evidently, the 1<sup>st</sup> respondent's cause of action was founded on a contract of insurance (D Exhc), tendered as evidence together with the certificate of insurance (P Exh 2), policy schedule and (D Exh b). The terms of the policy were captured in (D Exhb) and (D Exhc).
23. The Court of Appeal in *Kenindia Assurance Co Ltd v Monica Moraa* [2016] eKLR describing the nature of an insurance contract cited with approval the decision of the Supreme Court of India in *United India Insurance Company v Kantika Colour Lab and others* civil appeal No 6337 of 2001 where that court stated as follows:-

“Contracts of insurance are generally in the nature of contracts of indemnity. Except in the case of contracts of life insurance, personal accident and sickness or contracts of contingency insurance, all other contracts of insurance entitle the assured for the reimbursement of actual loss that is proved to have been suffered by him. The happening of the event against which insurance cover has been taken does not by itself entitle the assured to claim the amount stipulated in the policy. It is only upon proof of the actual loss, that the assured can claim reimbursement of the loss to the extent it is established, not exceeding the amount stipulated in the contract of Insurance which signifies the outer limit of the insurance company's liability. The amount mentioned in the policy does not signify that the insurance company guarantees payment of the said amount regardless of the actual loss suffered by the insured. The law on the subject in this country is no different from that prevalent in England; which has been summed up in *Halsbury's Laws of England - 4th Edition*” [emphasis added]

24. The type of cover and or policy issued to the 1<sup>st</sup> respondent by the appellant was a “PSV-matatu” cover as shown by the certificate of insurance (P Exh2), policy schedule (D Exhb) and insurance policy (D Exhc). In this case the excess sum was stipulated as Kshs 30,000/-, while the specific clause providing for excess penalties as found in D Exhb read in part as follows:-

“ Amendments to the motor vehicle insurance policy

Excess penalty

It is hereby agreed and understood that notwithstanding anything contained herein to the contrary, that in the happening of an event giving rise to a third party property damage claim which the insured is otherwise entitled to indemnity under this policy and which is subject to section 3c endorsement 2d of this policy, and where the insured has failed to remit the third party applicable excess within the stipulated period of 14 (fourteen) days upon demand by the company, the company shall at its own discretion, in addition to the applicable third party excess stated in the policy schedule, charge a monthly penalty as stated in the policy schedule for every month the insured continues to default for a period not



exceeding 3 months before the company confirms in writing to the third party claimant of it having agreed to deal with such a claim on behalf of the insured. Failure to comply within the specified time, the company shall not be liable to indemnify the insured for any related property damage claims whatsoever. Further, the amounts are payable by the insured to the company in lumpsum before the company undertakes to indemnify the insured for the loss.” (sic)

25. Clause (K) on Conditions and Warranties in the Insurance Policy (D Exhc) provides *inter alia* that:--

“ Claims procedure

The insured shall pay the applicable excess, if any, as and when required by the company. If the Insured fails to pay the applicable excess as per the policy schedule within the stipulated time, then the company shall repudiate the claim and if a third party is involved, the company shall instruct the third party to deal with the insured directly.” (sic)

26. Clause 2(b) of section four c under the heading “Endorsements” in D Exhc provides that:-

“ Excess clause

The Insured in respect of each and every event shall be responsible for the first amount payable of any expenditure for which provision is made under this policy as specified in the policy schedule. The said excess shall be payable directly to the company by the insured within fourteen (14) days upon demand failing which the company shall not be liable to indemnify the insured or any other person for any of the incurred claims....

It is hereby agreed and understood that where the insured has failed to remit the applicable excess within the stipulated period of six (6) months the company shall thereafter not be liable to indemnify the insured for any own damage and third-party property damage claims arising out of the event”.

27. The question falling for determination is whether the 1<sup>st</sup> respondent performed his obligations under the provisions of the policy schedule as read with the insurance policy and or whether the appellant is liable to settle the claim in the primary suit. The appellants had upon notice of the accident involving the 1<sup>st</sup> respondent’s vehicle by their letter of February 24, 2010 (P Exh9) addressed to Kerin Insurance Agency (hereafter the agency), demanded payment of the third-party policy excess. The letter read in part:

“ Kindly advise our insured to remit to us the third-party excess of Kshs 30,000/- due within the next fourteen (14) days from the date hereof that is before the close of business on March 12, 2010 to enable us to proceed appropriately with this matter.”

28. The 1<sup>st</sup> respondent’s maintained that he remitted the policy excess of Kshs 30,000/- as demanded by the appellant and as evidenced by the agency’s receipt dated July 14, 2010 (P Exh1). It appears from the appellant’s letter dated June 16, 2010, (D Exhe) that the agency had by a letter dated June 14, 2010 engaged the appellant with a proposal to waive the excess payment which request the appellant rejected but demanding a sum of Kshs 70,000/- made up of the excess together with accrued penalties and indicating willingness to take up the third-party claim if the 1<sup>st</sup> respondent paid that sum. The appellant’s further letter dated September 1, 2011 (D Exh f) communicated that the sum payable was at Kshs 210,00/- and asserting the 1st respondent’s continued default.



29. Based on the terms of the insurance policy, the excess payment ought to have been settled by the 1<sup>st</sup> respondent on or before the March 12, 2010. It is difficult to tell from the evidence of the 1<sup>st</sup> respondent and PW2 when the first demand letter (P Exh9, also D Exhc ) was received at the Agency and when it was delivered to the 1<sup>st</sup> respondent. However, the date of the receipt (P Exh1) issued by the agency in respect of the policy excess, is dated July 14, 2010, some four (4) months after it originally fell due. The 1<sup>st</sup> respondent stated that the agency had asked him to give them a chance to intervene with the appellant and not to pay the excess sum meanwhile, which would explain the appellant's letter of June 16, 2010 in answer to the agency's referenced letter dated June 14, 2010. This would mean that by that date, the 1<sup>st</sup> respondent was aware of the demand letter of February 24, 2010 but only paid excess on July 14, 2022. While PW2 purported that the payment was done earlier than the date of the receipt, this is not indicated in the evidence of the 1<sup>st</sup> respondent. None of these witnesses gave the exact date of payment, and further for PW2 the evidence of forwarding payment to the appellant.
30. In that regard, the appellant through DW1 was adamant that the agency was at all material times acting as the agent of the 1<sup>st</sup> respondent alone. Section 2 of the *Insurance Act* describes an agent as follows:-
- “Agent” means a person, not being a salaried employee of an insurer who, in consideration of a commission, solicits or procures insurance business for an insurer or broker”
31. Further the section states:
- “Broker” means an intermediary involved with the placing of insurance business with an insurer or reinsurer for or in expectation of payment by way of brokerage commission for or on behalf of an insurer, policyholder or proposer for insurance or reinsurance and includes a medical insurance provider;
32. Applying the above definition to the facts of this case as discerned from the testimony of witnesses and corroborated by the appellant's own correspondence produced by the appellant produced at the trial, the agency acted as a broker in this instance and therefore an agent of both sides since inception of the insurance cover in 2007 until this dispute broke out. Unfortunately, the agency did not prove that having received the excess payment, it attempted to remit the same to the appellant and the correspondence by the appellant produced before the trial appears to negate such attempts. What is not in doubt is that the agency had by July 14, 2010 received the excess sums from the 1<sup>st</sup> respondent on behalf of the appellant and hence the appellant's disavowal of the payment cannot stand.
33. The next question therefore is whether the 1<sup>st</sup> respondent's delay in settling the policy excess within the stipulated time of fourteen days constituted a material breach that entitled the appellant to repudiate the policy and or decline to satisfy the decree issued in the primary suit? It does not seem so. In my wholistic reading of the pertinent clauses in the appellant's D Exh b & c outlined earlier in this judgement, it seems that though delay in remittance of excess attracted a monthly penalty, the appellant could only decline to honour a third-party claim if the excess remained unpaid after a period of six months of demand. Pursuant to the excess clause contained in D Exhc which stated regarding third party claims inter alia that:
- “It is hereby agreed and understood that where the Insured has failed to remit the applicable excess within the stipulated period of six (6) months the company shall thereafter not be liable to indemnify the insured for any own damage and third-party property damage claims arising out of the event”.



34. Thus, as late as June 2010 (see D Exhe) the appellant conveyed the intention to take up the third-party claim if the 1<sup>st</sup> respondent paid the excess and penalty and did not evince an express intention to repudiate the policy based on the policy terms. The letter dated September 1, 2011 (D Exhf) equally stated the sums hitherto accrued on account of excess and penalty but did not expressly communicate repudiation, and more poignantly, each of the letters continued to call for the “outstanding claim documents” for the appellant’s “further action”. This conduct is not consistent with the strict construction of the insurance policy that the appellants have advanced herein to the effect that the appellant was entitled to repudiate the policy if the excess was not paid within 14 days of demand.

35. Besides, even accepting that the 1<sup>st</sup> respondent paid the excess some 4 months late, well after demand was made, it does not appear that such default could justify avoidance. In *Concord Insurance Company Limited v David Otieno Alinyo & another* [2005] eKLR the Court of Appeal citing with approval its decision in *Kenya National Assurance Co Ltd v Kimani & another* [1987] KLR 236, Plat JA stated that: -

“The premium paid is the consideration for the contract and concerns the creation of a contract. Consequently, it can be said that payment of premium “keeps the contract alive”. The payment of excess must be paid as part of the performance of the contract. By paying excess, the insured demands performance from the insurer. The excess is that part of the loss not insured. Having paid it, the insured demands performance on that part of the loss that was insured. The excess is of the same nature as those conditions which must be fulfilled in order that the contract will not be avoided ab initio”.

36. Apaloo JA, on his part, said at page 251 paragraph 25 stated:

“Premium is the consideration that moves from the promisee to the promisor to make the agreement enforceable. In its absence, the agreement will be a nudum pactum both in law and in equity. “Excess” on the other hand, is the insured’s agreed contribution to the loss. Its non-payment does not avoid or impair the legal nature of the contract of insurance. Its only result is that the insurer’s obligation to the insured is diminished to the extent of the excess”. (sic)

37. Similarly, *Colinvaux’s Law of Insurance* 9<sup>th</sup> Edn Para 7-001 states that policy terms are not created equal:

“In English law contractual terms are normally divided into three classes (1) warranties, which are subsidiary or minor terms, the breach of which gives the innocent party a right to damages only; (2) conditions, which are major terms, the breach of which confers upon the innocent party, in addition to a right to damages, the further right to treat the contract as repudiated and to refuse to proffer or accept further performance; and (3) innominate terms, the significance of which cannot be assessed at the outset so that the rights of the innocent party depend upon the seriousness of the consequence of any breach. Determining whether a contract term is a condition, warranty or an innominate stipulation is a matter of construing the contract, and the terminology use by the parties is not conclusive”

38. At paragraph para 7-007 *Colinvaux’s Law of Insurance* (supra) the author proceeds to state that:

“In practice it is likely that the majority of policy terms cannot from the outset be stated as either fundamental or ancillary and such provisions may be regarded as falling into the intermediate “innominate” category recognized by the Court of Appeal in *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha* [1962] 2 QB 26. This principle has been applied



in the insurance context and, in the case of an innominate condition the seriousness of the consequences of the breach for the insurer determines whether the breach is repudiatory of non-repudiatory. By parity of reasoning with the initial classification of policy terms, it would seem that there are very few breaches which can cause serious prejudices to insurers and which cannot be remedied by an action in damages.....It has thus been held that breach of an innominate term affecting notice of claims against the assured; see *Alfred McAlpine Plc BAI (run-off) Ltd* [2000] Lloyds Rep I.R 352 & *Friends Provident Life & Pensions Ltd v Sirius International Insurance Corporation* [2006] Lloyds Rep I.R 45; and failure to co-operate with the insurer in the investigation of third-party claims; see *K/S Merc-Skandia XXXXII v Certain Lloyd's Underwriters* [2001] Lloyds Rep I.R 802 & *King v Brandywine Reinsurance Co (UK) Ltd* [2004] Lloyds Rep I.R 554 are not repudiatory even though liability of the insurers to investigate the claims has been hampered, the insurers have been put to additional expense and the assured has deliberately made false statement.”

39. In my considered view, the delay in payment of excess to the appellant while properly attracting a penalty at the rate of Kshs 10,000/- p.m for each month of default since March 2010 until payment to the broker on July 14, 2010 could not serve to avoid or impair the legal nature of the contract of insurance save that the insured's obligation to the insured was diminished to the extent of the excess and penalty. Although the trial court did not analyze the evidence in any meaningful detail, its final conclusions are justifiable and supported by the applicable law and the evidence before the court. In the circumstances, the court finds no merit in this appeal and will dismiss it with costs.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 21ST DAY OF OCTOBER 2022**

**C.MEOLI**

**JUDGE**

**In the presence of:**

For the Appellant: Ms. Achieng

For the Respondent: Mr. Kiptanui h/b for Mr. Waiganjo

**C/A: Carol**

