Munene v Invesco Insurance Co. Limited (Civil Suit 56 of 2019)
[2022] KEHC 16767 (KLR) (Civ) (22 December 2022) (Judgment)

Neutral citation: [2022] KEHC 16767 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 56 OF 2019

CW MEOLI, J

DECEMBER 22, 2022

BETWEEN

KENNETH BOSIRE MUNENE ..... PLAINTIFF

AND

INVESCO INSURANCE CO. LIMITED ..... DEFENDANT

JUDGMENT

1. Kenneth Bosire Munene, (hereafter the plaintiff) sued Invesco Insurance Co Ltd (hereafter the defendant) seeking *inter alia* a declaration that the defendant is under an obligation to satisfy the decree in Milimani Nairobi CMCC No 6548 of 2009 Kenneth Bosire Munene v Diana Wanzau Kioko & Ronald Ojuku Momanyi) and an order for the defendant herein pay Kshs 3,000,000/- in part satisfaction of the decree in the said suit with interest at court rates from July 21, 2016 until settlement in full.

2. It was averred that on or about the year 2009 the plaintiff filed case namely Milimani Nairobi CMCC No 6548 of 2009 (hereafter the primary suit) seeking damages for injuries sustained as a result of an accident which occurred on October 5, 2006 involving motor vehicle registration number Kxx xxxL suzuki vitara registered in the name of Diana Kioko and at the time of the accident being driven by Ronald Ojuku Momanyi. That the defendant being the insurer of motor vehicle Kxx xxxL and having been served with statutory notice pursuant to section 10(2) of *cap 405* was obligated to satisfy the judgment entered in the primary suit for a total sum of Kshs 5,253,220.70/- against its insured.

3. It was further averred that the defendant had despite its commitment to pay a maximum of Kshs 3,000,000/- towards the decree by installments and subsequent demands , reminders and notice of intention to sue refused and or neglected to satisfy the said judgment.

4. The defendant was duly served with summons to enter appearance but failed and or neglected to enter appearance or file defence. An interlocutory judgment was therefore entered against the defendant.Thereafter the matter proceeded to formal proof during which the plaintiff testified as PW1 and was the sole witness to adduce evidence in the matter. The sum total of his evidence was that on October 3, 2006 he was involved in a motor vehicle accident after which he sued Diana Kioko and Ronald Ojuku Momanyi (hereafter defendants in primary suit) and obtained judgment.

5. That a demand was made to the insurer of the defendants in the primary suit seeking payment of Kshs 3,000,000/- which the insurer was willing to pay and the balance thereof was to be settled by the defendants in the primary suit. He produced the pleadings in the primary suit as P Exh1 -3, . He also produced the statutory notice to the defendant dated July 31, 2008 as P Exh4, decree and certificate of costs in Milimani Nairobi CMCC No 6548 of 2009 as P Exh5, demand letter to defendant dated August 31, 2017 as P Exh6, letter from defendant's advocate dated June 9, 2017 as P Exh7 and reminder letter dated February 28, 2018 as P Exh8. It was his evidence that the defendant had not made good the offer to pay Kshs 3,000,000/- which he now seeks by this suit.

6. Upon the close of its case, the plaintiff's counsel filed submissions in respect of the matter. Counsel submitted that the defendant by dint of section 23 and 24 of the *Evidence Act* is estopped from denying having insured the suit motor vehicle. That by the letter dated June 9, 2017 addressed to the plaintiff's advocates the defendant had agreed to pay Kshs 3,000,000/- in installments of Kshs 500,000/- every three weeks from which it can be inferred that the defendant admitted being the insurer of motor vehicle registration number Kxx xxxL.

7. While relying on section 10(1) of the *Insurance (Motor Vehicle Third party Risks) Act* cap 405 laws of Kenya, the decisions in *Kenindia Assurance Co Ltd v James Otiende* [1989] 2 KAR 162 and *Madison Insurance Company Limited v Augustine Kamanda Gitau* [2020] eKLR counsel argued that the evidence before this court satisfies all prerequisites for the insurance company to satisfy the decree. That from the pleadings in the primary suit and letter dated June 9, 2017 the 1st defendant in the primary suit was a policy holder of Invesco Insurance Co Ltd *vide* policy No INI/xxxxxxx/2006 and the judgment was against the defendant's insured in respect of liability that was covered under the terms of the policy.

8. It was further submitted that the defendant was notified of the judgment and decree of the court through a demand letter subsequent to which the defendant's advocate communicated a concession to satisfy part of the judgment to the tune of Kshs 3,000,000/- thereby admitting liability. Citing the decision in *Joseph Mbuta Nziu v Kenya Orient Insurance Company Limited* [2015] eKLR counsel asserted that the defendant having agreed to pay Kshs 3,000,000/- in satisfaction of the plaintiff's judgment in the primary suit is bound. In conclusion it was submitted that the defendant having admitted liability this court ought to find that pursuant to section 10(1) of cap 405 Laws of Kenya the defendant is liable to satisfy the judgment of the court in Milimani Nairobi CMCC No 6548 of 2009.

9. The court has considered the pleadings by the plaintiff as well as the submissions filed in respect of the matter. It is the court's view that the sole issue for its determination is whether the plaintiff has established on a balance of probabilities that the defendant is under an obligation to satisfy the decree in Milimani Nairobi CMCC No 6548 of 2009 - (Kenneth Bosire Munene v Diana Wanzau Kioko & Ronald Ojuku Momanyi). 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."

10. The plaintiff's claim is founded on the defendant's alleged breach of its statutory obligation pursuant to section 10 (1) of the *Insurance (Motor Vehicle Third Party Risks) Act* cap 405 Laws of Kenya. At the hearing, the plaintiff who testified as PW1 adopted his witness statement whose key assertions are;

> " 2. I remember on the October 5, 2006 I was driving motor vehicle registration number Kxx xxxW from Nairobi town heading to Ongata Rongai.
>
> 3. When I reached near Banda school, the insured negligently drove, managed and or controlled motor vehicle suzuki vitara registration number Kxx xxxL in the opposite direction in an effort to overtake a series of vehicles, he caused it to collide with my motor vehicle, thus knocking my motor vehicle away from its proper lane and into the three line.
>
> 5. At the material time the motor vehicle , suzuki vitara registration number Kxx xxxL was insured by defendant *vide* policy No INI/xxxxxx/2006/05.
>
> 6. I initiated a suit against the insured in Nairobi CMCC 6548 of 2009 through my advocates on record Messrs Waweru Gatonye advocates.
>
> 7. The consent was recorded as a judgment on the court in the matter on July 21, 2016 and the insured was ordered to pay an award of Kshs 4,638,400/- plus costs, being a sum of Kshs 203,850 and interest to myself.
>
> 12. Via a letter dated June 9, 2017 the defendant agreed that they could only pay a maximum of Kshs 3,000,000.00 and that we should seek to recover the balance from the insured." (sic)

11. The onus is on the plaintiff to prove the defendant's statutory obligation pursuant to section 10 (1) of the *Insurance (Motor Vehicle Third Party Risks) Act* cap 405 Laws of Kenya. The applicable law as to the burden of proof is found in section 107, 108 and 109 of the *Evidence Act* which provides that;

> " 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. 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.... 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

12. In *Karugi & another v Kabiya & 3 others*[1987] KLR 347 the Court of Appeal stated that:

> "[T]he burden 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....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."

13. Section 10(1) & (2) of the *Insurance (Motor Vehicle Third party Risks) Act* states that;-

(1) If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(1A).....

(1B).....

(2) No sum shall be payable by an insurer under the foregoing provisions of this section—

(a) in respect of any judgment, unless before or within thirty days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings; or

(b) in respect of any judgment, so long as execution thereon is stayed pending an appeal; or

(c) in connexion with any liability if, before the happening of the event which was the cause of the death or bodily injury giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provision contained therein, and either—

(i) before the happening of the event the certificate was surrendered to the insurer, or the person to whom the certificate was issued made a statutory declaration stating that the certificate had been lost or destroyed; or

(ii) after the happening of the event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer, or the person to whom the certificate was issued made such a statutory declaration as aforesaid; or

(iii) either before or after the happening of the event, but within a period of twenty-eight days from the taking effect of the cancellation of the policy, the insurer has notified the registrar of motor vehicles and the commissioner of police in writing of the failure to surrender the certificate.

14. The above provision sets out the statutory ingredients necessary for the success of a suit seeking a declaration that an insurer is under an obligation to satisfy a decree arising from a liability covered under a policy of insurance. Essential to the success of the plaintiff's case on a balance of probabilities is that he ought to establish that; - (a) he is a claimant within the meaning of section 5(b) of the *Insurance (Motor Vehicle Third party Risks) Act*; (b) that judgment is as against the defendant's insured; (c) service

of the statutory notice was effected upon the defendant and; (d) existence of a valid policy of insurance between the defendant and its insured at the time of the accident. See the Court of Appeal decision in *Jiji v Gateway Insurance Co Ltd* (Civil Appeal 126 of 2018) [2022] KECA 368 (KLR)

15. Reviewing the uncontroverted oral and documentary evidence tendered by the plaintiff, items (a) and (c) and a part of item (b) above appear established on a balance. The key issue outstanding that encompasses items (b) in part and item (d) is the nexus between the accident vehicle, the insured and its insurer. The plaintiff had alleged that the defendant had insured motor vehicle registration number Kxx xxxL *vide* policy number INI/xxxxxxx/2006 in the material period. However, however no material was placed before the court to establish the said fact either by way of a certificate of insurance or police abstract to demonstrate the source of the policy number or to demonstrate that there was in existence a valid policy between the insured and the insurer at the material time.

16. The question therefore is whether in the absence of such evidence the document PExh7 , a letter emanating from the defendant's advocates, to the defendant's advocates suffices. The contents of the document read in part as follows;-

> " Our instructing client Invesco Assurance Co Ltd are willing to pay Kshs 3,000,000 albeit in instalments of Kshs 500,000 after every three weeks. The balance above Kshs 3,000,000 can be recovered from the defendants. Kindly let us know if your client is agreeable to enable us draw a consent and call for the first cheque.
>
> Otherwise we seek your indulgence as we seek instructions on settlement by instalments."

17. Does the foregoing letter constitute an admission on the part of the defendant with respect to liability to settle the decree in Milimani Nairobi CMCC No 6548 of 2009? The Court of Appeal in *Agricultural Finance Corporation v Kenya National Assurance Company Limited (In Receivership)* [1997] eKLR stated with regard the nature of an admission that;

> " order 12 r 6 empowers the court to pass judgment and decree in respect of admitted claims pending disposal of disputed claims in a suit. Final judgment ought not to be passed on admissions unless they are clear, unambiguous and unconditional. A judgment on admission is not a matter of right; rather it is a matter of discretion of the court and where a defendant has raised objections which go to the very root of the case, it would not be proper to exercise this discretion. In the case of Choitram v Nazari (1982-88) 1 KAR 437 Madan, J A (as he then was) said at pages 441 to 442:
>
> "For the purposes of o X111 r 6 admissions have to be plain and obvious, as plain as a spikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admission must leave no room for doubt that the parties passed out of the stage of negotiations on to a definite contract. It matters not even if the situation is arguable, even if there is a substantial argument, it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admission by analysis." [emphasis added]
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> See - Cassam v Sachania [1982] KLR 191 and Harit Sheth v Shamas Charania, CA No 252 of 2008

18. The decree and certificate of costs produced as P Exh5 contextualizes P Exh7 in that the defendant through its counsel acknowledges the emanating judgment in Milimani Nairobi CMCC No 6548 of 2009 and asserts the defendant's willingness to settle the resultant decree to the tune of Kshs

3,000,000/-. Applying the dicta in Agricultural Finance Corporation (supra), it is the court's view that the contents of P Exh7 constitutes an admission that 'is plain and obvious, as plain as a pikestaff and clearly readable'. There is no evidence to negative the finding and the logical conclusion that the admission could only have been made by the insurer because there existed a valid policy of insurance, in relation to the accident vehicle, between the defendant and its insured defendant in the primary suit, at the time of the accident.

19. Having analyzed the evidence on record, the court finds that the plaintiff has on a balance of probabilities established that the defendant is under a statutory obligation to satisfy the decree in Milimani Nairobi CMCC No 6548 of 2009. Consequently, judgment is hereby entered for the plaintiff against the defendant as prayed in the plaint.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 22ND DAY OF DECEMBER 2022.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: Ms. Chepng'eno

For the Defendant: N/A

C/A: Adika