



**Kenyan Alliance Insurance Co Ltd v Gaichugi (Civil Appeal E280 of 2023)
[2025] KEHC 428 (KLR) (Civ) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 428 (KLR)

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

CIVIL

CIVIL APPEAL E280 OF 2023

JM OMIDO, J

JANUARY 23, 2025

BETWEEN

THE KENYAN ALLIANCE INSURANCE CO LTD APPELLANT

AND

LUCY GAICHUGI RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. Martin M. Mutua Adjudicator/Senior Resident Magistrate delivered on 13th March, 2023 in Nairobi Milimani SCCOMM No. E1963 of 2022)

JUDGMENT

1. Vide a Statement of Claim dated 21st July, 2022, the Respondent herein filed the suit before the Small Claims Court seeking the following reliefs against the Appellant:
 - a. Judgement in the sum of Ksh.212,630/-.
 - b. Costs of the Claim.
2. The Appellant resisted the suit by filing a Response to the Statement of Claim dated 12th November, 2022 on the key ground that it was not the insurer of the Defendant in SCC E577 of 2021 and sought that the entire Claim be dismissed with costs.
3. In the trial court's judgement delivered on 13th March, 2023, the learned trial Adjudicator/Senior Resident Magistrate entered judgement in favour of the Respondent as per the prayers in the Statement of Claim.



4. The Claim before the trial court was one in the nature of an enforcement suit under Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405 Laws of Kenya, popularly referred to as a declaratory suit.
5. The instant appeal emanates from the judgement of the trial court. The Memorandum of Appeal dated 11th April, 2023 raises two grounds of appeal:
 - a. That the learned Adjudicator erred in law by allowing a declaratory suit founded on a Statement of Claim in which particulars central to declaratory suits were not pleaded.
 - b. The learned Adjudicator erred in law by finding that the Respondent proved her Claim when there was no documentary evidence adduced in support of that Claim.
6. The Appellant proposes that the appeal be allowed and the judgement and decree of the lower court be set aside and be substituted with an order dismissing the Respondent's suit.
7. This court directed that the appeal be canvassed by way of written submissions and both parties filed their respective submissions.
8. I have perused the Record of Appeal and the lower court record. Being aware of previous pronouncements by this court (Aburili, J.) in *Kenya Orient Insurance Limited v Otieno (Civil Appeal E166 of 2023)* [2024] KEHC 7637 (KLR) (25 June 2024) (Judgement) and myself in *Kuria v Monarch Insurance Co. Ltd (Civil Appeal E661 of 2022)* [2024] KEHC 15253 (KLR) (Civ) (3 December 2024) (Judgement), I will look into the issue whether the trial court was clothed with jurisdiction to determine a Cap 405 declaratory suit.
9. It is trite law that a challenge to jurisdiction can be raised by any party to the proceedings or by the court suo moto, even at the appellate stage (See *Republic v Public Procurement Administrative Review Board Ex Parte Intertek International Limited Accounting Officer, Kenya Bureau of Standards & 6 others (Interested Parties)* [2022] eKLR; *Constantine Joseph Advocates LLP v Attorney General* [2022] eKLR; and *Southern Star Sacco Limited v Vanancio Ntwiga* [2021] eKLR).
10. Aburili J. in *Kenya Orient* (supra) had the following to state on the issue of jurisdiction of the Small Claims Court to determine a Cap 405 declaratory suit:

“20. The Court considers that Section 10 of the Insurance Motor Vehicle (Third Party Risks) Act provides for the duty of an insurer to settle a decretal amount as follows:

10. Duty of insurer to satisfy judgments against persons insured

- (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.

Provided that the sum payable under a judgment for a liability pursuant to this section shall not exceed the maximum percentage of the sum specified in Section 5 (b) prescribed in respect thereof in the Schedule.

21. Upon entry of judgment in such accident claims where the Defendant was insured, the above provisions require the insurer to settle the decretal amount as awarded and in accordance with the provisions of the Act. It is however not always the case that the insurers willingly settle the claim and this necessitates the filing of a declaratory suit to compel the insurer to settle the decree. Ordinarily, such declaratory suits may be filed by the Defendant and/or Judgment Debtor in the primary suit.
 22. However, that can only happen if there is jurisdiction conferred on the court to hear such claims albeit they are claims arising from or as a consequence of a judgment and in effect, to give effect to a judgment or decree in those specific cases.
 23. What then is a declaratory suit? Relevant to this case, a declaratory suit is one that seeks to compel a judgement debtor's insurer to settle the decree passed against the insured. This kind of claim is not provided for under Section 12 of the SCC Act.
 24. In the circumstances I find that declaratory suits do not fall within the mandate of the Small Claims Court. I thus find and hold that the Adjudicator erred in law in dismissing the preliminary objection raised by the appellant. I set aside the order dismissing the preliminary objection and substitute it with a finding that the Small Claims Court has no jurisdiction to hear and determine declaratory suits relevant to the matter before this court. Consequently, the declaratory suit before the Small Claims Court is hereby struck out with an order that each party shall bear their own costs of the said suit and of this appeal.”
11. In *Kuria v Monarch Insurance Co. Ltd* (supra), I made the following observations while dealing with the same issue of jurisdiction:
15. But then, it is to be remembered that the matter as filed before the lower court was one that is in our jurisdiction popularly referred to as a Cap 405 declaratory suit. It is one that seeks to enforce the judgement and decree already passed by a court of law against a Defendant who was not a party to the suit, pursuant to a policy of insurance issued by the Defendant as the insurer of the party against whom the judgement was entered and decree issued, courtesy of a statutory duty that may have existed (if proved), placed upon the insurer under Section 10(1) of Cap 405.
 16. Let us read the said provision:
 10. Duty of insurer to satisfy judgments against persons insured (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.

17. Of course, under Section 5(b) of Cap 405, the liability for which the insurer is under statutory duty to meet is that which may be incurred by the policy holder and is limited to a judgement and decree that is entered in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the insured vehicle on a road, subject to satisfaction of the further conditions under Section 10(2) to (7) of the statute.
 18. Perhaps knowing well that this court (R.E. Aburili J) has in the case of *Kenya Orient Insurance Limited v Otieno (Civil Appeal E166 of 2023)* [2024] KEHC 7637 (KLR) (25 June 2024) (Judgement) already elaborately, in my view, dealt with the issue as to whether the Small Claims Court has jurisdiction to entertain and determine a declaratory suit, Mr. Kaburu sought to distinguish the said decision by stating that my sister did not attempt a consideration or delimitation of what would amount to “compensation for personal injuries” as provided under Section 12(1)(d) of Cap 10A.
 19. In my considered view, the claim that sought the relief for compensation for personal injuries is the primary suit that was filed by the Appellant against the party against whom judgement was entered and a decree issued. From the pleadings filed, that suit was Milimani CMCC No. 3716 of 2019.
 20. The present suit seeks to enforce the judgement in Milimani CMCC No. 3716 of 2019 on the basis of the underpinning of statute under Section 10 of Cap 405. Does that make the declaratory suit that was filed before the Small Claims Court one for compensation for personal injuries?
 21. I do not think so. I say so because the suit is one that relates to the duty of insurer to satisfy a judgment against a person that it had insured and not one in which the court considers ordering compensation for personal injuries, which would have already been determined in the primary suit. Put in another way, a declaratory suit is one that seeks to compel the insurer of a judgement debtor to settle and/or satisfy the decree issued in the primary suit. Such a suit does not fall under any of the categories under Section 12(1) of Cap 10A and is most definitely not one for compensation for personal injuries as the aspect of such compensation would already have been dealt with in the primary suit in which the decree sought to be enforced is issued.
 22. From my analysis above, I reach the same conclusion as Aburili J. that a Cap 405 declaratory suit is not among the claims the Small Claims Court is mandated by Act No. 10A to handle.
 23. I therefore reach the result that the appeal herein lacks merit. The ruling and order of Hon. Aswani that the Small Claims Court lacks jurisdiction to entertain the suit before it is hereby upheld, save only to add that the suit in the lower court stands struck out from the date of the ruling, with no order as to costs.
12. From the foregoing, I remain to be of the persuasion that the Small Claims Court does not have jurisdiction to entertain and/or determine an enforcement declaratory suit.



13. The upshot then is that as the learned trial Adjudicator/Senior Resident Magistrate had no jurisdiction to entertain and/or determine the suit before him, I proceed to set aside the judgement and decree of the trial court and substitute the same with an order striking out the Claim before it for want of jurisdiction.
14. I make no order as to costs of the appeal and the suit before the lower court as the issue of jurisdiction has been raised by the court on its own motion.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 23RD DAY OF JANUARY, 2025.

JOE M. OMIDO

JUDGE

For the Appellant: Ms. Njoroge.

For the Respondent: No appearance.

Court Assistant: Mr. Ngoge & Mr. Juma.

