



REPUBLIC OF KENYA



**Geminia Insurance Company Limited v Sabulei (Civil Appeal E006 of 2023)
[2025] KEHC 2112 (KLR) (Civ) (17 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2112 (KLR)

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

CIVIL

CIVIL APPEAL E006 OF 2023

JM NANG'EA, J

FEBRUARY 17, 2025

BETWEEN

GEMINIA INSURANCE COMPANY LIMITED APPELLANT

AND

SILAH K SABULEI RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. J. P Omolo (SRM) & Adjudicator delivered on 30th December, 2022 in Milimani SCCC No. E732 of 2021)

JUDGMENT

1. The Respondent herein filed Nairobi SCCC No. E732 of 2021 (hereinafter referred to as the “declaratory suit”) vide Statement of Claim dated 1st November 2021 seeking a declaration that the Appellant is liable to settle the decretal sum of Kshs. 242,805 arising from Judgement delivered on 12th October, 2021 in another suit being Nairobi SCCC No. E255 of 2021 (“the primary suit”). He had attempted to realize the decretal sum from the Appellant’s insured clients he sued in the primary suit in vain, hence the decision to bring the declaratory suit to enforce the judgement.
2. The Appellant on its part denied the claim in toto vide its response dated 7th December, 2021 and also raised a Preliminary Objection to the suit on the ground that the primary suit was void and incompetent. It also denied being the insurer of the defendants in the primary suit or being served with a statutory notice of institution of that suit. On a without prejudice basis, the Appellant further contended that if it was otherwise proven that it was such insurer, then the policy had been cancelled and that it did not cover material damage claims such as lodged in the primary suit.
3. By consent of the parties, the declaratory suit was disposed of by documentary evidence. Judgement was thereafter entered in favour of the Respondent with the Court issuing a declaration that the Appellant was bound to settle the decree in the primary suit.



4. The Appellant being dissatisfied with the judgement and Decree of the Court preferred the instant appeal vide the Memorandum of Appeal dated 6th January, 2023 on the following grounds that:-
 - i. The Learned Trial Magistrate/Adjudicator misdirected herself and erred both in law and in fact by allowing the Claimant's claim against the Respondent to stand;
 - ii. The Learned Trial Magistrate misdirected herself and erred in both law and in fact by failing to strike out the Claimant's claim against the Respondent;
 - iii. The Learned Trial Magistrate misdirected herself and erred in both law and in fact by failing to find that the Claimant's suit against the Respondent could not stand as it was premised on wrong principles and wrong application of the law making the whole suit a non-starter and defective ab-initio;
 - iv. The Learned Trial Magistrate misdirected herself and erred in both law and in fact by failing to find that the whole suit was premised on a defective decree making the whole proceedings defective ab initio;
 - v. The Learned Trial Magistrate misdirected herself and erred in both law and in fact by failing to find that Milimani SCCC No. E255 of 2021 that gave rise to the declaratory suit before her was in itself void for all purposes, the pleadings thereof having been filed by a non-advocate an unqualified person;
 - vi. The Learned Trial Magistrate misdirected herself and erred in both law and in fact by failing to find that subsequently all proceedings and judgement in the said Milimani SCCC No. E255 of 2021 is void ab initio and therefor incapable of giving birth to a declaratory suit as this amounted to sanitizing and abetting an illegality;
 - vii. The Learned Trial Magistrate misdirected herself and erred in both law and in fact by failing to find that under the Insurance (Motor Vehicle) Third Party Risks Act Cap 405 Laws of Kenya a Declaratory suit against an insurer only lies in personal injury claims and not material damage;
 - viii. The Learned Trial Magistrate misdirected herself and erred in both law and in fact by failing to address herself on the gist of the law, whether its is proper, procedural and la to file a declaratory suit against an insurer in a material damage claim;
 - ix. The Learned Trial Magistrate misdirected herself and erred in both law and in fact by failing the Respondent therein an alleged insurer, was wrongly sued and the Claimant's suit was therefore misconceived, misplaced, defective, incompetent bad in law and a blatant abuse of the Court process and strike out the same.
5. The appellant therefore wants the lower court's judgement and decree to be set aside and the Claim be struck out. It also prays for the costs of the appeal.
6. The above grounds may be condensed into only three to wit: that the declaratory suit was defective and could not be a lawful basis for the decree in favour of the Respondent; that the lower court applied wrong principles of law in its determination of the suit and that the learned trial Magistrate's/ Adjudicator's decision was arrived at against the weight of evidence.
7. The Appellant thus prays that the Appeal be allowed; the whole of the Judgement and Decree of the Subordinate Court in the declaratory suit be set aside and the claim struck out with costs to the Appellant.
8. I shall consider all the stated grounds of appeal together.



The Appellant's Submissions

9. The Appellant proposes the following three issues as arising for determination:
 - a. Whether the suit having been filed by unqualified persons was defective and ought to have been struck out
 - b. Whether the advocates on record were properly on record (sic)
 - c. Whether the suit being a decree arising from material damage claim was enforceable via declaratory suit.
10. On the first issue it was submitted that the declaratory suit was irregular and bad in law. The primary suit having been filed by an unqualified person, the court is told that the lower court's judgment was irregular, reliance being placed on the judicial determination in *Daniel Odera Obonyo v Edwin Akach Okinda* [2017] eKLR.
11. Regarding the second point Counsel submitted that no notice of change of advocates for the Respondent was filed and neither was leave therefor sought and obtained contrary to Order 9 Rule 9 of the Civil Procedure Rules 2010. Counsel further referred to the case of *Violent Wanjiku Kanyiri vs Kuku Foods Limited* [2022] eKLR to urge that the Respondent's purported advocates had no right of audience and all documents they filed should have been struck out.
12. Finally on the third issue as framed I was referred to case law in *David Kinyanjui & 2 Others vs Meshack Omari Manyori* [1998] eKLR, the Appellant contending that it is neither the tortfeasor nor a defendant in the primary suit. According to Counsel, judgment in a material damage claim cannot also be enforced via a declaratory suit as envisaged under Section 5 the Insurance (Motor Vehicle) Third Party Risks Act.

The Respondent's Submissions

13. The Respondent through his advocates submitted on four issues he proposes as hereunder :-
 - a. Whether the declaratory suit was fatally defective.
 - b. Whether the firm of Brian Odhiambo & Associates are properly on record for him.
 - c. Whether the respondent satisfied the requirements for bringing the declaratory suit.
 - d. Who should pay the costs of the declaratory suit?
14. Pertaining to the first issue, the Respondent's Counsel opine that the declaratory suit was authenticated, the Respondent having personally signed the same as required by Section 23 (1) of the *Small Claims Court Act*. Furthermore, it is observed that the Appellant never disputed occurrence of the accident subject of the primary suit. The Respondent also takes issue with the Appellant's failure to raise the issue of alleged defectiveness of the claim throughout trial of the declaratory suit.
15. In respect to the second issue the Respondent identified for determination, Counsel rely on Article 159 (2) (d) of *the Constitution* to submit that the Appellant did not challenge the ruling of the Court that the law firm of Brian Odhiambo & Associates were not properly on record. It was argued that the Appellant was raising a procedural technicality that should have been determined in the lower court in a bid to deny the Respondent an opportunity to present his case to this court.
16. Concerning the third point, Counsel cited the case of *UAP Insurance Co Ltd vs Patrick Charo Chiro* [2021] eKLR where the Court noted the importance of meeting "the four-fold test" under Section



10 of the *Insurance (Motor Vehicles Third Party Risks) Act*. Further, the court is referred to the case of Jubilee Insurance Co Ltd vs Walter Tondo Soita [2021] eKLR in which it was observed that;

“if the appellant wanted the court to believe that material damage is not covered by the policy, it was duty bound to adduce evidence for the court to find in its favour”

Analysis and determination

17. I have considered the record of appeal as well as the arguments for and against the appeal fronted in the rival submissions. The jurisdiction of an appellate court in such an appeal is restricted to only points of law by dint of section 138 (1) of the Small Claims Courts Act.
18. In the famous case of Mbogo & Another vs. Shah [1968] EA 93 the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
19. I find it proper to give a brief background to this appeal. The Respondent was the Claimant in the primary suit against the Appellant’s alleged insured clients he sued seeking compensation for material damage arising from a road accident that occurred on 6th January, 2021. The Appellant’s clients were accused of negligent driving that caused damage to the Respondent’s motor vehicle described in the suit. The suit, filed by the firm of Klein & Omino Associates on behalf of the Respondent, was dismissed on 14th March 2022 for want of prosecution.
20. The Respondent subsequently appointed the firm of Brian Odhiambo & Associates Advocates to pursue his interests. The said advocates filed the primary suit as a fresh claim supposing that the pleadings filed by the previous unqualified advocates were null and void. In its judgment the lower Court awarded the Respondent a sum of Kshs. 242,805 together with costs and interest as compensation for damage occasioned to his vehicle. He thereafter filed the declaratory suit upon which the Appellant herein filed a Notice of Motion Application dated 26th July, 2022 praying for the suit to be struck out for being res judicata. The Court found merit in the application and in its ruling of 1st September 2022 struck out the primary suit on account of being res judicata, the same claim having been earlier dismissed for non-prosecu.
21. The Respondent reacted by moving the Court to reinstate the suit by application dated 7/9/2022. The Court found in his favour and he thereafter filed the declaratory suit which is the subject of the instant appeal and obtained the impugned judgement.
22. The following issues therefore rise for this Court’s determination:
 - i. Whether the Respondent’s claim was void ab initio.
 - ii. Whether a declaratory suit can be instituted against an insurer under the Motor Vehicles Third Party Risks Act for a material damage claim
 - iii. Who bears the costs of the suit?
23. The Appellant has questioned the competence of the declaratory suit for the reason that the primary suit had been dismissed as having been filed by persons who were not advocates and therefore by entertaining the declaratory suit the lower Court was allegedly aiding and abetting an illegality.



24. I am of the opinion that the trial court did not err by allowing the suit to be reinstated to proceed to its logical conclusion. Although the Respondent's suit documents were filed by unqualified persons they were executed by the Respondent himself in accordance with the provisions of Section 23 (1) of the *Small Claims Court Act* which provide that:-

“Every claim filed with the Court shall commence with the filing of a statement of claim in the prescribed form signed or authenticated by the claimant or authorized representative.”

25. As the Claim document in the primary suit was signed by the Respondent himself, the same was not defective. Besides, it should also be noted the spirit of the Small Claims Act abhors application of strict rules of drafting of pleadings and evidence. The court accordingly finds and holds that the Claim as filed in the lower court is not void and was properly and lawfully entertained by the trial court.

26. On whether a declaratory suit can be sustained in a material damage claim, the Appellant has put up a spirited argument that Section 5 of the *Insurance (Motor Vehicles Third Party Risks) Act* does not allow a declaratory suit in material damages claims. Section 5(b) Act provides that:-

“In order to comply with the requirements of Section 4 the policy of insurance must be a policy which—

a. ...

b. insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road.”

27. Furthermore, Section 10 (1) of the *Insurance (Motor Vehicles Third Party Risks) Act* provides that the duty of the insurers is to satisfy judgements against persons insured. It is enacted as follows:

“10. Duty of insurer to satisfy judgments against persons insured

i. 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.

28. Sections 5 and 10 of the *Insurance (Motor Vehicles Third Party Risks) Act* cushion a party that has suffered loss or injury as a result of the acts or omissions of the insured. If Section 5 of the *Insurance*



(Motor Vehicles Third Party Risks) Act was to be read in isolation it would mean that in every material damage claim that an insured fails to satisfy, the injured party would simply have no recourse for the damage, loss or inconvenience.

29. This Court in *Directline Assurance Company Limited vs Mwangi* [2024] KEHC 9887 (KLR) while answering the question of whether the lower Court erred in allowing the Respondent's suit when material damage was not covered under the Insurance (Motor vehicle Third Party Risks) Act had the following to say:-

“24. I understand the import of the above provision of the law to be that for liability to accrue under Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405, there is a 4-fold test to be met. Firstly, that the motor vehicle in question was insured by the Appellant; Secondly, that the Respondent has a judgment in his favour against the insured; Thirdly, that statutory notice was issued to the insurer within 30 days of filing the suit where judgment has been obtained and finally the Respondent was a person covered by the insurance policy.

25. In my view, the purpose of the above provisions and the Insurance (Motor Vehicle Third Party Risks) Act Cap. 405 was to ensure that a third party who suffered injury or loss due to acts or omission on the part of an insured motor vehicle would be assured of compensation for their injury, loss or inconvenience in circumstances where the owner or driver of the insured motor vehicle has no means to settle the claim.”

30. The Appellant insisted that the requisite statutory notice of institution of the primary suit was not served upon it. This contention has, however, been disproved as the notice was exhibited. The relevant police abstract tendered also purports to indicate that the Appellant insured the subject vehicle against third party risks as per the requirement of the law. The Appellant did not tender evidence to show that their policy only covered personal injuries or death and not material damage.

31. In *Jubilee Insurance Co Ltd vs Walter Tondo Soita* [2021] KEHC 5999 (KLR) the Court observed thus:

“The provisions of Sections 107 and 108 of the Evidence Act come into play. If the appellant wanted the court to believe that material damage is not covered by the policy, it was duty bound to adduce evidence for the court to find in its favour.

...

The appellant contends that the insurance policy was not issued in favour of the respondent. The law of insurance is such that privity of contract is not adhered to in its strict sense. Under insurance law, especially Third Party policies, the beneficiary of the cover is the person who has been injured by the insured”

32. It is my considered view that the Respondent proved the Appellant's liability on a balance of probabilities. The trial court rightly entered judgement for the Respondent and I fully concur.

33. The upshot of the above is that the appeal lacks in merit and is dismissed with costs to the Respondent.

J. M. NANG'EA, JUDGE.



JUDGEMENT DELIVERED VIRTUALLY ON THIS 17TH DAY OF FEBRUARY 2025 IN THE PRESENCE OF:

The Appellant's advocate, absent.

The Respondent's advocate, Mr Odhiambo.

J. M. NANG'EA, JUDGE.

