



**Madison Insurance Co Ltd v Kurstan Builders Ltd & 2 others (Civil Suit
03 of 2021) [2025] KEHC 2145 (KLR) (12 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2145 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL SUIT 03 OF 2021
FR OLEL, J
FEBRUARY 12, 2025**

BETWEEN

MADISON INSURANCE CO LTD PLAINTIFF

AND

KURSTAN BUILDERS LTD 1ST DEFENDANT

MATHIUS MUNTINDA 2ND DEFENDANT

JOHN MUTUA MULI 3RD DEFENDANT

JUDGMENT

A. Pleadings

1. Vide a plaint dated 10th May 2019 and filed in court on 4th June 2019, the plaintiff averred that they were a limited liability company incorporated under the *Companies Act*, Cap 486, to undertake insurance business, while the 1st defendant was the registered and insured owner of motor vehicle registration No KBP 098S Isuzu Canter. (Hereinafter referred to as the insured/suit motor vehicle).
2. The 2nd and 3rd defendants, were described as adults of sound mind, working for gain as loaders of the 1st defendant in the suit motor vehicle.
3. The plaintiff averred that on or about 02.11.2024, the 1st defendant took out a comprehensive insurance policy No MCI/7021044814/2011/COM for the suit motor vehicle, which insurance was to cover accidental loss or damage to the insured motor vehicle, death, bodily injury, loss or damage to property of third party arising out of the use of the suit motor vehicle. The said policy was issued in compliance with, The Insurance (Motor vehicle third party risks) Act, Cap 405 laws of Kenya, which expressly excluded any cover/ risks under any employment statute. Injuries to the 1st defendant's employees were therefore excluded.



4. On or about 16.05.2015 at about noon, while carrying sand for sale, the suit motor vehicle was involved in an accident along Machakos-Kitui road in consequence whereof the 2nd and 3rd defendant herein sustained serious bodily injuries. The said persons were on board the suit motor vehicle as employees of the 1st defendant and eventually filed Machakos CMCC No 982 and 983 of 2015 claiming damages.
5. In light of the clear provisions of the Insurance policy, the plaintiff averred that they were not liable under the insurance policy to compensate, indemnify, or restitute the 1st defendant nor did they have any obligation to take over and defend the suits filed against the 1st defendant by the 2nd and 3rd defendant, who were claiming damages for injuries suffered, as they were his employee's and fell under the category of person excepted from the policy.
6. The plaintiff prayed that a declaration be so issued and judgment be entered in their favour as prayed for in the plaint.
7. The 1st defendant did not file any pleadings in response to this suit, nor did they take part in the proceedings.
8. The 2nd and 3rd defendant filed their joint statement of defence dated 29th September 2012 and categorically denied all the averments made by the plaintiff in paragraphs 6,8, 9, 11,12, and 13 of the plaint. They were categorical that they had been hired by the 1st defendant as casuals, and had rightfully boarded the suit motor vehicle cabin when the accident occurred. They were therefore rightly entitled to be compensated since the suit motor vehicle was properly insured by the plaintiff.
9. They also pointed out that this claim was an abuse of the process of the court, since the plaintiff had previously filed Kitui Cmcc No. 48 of 2017, which was dismissed on 16.03.2021 for want of prosecution. They also believed that this suit was filed as a conspiracy between the plaintiff and the 1st defendant to defeat the claims they had instituted in the lower court.
10. The 2nd and 3rd defendants therefore prayed that this suit be dismissed with costs.

B. The Plaintiff's case.

11. PW1 Moses Baraza testified that he worked for the plaintiff company as a legal officer and adopted his witness statement dated 03.04.2023 as his evidence. The said witness statement reaffirmed the averments made in the plaint that the 1st defendant had taken out a comprehensive motor vehicle insurance cover for the suit motor vehicle, which was subsequently involved in an accident, and two claims were filed by the 2nd and 3rd defendant herein.
12. The Insurance cover issued was based on statutory requirements of the Insurance (Motor vehicle Third party Risks) Act, Cap 405 laws of Kenya but did not extend to cover passengers who were in the employment of the 1st defendant. Both the 2nd and 3rd defendants in their pleadings had admitted to being employees of the 1st defendant and in light of the outlined facts, they had to be absolved from satisfying any decree arising from the suit's filed or any other claim, which may arise in relation to the road traffic accident which occurred on 16.05.2015, for the simple reason that the policy did not cover/ extend to employees of the insured.
13. PW1 also produced all the documents in their bundle of documents as exhibit P1-P5. The said documents were the policy document, police abstract, investigation report, pleadings file in Machakos Cmcc No 982 and 983 of 2015 and a disclaimer notice to the insured. He prayed that the suit be allowed with costs.



14. Under cross-examination, PW1 stated that based on the pleadings filed, the 2nd and 3rd defendants had described themselves as employees of the 1st defendant and their investigations had also confirmed this fact, as outlined in the investigations report produced (Exhibit P3). He also pointed out that the 2nd and 3rd defendants had stated in their witness statements that they were picked from Kaani and Masii markets by the 1st defendant's driver and assigned work to go offload sand. The agreed labour cost would be Kshs 200/= for the work done. PW1 was also not aware if the plaintiff had filed any earlier suit at Kitui law court.
15. In re-examination, PW1 reiterated his earlier evidence as to the terms and condition of the insurance policy and reasons as to why, they had to be absolved from indemnifying the 1st defendant. The 2nd and 3rd defendant had confirmed that they were employees of the 1st defendant and could not run away from their pleadings, where it was so admitted.

C. The 2nd and 3rd Defendants case

16. DW1 John Mutua Muli, the 3rd defendant adopted his witness statement dated 19.09.2022 as his evidence. He insisted that they were not employed by the 1st defendant and had been picked by the suit motor vehicle driver at Kaani shopping center to assist him offload sand and was to be Ksh.200/= for the work done. He did not know the 1st defendant and therefore was entitled to be compensated.
17. He also relied on documents filed in their list of documents, being statutory notice dated 24.11.2015, letter dated 30.06.2016 forwarding the primary pleadings to the insurer, plaintiff filed by the plaintiff in Kitui Cmcc No. 48 of 2017, and Order dismissing the said suit. The same were produced as Exhibit D1 to D5. He prayed that the suit be dismissed.
18. Under cross examination, DW1 confirmed that he boarded the suit motor vehicle at Kaani market and was not related to the suit motor vehicle driver and/or the 2nd defendant, though he noted that the two were cousin brothers. He confirmed that he had filed a suit seeking compensation and stated therein that the suit motor vehicle driver was to pay them Kshs 200/= for work done.
19. Under re-examination, DW1 reiterated that their claim was valid as they had been injured as passengers on the suit motor vehicle and were not employees of the 1st defendant. He prayed that the suit be dismissed.
20. DW2 Mathius Mutinda, similarly adopted his witness statement dated 19.09.2022 and fully associated himself with the evidence of DW1 in its entirety. Under cross-examination, he confirmed that the driver of the suit motor vehicle was his stepbrother and was to be paid Kshs 200/= for work done. Again, in re-examination he pointed out that he filed his claim as a passenger in the suit motor vehicle and not as an employee of the 1st defendant.

D. Analysis & Determination

21. The Court has considered the pleadings filed herein, evidence on record, and written submissions filed by both parties. The issues that emerge for determination are;
 - a. Whether this suit is res judicata given that a previous suit Kitui CMCC No 48 of 2017, had been filed and dismissed.
 - b. Whether the 2nd and 3rd defendant are employees of the 1st defendant, and
 - c. Whether the plaintiff is entitled to reupdate the insurance policy covering the suit motor vehicle.



i. Whether this suit is res judicata given that a previous suit Kitui CMCC No 48 of 2017, had been filed and dismissed.

22. It is a fact that the plaintiff company did initially file Kitui CMCC No. 48 of 2017, which was eventually dismissed for want of prosecution on 16.03.2021. Though the suit involves the same parties and the pleadings filed herein are a replica of the pleadings filed in Kitui Chief Magistrate court, it has not been shown that the previous matter was heard and determined on merit nor did any witness testify in the aforestated Kitui suit. This suit is therefore not res judicate and does not offend the provisions of Section 7 of the Civil Procedure Act.

ii. Whether the 2nd and 3rd defendant are employees of the 1st defendant.

23. The 2nd and 3rd defendant in the pleadings filed in Machakos CMCC No 982 and 983 of 2015 specifically confirm at paragraph 4 of the plaint that,

“on or about 16.05.2015 at about 12.00pm or thereabouts along Machakos-Kitui Road at Kaseve area, whilst the plaintiff was lawfully travelling in the defendant’s motor vehicle registration Number KBP 098 S, having been hired to offload sand which was being ferried by the said motor vehicle from Masii to Makutano.....”

24. During cross-examination, both the 2nd and 3rd defendants agreed that as at the time of the accident, they had been assigned work of off-loading sand and would be paid Kshs 200/= for work done. Parties are bound by their pleadings. In ADETOUN OLADEJI (NIG) VRS NIGERIA BREWERIES PLC SC 91/2002

“.....It is now trite law that parties are bound by their pleadings and that any evidence lead by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....”

“..... in fact that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprise by which no opportunity is given to the other party to meet the new situation.”

25. The 2nd and 3rd defendants herein therefore cannot turn their back and allege that they were passengers in the suit motor vehicle but not the 1st defendant’s employee’s. They were hired by the 1st defendant’s driver, who had the authority to do so in the cause of the 1st defendant’s assigned work. The said parties were thus vicariously employed by a person with authority to do so and for the said assignment are properly deemed to be servants/agents of the 1st defendant, who was the principal.

iii. Whether the plaintiff is entitled to reupdate the insurance policy covering the suit motor vehicle.

26. The plaintiff produced the insurance policy (Exhibit 1), which proved that they had a binding insurance contract, but under Section II (b) and (c), of the said policy, it is clearly stated that accident/incidences of death or bodily injury to any person in employment of the insured arising out of and in the cause of such employment were exempted from the said policy.



27. It is now a longstanding principle of law, that parties to contract are bound by the terms and conditions thereof, and that it is not the business of courts to rewrite such contracts. In *National Bank of Kenya Limited v Pipe Plastic Samkolit (K) Ltd* [2002] 2 EA 503 [2011] eKLR at 507, this Court stated:

“A court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded or proved.” See also *Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited* [2017] eKLR.

28. In the House of Lord’s decision in *Brogden v Metropolitan Rly Co* [1876-77] LR 2 APP CAS 66, Lord Blackburn held as follows:

“I have always believed the law to be this, that when an offer is made to another party and in that offer, there is a request express or implied that he must signify his acceptance by doing some particular thing, then as soon as he does that thing, he is bound.”

29. Section 5(b) of The Insurance (Motor Vehicle Third-party Risks) Act, Cap 405 also expressly provides that; -

Section 5 ;

In order to comply with the requirements of section 4, the policy of insurance must be a policy which-

- a. Is issued by a company which is required under the *Insurance Act*, 1984 (cap 487) to carry on motor vehicle insurance business; and
- b. Insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which maybe incurred by him or them in respect of the death of, bodily injury to, any person caused by or arising out of the use of the vehicle on the road.

Provided that a policy in terms of this section shall not be required to cover-

30. Liability in respect of the death arising out of or in the cause of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment;

31. The statutory law underpinning the contractual relationship between the plaintiff and 1st defendant is also very clear on the level of liability the plaintiff can absorb.

Disposition

32. The upshot and having considered the evidence presented, I do enter judgment in favour of the plaintiff in terms of prayer (a) and (b) of the plaint dated 10th May 2019.

33. The plaintiff will also have the costs of this suit.

34. It is so ordered.

JUDGMENT DATED AND SIGNED AT MACHAKOS THIS 12TH DAY OF FEBRUARY 2025.

FRANCIS RAYOLA OLEL

JUDGE



DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 12TH DAY OF FEBRUARY 2025.

In the presence of;

No appearance for Plaintiff

No appearance for Defendant

I.Jabo Court Assistant

