Pacis Insurance Company Limited v Chongqing International Construction Corporation (Civil Appeal E736 of 2022) [2025] KEHC 4433 (KLR) (Civ) (8 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4433 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E736 OF 2022

LP KASSAN, J

APRIL 8, 2025

BETWEEN

PACIS INSURANCE COMPANY LIMITED ..... APPELLANT

AND

CHONGQING INTERNATIONAL CONSTRUCTION CORPORATION ..... RESPONDENT

(Being an Appeal and a Cross-Appeal from the judgment and decree by Hon. David W. Mburu (Principal Magistrate) in Nairobi Milimani CMCC No. 604 of 2019 delivered on 19.08.2022)

JUDGMENT

Introduction & Background:

1. This judgment is in respect to the Appeal and the Cross-Appeal in this matter. The main appeal was preferred by Pacis Insurance Company Limited, whereas the Cross-Appeal was instituted by Chongqing International Construction Corporation.

2. The suit before the trial court related to a material damage claim by the Respondent vide their plaint dated 18.09.2019 seeking:

    a. A declaration that the Defendant is in breach of the insurance policy

    b. Special damages of Kshs 7,394,585/=

    c. A declaration that the Plaintiff be indemnified by the Defendant against all risks covered by the insurance policy for the period in question

    d. Interest on (b) above at court rates until payment

e. Such or further orders as this Honourable Court may deem fit to grant.

3. The Appellant filed a counterclaim dated 03.02.2020 seeking:

a. A declaration that it is not bound to satisfy the purported policy no. 010/070/01400/2018 as the same was void for lack of payment of premiums to the Defendant now the Plaintiff

b. A declaration that the Plaintiff now Defendant did not pay insurance premium to the Defendant, and as such the insurance policy no. 010/070/01400/2018 is not enforceable against the Defendant now Plaintiff

c. A declaration that the Defendant now the Plaintiff is not bound to indemnify the Plaintiff now the Defendant over purported loss over motor vehicle registration no. KCQ 443L under policy no. 010/070/01400/2018 on 1/7/2018 as the said policy was not enforced due to non-payment of premiums to the Defendant

d. A declaration that under a contract of insurance the insurer does not pay the total loss but pays only the sum assured as total loss, subject to loss adjustment

e. A declaration do issue that the declared sum assured declared to their agent was Kshs 1,000,000/= and that premiums were not paid to the Defendant hence the insurance policy was void and unenforceable

f. Costs of the counterclaim

4. The Respondent called three witnesses in support of its case at the trial court.

5. PW1, police officer, stationed at Lokichoggio police station, testified that on 12.07.2018 at 5 pm at Natira area along Kakuma-Lokichoggio road, a self-involving accident of a motor vehicle registration KCQ 443L owned by the Respondent caused fatal injuries to 2 of the 3 on board. The said motor vehicle was fully insured and had a sticker C12213143 policy/0XX0/010 Policy no. 010/0070/0XX00/2018 comprehensive cover commencing 14/04/2018 and expiry 13/04/2019 issued by Appellant.

6. PW2, valuation manager, testified that on 03/07/2019, he prepared a report in respect of motor vehicle KCQ 443L, make Toyota Hilux Double Cabin, year of manufacture 2017. He opined that the said motor vehicle to be a constructive total loss. He assessed the pre-accident value at Kshs 6,280,000/= with a salvage value of Kshs 1,500,000/=. On cross-examination, he testified that there was no way the pre-accident value could have been Kshs one million.

7. PW3, manager of the Respondent's company, testified that on 01.07.2018 their vehicle was involved in a road accident that caused two fatalities. The accident was reported at Lokichoggio police station and the Appellant on 02.07.2018. She filled a claim form and submitted it to the Appellant. On 26.09.2018, the Appellant rejected the claim. She testified there was no notice of cancellation of the policy prior to the accident. The insurance documents were handled by Paradigm Insurance Agency. They were not issued any policy documents. The sticker for the subject vehicle was issued. She testified that no valuation of the vehicle was done as it was brand new. They settled the claims with the families of the victims, and the Appellant was informed but didn't respond.

8. DW1, the Appellant's manager, stated that the Respondent was unknown to them as the subject vehicle was not insured by them. The claim opening document was dated 10.07.2018 of 3 vehicles, inclusive of the subject vehicle. The amount paid was Kshs 105,513/=, the sum insured for each vehicle was Kshs 35,000/= for Kshs 1,000,000/= respectively. That the premiums were never received by the

Appellant. That a claim of this nature required proposal forms and policy documents. The sum insured was Kshs 1,000,000/=. That no valuation was done. The money paid to Paradigm was never remitted to them. The receipt by paradigm was dated 14.08.2018. The payments of the alleged deceased families were made without the involvement of the Appellant. That Paradigm was the agent of the Plaintiff and not their agent.

9. On cross-examination, she testified that Paradigms were issued insurance stickers by the Appellant. That there was no presumption of payment by the Respondent if they were holding a certificate of insurance. She confirmed that all the certificates held by the Respondent were genuine. That the policy for KCQ 443L had been cancelled due to non-payment of the premium. That the claim form was generated by the Appellant, showing no policy was in existence. They had not made the agent a party to the suit.

10. On re-examination, he stated that the letter offering settlement at Kshs 1,000,000/= was not an admission of liability.

11. After the hearing, a judgment was rendered on 19.082022 against the Appellant. It was decreed that:

    a. A declaration that the Defendant is in breach of the insurance policy

    b. The counterclaim by the Defendant fails as the contract which the Defendant breached was properly entered into and they had records of all transactions between the Plaintiff and their agent

    c. Special damages of Kshs 6,280,000/= for loss of motor vehicle KCQ 443L

    d. Interest on (c) above at court rates from the date of filing suit until full payment is made

    e. The costs of the suit and the counterclaim are hereby awarded to the Plaintiff

12. Both Pacis Insurance Company Limited (hereinafter referred to as 'Pacis Insurance') and Chongqing International Construction Corporation (hereinafter referred to as 'Chongqing Corporation') were aggrieved by the judgment. Pacis Insurance filed the main appeal and Chongqing Corporation filed a Cross-Appeal.

The Appeal and the Cross-Appeal:

13. Pacis Insurance filed a Memorandum of Appeal dated 14.11.2022 in which it challenged the entire judgment delivered on 19.08.2022 in Milimani CMCC No. 604 of 2019, where the trial court found in favour of Chongqing Corporation. The insurer contends that the magistrate erred in both law and fact by holding that a valid contract of insurance existed despite lack of evidence of premium payment, by awarding damages exceeding the sum insured, and by failing to recognize that the subject motor vehicle was not insured under the disputed policy. The appellant also disputes the finding that the alleged agent acted on its behalf and faults the trial court for dismissing its counterclaim. The insurer prays for the lower court's judgment to be set aside, the suit dismissed, and the counterclaim allowed with costs.

14. Chongqing Corporation on its part filed its Cross Memorandum of Appeal dated 03.07.2024 it challenged the trial court's decision in failing to find that Pacis Insurance were to indemnify them for sums already paid by the Respondent to the families of deceased victims involved in the accident.

15. The Respondent asserts that since the insurance company had issued a certificate of insurance for the subject vehicle (KCQ 443L), which was involved in a fatal road accident during the policy period, the insurer is obligated to indemnify the Respondent for all liabilities arising from that accident—

including compensation made to the deceased's families. The Respondent contends that this liability fell squarely within the scope of the insurance policy, and that the trial court erred in failing to make a finding on the insurer's duty to cover third-party claims.

16. On the directions of this Court, the appeals were heard by way of written submissions. Both parties complied.

Analysis:

17. This Court has duly considered the entire record and the parties' submissions as well as the decisions referred to.

18. The High Court, as the first appellate Court, is enjoined to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123).

19. This Court nonetheless recognizes the trite and firmly established doctrine that an appellate court ought not to interfere with the findings of fact rendered by a trial court, save in instances where such findings are shown to be unsupported by any evidence on record, are predicated upon a fundamental misapprehension or misapplication of the evidence adduced, or are demonstrably founded upon erroneous principles of law. This was the holding in Mwanasokoni -versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278 and Kiruga -versus- Kiruga & Another (1988) KLR 348).

20. Bearing the above in mind, this Court has come up with the following issues for determination: -

    i. Whether the trial court erred in holding that the alleged agent acted on behalf of the Appellant, and whether such a finding was contrary to the legal limits governing agency relationships in insurance.

    ii. Whether the trial court erred in finding that there existed a valid and enforceable contract of insurance between the parties in the absence of a signed policy document, and whether the court failed to properly appreciate that payment and receipt of premium was a condition precedent to the insurer's liability under the policy.

    iii. Whether the trial court erred in holding that the subject motor vehicle, KCQ 443L, was validly insured under policy/0XX0/010 Policy No. 010/0070/0XX00/2018, and in failing to find that the said policy was neither valid nor in force under the *Insurance Act*.

    iv. Whether the trial court erred in finding the Appellant liable under the alleged insurance policy despite the Appellant's denial of insuring the subject vehicle or receiving premium in relation thereto.

    v. Whether the trial court erred in awarding a sum exceeding the insured value, and in failing to find that the claimed amount of Kshs. 6,280,000/= was not covered or insured by the Appellant.

    vi. Whether the trial court erred in awarding damages that were not specifically pleaded and proved by the Respondent.

    vii. Whether the trial court erred in finding that the Appellant had breached a contract of insurance, and whether such finding was supported by the evidence on record.

    viii. Whether the trial court erred in dismissing the Appellant's counterclaim.

    ix. Who should bear the costs of the suit and of this appeal.

21. Under the cross memorandum of appeal:

i. Whether the trial court erred in failing to find that the payment of Kshs. 5,750,000/= as compensation to the families of the deceased persons was justified in law.

22. The above issues will be addressed in seriatim.

ii. Whether the trial court erred in holding that the alleged agent acted on behalf of the Appellant and whether such a finding was contrary to the legal limits governing agency relationships in insurance.

23. According to Bowstead and Reynolds on Agency, 22nd Ed., Sweet & Maxwell 2021 para 2-001, pp 41-42 outlines agency as;

> "Agency may be created by express appointment, by implication from the conduct or situation of the parties, or by estoppel (ostensible authority)."

24. In the Insurance field, the term commonly used for an agent is broker. Section 2 of the *Insurance Act* defines a broker as -

> "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;"

25. From the above definition, the broker can be an agent of the insurer, policyholder, or proposer for insurance or reinsurance. In this instant case an agreement dated 12.01.2018 was relied upon by the Appellant and Respondent showing their was an agency relationship between the Appellant and Paradigm Insurance Agency Limited as the broker/agent for the Appellant.

26. The trial court stated that"

> "Paradigm Insurance Company was an agent of the Defendant company. DW1 in her statement, which she adopted on 3rd February 2020, stated that they were unable to find the policy in the system but were informed that it was entered by Paradigm Insurance Company. the Defendant's Ex 2 was a policy schedule that contained the information that was allegedly entered by the agent into the Defendant's Insurer's database system. A statement which DW1 confirmed in cross-examination. Another indicator that the Defendant was aware that Paradigm Insurance Company was selling policy in their name is from DW1's testimony that the agent had stockpile of the Defendant's certificates of insurance."

27. Furthermore, the Appellant did not call any witnesses to challenge the authenticity of the certificate of insurance or deny the authority of the agents who issued it. In fact, in DW1's testimony, she confirmed that the certificate of insurance issued to the Respondent was genuine.

28. I find that the trial court did not err in this finding.

iii. Whether the trial court erred in finding that there existed a valid and enforceable contract of insurance between the parties in the absence of a signed policy document, and whether the

court failed to properly appreciate that payment and receipt of premium was a condition precedent to the insurer's liability under the policy.

29. The Appellant disputed the existence of a valid insurance contract for motor vehicle KCQ 443L, citing the absence of a signed policy document and alleging that no premium was received.

30. However, a formal signed policy document is not mandatory for the validity of an insurance contract. The formation of the contract depends on offer, acceptance, consideration (premium), and intention, not necessarily on a signed document. See Edwin Peel, Treitel: The Law of Contract (15th edn, Sweet & Maxwell 2020). In the cases of Njagi v Occidental *Insurance Company Limited (Civil Appeal 77 of 2023*) [2024] KEHC 9633 (KLR) (31 July 2024) (Judgment) & Kensilver Express Ltd & 3 Others v Commissioner of Insurance & 4 Others [2007] eKLR the courts held that the issuance of a certificate of insurance and receipt of premium is evidence of a valid contract.

31. From the record, the Respondent paid a series of premiums for its vehicles which were covered under the same umbrella. The Respondent produced three receipts evidencing payment of the premiums as follows: first, receipt no. 006199 dated 18.04.2018 for KCQ 443L for Kshs 77,750/= issued by Paradigm Insurance. Second, receipt no. 006214 dated 13.04.2018 for Kshs 360,000/= in relation to KCP 190Y and KCP 191Y as per policy issued by Paradigm Insurance. Last, receipt no. 006200 dated 18.04.2018 for Kshs 167,000/= for KCQ 915K and KCQ 443L issued by Paradigm Insurance. These receipts were produced without any objection by the Appellant, and so they form part of exhibits worthy of consideration as evidence by this court. The Respondent was issued *Policy No. 010/0070*/01400/2018, which covered the said motor vehicle registration no. KCQ 443L, among other vehicles belonging to the Respondent, under one umbrella.

32. However, the evidence on record, particularly the Certificate of Insurance issued for motor vehicle KCQ 443L, confirms that insurance coverage was in force during the period when the fatal accident occurred. It is trite law that a Certificate of Insurance is prima facie evidence of the existence of a valid insurance contract, particularly under Section 4(5) of the Insurance (Motor Vehicle Third Party Risks) Act.

33. The trial court at paragraph 21 of its judgment noted:

> "21. The receipts produced by the Plaintiff as proof that they made payment to the agent are enough proof that payments of premiums were made. If not, it is common insurance practice that a sticker is only provided after premium payments are made. This court considered and was guided by a number of authorities, the main one being Court of Appeal decision in the case of Nizar Virani t/a Kisumu Beach Resort-vs-Phoenix of East Africa Assurance Company Ltd KSM CA Civil Appeal No. 88 of 2002 (2004) eKLR wherein the Court of Appeal held that under Kenyan Law, the non-payment of premium does not invalidate an insurance contract. In the court's reasoning, there is no law demanding that a contract of insurance can only be deemed complete after payment of the premium.
>
> 22. I am therefore satisfied that the parties had entered into a valid insurance contract."

34. In Radheshyam Transport Limited v Ndoka (Civil Appeal E179 of 2020) [2024] KEHC 16830 (KLR) (15 August 2024) (Judgment), the Court held that a Certificate of Insurance and policy documents are not the only documents to demonstrate a valid insurance contract. Generally, insurers cannot repudiate liability where coverage was active and premiums had been accepted.

35. The absence of the proposal form or valuation report can be material where the insured amount is in dispute. However, if a certificate of insurance was issued, and no effort was made by the insurer to repudiate the policy within a reasonable time or refund premiums, it creates a presumption of an existing and valid contract (see Sanlam General Insurance Co. Ltd v Julius Kiambati M'Mbura (Meru HCCA No. E054 of 2024).

36. The Court finds no error in the trial court's conclusion that an enforceable insurance contract existed.

iv. Whether the trial court erred in holding that the subject motor vehicle, KCQ 443L, was validly insured under *Policy No. 010/0070*/01400/2018, and in failing to find that the said policy was neither valid nor in force under the *Insurance Act*.

37. The trial court's finding was premised on the presumption that the broker/agent had ostensible authority and the insurer did not disown that relationship at the time the policy certificate was issued.

38. Under Section 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act, once a certificate of insurance is issued, the insurer is obligated to satisfy any third-party judgment notwithstanding its right to cancel the policy thereafter.

39. The certificate of insurance was genuine, as confirmed by DW1 listing the policyholder as the Respondent under policy no. 010/0070/0XX00/2018-COMP commencing 18/04/2018 expiring 17.04.2019 for motor vehicle registration no. KCQ 443L, issued by the Appellant.

40. Hence, the Appellant is estopped from denying liability after such a certificate was issued through its agent.

41. As noted above, the pendency of the policy period was from 18.04.2018 to 17.04.2019. The police abstract indicates the accident occurred on 01.07.2018 and was reported under OB 12 of the same date. The accident occurred during the pendency of the cover.

v. Whether the trial court erred in finding the Appellant liable under the alleged insurance policy despite the Appellant's denial of insuring the subject vehicle or receiving premium in relation thereto.

42. While the Appellant asserts that no premium was received and that the agency relationship was non-existent, the law imposes liability on the insurer if the policyholder pays premium to an authorized or ostensible agent. Premium paid to an agent is deemed paid to the insurer. See Kenya National Assurance Co. Ltd v. Kimani & Another (1987) eKLR.

43. There is sufficient evidence on record (receipts, policy documents) suggesting that the policyholder acted on the representations of an agent or broker that was not repudiated by the insurer until after the claim arose. The insurer's failure to supervise its agent does not relieve it of liability.

vi. Whether the trial court erred in awarding a sum exceeding the insured value, and in failing to find that the claimed amount of Kshs. 6,280,000/= was not covered or insured by the Appellant.

44. In the case of Castellain v Preston (1883) 1 QBD 380, Brett LJ held:

> " The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case

of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. "

45. Additionally, in Madison Insurance Company Ltd vs. Solomon Kinara t/a Kisii Physiotherapy Clinic [2004] eKLR, the Court underscored the principle of indemnity—that the insured should be restored to their prior financial position but not profit meaning that the sum insured or fair market value can be established from other objective evidence.

46. The Respondent relied on a post-accident valuation of Kshs 6,280,000/= prepared by AA motor vehicle assessment report dated 03.07.2019, while the Appellant relied upon an unsigned policy document which reflected a sum insured of Kshs 1,000,000/= and a premium of Kshs 35,000/= for the subject motor vehicle registration no. KCQ 443L.

47. A policy document is, in law, ordinarily construed as a binding contract, the fundamental constituents of which encompass, inter alia, an offer, acceptance, and consideration—being the premium in the context of an insurance agreement—duly executed by the parties thereto. In the instant case, the Appellant failed to furnish the Respondent with the policy document delineating the insured sum as Kshs. 1,000,000/= and the premium payable as Kshs. 35,000/=. What remains incongruous and unexplained is the fact that the Respondent remitted a sum of Kshs. 77,750/= on 18.04.2018 in respect of the subject motor vehicle, and thereafter a further sum of Kshs. 167,000/= encompassing the subject vehicle together with another under the same policy umbrella. The Appellant offered no cogent explanation for the disparity in the amounts received. Further, clearly the amounts received were higher than the Kshs 35,000/= premium alleged by the Appellant, which as stated above was not explained by the Appellant.

48. Further to the foregoing, both parties adduced in evidence a copy of the agency agreement executed between the Appellant and Paradigm Insurance Agency Ltd, dated 12.01.2018, for the operative period. Said agreement expressly provided that the applicable premium in respect of insured vehicles was to be computed at the rate of 3.5% of the vehicle's value. It therefore follows that if the pre-accident value of the subject motor vehicle was Kshs. 6,280,000/=, then the corresponding premium payable ought to have been Kshs. 219,800/=.

49. In light of the above, it is noteworthy that the Respondent, through three receipts tendered into evidence, remitted an aggregate sum of Kshs. 604,750/=. In the absence of any rebuttal or cogent challenge from the Appellant regarding the amount of premium actually received from the Respondent, this Court finds that the Appellant is estopped from denying the pre-accident value of Kshs. 6,280,000/= attributed to the subject vehicle. The conduct of the Appellant, particularly the failure to supply the policy document and the unexplained disparity in premiums paid, lends credence to the Respondent's contention regarding the insured value. Consequently, this Court is inclined to adopt the said figure as the operative pre-accident value for purposes of determining liability and compensation as it was prepared by AA company an expert in the field.

50. The trial court therefore did not err in awarding the motor vehicle compensation loss at Kshs 6,280,000/=.

vi. Whether the trial court erred in awarding damages that were not specifically pleaded and proved.

51. It is a settled principle that special damages must not only be pleaded but strictly proved. This has been considered under issue (vi) above.

vii. Whether the trial court erred in finding the Appellant had breached the contract of insurance.

52. Given the Court's earlier finding that a valid contract existed, and the insurer issued a certificate of insurance while receiving a premium via its intermediary, the Appellant became bound by the contract.

53. The trial court was correct in holding that the Appellant breached the insurance contract by failing to indemnify the Respondent.

viii. Whether the trial court erred in dismissing the Appellant's counterclaim.

54. The Appellant sought to avoid the policy. However, having been found liable under a valid contract and having not proved fraud or misrepresentation, there was no legal basis to grant the counterclaim.

55. The dismissal was proper.

56. Based on the record and the issue raised in the cross-appeal, the following is the court's analysis and determination:

Whether the trial court erred in failing to find that the payment of Kshs. 5,750,000/= by the Respondent to the families of the deceased persons was justified in law and recoverable as indemnity from the insurer.

57. The Respondent's position is that it settled liability claims with the families of two deceased victims following a road traffic accident involving the subject vehicle KCQ 443L, and that it is entitled to indemnity from the Appellant (the insurer) under the alleged policy of insurance. The payment was made without the express consent of the insurer.

58. The central legal question is whether the Respondent, as insured, was entitled to settle claims without the Appellant's prior knowledge or consent and still maintain a valid claim for indemnity.

59. A settlement made without an insurer's consent may prejudice the insurer's right of subrogation, a fundamental principle in indemnity insurance that entitles the insurer to step into the shoes of the insured to pursue third-party recovery.

60. According to McGee in The Modern Law of Insurance, 4th Ed. Pp 302 para 22.20 on insured's duties, it is a general principle that an insured should not act to the prejudice of the insurer's subrogation rights without the insurer's consent. To do so is a breach of the insurance contract. In such an event, the insurer is entitled to retain or recoup the loss caused by the insured's breach.

61. In Hayler-vs-Chapman (1989) 1 Lloyd's Rep 490, CA and similar authorities cited by McGee Supra at para 22.19, it was held that unilateral settlements by the insured prejudicing the insurer's potential defences or recoveries affect the enforceability of indemnity rights.

62. In the present case, there is no evidence that the Appellant was notified of or involved in the negotiation or settlement with the deceased families. Neither was the insurer accorded an opportunity to approve the quantum nor participate in the litigation or settlement strategy.

63. An insured who settles a claim must prove:

    a. That they were legally liable, and

    b. That the amount paid was reasonable.

64. The Court finds that the trial court did not err in refusing to allow the indemnity claim of Kshs. 5,750,000/=. The Respondent unilaterally settled third-party claims without the Appellant's knowledge, approval, or participation.

65. Accordingly, the insurer cannot be bound to indemnify the policyholder for a settlement it neither agreed to nor had an opportunity to contest. The insurer must be notified and allowed to participate or repudiate the claim. An insured cannot compromise or settle a claim without involving the insurer and later seek indemnity; doing so prejudices the insurer's contractual and legal rights. The principle that "he who pays voluntarily pays at his own risk" applies. For a valid indemnity claim to succeed in such contexts, the insured must prove liability, reasonableness of settlement, and the insurer's opportunity to participate, which the Respondent failed to adhere to, therefore, the cross appeal lacks merit.

Conclusion

66. Accordingly, I make the following orders:

    a. That the appeal herein is without merit and is dismissed

    b. The cross-appeal equally lacks merit and is hereby dismissed.

    c. Each party to bear its own costs.

    It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 8TH DAY OF APRIL 2025

LINUS P. KASSAN

JUDGE

In the presence of:-

Kevoyo for Appellant

Owino for Respondent

Carol – Court Assistant