



REPUBLIC OF KENYA



**Ainu Shamsi Hauliers Ltd v Directline Assurance Co Ltdn aka Directline Insurance  
(Civil Appeal E064 of 2022) [2025] KEHC 7274 (KLR) (23 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7274 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CIVIL APPEAL E064 OF 2022**

**TM MATHEKA, J**

**MAY 23, 2025**

**BETWEEN**

**AINU SHAMSI HAULIERS LTD ..... APPELLANT**

**AND**

**DIRECTLINE ASSURANCE CO. LTD AKA DIRECTLINE  
INSURANCE ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon. C.A Mayamba (PM) in the Principal  
Magistrate's Court at Kilungu, Civil Case No.E032 of 2020, delivered on 30th July 2021)*

**JUDGMENT**

**Introduction**

1. On 23/11/2013, there was a fatal accident at Ngokomi area along the Nairobi-Mombasa highway involving motor vehicle Reg.No. KBQ 869V/ZD 7699 (trailer) and motor vehicle KAY 060X (bus). The Appellant was the owner of the trailer while the bus was owned by one Kambua Kambua Musyimi (herein after 'Kambua').
2. Kambua sued the Appellant in Kilungu PMCC No.2 of 2014 seeking compensation for the extensive damage of the bus. She prayed for a sum of kshs 3,980,500/=, costs of the suit and interest. The Appellant denied the claim and counter claimed for the damage caused to the trailer in the sum of kshs 5,446,828.15/=. The trial magistrate apportioned liability in the ratio of 80:20 in favor of the Appellant but dismissed the suit and counter claim in their entirety.
3. The Appellant appealed to this court (HCCA 27 of 2019) and Kambua filed a cross-appeal. This court (Ong'udi J) heard and determined the appeal and cross-appeal whereupon it found that Kambua was liable to pay kshs 953,342.52/= plus costs to the Appellant herein. The costs were eventually taxed at kshs 258,550/=.



4. Armed with the judgment, the Appellant returned to the trial court via Kilungu PMCC E032 of 2020 where it filed a declaratory suit against Kambua's Insurer i.e Directline Assurance Co. Ltd a.k.a Directline Insurance. The trial court found that the insurer was not liable for the damages and declined to grant the declaratory orders. Further, the trial court found that the Appellant ought to execute against Kambua.

### **The Appeal**

5. Aggrieved by the judgment, the Appellant filed this on 3 grounds as follows;
  - a. That the learned magistrate erred in law and fact in failing to apply the correct provisions of the law on the matters for determination before the court.
  - b. That the learned magistrate erred in law and fact in failing to appreciate the submissions of the Appellant.
  - c. The learned magistrate erred in law and fact in dismissing the Appellant's declaratory suit against the Respondent.
6. Directions were given for the appeal to be canvassed through written submissions.

### **The Appellant's Submissions**

7. The Appellant identified the following as the issues for determination;
  - a. Whether the learned magistrate erred in law and fact in failing to apply the correct provisions of the law on the matters for determination before the court.
  - b. Whether the learned magistrate erred in law and fact in failing to appreciate the submissions of the Appellant.
  - c. Whether the learned magistrate erred in law and fact in dismissing the Appellant's declaratory suit against the Respondent.
8. Relying on section 10(1) of Insurance Motor Vehicles Third Party Risks Act, Cap 405 Laws of Kenya (the Act), it was submitted that an insured is entitled to indemnity from the insurer and that in this case, the Respondent admitted that Kambua was their insured.
9. It was submitted that the Respondent made allegations of breach of policy by its insured but did not tender evidence to that effect hence it could avoid settling judgments against its insured. Reliance was placed inter alia on Republic -vs- Subordinate Court of the 1<sup>st</sup> Class Magistrate at City Hall, Nairobi & Anor ex-parte Yougindar Pall Sennik & Anor [2006] eKLR where the court noted;

“When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. It is only where a law provides to the contrary pursuant to section 109 of the *Evidence Act* can the burden be shifted. Contrary to popular belief, Parliament can by law shift the burden of proving particular facts and shifting of the burden is not a constitutional issue where any such other law provides.”
10. It was the Appellant's position that an insurer could avoid to indemnify an insured for breach of the policy terms but contended that could not be by word of mouth as a declaration had to be sought from



a court of law. Reliance was placed on Jason Nyawira Kagu & Another -vs- Intra Africa Assurance Co. Ltd (2014) eKLR where the court held;

“The failure by the defendant therein to file an action seeking a declaration that it was entitled to and was absolved from liability arising from the insured’s act or under the policy could not afford it under section 10(4) of the Act.”

11. Further reliance was placed on Charles Makenzi Wambua -vs- Africa Merchant Assurance Co. Ltd (2014) eKLR where the court stated;

“The provisions of section 10(1) of Cap 405 are clear that notwithstanding that the defendant may be entitled to avoid or may have avoided the policy, it nevertheless must pay to the persons holding judgment against the defendant and therefore any purported restriction or limitation on the extent of the quantum it can pay is not supported by laws as the rights of the third(interested) parties under the Act override the insurer’s and the insured’s contractual rights under the policy of insurance.”

12. It was submitted that the Respondent could not refuse to settle the claim because it admitted it in the first instance and defended the suit.

13. It was submitted that the purpose of material damage insurance is to reinstate the asset lost or damaged as if no fire or other insured event had occurred. It was further submitted that the only exemption in section 5(b) of the Act is when the insured’s motor vehicle was used for any other purpose other than the one for which the vehicle was insured. Reliance was placed on section 10(1) of the Act for the submission that the obligation to file a suit for a declaration that an insured is not liable is mandatory irrespective of the source and/or nature of the entitlements for avoidance of liability. Reliance was placed on Kenyan Alliance Insurance Company Ltd -vs- Naomi Wambui Ngira & Anor (suing as the legal representatives and Administrators of the estate of Nelson Machari Maina (2021) eKLR where the court stated;

“A liability may be required under section 5(b) to be covered by a policy and yet the liability may not in fact be covered by the particular policy. An example of this is where a policy is taken out relating to the use of the vehicle by the insured only but in fact the vehicle is used by another person. Another example would be where the insured obtained the policy by non-disclosure of a material fact. This would enable the insurer to take action in accordance with the appropriate provisions of section 10 and to obtain a declaration that although the policy apparently covered the liability, nevertheless in fact did it not do so as there was never in existence a contract of insurance.”

14. It was contended that section 5(b) does not exclude material claim by the Appellant but introduces different classes of claim.

15. In conclusion, it was submitted that Kambua Musyimi had taken out a valid policy of insurance from the Respondent and is entitled to be indemnified in respect of liability to third parties.

### **The Respondent’s Submissions**

16. The Respondent identified the issues for determination to be;

- a. Whether the Respondent is statutorily bound to settle the decretal sum.
- b. Whether the Respondent can be bound to settle a claim on a repudiated policy.



17. On the first issue, relying on section 10 of the Act the Respondent submitted that a declaratory suit can only be applicable to the extent of death and bodily injury. The respondent cited Blue shield Co. Ltd -vs Joseph Mboya Oguttu (Civil Appeal 262 of 2003) (2009) KECA 221 (KLR) (17 July 2009) where the Court of Appeal was of the view that material damage claims are not in any nature anticipated by Cap 405 because of the nature of contracts between insurances and insured. That the strict nature of these contracts is such that only parties to a suit can sue and be sued. That the remedy for material damage claims lies in compensation by the insured since it is the insured who can solely sue and be sued on that contract.
18. It was submitted that the policy used by the Appellant to sue is between the Respondent and Kambua whose contractual benefit and enforceability can only be enforced by the parties to the contract.
19. On the second issue, it was submitted that the Respondent repudiated the policy of insurance it had extended to Kambua and was therefore not under any obligation to indemnify the insured for any third-party obligations as a result of the policy of insurance. Reliance was placed on UAP -vs- Nancy Wakuthi Kago (2019) eKLR in which the court held that where a contract of insurance was breached, the plaintiff was not liable to indemnify under the insurance policy. That a contract in terms of a policy bound the parties to it and breach of a freely entered contract entitled parties to repudiation.
20. It was submitted that altering the trial court's decision would amount to compelling the Respondent to honor a repudiated policy whose breach was caused by its insured who is not a party to this suit.

### **Duty of Court**

21. It is now settled that the duty of a first appellate Court is to analyze and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses. (Selle & another -vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123)
22. Having considered the grounds of appeal, the rival submissions and entire record, the following issues arise for determination ;
  - a. Whether the award of kshs 953,342.52/= in Makueni HCCA 27 of 2019 is with respect to loss which is excluded by section 5(b) of the Insurance Motor Vehicles Third Party Risks Act, Cap 405 Laws of Kenya
  - b. Whether the policy between Jacqueline Kambua Musyimi and the Respondent was repudiated.
  - c. Whether the Respondent is liable to settle the decretal award of kshs 953,342.52/= in Makueni HCCA 27 of 2019.

### **Analysis & Determination**

#### **Whether the award of kshs 953,342.52/= in Makueni HCCA 27 of 2019 is with respect to loss which has been excluded by section 5(b) of the Insurance Motor Vehicles Third Party Risks Act, Cap 405 Laws of Kenya**

23. It is not in dispute that the award is for material damage caused to the Appellant's trailer. The Respondent submitted that material damage claims are not anticipated by the Act due to the strict nature of contracts of insurance.
24. Section 4 of the Act states inter alia: Motor vehicles to be insured against third party risks.



- (1) Subject to this Act, no person shall use, or cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Act.

25. Section 5 of the Act provides as follows;

5. Requirements in respect of insurance policies

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 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:

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

- i) Liability in respect of the death arising out of and in the course 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; or
- ii) Except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arose; or
- iii) Any contractual liability.
- iv) Liability of any sum in excess of three million shillings, arising out of a claim by one person.

26. The police abstract dated 27/11/2013 shows that the bus was comprehensively insured and it is trite that a comprehensive policy covers the insured vehicle and third-party liabilities. Be that as it may, section 4 of the Act makes it a legal requirement for all motor vehicles being used on the roads to have a third-party insurance cover. The Black's Law Dictionary defines "third Party" as;

“A party who is not a party to a lawsuit, agreement or other transaction but who is somehow implicated in it; someone other than the principal parties.”

27. The Appellant was not a party to the contract of insurance between Kambua and the Respondent but, the damage to the Appellant's trailer was the direct result of the accident between the trailer and the bus and a court of competent jurisdiction found that the bus was 80% liable for the accident. Consequently, the material damage claim by the Appellant is certainly a third-party liability.

28. The Respondent having asserted and invited this court to believe that a material damage claim was not covered by the policy, it had a duty under the provisions of section 107 and 108 of the *Evidence Act*, to prove that indeed that was the position. In my view, since it is a legal requirement for all motor vehicles



using the roads to have a third -party cover and in light of the fact that the bus was comprehensively insured, the Respondent cannot hide behind the provisions of section 5(b) without even producing the policy document to show that a material damage claim was specifically excluded.

**Whether the policy between Jacqueline Kambua Musyimi and the Respondent was repudiated.**

29. The Respondent asserts that the policy existing between them and Kambua was repudiated and as such, they are not liable to satisfy the award in Makueni HCCA 27 of 2019.
30. The substantive law on this issue is section 10 of the Act which provides;

Duty of insurer to satisfy judgements 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.
- (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 fourteen 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 connection 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 provisions 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.

(3) .....

(4) No sum shall be payable by an insurer under the foregoing provisions of this section if in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provisions contained in it:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto.

31. What can be distilled from section 10(4) is that; for an insurer to avoid liability;

- a. The insurer must obtain a declaration of entitlement to avoid the policy within three months after commencement of the primary suit.
- b. The insurer must give notice of intention to avoid policy before or within 14 days after commencement of the action which will result in the declaration stated in (a) above.
- c. The notice in (b) above must be given to the person who is the plaintiff in the primary suit and should specify the non-disclosure or false representation on which the insurer proposes to rely.
- d. An insurer who obtains a declaration to avoid liability on a policy shall not avoid such liability unless a notice has been given as indicated in (c) above.

32. In *Kenyan Alliance Insurance Company Ltd -vs- Naomi Wambui Ngira* (supra), the court stated;

“ 32. This Court has analyzed the provisions of Section 10 (4) of the Act. According to this Court, the said section requires of an insured who wants to deny liability to obtain a declaration either before or not more than three (3) months following commencement of the primary suit. The way to obtain such declaration is by filing a declaratory suit in Court. Furthermore, this action would only be valid if the said insured had within fourteen (14) days of the filing of the primary suit, had given notice to the Plaintiff in that matter that it was not liable. In essence, repudiation of liability is two-fold, first, by way of



giving notice to the Plaintiff in the primary suit, and secondly, by way of filing a declaratory suit. However, the said repudiation is not a blanket one, requiring to be done whenever an insurer has been served with a notice. This Court finds that the requirement for an insurer to file a declaratory suit is intended for only those liabilities for which the insurer is entitled to repudiate and/or avoid for reasons beyond the express provisions of the policy, specifically being that there was non-disclosure of material facts or a misrepresentation of a material fact. The liability in issue in this case is not one such contemplated by the said Section.”

33. In this case, the Respondent has not produced any evidence of compliance with section 10(4) of the Act. The primary suit in this case was Kilungu, PMCC No.2 of 2014 which was initiated by the Respondent’s insured-Kambua. Upon the Appellant filing a counter-claim in the primary suit, the Respondent should have obtained a declaration to avoid liability but there is no evidence of such a declaration.
34. The Respondent urged this court to be guided by Blue Shield Co. Ltd -vs- Joseph Mboya Oguttu (supra) where the Court of Appeal stated that material damage claims are not in any nature anticipated by Cap 405 because of the strict nature of contracts between insurances and insured. I have considered that authority. It is my view that that was not the court’s holding. The appeal was basically against a ruling of the High Court which had struck out a statement of defence and one of the issues raised in the said defence was that material damage claims are not covered by section 5(b) of the Act. The Court of Appeal concluded that the defence raised triable issues which warranted a full trial.
35. Consequently, there is no evidence that the policy of insurance between the Respondent and Kambua was repudiated.

**Whether the Respondent is liable to settle the decretal award of kshs 953,342.52/= in Makueni HCCA 27 of 2019.**

36. Having answered issues (a) and (b) in the negative, it goes without saying that the Respondent is liable to settle the decretal award of Kshs 953,342.52/= in Makueni HCCA 27 of 2019.
37. The appellant failed to establish that the insurance policy excluded the third party risk that is material damage.
38. It would not make sense to state that the fact of material damage was not an insurable risk without providing proof that the same was excluded. S. 5(b) provides for claims, excludes others but the policy remains the sole evidence of the actual agreement between the parties.
39. From the foregoing, the trial magistrate erred by finding that the Appellant’s claim is statutorily barred and further erred by finding that; allowing the claim would lead to the presupposition of an amendment of section 5(b) of the Act.
40. In the circumstances I find the appeal meritorious. I allow it with costs to the appellant.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 23<sup>RD</sup> MAY 2025.**

**MUMBUA T MATHEKA**

**JUDGE**

CA Chrispol

Mr. Ojienda for the appellant



Ms Nduta for respondent

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