



**Directline Assurance Company Limited v Gathoni (Civil Appeal
E241 of 2023) [2025] KEHC 7013 (KLR) (19 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7013 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E241 OF 2023
JM NANG'EA, J
MAY 19, 2025**

BETWEEN

DIRECTLINE ASSURANCE COMPANY LIMITED APPELLANT

AND

DAVID KARIUKI GATHONI RESPONDENT

*(Being an Appeal from the Judgement and Decree of Hon. Prisca Nyotah
Magistrate delivered on 2nd August , 2023 in Nakuru CMCC No. E253 of 2022)*

JUDGMENT

1. The Respondent herein filed the above stated Nakuru CMCC No. E253 of 2022 (hereinafter referred to as the “declaratory suit”) vide Plaintiff dated 1st November 2021 seeking a declaration that the Appellant is liable to settle the decretal sum of Ksh. 700,000 together with interest thereon and the costs of the suit, arising from Judgement delivered on 8th September , 2021 in another suit being Nakuru CMCC No. E214 of 2020 (“the primary suit”). Payment of the stated decretal sum was also craved in the declaratory suit.
2. The Appellant on its part denied liability for the claim vide its written Statement of Defence dated 7th July , 2022 contending inter alia that it was unaware of occurrence of the accident subject of the primary suit. On a without prejudice basis, the Appellant averred that if it is otherwise shown that the accident of did occur and judgement was entered against its purported insured clients as claimed, then its non-satisfaction of the decree therein is in compliance with the provisions of Section 5 of the Traffic Act (sic) and the relevant insurance policy exemptions which exclude compensation for employees of insured clients.
3. The Respondent’s evidence before the lower court is that he was injured while a lawful passenger in the Appellant’s Insured Client’s motor vehicle registration number KCE 576 T . The Appellant conceded that it insured the accident vehicle but contended that it was exempted from liability in law because



the Respondent was an employee of their insured client at the material time. The Appellant's Claims Manager who testified, however, confirmed that they had no evidence to back up the claim.

4. In her judgement the learned trial magistrate found that there was no proof that the Respondent was an employee of the Appellant's insured client and entered judgement in favour of the Respondent, the court issuing a declaration that the Appellant was bound to settle the decree in the primary suit.
5. The Appellant being dissatisfied with the judgement and Decree of the Trial Court preferred the instant appeal vide the Memorandum of Appeal dated 31st August , 2023 on various grounds that may be condensed into two as hereunder :-
 - i. That the Learned Trial Magistrate misdirected himself and erred in both law and fact by ignoring applicable principles and relevant authorities relating to Sections 5 (b) (i) and 10 (1) of the Insurance (Motor Vehicles Third Party Risks Act) ;
And;
 - ii. That the Learned Trial Magistrate erred in both law and in fact by finding and holding that the Appellant is liable in the declaratory suit against the weight of evidence.
6. The appellant therefore wants the Appeal to be allowed and the lower court's judgement and decree set aside and substituted with an order dismissing the declaratory suit . It also prays for the costs of the declaratory suit and in this Appeal.
7. I shall consider all the stated Grounds of Appeal together.

The Appellant's Submissions

8. The Appellant's advocates submit inter alia that the trial court fell into error by failing to find that the purported insured client of the Appellant was an employee who was not covered under the insurance policy in issue. I am referred to the judicial determination in Kenya Alliance Insurance Co. Ltd V. Naomi Wambui Ngira & Another (suing as the Legal Representatives & Administrators of the estate of Nelson Macharia Maina (deceased) eKLR in which this court held that where the insurance policy expressly excludes a category of persons, in this case an employee of the insured client, then the insurer cannot be liable to satisfy judgment obtained from such employee under the policy. Reliance is further placed on the provisions of sections 5 (b) (i), 10 (1) and 10 (4) of the Insurance (Motor Vehicle) Third Party Risks Act ("the Act").

The Respondent's Submissions

9. The Respondent's advocates retort that the trial court is not to be faulted, holding the position that section 10 (1) of the Act is actually in sync with the Respondent's contention. According to Counsel, the trial court rightly found no sufficient evidence that the Respondent was an employee of the insured client and that , in any event, the Appellant was obliged to satisfy the judgement in the primary suit by dint of section 10 (1) of the Act. To buttress this argument, Counsel refer to case law in Thomas Muoka & Another V. Insurance Co. of E.A Ltd (2008) eKLR which underscores this statutory enactment.

Analysis and determination

10. This being a first appeal I am required to reconsider the evidence adduced, evaluate it and draw my own conclusions bearing in mind that I did not hear and see the witnesses who testified{ (see Selle & Another Vs Associated Motor Boat Company Ltd & Others [1968] EA 123 } . The Court of Appeal



for East Africa in *Peters –vs- Sunday Post Limited* [1958] EA 424 underscored the same principles delivering itself thus:”

- i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
- iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.”

11. In the famous case of *Mbogo & Another vs. Shah* [1968] EA 93 it was further 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.”

12. I have considered the record of appeal as well as the arguments for and against the appeal fronted in the rival submissions.

13. 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 personal injuries arising from the road accident referred to hereinabove. The Appellant’s insured clients were accused of negligent driving that caused the injuries to the Respondent .

14. In its judgment the lower Court awarded the Respondent a sum of Kshs. 700,000 together with costs and interest as compensation for the personal injuries occasioned to him, after finding no evidence of the Appellant’s exemption from liability . He thereafter filed the declaratory suit to enforce the judgement entered in the primary suit.

15. The following issues therefore rise for this Court’s determination:

- i. Whether a declaratory suit could be instituted against the Appellant under the Motor Vehicles Third Party Risks Act in the circumstances of this case.
- ii. Whether the Appellant was lawfully found liable to satisfy the decree in the lower court.
- iii. Who bears the costs of the suit?

16. On whether a declaratory suit can be sustained in a claim lodged by the insured client’s employee, the Appellant contends that Section 5 of the *Insurance (Motor Vehicles Third Party Risks) Act* does not allow such 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.”

17. 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.

18. 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 Sections 5 and 10 Act were to be read in isolation it would mean that in every personal injury claim that an insured fails to satisfy, the injured party would simply have no recourse for the damage, loss or inconvenience.

19. This Court in *Directline Assurance Company Limited v 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:-

“.....I understand the import 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.

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.”

20. In *UAP Insurance Co Ltd vs Patrick Charo Chiro* [2021] eKLR the Court also noted the importance of meeting “the four-fold test” under Section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act*. Further, the court in *Jubilee Insurance Co Ltd v Walter Tondo Soita* [2021] eKLR posited that



the onus is on the Appellant to prove that a risk is not covered by the insurance policy in question. It is observed in that case that;

“..... 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.”

21. It is common ground that the Appellant insured the subject vehicle against third party risks as per the requirement of the law. Whilst the Appellant claimed that the insurance policy did not cover employees of the insured, the Respondent told the trial court that there is no evidence offered in proof of the claim. The trial court agreed with the Respondent and found no sufficient or credible evidence showing the employment relationship.
22. It is my considered view that the Respondent proved the Appellant’s liability on a balance of probabilities and the trial court rightly entered judgement for the Respondent. I find no ground on which to impugn the trial court’s finding of fact that the Respondent was not proven to have been the employee of the Appellant’s insured client. Besides, there is no evidence that the Appellant moved to avoid the policy by instituting the requisite suit as required in law. The case of Kenya Alliance Insurance Co. Ltd supra is therefore distinguishable.
23. The upshot is that the appeal lacks in merit and is dismissed with costs to the Respondent.

JUDGEMENT DELIVERED VIRTUALLY THIS 19TH DAY OF MAY 2025 IN THE PRESENCE OF:

The Appellant’s Advocate, Ms Omollo for Mr Awino.

The Respondent’s Advocate, Ms Wamaitha.

The Court Assistant, Jeniffer.

J.M NANG’EA,

JUDGE.

