Britam Insurance Company Limited v Mbugua (Civil Appeal E071 of 2025) [2025] KEHC 9991 (KLR) (Civ) (11 July 2025) (Judgment)

Neutral citation: [2025] KEHC 9991 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E071 OF 2025

AC MRIMA, J

JULY 11, 2025

BETWEEN

BRITAM INSURANCE COMPANY LIMITED ..... APPELLANT

AND

JOEL GITAU MBUGUA ..... RESPONDENT

(Being an appeal from the Ruling and Order of Hon. Z. K. Kibos [Magistrate] delivered on 20th January 2025 in Nairobi MCCC No. E5625 of 2024)

JUDGMENT

1. The appeal subject of this judgment relates to the manner in which Courts deal with preliminary objections raised in the course of proceedings. In this matter, the objection was raised in the context of the applicability of Section 5(b) of the Insurance (Motor Vehicle Third Party Risks), Cap 405, (hereinafter referred to as 'the Act') in a declaratory suit instituted by the Respondent in Nairobi [Milimani] Chief Magistrates Court Civil Case No. E5625 of 2024 (hereinafter referred to as 'the suit').

2. The suit sought for a declaration that the Appellant was under legal obligation to settle the decretal sum in Nairobi [Milimani] SCCC No. E4250 of 2023 [hereinafter referred to as 'the primary suit'] which was a material damage claim that arose from a road traffic accident. It was the Appellant's position that Section 5(b) of the Act was only limited to personal injury claims and not otherwise.

3. The Appellant's Notice of Preliminary Objection was dated 18th November 2024 and was tailored as follows: -

    1. That the Appellant was not liable to settle the decretal sum totalling to Kshs.214, 500/= arising from SCC No. E4250 of 2023.

2. That the Insurance (motor Vehicle Third Party Risks) Act only provides for declaratory suits emanating from personal injury claims and not material damage claims.

3. That there is no further remedy available to the Respondent from the Court.

4. That the suit as formulated and envisaged was fatally defective and bad in law and hence should be dismissed with costs to the Appellant.

4. The objection was heard and a ruling rendered on 20th January 2025 where the trial Court dismissed the objection with costs to the Respondent. It was that dismissal that led to the instant appeal. Vide a Memorandum of Appeal dated 23rd January 2025, the Appellant preferred the following grounds: -

1. That the learned magistrate failed to appreciate the distinction between legal and factual objections.

2. That the preliminary objection raised by the appellant was strictly on legal grounds, specifically the statutory interpretation of Section 5(b) of the Insurance (Motor Vehicle Third Party Risks) Act, which does not require any factual investigation or evidence probing.

3. That by erroneously categorizing the Preliminary Objection as requiring factual inquiry, the Honourable Court misapplied the legal threshold for determining jurisdictional objections.

4. That the Honourable court failed to interpret section 5(b) of the Act in its plain and unambiguous terms, which explicitly limit the mandatory motor vehicle insurance cover to liabilities arising from death or bodily harm to third parties.

5. That the learned magistrate overlooked that claims for material damage or property are expressly excluded from the statutory scope of the Act.

6. That this failure led to a misapprehension of the legal principles governing motor vehicle insurance, thereby erroneously extending the jurisdiction of the court to a matter it was legally competent to adjudicate.

7. That by declining to uphold the Preliminary objection on jurisdiction, the Honourable court acted in contradiction of established legal principles.

8. That a proper reading of the pleadings and statutory framework would have revealed that the issue was purely a matter of law, not fact, and thus amenable to determination without recourse to evidence.

9. That the erroneous conclusion of the Learned Magistrate effectively prolonged litigation unnecessarily, contrary to overriding objective of achieving expeditious and just resolution of disputes.

5. The appellant prayed that the impugned ruling be set aside, the objection be upheld, the suit be dismissed for want of jurisdiction with costs of both the instant appeal and the suit.

6. Pursuant to the directions of this Court, the appeal was canvassed by way of written submissions. The Appellant's submissions were dated 17th February 2025 while the Respondent's submissions were dated 25th February 2025. This Court has carefully considered the submissions and the decisions therein and their import shall be ingrained in the latter part of this judgment.

7. As the appeal is against a ruling of a trial Court in the manner the Court dealt with a preliminary objection, this Court, as the first appellate Court, is to relook at the objection and the parties'

submissions and to arrive at its own conclusion. As a starting point, and since the subject is a preliminary objection, a look at the law on preliminary objections becomes imperative.

8. The law on objections is settled. A Court seized of a preliminary objection must, in the first instance, ascertain that the objection is a pure issue or question of law which is not caught up with factual issues necessitating the calling of evidence. The foregoing nature of preliminary objections was discussed in Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors Ltd (1969) E.A 696 pg. 700 where the Court observed as follows: -

> ...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.
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> ...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.

9. In Civil Suit No. 85 of 1992, Oraro vs. Mbaja [2005] 1 KLR 141, Ojwang J, [as he then was], cited with approval the position in Mukisa Biscuit -vs- West End Distributors (supra) and stated as follows on the operation of Preliminary Objections: -

> .... I think the principle is abundantly clear. A "preliminary objection", correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.

10. In Omondi -vs- National Bank of Kenya Ltd & Others {2001} KLR 579; [2001] 1 EA 177, it was observed that a Court in determining a preliminary objection can look the pleadings and other relevant documents, but it must abide by the principle that it must raise pure points of law. It was held: -

> ...In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion.

11. Having laid down the law, this Court will now juxtapose the objections with the foregoing as to ascertain whether the objection attained the threshold of raising pure points or questions of law capable of determining the suit. The objection raised four limbs which this Court will separately look at. The first limb was that 'the Appellant was not liable to settle the decretal sum totaling to Kshs.214, 500/=

arising from SCC No. E4250 of 2023.' In determining the Appellant's liability under the Act, reference has to be made to the policy document between the Appellant and its insured, on one hand, and the primary suit, on the other hand. Such interrogation may possibly lead to calling of further evidence. Therefore, the first limb as crafted, is not a pure point of law and cannot be raised as a preliminary objection in law.

12. The second limb of the objection was that '...the Insurance (Motor Vehicle Third Party Risks) Act only provides for declaratory suits emanating from personal injury claims and not material damage claims.' The Preamble to the Act is that it is An Act of Parliament to make provision against third party risks arising out of the use of motor vehicles. In expounding the scope of the Act, a Court will be called upon to interpret the various provisions of the law. Whereas interpretation is a legal preserve of the Court, in some cases reference has to be made to evidence that points to the purpose and intent of the lawmakers. Such will definitely call for production of evidence and that in itself disqualifies the limb from being a pure point of law.

13. The third limb of the objection was that '... there is no further remedy available to the Respondent from the Court.' The arena of remedies lies on a Court and is always guided by *the Constitution* and the law. Whether the Respondent has any available remedies in law cannot, therefore, be raised under the auspices of a preliminary objection. It is such a serious issue which calls for a deep interrogation of the policy document and may also call for other evidence.

14. The fourth limb of the objection was '... that the suit as formulated and envisaged was fatally defective and bad in law and hence should be dismissed with costs to the Appellant.' This limb has been subsumed in the three foregoing limbs. Its determination will depend on how the others unfold. This limb cannot, hence, stand on its own as a pure point of law.

15. The above discussion unfolds the preliminary objection as one which did not raise pure points of law and as such, did not attain the threshold of a sound legal objection. The trial Court, therefore, did not err in disallowing the objection. In finding as much, this Court must clarify that the issues raised in the preliminary objection are germaine in the insurance industry and can still be taken up during the hearing of the suit. Of course, there is every reason why the issues call for settlement as to bring certainty in the industry and the law. This Court would, hence, urge the parties to pursue the issues in the suit.

16. Deriving from the above, this Court finds and hold that the Notice of Preliminary Objection dated 18th November 2024 was properly dismissed. Consequently, the appeal is not merited and the following final orders do hereby issue:

    a. The appeal be and is hereby dismissed.

    b. The Appellant shall bear the costs of the appeal hereby assessed at Kshs. 50,000/= [Kenya Shillings Fifty Thousand Only].

    Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 11 TH DAY OF JULY, 2025.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Ms Wambui, Learned Counsel for the Appellant

Amina/Abdirazak – Court Assistants.