Saham Assurance Co Limited v Simiyu (Civil Appeal E006 of 2021) [2024] KEHC 1225 (KLR) (17 January 2024) (Judgment)

Neutral citation: [2024] KEHC 1225 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAPENGURIA

CIVIL APPEAL E006 OF 2021

AC MRIMA, J

JANUARY 17, 2024

BETWEEN

SAHAM ASSURANCE CO LIMITED .... APPELLANT

AND

FRANCIS KUTORO SIMIYU .... RESPONDENT

(Being an Appeal arising out of the judgment and decree of Hon. S. K. Mutai (Senior Principal Magistrate) in Kapenguria Senior Principal Magistrate's Court Civil Case No. 10 of 2019 delivered on 01/10/2019)

JUDGMENT

Introduction:

1. This matter revolves around a very common subject on compensation arising from road traffic accidents. It involves a scenario where judgment was obtained by a Claimant against an insured in a primary suit.
2. When the judgment was not settled, the Claimant filed a declaratory suit against the insurer. Upon judgment being entered against the insurer in favour of the Claimant, the insurer lodged the instant appeal.
3. The appeal was vehemently opposed.

The Background:

4. The Respondent herein, Francis Kutoro Simiyu, was the Plaintiff in Kapenguria SPMCC No. 16 of 2014; Francis Kutoro Simiyu vs. Michael Murage, Ndirangu Isaac & Magari Hire Purchase Limited (hereinafter referred to as 'the Primary suit'). The suit was filed on 15th May, 2014.

5. The Respondent filed the primary suit as the Administrator of the Estate of one Nicholas Juma Barasa (hereinafter referred to as 'the Deceased') who suffered fatal injuries out of an accident that occurred on 23rd September, 2013 involving motor vehicle registration number KBE 255P make Mitsubishi Fuso (hereinafter referred to as 'the Lorry'). The deceased was described to have been a passenger in the lorry.

6. The primary suit was defended by Messrs. Maangi, Otieno & Co. Advocates who entered appearance for the First and Second Defendants having been instructed by the then insurer of the lorry who is the Appellant herein, Saham Assurance Co. Limited. The Memorandum of Appearance was dated 3rd June, 2014 and was filed on 5th June, 2014.

7. The primary suit was heard and judgment was entered in favour of the Respondent herein on 6th August, 2015 in the sum of Kshs. 1,484,530/= with costs and interests. According to the record, no appeal was preferred against the said decision.

8. Desirous of enjoying the fruits of the judgment in the primary suit, and citing non-satisfaction thereof, the Respondent herein filed Kapenguria SPMCC No. 10 of 2019; Francis Kutoro Simiyu vs. Saham Assurance Co. Limited (hereinafter referred to as 'the Declaratory suit'). This suit was against the insurer of the lorry.

9. The declaratory suit was also defended. It was heard where witnesses testified and, in its judgment, rendered on 1st October, 2021, the trial Magistrate allowed the suit as prayed.

10. Dissatisfied with the said decision, the Appellant herein lodged the appeal subject of this judgment.

The Appeal:

11. The Appellant filed a Memorandum of Appeal dated 19th October, 2021 on 21st October, 2021.

12. The Appellant raised 7 grounds of appeal in disputing the rendition by the trial Court. The grounds mainly challenged the Appellant's liability in light of the provisions of the *Insurance (Motor Vehicles Third Party Risks) Act*, Cap. 405 of the Laws of Kenya.

13. On directions of this Court, the appeal was to be disposed of by way of written submissions. The Appellant filed its submissions dated 3rd October, 2023 whereas the Respondent's submissions were dated 19th October, 2023.

14. Both parties' submissions were comprehensive and referred to various decisions. This Court was urged to find in the respective parties' favour.

Analysis:

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

16. 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).

17. This Court, nevertheless, appreciates the settled principle that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in Mwanasokoni -versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278 and Kiruga -versus- Kiruga & Another (1988) KLR 348).

18. The gravamen of this appeal is whether the Appellant is liable to settle the judgment in the primary suit in light of the provisions of the *Insurance (Motor Vehicles Third Party Risks) Act* (hereinafter referred to as 'the *Insurance Act*').

19. In settling this appeal two issues arise for determination. The issues were aptly captured by the Appellant and also submitted upon by the Respondent. They are as follows: -

    a. Whether there was a valid policy covering the deceased passenger;

    b. Whether the Appellant is bound to settle the judgment in the primary suit.

20. This Court will now deal with the issues in seriatim.

i. Whether there was a valid policy covering the deceased passenger:

21. The Appellant relied on Section 5(b)(ii) of the *Insurance Act* in arguing that the deceased was a passenger, hence, not among the people contemplated to be covered under the policy issued by the Appellant. It was argued that, according to the policy document, the lorry was insured under the class of General Cartage and it was to be used to transport commercial goods with a carrying capacity of 2 passengers and the driver. The cover was a comprehensive one. Emphasis was made that the lorry was not a public service vehicle.

22. It was further argued in the Appellant's submissions that the two passengers referred to under the policy cover were those carried in pursuance of the insured's contract of employment.

23. The Respondent was of the contrary position. He posited that the deceased was among the passengers covered under the policy.

24. The Appellant called one witness at the hearing of the declaratory suit. She was Rachel Njoki. The witness was one of the Appellant's Legal Officers. The witness adopted her statement as her evidence-in-chief. In her evidence, therefore, the witness stated, of the policy, as follows: -

> THAT the policy cover was in respect of motor vehicle registration number KBE 255P, a Mitsubishi Lorry. The class of use was for commercial goods with a carrying capacity of two (2) passengers and the driver as per the log book.

25. The witness then proceeded to give the reason as to why the deceased could not be covered under the policy. She stated as follows: -

> Thatthe aforementioned motor vehicle was overloaded at the time of the accident which was in breach of the contract of insurance and traffic regulations. The carrying capacity of the said motor vehicle is two (2) people and one (1) driver as per the logbook. At the date of the accident, the motor vehicle was overloaded, that is, four people. (sic)

26. The witness then referred to the policy document under the rubric Limitations As to Use (General Cartage). She stated that according to the Police Abstract produced in the primary suit, the deceased was a passenger.

27. Therefore, according to the Appellant, the reason as to why the deceased could not be covered under the policy as a passenger was that the lorry was overloaded. However, Learned Counsel for the Appellant argued in the submissions that the reason for the decline was that the deceased was not in the lorry pursuant to a contract of employment.

28. The insured did not testify both in the primary suit and the declaratory suit. Likewise, the deceased, having died, could not testify. Therefore, none of those who were in the lorry at the time the accident occurred testified. Further, the Appellant's witness did not posit that the cover extended only to the passengers in the lorry under a contract of employment. She only stated that the cover was limited to two passengers.

29. Further, in paragraph 6 of the Plaint in the primary suit, the Respondent herein only pleaded that the deceased was a passenger in the lorry. He neither stated that the deceased was a fare-paying passenger nor used the lorry for commercial travelling. As such, it is only deducible that the deceased was in the lorry as a passenger and that the policy covered two passengers.

30. It is apparent that the submissions Learned Counsel for the Appellant that the reason for the Appellant declining to satisfy the judgment was that the deceased was not in the lorry pursuant to a contract of employment is at variance with the position taken by the Appellant on the deceased. The issue raised by the Counsel was, hence, not supported by evidence.

31. It is well settled that in an adversarial system of litigation any evidence which does not support the pleadings is for rejection. That position was clearly emphasized by the Court of Appeal in Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Sylvester Umaru Onu, JSC stated that: -

> .... It is settled law that it is not for the Courts to make a case of its own or to formulate its own from the evidence before it and thereafter proceed to give a decision based upon its own postulation quite separate from the case the parties made before it......
>
> It is settled law that parties are bound by their pleadings......the Court below was in error when it raised the issue contrary to the pleadings of the parties.

32. Adereji, JSC in the same case expressed himself thus on the importance and place of pleadings: -

> ......it is now trite principle in law that parties are bound by their pleadings and that any evidence led 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 surprises by which no opportunity is given to the other party to meet the new situation.

33. The Supreme Court of Kenya as well added its voice on the legal position in a ruling in Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR.

34. With the above legal position, the submission by Counsel that the deceased was not in the lorry pursuant to a contract of employment is for rejection.

35. This Court now finds and hold that the policy in issue covered the deceased who was a passenger in the lorry irrespective of whether the lorry was overloaded or not.

ii. Whether the Appellant is bound to settle the judgment in the primary suit:

36. Having found that the deceased was properly covered under the impugned policy, the Appellant still contended that it was not liable to settle the judgment in the primary suit on the basis of Section 10(2) (a) and (4) of the *Insurance Act*.

37. It was submitted that notwithstanding that the Appellant did not file a declaratory suit, it was still entitled to avoid the policy since the policy expressly provided for limitation of cover. It was also contended that the Respondent did not timeously issue the Appellant with the mandatory statutory notice.

38. The Respondent submitted that the disclaimer suit was mandatory in the circumstances of this case and that the statutory notice was issued accordingly.

39. The Preamble of the *Insurance Act* has that it is an Act of Parliament to make provision against third party risks arising out of the use of motor vehicles. Section 4 thereof provides for mandatory cover of vehicles. The Court of Appeal in Corporate Insurance Company Ltd Vs Elias Okinyi Ofire [1999] eKLR explained the nature of the mandatory cover under the *Insurance Act*, as follows: -

> The compulsory insurance cover for use of a vehicle on a road especially in regard to fare-paying passengers is required in respect of vehicles like buses and 'matatus' whose owners use it for hire or reward. But an owner of a vehicle who is not supposed to use his vehicle for carrying fare-paying passengers is not bound to insure the passengers and if he carries such passengers he does so at his own risk and in fact he commits an offence if he uses the vehicle for such purpose without relevant cover as provided for in section 4(2) of the Act.

40. Section 10 provides for the duty of an insurer to satisfy judgments against persons insured. Sub-section (1) provides as follows: -

> (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.
>
> 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.

41. Sub-section (2) provides for instances where the insurer's liability is repudiated as follows: -

> (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 thirty days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings;

42. Sub-section 4 further provides as follows: -

> (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 provision 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.

43. As said, the first issue above has already settled the fact that the deceased was duly covered under the policy. Whereas Section 10 provides for the duty of an insurer to satisfy judgments against persons insured, there exists some conditions that must be satisfied before the duty yields.

44. The conditions have been discussed in many decisions including Roseline Violet Akinyi vs. Celestine Opiyo Wangwau (2020) eKLR and Stephen Kiarie Chege vs. Insurance Regulatory Authority & Another (2009) eKLR. They are the following four: -

    i. The subject motor vehicle was insured by the insurer.

    ii. There is a judgment in favour of the Claimant/third party.

    iii. The issuance of the statutory notice.

    iv. The Claimant was covered under the policy.

45. Going forward, this Court will consider each of above conditions separately.

Whether the subject motor vehicle was insured by the insurer:

46. This condition is settled in the affirmative. As discussed in the first issue, there is no dispute that the lorry was insured by the Appellant.

Whether there is a judgment in favour of the Claimant/third party:

47. This condition is also settled in the affirmative. There is indeed a judgment in favour of the Respondent herein in the primary suit.

48. That judgment has neither been set-aside, appealed against nor reviewed.

Whether the Deceased was covered under the policy:

49. Again, this condition is settled in the affirmative.

50. It was discussed in the first main issue.

Whether the statutory notice was duly issued:

51. Section 10(2)(a) requires a Claimant to issue a statutory notice to an insurer either before or within 30 days of filing of the primary suit.

52. In this case, it is on record that the Respondent served the Statutory Notice upon the Appellant on 5th July, 2016 (See page 31 of the Record of Appeal). The primary suit was instituted on 15th May, 2014 and judgment was rendered on 6th August, 2015. The notice was, therefore, not served in line with Section 10(2)(a) of the *Insurance Act*.

53. The purpose of the statutory notice is to notify the insurer of intended or current proceedings in respect of a party alleged to be its insured. By issuing such notice, the insurer is accorded an opportunity to exercise its rights on whether to take up the matter or to lawfully so, decline and to avoid the policy. It is for that reason that in the event the insurer is not made aware accordingly, it is entitled in law to decline to satisfy any resultant judgment or sums decreed against the insured.

54. Whereas the Appellant herein was not issued and served with the requisite statutory notice within the statutory timelines, the Appellant eventually instructed a firm of Advocates, Messrs. Maangi, Otieno & Co. Advocates, who appeared on behalf of its insured. The Advocates filed a Memorandum of Appearance on 5th June, 2014.

55. Since the primary suit was instituted on 15th May, 2014, then it means that the insured was served and he, in turn, informed the Appellant who appointed the Advocates within a period of around 20 days from the date the primary suit was instituted. That was within the 30 days window provided for under Section 10(2)(a) of the *Insurance Act*.

56. Given that the purpose of service of the statutory notice was to notify the Appellant of the proceedings in the primary suit and, that, despite the non-service, the Appellant was instead served by its insured with the primary suit documents and that the Appellant eventually instructed a Counsel who appeared for the insured, then this Court finds that the Appellant was sufficiently notified of the proceedings in the primary suit within the 30 days of institution of the primary suit.

57. The requirement in Section 10(2)(a) of the *Insurance Act* is in tandem with the fair hearing prerequisites in Article 50(1) of *the Constitution*. That requirement must be weighed against the calling in Article 159(2)(d) of *the Constitution* which roots for dispensation of justice without due regard to procedural technicalities. Therefore, in striking a constitutional balance, suffice to say that as long as the insurer becomes aware of the pendency of the primary suit within 30 days of its institution, then Section 10(2)(a) of the *Insurance Act* ought to be regarded as duly complied with.

58. This Court takes the said position since *the Constitution* of Kenya, 2010 ushered in a transformative trajectory in the governance of the country. For instance, prior to 2010, equity was a common law doctrine whose remedies were purely discretionary. However, the 2010 Constitution elevated equity to a constitutional principle under Article 10(2)(b). In such a scenario, even the maxims of equity were also so elevated. (See the Court of Appeal in Willy Kimutai Kitilit v Michael Kibet [2018] eKLR).

59. One of the equitable maxims speaks to performance of obligations. It is the maxim that equity regards as done what ought to be done. The Court in Rodeck vs. U.S., 697 F. Supp. 1508 (D. Minn. 1988) had the following to say on this maxim: -

SUBPAR

... It is a fiction of equity designed to effectuate the obvious intention of the parties and to promote justice.

60. Therefore, on the basis of the foregoing, this Court now finds and hold that in instances where Section 10(2)(a) of the *Insurance Act* is not strictly complied with, but there is evidence that the insurer became aware of a primary suit within 30 days of its institution or within any other reasonable time depending on a case-by-case basis, then the requirements of Section 10(2)(a) of the *Insurance Act* stands fully satisfied.

61. Returning to the case at hand, since the Appellant acted on the primary suit within 20 days of its institution, it cannot, therefore, hold to the objection that it was not served with a statutory notice. The objection is hereby overruled.

The issue of a disclaimer suit:

62. One of the Respondent's argument related to the failure by the Appellant to file a disclaimer suit pursuant to Section 10(4) of the *Insurance Act*. On its part, the Appellant argued that as long as the policy expressly excluded liability, there was no need of filing a disclaimer suit.

63. This Court has considered Section 10(4) of the *Insurance Act* with keenness. To this Court, an insured has two options in avoiding liability under a policy.

64. The first option is for the insurer to file a disclaimer or declaratory suit avoiding the policy against the insured with notice to the Claimant(s) as the case may be. The second option is for the insurer to rely on the provisions in the policy which expressly avoids liability. However, in the event an insurer settles for the second option, it must nevertheless ensure that the Claimants are made aware of such a position.

65. In the case at hand, the Appellant, upon service of the primary suit documents, appointed Advocates who entered appearance. The appearance was not limited or at all. If the Appellant, as it argued, entered appearance limited to any material damage claim on the lorry, then such limitation ought to have been clearly captured in the Memorandum of Appearance or the Defence. That, did not happen. Furthermore, the argument is defeated in that the primary suit had nothing to do with any material damage claim over the lorry for the suit was neither instituted by the insured neither was the insurer a party.

66. Therefore, the Appellant having not filed a disclaimer suit and having not entered a limited appearance in the primary suit was thereby estopped from contending that it was not bound to satisfy the judgment in the primary suit.

67. Having said as much, this Court is persuaded that the foregoing is sufficient to determine the appeal.

Disposition:

68. Coming to the end of this judgment, this Court, unhappily so, notes that this, somewhat straight forward matter, has been in Court since 2014. That is for a period of 10 years. It is hoped that, going forward, mechanisms shall be put in place towards attaining Article 159(2)(b) of *the Constitution*.

69. Deriving from the foregoing, this Court hereby makes the following final orders in this appeal: -

    a. The appeal is wholly unsuccessful. It is hereby dismissed.

    b. The Appellant shall bear the costs of this appeal.

    Orders accordingly.

DELIVERED, DATED AND SIGNED AT KAPENGURIA THIS 17TH DAY OF JANUARY, 2024.

A. C. MRIMA

………………………………

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Judgment delivered virtually and in the presence of:

Mr. Muchela, Learned Counsel for the Appellant.

Miss. Bett, Learned Counsel for the Respondent.

Juma/Hellen – Court Assistants.