Ouma v Occidental Insurance Company Limited (Civil Appeal E052 of 2021) [2024] KEHC 1612 (KLR) (13 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1612 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL E052 OF 2021

SM MOHOCHI, J

FEBRUARY 13, 2024

BETWEEN

MICHAEL OTIENO OUMA ..... APPELLANT

AND

OCCIDENTAL INSURANCE COMPANY LIMITED ..... RESPONDENT

(Being an appeal arising out of the judgment and decree of Hon. E. Soita Resident Magistrate in Molo Chief Magistrate's Court Civil Case No. 270 of 2019 delivered on 12/04/2021)

JUDGMENT

Introduction

1. The Appellant was the Plaintiff in Molo CMCC No. 270 of 2019; Michael Otieno Ouma v Occidental Insurance Company Limited. In his Plaint dated 18th April, 2018 and filed on 7th October, 2019, the Appellant stated that, by judgment of the subordinate court, entered on 22nd June, 2017 in Molo CMCC No. 300 of 2014; Michael Otieno Ouma v Hemanshu Suryakant Amin & Company and Robert Onsumu Onchoke, he was awarded damages in the sum of Kshs. 907,5000.00 plus costs and interest as a result of an accident that occurred on 3rd August, 2013.

2. The Defendant therein had at all material times to the suit been insured by the Respondent herein vide policy number TP/H/093/11. The Appellant averred that the said judgment was a liability covered by the said policy and as such, the Respondent was bound to meet the said sum.

3. By judgment of the trial court dated 12th April, 2021, the trial court dismissed the suit in its entirety with costs.

The Appeal

4. The Appellant being aggrieved by the findings of the trial court filed this Appeal vide his memorandum of appeal dated 5th May, 2021 and filed on 27th May, 2021, the Appellant impugned the trial court's decision on the following five (5) grounds:

    1. That the learned Trial Magistrate erred in law and in fact in failing to consider evidence adduced in totality and applicable laws hence arrived at a wrong conclusion that the Appellant failed to prove his case against the Defendant;

    2. That the learned Trial Magistrate failed to appreciate that this case was a declaratory suit and no evidence was tendered by the Defendant/Respondent to exonerate them from culpability;

    3. That the learned Trial Magistrate took into account and considered irrelevant factors hence reaching a wrong conclusion;

    4. That the learned Trial Magistrate failed to appreciate that the Defendant/Respondent was liable given that it had not sought any declaration that it was not;

    5. That the learned Trial Magistrate erred in law and in fact in failing to deliver a reasoned judgment outlining the facts of the case and reasons for his judgment.

5. In light of the foregoing, the Appellant prayed that the Appeal be allowed by setting aside the judgment of the trial court with a substituted order that judgment be entered in his favor against the Respondent. He also prayed for interest on the decretal sum from the date of the decree in Molo CMCC No. 300 of 2014 until payment in full and further prayed for costs of the appeal.

Hearing of Appeal

6. The appeal was disposed of by way of written submissions. The Appellant's submissions dated and filed on 20th March, 2023 lay a background abridgment of the facts at trial to argue that, based on the evidence adduced before the trial court, the only inescapable conclusion that ought to have been arrived at was a finding that the Respondent was liable to satisfy the decree in Molo CMCC No. 300 of 2014.

7. Recalling his evidence at trial, the Appellant observed that the Respondent did not deny service of the notice of institution of suit in respect to Molo CMCC No. 300 of 2014. In fact, the Respondent was aware of the proceedings. While admitting that he was not a fare paying passenger but had access of the suit vehicle registration number KAL 948V by getting a ride, he submitted that the same was a non-issue. With the crux of the appeal bringing to the fore whether the Respondent was excused from liability on account of their assertion that the insured had abrogated the policy terms. According to the Respondent, the policy was strictly confined to cover carriage of goods.

8. The Appellant cited Section 10 (1) and (4) of the Insurance (Motor Vehicles Third Party Risks) Act Cap 405 Laws of Kenya to advance that his claim was well covered under the Respondent's policy of insurance. He questioned the Respondent's authenticity to adduce all facts of the case for the benefit of the trial court since its witness at trial did not produce the full policy document. As such, its lack of candor ought to be taken into consideration when allowing the appeal.

9. According to the Appellant's interpretation of the policy renewable advice covering the period 23rd August, 2012 to 22nd August 2013, relied on by the Respondent, the insured's policy as transporters was not couched in clear terms, as to whether it was solely in the business of transporting goods or people. His further elucidation of section 11-1 (a) and NP12 of the policy was that non-fare paying passengers were covered since the provisions contemplated carrying of passengers. A general outlook

of the policy document in the Appellant's view was calculated to defeat his claim with parts of the policy being interpreted in bad faith.

10. The Appellant argued that since the Respondent failed to comply with Section 10 (4) of the Act, it was bound to satisfy the judgment obtained against its insured. He fortified his argument by citing the case of Madison Insurance Co. Kenya Limited v Justus Ongera Nairobi HCCA No. 164 of 2002 and Gateway Insurance Company Limited v Thomas Njenga Gitau and another Nairobi HCCC No. 342 of 2011.

11. Based on the foregoing, the Appellant submitted that, the trial court misconstrued Section 5 (b) of the Act when it held that, the Appellant was given a lift and hence not covered under the policy. For those reasons, he prayed that the appeal be allowed with costs.

12. The Respondent rightly opposed the Appeal. It filed its written submissions dated 24th March, 2023 on 13th July, 2023. The Respondent summarized the facts and evidence at trial to submit that the Appellant's injury was not a risk covered by the policy by dint of Section 5(b) and 10(1) of the Insurance (Motor Vehicles Third Party Risks) Act. That by virtue of the said provisions, the Appellant was not covered since he was not carried for reward, hire or in pursuance of an employment contract. He cited the case of *Gateway Insurance Company Limited v Bernard Kamande Kamuyu* [2007] eKLR for this presupposition adding that it was not required to comply with Section 10(4) of the Act. For this reason, the Respondent contended that the declaratory suit was defective and was thus properly dismissed by the trial court.

13. The Respondent then denied that the policy relied on by the Appellant was issued by the Respondent company stating that it issued TP/H/01093/H and not TP/H/0/093/11. Though admitting that it had covered the insured during the time of the accident, the Respondent submitted that it could not be compelled to compensate for what it was not bound by.

14. Be that as it may, the Respondent submitted that the policy contained a passenger exclusion clause avoiding liability against passengers excluded from the cover in compliance with the Act. Furthermore, the Respondent clarified that it submitted the entire policy document. However, if the court found that the same was incomplete, the provisions of Sections 5 and 10 of the Act still absolved it from any form of liability. For these reasons, it was gratuitous to file suit going by the wordings of Section 10(4) of the Act since the clause was a provision contained in the policy. Reliance was further placed on *Gateway Insurance Company v Sudan Mathews* [2003] eKLR.

15. The Respondent then drew another angle circumventing liability: by citing Section 10(2) of *the Act*, it submitted that it ought not to bear liability because the notice of institution of suit in Molo CMCC No. 300 of 2014 ought to have been served within 14 days after filing the suit. It calculated that since service ought to have been made by 10th December, 2014, the Appellant was in breach of the provision for want of form and late posting.

16. Finally, the Respondent submitted that the judgment sought to be enforced was unenforceable. Quoting the Court of Appeal decision of *Corporate Insurance Company Limited v Elias Okinyi Ofire* [1999] eKLR, the Respondent submitted that the judgment herein was unenforceable because the subject policy cover was for private use, the Act covered passengers in PSV vehicles only and liability needed not be covered by the insurer since the Appellant was not a fare paying passenger. In the circumstances, it prayed that the appeal be dismissed with costs.

Analysis and disposition

17. This being a first Appeal, this Court is obligated to re-evaluate and re-appraise the evidence adduced in the trial court in order to arrive at its own independent conclusion taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. [*Selle v Associated Motor Boat Company Ltd* [1968] EA 123.]

18. According to the fact sheet, PW2 the Appellant was on 3rd August, 2013 aboard motor vehicle registration number KAL 948V along the Nakuru-Eldoret highway. He was given a ride home. The same vehicle was owned by Hemanshu Suryakant Amin & Company who took out an insurance policy with the Respondent herein and driven by Robert Onsumu Onchoke.

19. While at Sachangwan area, the driver caused a self-involving accident out of which the Appellant sustained bodily injuries. The Appellant was treated at Nakuru Provincial General Hospital. He later reported the accident at Salgaa Traffic base where he was issued with a police abstract. The particulars of the policy as attached to the suit vehicle's certificate of insurance revealed that the vehicle was insured by the Respondent under policy number TP/H/0/093/11.

20. Following the accident, the Appellant sued the owner and driver of the suit vehicle in Molo CMCC No. 300 of 2014; Michael Otieno Ouma v Hemanshu Suryakant Amin & Company and Robert Onsumu Onchoke. His evidence was that he served a statutory notice dated 27th November, 2014 to the Respondent via registered post on 2nd December, 2014. Evidence of service as well as the notice and the forwarding letter dated 27th November, 2014 were produced and marked P-Exh.4, P-Exh.2 and P-Exh.3 respectively.

21. The suit thereafter proceeded for hearing on its merits where by the judgment of the court dated 22nd June, 2017, the Appellant was awarded Kshs. 907,500.00 costs and interests which had accumulated to a total sum of Kshs. 1,126,571.00.

22. PW1, Caroline Munuago Court Administrator at Molo Law Courts produced the court filed and P-Exh.1. PW2 also produced the decree marked P-Exh.4 and a letter dated 3rd July, 2017 03/07/2017 sent to the Respondent demanding for the decretal sum marked P-Exh.5. The Appellant contended that the Respondent was under statutory obligation to meet the decretal sum hence the suit.

23. Disputing that the Respondent was under statutory obligation to pay, the Respondent called DW1, Rahab Mwai the Respondent's legal officer. She testified that on 2nd August, 2013, their insured's motor vehicle registration number KAL 984V was in a self-involving accident where the passenger sued their insured in Molo CMCC No. 300 of 2014.

24. While judgment was successfully obtained against the insured, the insurance policy was confined to the carriage of goods only. DW1 continued that the insured abrogated the terms of the policy by carrying an unauthorized passenger which liability was not carried to the Respondent. According to the witness, the liability to 3rd party risks in the insurance cover specifically excluded passengers who may be injured whilst in the insured's motor vehicle.

25. Further contending that under the Insurance (Motor Vehicles Third Party Risks) Act, only fare paying passengers were covered, the Respondent declared that it was not liable to indemnify the Appellant.

26. In its evidence in chief, DW1 testified that TP/H/093/11 was not a policy covered by the Respondent but instead covered under policy TP/H/01093/H. She invited the trial court to look at clause MP12 of the contract produced and marked D-Exh.1. According to the policy, the suit vehicle was insured for the period 23rd August, 2012 to 23rd August, 2013. She denied that a notice of institution of suit

was served upon the Respondent. She stated that the policy schedule was not paginated, was signed by a representative and the signature was system generated.

27. Confirming that the produced document was a renewal advice, DW1 explained that so long as the policy was renewed, the previous clauses were automatically adopted. In this instance, the renewal advice made reference to a policy dated 6th August 2017.

28. From a reading of the policy, which was incomplete for missing inter alia MP2 and MP7, the vehicle was not to be used to carry fare paying passengers and gave limits for people who are carried as non-employees. That there was a passenger extension clause excluding passengers from entering the vehicle.

29. The issue for determination in this aspect is whether the Respondent was liable to indemnify the Appellant. Put differently, did the trial court err in failing to find that the Respondent was liable to meet the decretal and unchallenged sum obtained in Molo CMCC No. 300 of 2014? The answer to this question lies in a holistic and purposive interpretation of the policy, the renewal advice, the evidence at trial as read with the relevant provisions of the *Insurance (Motor Vehicles Third Party Risks) Act*.

30. It is not disputed that judgment was obtained in favor of the Appellant in Molo CMCC No. 300 of 2014 against the Respondent's insured one Hemanshu Suryakant Amin & Company following a self-involving accident over motor vehicle registration number KAL 984V that occurred on 3rd August, 2013.

31. It is also not disputed that the Respondent insured the vehicle at all material times the primary suit. It is for this reason that the Appellant sought indemnity from the Respondent. Indeed, according to the policy renewal advice, the suit vehicle was renewed for the period 23rd August, 2012 and 23rd August, 2013 under policy number TP/H/01093/H and renewal number OLG/R/08/201765/08. I therefore dismiss any allegations to the contrary to hold that indeed the suit vehicle had been insured by the Respondent.

32. Under its preamble, the *Insurance (Motor Vehicles Third Party Risks) Act* CAP 405 Laws of Kenya is an Act of Parliament to make provision against third party risks arising out of the use of motor vehicles. Section 4 mandates all motor vehicles to take out a policy of insurance or such a security in respect of third party risks as complies with the requirements of the Act. In fact, the provision is so couched in mandatory terms that it is an offence to do anything contravening those provisions.

33. Section 5 (b) provides that the policy must insure such persons as may be specified in the policy in respect to any liability which may be incurred in respect of the death or bodily injury to any person caused by or arising out of the use of the vehicle on a road. There is a reserve clause which provides that the policy 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.

34. My interpretation of Section 5(b) must be read purposively and holistically with the understanding of the nature and scope of *the Act* in general which is to protect third parties from accidents arising out of motor vehicles. It would be foolhardy to make an interpretation that will achieve the purpose of escaping liability by an insurer. Such would render the tenor of the Act an academic exercise.

35. According to the Respondent, liability ought to be avoided by dint of Section 5(b)(ii) of *the Act* for the purpose that the Appellant was not carried for reward, hire or in pursuance of an employment contract since the policy contained a passenger exclusion clause. Evidence was led that the Appellant was only ferried by the insured's driver enjoying a free ride home.

36. While it is not disputed that the Appellant was not carried for reward, hire or in pursuance of an employment contract since it was purely a lift, it is also not disputed that the accident occurred when the Appellant was already on board the motor vehicle. In other words, the Appellant did not sustain bodily injuries when entering or alighting from the vehicle. The Appellant was in the suit vehicle which was in motion when the accident occurred. Based on that solitude evidence, Section 5(b)(ii) of *the Act* remained inapplicable to the facts and circumstances of the suit.

37. The Respondent urged this court to be guided by the passenger exclusion clause set out in its purported policy that provided as follows:

> "Notwithstanding anything within stated to the contrary it is hereby declared that the Company shall not be liable in respect of death of or bodily injury to any person being carried in or upon entering or getting on to or alighting from the motor vehicle at the time of the occurrence of the event out of which any claim arises."

38. Firstly, this court notes that the said clause is an embodiment of Section 5(b)(ii) of *the Act* which this court has already declared is inapplicable to the facts and circumstances of the suit. Secondly, the purported policy was too unreliable in evidence and bore no weighty probative value as it was incomplete. A cursory perusal of the purported policy was only a one-page document which the Respondent relied on as the entire policy document.

39. The Respondent's witness in its own admission testified that the document was incomplete. How then did it expect the court to place a lawful reliance of it? In the circumstances, the said clause could not thus be interpreted in isolation in the absence of an incomplete document yet the said provision relies on the entire policy. It was incumbent on the Respondent to furnish the entire policy to derive benefit in its interpretation. In the absence thereof, the court would be interpreting a document based on conjectures. Be that as it may, the only adduced portion of the policy did not assist the Respondent since the Appellant was not a fare paying passenger.

40. Next, by dint of Section 10(1) and (2) of *the Act*, the Respondent as an insurance company, is mandated to satisfy a decree obtained against its insured. Section 10 (1) provides as follows:

> "If after a policy of insurance has been effected, judgement 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 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 provision of this section, pay to the person 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 some payable in respect of interest on that sum by virtue of any enactment relating to interest on judgment."

41. Section 10(2)(a) provides that the insurer shall not be liable to pay unless the insurer had notice of the bringing of the proceedings before or within thirty days after the commencement of the proceedings.

42. In the present case, the Appellant satisfied the court that upon filing the suit in Molo CMCC No. 300 of 2014, he served a statutory notice dated 27th November, 2014 to the Respondent via registered post on 2nd December, 2014. Evidence of service as well as the notice and the forwarding letter were produced. This was well within the statutory required period.

43. Having complied with statutory provisions, the Appellant was as such within his right to file the declaratory suit. Furthermore, the Respondent as admitted, did not take any steps to repudiate the policy. Instead, from the proceedings, the Respondent avoided blame by calling out the insured for abrogating the policy. Section 10(4) of the Act, in clear, concise and couched mandatory terms provides as follows:

> "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 judgement was given he has obtained a declaration that apart from any provisions 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 sub-section as respects any judgement obtained in proceedings commenced before the commencement of that Section, unless before or within fourteen (14) days after the commencement of that action he has given notice thereof to the person who is the Plaintiff in the said proceedings specifying that 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."

44. The court in *Cannon Assurance Company Limited v Peter Mulei Sammy* [2020] eKLR in interpreting the provision held as follows:

> "Being guided by the above provisions and noting the fact that the Appellant has never exercised its right by filing the requisite declaration to avoid the policy on any ground in the policy in the primary suit, I find that the time to do so in the proceedings before the trial court the subject of this appeal is not available at that stage. The Appellant did not provide any evidence to the effect that it had sought to set aside the proceedings in the primary suit or that an appeal had been lodged. The trial court was thus left with no option but to find for the Respondent herein. The finding by the learned trial magistrate was therefore not in error as suggested by the Appellant."

45. Similarly, Kasango J in *African Merchant Assurance Co. Limited v Jane Atieno* [2014] eKLR held:

> "The preamble of the Act shows that the objective of the Act is to make provisions against third party risks out of the use of motor vehicles. That preamble as read together with Section 4(1) of the Act indicates that the overriding objective of the Act is to protect third parties against the risks that may arise as a result of the use of a motor vehicle. The emphasis therefore, as the name of the Act suggests, is a protection of third parties who may suffer risks as a result of the use of a motor vehicle on the road ..... In my view it would defeat the

aforesaid purpose and objective of the Insurance (Motor Vehicle Third Party Risks) Act if the Appellant were allowed to escape liability simply on the basis that the person sued was not the policy holder. The insurance policy was issued to cover risks caused by the vehicle and the Respondent did not suffer such risk. She is therefore entitled to compensation by the Appellant..... The insurance policy is not repudiated just because the registered owner is different from the person who took up the policy."

46. The Respondent's allegations as tailored in the trial court were late in the day. What they ought to have done was to place themselves in conformity with Section 10(4) in avoiding liability in toto. That was the proper forum for escaping liability and not at the subject of the Appeal proceedings. The Respondent was the author of its own misfortune. Based on that, I find that the trial court indeed erred in finding that the suit lacked merit. Indeed, the Appellant's case was merited on a balance of probabilities based on my foregoing analysis.

47. Consequently, this court makes the following orders:

    1. The Appeal is allowed

    2. The judgment of the trial court dated 12th April, 2021 be and is hereby set aside and substituted with an order that the Respondent is liable to indemnity the Appellant the sum of Kshs. 1,126,571;

    3. The Appellant shall have costs of the Appeal and those at trial Court;

    4. The amount in (2) above shall attract interest at court rates from the date of filing until payment in full.

    Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 13TH DAY OF FEBRUARY 2024.

MOHOCHI S.M.

JUDGE OF THE HIGH COURT.