CIC Insurance Group Limited v Asuku (Suing as the Legal Representative of the Estate of Linet Kerubo Obiri - Deceased) & another (Civil Appeal 679 of 2021) [2024] KEHC 3076 (KLR) (Appeals) (14 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3076 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

APPEALS

CIVIL APPEAL 679 OF 2021

JN MULWA, J

MARCH 14, 2024

BETWEEN

CIC INSURANCE GROUP LIMITED ..... APPELLANT

AND

PRISCAH NYABOKE ASUKU (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF LINET KERUBO OBIRI - DECEASED) ..... 1ST RESPONDENT

AFRICA MERCHANT ASSURANCE COMPANY LTD ..... 2ND RESPONDENT

JUDGMENT

1. This Appeal arose from the trial court's judgment delivered on 24/09/2021 being from a declaratory suit wherein the issue was which of the two insurance companies the Appellant and 2nd Respondent were liable to settle the trial courts judgment wherein both were held equally liable for the accident that claimed the life of the deceased upon being sued by the legal representative of the deceased following the accident on the 6/08/2011.

2. At the material times, the Appellant's motor vehicle wherein the deceased was a passenger registration No. KBL 688Q a matuatu was co-owned by Waithaka Benson and National Industrial Credit Bank Ltd and Insured by the 2nd Respondent. The other vehicle Registration no. KAV 389Qwas owned by Srilankan Trading and Insured by the Appellant.

3. Both the owners and Insurers of the two vehicles were served with the statutory Notices under Cap 405 Laws of Kenya and demand notices. They did not enter appearances nor filed their defences when served with the summons to enter appearance in the Primary suit vide Plaint dated 2/08/2013 CMCC No. 4729 of 2013 *Obiri Asuka (suing as Legal Administrator of the estate of the late Linet*

Kembo) deceased) vs. Srilankan Trading – 1st Defendant and National Industrial Credit Bank Ltd – 2nd Defendant; and Waithaka Benson – 3rd Defendant.

4. Upon formal proof on the 9/09/2016 the trial magistrate made a finding that the Defendants were equally liable and awarded to the plaintiff damage assessed at Kshs. 1,968,438.40 and payable by each of the two Defendants plus costs and interest.

   The two Defendants failed to settle the decretal sum upon which the plaintiff filed the declaratory suit: CMCC No 114 of 2020 at Milimani vide a plaint dated 20/12/2019 against both insurers of the two motor vehicles seeking a declaration that the defendant are liable to settle the decretal sum at the ration 50:50; and an order compelling the two defendants to each settle half of the decretal sum Kshs. 968,438.46/- plus costs and interest.

5. Being dissatisfied with the above judgment the 1st Defendant now Appellant CIC Insurance Group Limited preferred this Appeal against both the Plaintiff (now 1st Respondent) and Africa Merchant Assurance Company Limited as 2nd Respondent.

6. The grounds for the Appeal are numerous but may be summarized into three as hereunder: -

   1. That the Learned Trial Magistrate erred both in Law and fact in making a finding that the Appellant was liable to satisfy 50% of the decree from the trial court not withstanding that its insured nor the Insured's driver had been sued in the primary suit.

   2. That the learned trial Magistrate erred in misinterpretation of the meaning and purport of Section 5 and 10(4) of Cap 405, *Insurance (Motor Vehicle Third Party Risks Act)* thus arrived at a wrong conclusion that service of statutory Notices under the Act imputes and creates strict liability on an Insurer to satisfy a judgment against the insurer where the insured nor the insured's driver were not sued in the primary suit.

   3. The learned trial Magistrate erred in Law in finding that the Appellant failed to obtain a declaration avoiding liability.

   The Appellant proposed that the appeal be allowed; that a declaration do issue that the appellant is not statutorily obligated to satisfy part of the decree of the primary suit in favour of the 1st Respondent for reasons that neither its insured nor its driver were sued.

7. Being the first appellate court, this court is under a duty to re-evaluate reconsider and reanalyze the evidence adduced before the trial court and draw its own conclusions but also taking into account that it neither saw or heard the parties testify. Further the appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached by the trial court should stand as stated in numerous decisions, notably *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 and *Peters v Sunday Post Limited* [1958] EA 424.

The Appellant's Case And Submissins.

8. It is its case that the plaintiff in the primary suit now 1st Respondent had not sued its insured and/or the insured's driver at the material time of the accident and therefore could not be held liable under the declaratory suit, to satisfy the decree in that the insured Motor vehicle under policy no. 012/080/022943/2010/02 was Reg. No. KAV 389Q Mitsubishi Fit and the Policy was executed between Anne Njoki Waithaka and Cooperative Bank Limited who were not sued as defendants in the primary suit, that gave rise to the Declaratory suit.

9. Additionally, the Appellant submits that service of a statutory Notice upon an Insurance Company under Section 10 of Cap 405 does not create liability upon the insurer and thus the trial court

misinterpreted the meaning of Section 5 and 10 of the said *Act* relying on the Court of Appeal case *Anyanzwa v. Gasperis* [1981] KLR where it was held that only the Insurer may be liable to satisfy damages to a third party if the Insurer or the Insured's driver, or if deceased, then his personal representative was joined as a defendant, his negligence established and judgment obtained against the driver or his employer. It is also conditional that the insured motor vehicle was at the material time being driven by the driver as an authorized driver within the terms of the policy.

10. Additionally, the Appellant relied upon Court of Appeal decision in *Kenindia Assurance Company Ltd vs. James Otiende* [1989] eKLR and *Intra Africa Assurance Company Limited v. Simon Njoroge & Another* 1997 for the proposition that it is a precondition of liability under the *Act* (Cap 405) that judgment is obtained against the Insured before the Insurer becomes liable, that the judgment must be in respect of a liability covered under the policy.

11. The Appellant further submits that as the Respondent never met the Pre-conditions stated above no liability could detach against it as the Insurer and the Insured's driver were not sued nor was judgment entered against either of them in the primary suit in terms of section 10 of Cap 405.

12. Further, it is the appellants case that the trial court erred in law when it held that the appellant did not file a declaratory suit to avoid the policy by submitting that there is no requirement under Cap 405 for an insurer to file a declaratory suit save when the insurer is entitled to repudiate or avoid the policy for reasons beyond express provisions of the policy for instance non-disclosure of material facts or misrepresentation of material facts which was not the case in the instant matter, and relied upon the case *Kenyan Alliance Insurance Company Ltd vs. Noami Wambui Ngira & Stanley Waira Ngugi* HCCA. 98 of 2019.

1st Respondents Case And Submissions

13. The 1st Respondent reiterated that before institution of the suit it had served the statutory Notices upon both the Appellant and the 2nd Respondent, an issue not under dispute in the appeal and that the trial courts judgment ought to be settled by both the appellant and the Respondents as determined by the trial court.

    In addition the 1st Respondent submits that notwithstanding that the registered owner as at the date of the accident was the ne sued as opposed to the beneficial owner Ann Njoki Waithaka, the appellant had covered the user of the same vehicle Registration No. KAV 389Q under the same policy number hence submits that under both instances, the Appellant remains liable under the policy.

14. It is a further submission that the issue of registered owner vis-à-vis beneficial owner would have been an issue and interrogated before the trial court in the primary suit had the appellant defended the suit, but only came up during the hearing of the declaratory suit.

15. Replying on the case *Corporate Insurance Co. Ltd vs. Makau Kaithu Musomba & another* [2018]eKLR, where the issue of whether the Appellant under the provisions of third Part Motor *Insurance Act* was entitled to honour a judgment obtained against a defendant who is not the insured but in respect of an accident involving a motor vehicle insured by the same when the court (J. Wakiaga) held that the Appellant is obligated to pay and satisfy judgment obtained by the Respondent unless they had filed a declaratory suit to avoid the policy before the judgment was obtained.

    The 2nd Respondent did not participate in the Appeal.

Issues for Determination

1. Whether the Appellant being the Insured of the accident vehicle is liable to settle a claim whether or not the registered owner is sued as opposed to the beneficial owner.

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2. Whether the appellant was required to obtain declaration from the court under Section 10(4) of Cap 405 to avoid liability before judgment in the primary suit.

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3. Who bears costs of the appeal?

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Analysis and Determination

16. There is no doubt or dispute that the subject matter vehicle registration No. KAV 389Q was at the material times insured by the Appellant notwithstanding that the policy holder was not the Registered owner. The 1st Respondent sued the registered owner as shown in the certificate of search of the said vehicle produced before the trial court in the suit. Had the appellant defended the said suit the above fact would have been resolved that the subject vehicle was under control and possession of a beneficial owner and probably would have initiated a declaratory suit to avoid the policy before judgment was entered against the appellant.

17. Section 4(1) of Cap 405 provides that: -

> " 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.*" (emphasis mine)

In the instant matter the Appellant acknowledges that there was indeed a valid cover for third party risks in force Section 4(1) which connotes that the Policy is for the use of the vehicle by the insured person or other person a beneficial owner or an authorized person. The Insurance Policy was therefore issued to cover risks caused by the vehicle which caused the Respondent to suffer loss or damage.

18. The common factor in both instances is the vehicle not the registered owner or the beneficial owner. In my considered view if it were to be the opposite the objective of the Act would be defeated totally if the insurer where to be allowed to escape liability only for the reason that the person sued is not the policy holder. That is the question that the courts in the cases sought to answer - *African Merchant Assurance v Jane Atieno* [2014] eKLR; *Corporate Insurance Co. Ltd v Makau Kaithu Musomba & Another* (*supra*); *Kenya Alliance Insurance Co. Ltd v Thomas Ochieng Apopa* [2020] eKLR; *Cannon Assurance Co. Ltd v Peter Mulei Sammy* [2020] eKLR; among others. In my view the question is analyzed in the *Corporate Insurance Co. Ltd v Makau Kaithu* (*supra*) (J. Wakiaga) when the court held that -

> " The person "Insured under the policy" is any authorized driver provided he shall as though he were the insured observe the terms of the policy"

Therefore if all terms of the policy are observed and the driver is deemed to be the "insured" then the injured person is entitled to the benefit of the judgment and therefore any such judgment ought to be enforced against the insurer.

19. The law envisages a situation where the Insurer is obligated to satisfy a claim by a third party so long as damage can be attributed to the accident vehicle. Such insurer cannot escape liability when the policy is valid and covers the risk which has attached involving the insured vehicle.

As to the question that the Appellant was not sued in the primary suit, and the person sued therein was not its insured, such issue would have been resolved had the appellant defended the suit at the primary level as well articulated in the case *Cannon Assurance Co. Ltd v Peter Mulei Sammy* (*supra*)

20. Section 10(1) of the *Act* provides: -

> "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 interests on that sum by virtual of any enactment relating to interest on judgments"

21. The above analysis answers the issue No. 3 as to whether the Appellant was obligated to avoid the policy by a declaratory suit and therefore not liable to satisfy the decree. In my view there is no legal requirement that an insurer must avoid the policy to run away from its obligations placed upon an insurer when the damage can be attributed to the accident vehicle even when the insurer and the insured have not been made parties to the primary suit even when the insurer is in a position to repute the claim. The bottom line is that the insurer in these circumstances cannot escape liability whenever the policy is valid and in force and covers the risk it attaches.

22. Section 10(4) provides that: -

> "No sum shall be payable by any insurer under the forgoing 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 particularly 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....."

23. The Appellant did not dispute having had knowledge of the accident nor that it was served with the statutory notice as well as demand notice. Summons to enter appearance were served upon it. It did not deny having been so served. It had the opportunity to obtain a declaration from the court to avoid the policy. If indeed the insured had not complied with the terms of the policy. Having opted not to defend the declaratory suit it can only blame itself. It failed to take advantage of provisions of Section 10(4) to avoid the policy.

24. Further as stated in the case *Joseph Mwangi Gitundu vs. Gateway Insurance Co. Ltd* [2015] eKLR, the only way to avoid a policy is by strictly following prescriptions provided for under section 10 of the *Act*.

This Appeal therefore comes late in the day after the appellant failed to act within the time frame provided when it failed to file a suit to avoid the policy soon after the accident was reported to it. To that end therefore, the Appellant is obligated to satisfy the part of the decree of the primary suit attached to it, being 50% of the decretal sum plus interest and costs. For the aforetasted I am persuaded that the trial court Magistrate did not err in the manner attributed to him in the grounds of Appeal.

25. As to whether the Appellant was required or obligated to avoid the policy by obtaining a declaration from court Section 10(4) of the *Act* grants an insurer an option to do so or not by the words

> " notwithstanding that the insurer may be entitled to avoid, or may have avoided or cancelled the policy....."

It is important to state that the requirement that the insurer settles the decretal amount following entry of judgment is only applicable for such judgments involving liability covered under the *Act* and Insurance Policy as stated under paragraph (b) of Section 5 (being a liability covered by the terms of the policy).

26. For the forgoing it is my finding that the Appellant has failed to demonstrate that the liability subject of the appeal was not covered under the *Act* nor by the terms of the policy.

The upshot is that the Appeal lacks merit and it is dismissed with costs to the 1st Respondent.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF MARCH, 2024.

J. N. MULWA

JUDGE