Directline Assurance Compant Limited v Waithera (Civil Appeal E585 of 2021) [2024] KEHC 2720 (KLR) (Civ) (12 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2720 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E585 OF 2021

JN NJAGI, J

MARCH 12, 2024

BETWEEN

DIRECTLINE ASSURANCE COMPANT LIMITED .... APPELLANT

AND

GILBERT KIHUNGU WAITHERA .... RESPONDENT

(Being an appeal from the judgment and decree of Hon.A.N. Makau (Ms), Principal Magistrate, in Nairobi MCC Civil Case No.9394 of 2018 delivered on 4/6/2021)

JUDGMENT

1. The Respondent herein brought suit against the Appellant seeking for a declaration that the Appellant was bound to satisfy a decretal sum of Ksh.593,891.42 with costs and interest awarded to the Respondent in Nairobi CMCC No.2948 of 2013.

2. It was the case for the Respondent that on the 1st July 2012 he was travelling in a motor vehicle registration No. KBB xxxG when the vehicle was involved in an accident and he was injured. The police issued him with a police abstract showing that the vehicle was insured by the Appellant vide a policy No. 30xxxx36 and Certificate No. A5xxxx12. He sued the driver of the said motor vehicle in CMCC No.2948 of 2013 and issued the necessary notice to the Appellant under Section 10 of The *Insurance (Motor Vehicles Third Party Risks) Act*, CAP 405 Laws of Kenya. Judgment was entered for him in the sum stated above. He then filed a declaratory suit against the Appellant. The Appellant entered a defence and contended that the motor vehicle did not have a valid insurance cover with them at the time of the accident. After a full trial the court dismissed the Respondent`s defence and ordered the Appellant to satisfy the claim. The Appellant was aggrieved by the judgment and lodged the instant appeal.

3. The grounds of appeal are that:

1. The learned Magistrate erred in law by finding that the Appellant was still liable for the Respondent's claim in Nairobi CMCC No. 2978 of Gilbert Kihungu Waithera Vs Francis Mirimi Njagi despite the Appellant having demonstrated that when the accident in the said suit allegedly took place, the Respondent did not have a valid policy insurance cover at all from the Appellant.
2. The learned trial Judge erred in law and in fact by completely disregarding the Appellant's statement of defence, the Appellant's witness statement, evidence adduced during trial and the Appellant's submissions and the numerous binding authorities cited by the Appellant thereby basing its judgment on erroneous principles of law.
3. The learned trial Judge erred in law and in fact by failing to consider the defence evidence and submissions tabled by the Plaintiff in Nairobi CMCCNo.9394 of 2018 Gilbert Kihungu Waithera Vs Directline Assurance Company Limited before the trial court to accordingly uphold the policy of insurance relating to the insured motor vehicle involved in the accident on 1 July 2012 when the said accident occurred was nonexistent. The said insurance cover had lapsed 25th June 2012 and was only renewed on 9th July 2012.
4. The learned Magistrate erred in law and in fact in failing to consider that even the certificate of insurance number A5xxxx12 arising from policy number 30xxxx36 relied on by the Respondent was issued to cover the period between 12th September 2012 and 18th September 2012 which was about three months after the accident had occurred.

4. The appeal was canvassed by way of written submissions.

Appellant`s Submissions

5. The Appellant submitted that the requirement to settle judgments as contemplated by section 10 of CAP 405 comes into play upon confirmation that an insurance policy has been effected. That this means that a policy of insurance has to be effected before an insurer is held liable to satisfy a judgment.
6. The Appellant submitted that the trial court erred in relying on police abstract to hold that the subject motor vehicle was insured by the Appellant. They submitted that a police abstract is not conclusive evidence of a valid cover as held in the case of Gerald Njuguna Mwaura v Africa Merchant Assurance Co. Limited (2020) eKLR.
7. The Appellant further submitted that it had laid sufficient evidence to indicate that the said motor vehicle was not insured by them. The Appellant relied on a bundle of policy schedules issued to the owner of the motor vehicle during the period around the accident that showed that no cover was taken for the period between 24th June to 9th June 2012 hence the Appellant was not its insurer. The Appellant submitted that the Respondent did not enjoin the owner of the motor vehicle to adduce evidence of any cover but relies solely on the police abstract.
8. The Appellant further relied on the evidence of its witness, Pauline Waruhiu who in her evidence stated that the Certificate of Insurance A5xxxx12 that the Respondent relied on in holding the Appellant liable was of a policy effected on 17th to 18th September 2012 which date was after the accident. It further relied on the statement of account and receipt of payment of policy for the said certificate. It was submitted that this evidence was enough proof that the police abstract relied on was erroneous.
9. The Appellant submitted that since it had proved that the said certificate was not for the period of the accident and that the vehicle in the said period did not have a cover with them, the evidential burden had shifted back to the Respondent to prove that the Appellant indeed issued the said cover. In this

respect the Appellant cited the case of Winfred Nyawira Maina v Peterson Onyiego Gichana 2015) eKLR where the court discussed the place of evidential burden and stated that:

(31) ....The way I understand the law, the term Burden of proof, entails the legal burden of proof and evidential burden. The two terminologies are most of the time misunderstood; albeit distinct. I am concerned mostly with the evidential burden which initially rests upon the party bearing the legal burden, but as the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence. See Halsbury'sLaws of England, 4th Edition, vol. 17. Therefore, the Applicant must first lay prima facie evidence against the Respondent if evidential burden is to be created on the shoulders of the Respondent. In simple terms see what the Supreme Court said in the case of Raila Odinga vs. IEEBC & 3 Others [2013] eKLR that:-

> ''...a Petitioner should be under obligation to discharge the initial burden of proof, before the Respondents are invited to bear the evidential burden''.

10. The Appellant in conclusion submitted that mere reliance on an erroneous police abstract, lack of enjoining the owner of the motor vehicle cannot be said to be discharging an evidential burden by a party. That the Appellant was under no duty to explain to court how a certificate found at the scene of the accident belongs to itself or otherwise. More so that the requirement to avoid policy only comes into play once a policy has been determined to exist, as one cannot seek to avoid a policy that was not in existence in the first case.

11. The Appellant submitted that the trial court misdirected itself in holding that the subject motor vehicle was insured by the Appellant. They urged the court to allow the appeal with costs.

Respondent`s Submissions

12. The Respondent on the other hand submitted that the police abstract that was produced during the trial recorded the policy No.,30xxxx36 and the Certificate of Insurance Number, A5xxxx12 that were found on the vehicle on the date of the accident. That the witness for the Appellant, Pauline Waruhiu, admitted that both the Certificate number and policy number were theirs. Therefore, that it was the burden of the Appellant to disprove the contents of the police abstract which they did not do. That they should have explained to the court how its certificate of insurance came to be on the vehicle in July if it issued it in September. That it did not disclose why the policy it issued had the same certificate number.

13. It was submitted that the Respondent produced a letter from the Association of Kenya Insurers (AKI) that showed that the certificate in issue was issued to the Appellant by AKI on 26th December 2012. However, that Pauline Waruhiu produced documents showing that the said certificate number was issued to the subject motor vehicle by their agent to cover the period from 12th to 18th September 2012. The Respondent submitted that the Appellant was lying on the issue and they therefore did not disprove the contents in the police abstract. They submitted that contents of a police abstract are proof thereof unless disproved. On this proposition they cited the cases of Anne Ayuma Harrison v Simon Githure Marungo (2014) eKLR and Joel Muga Opija v East African Sea food Limited (2013) eKLR.

14. The Respondent submitted that the Appellant pleaded in their defence that it had not issued any policy of insurance in respect of the suit motor vehicle. That contrary to that they produced documents and witness statements confirming issuance of a policy over the vehicle hence departure from their pleading. More so that it was not pleaded that the Appellant was not liable because premium had not

been paid. It was submitted that premium payment is contractual between the insurer and its insured and issuance of a certificate presupposes that premium had been paid or promises to be paid.

15. It was submitted that the burden of proof was on the Appellant to disprove the certificate of insurance cited in the police abstract or to disprove the contents thereof. Further that the Appellant had special knowledge of such matters hence its burden under section 112 of the *Evidence Act* to disprove them. That they did not explain how a certificate of insurance they admit to be theirs came to be found on the vehicle on the date of the accident, yet there was no allegation of loss or theft of the same.

16. It was further submitted that Section 10 of The *Insurance (Motor Vehicles Third Party Risks) Act*, CAP 405 does not name non-payment of premium as a defence to a third party claim. That an insurer who takes the position that it was not liable under a policy or certificate of insurance cited in a demand letter or a statutory notice served upon it before or within 14 days of filing of a suit against its insured is required to file a suit in accordance with Section 10(4) of the Act for a declaratory decree that it was not liable.

17. It was submitted that the Appellant herein did not file any declaratory suit to avoid the policy after service of the statutory notice. Therefore, that it has no defence to the declaratory suit. That without a declaratory decree an insurer has no defence. The following cases were cited in support of that proposition-Africa Merchant Assurance Co. Ltd v Confas Ntabo (2016) eKLRBlue Shield Insurance Company Limited V Raymond Buuri M`rimberia (1998) eKLRGerald Njuguna Mwaura V Africa Merchant Assurance Co. LimitedCanon Assurance Company Limited v Peter Mulei Sammy (2020) Eklr

18. The Respondent urged the court to dismiss the appeal with costs.

Analysis and Determination

19. This being the first appellate court in the matter, the court recalls its duty as was espoused by the Court of Appeal in the case of Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, where it stated that;

> This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212 wherein the Court of Appeal held inter alia that:-
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> > "On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

20. I have considered the grounds of appeal, the record of the trial court and the submissions by the respective Advocates for the parties. The issues for determination are:

    (1) Whether there was a valid insurance cover at the time of the accident.

    (2) Whether the Appellant has a defence to the suit in face of the provisions of Section 10(4) of CAP 405.

Whether there was a valid insurance cover at the time of the accident.

21. The trial Magistrate found that the motor vehicle was duly insured by the Appellant at the time of the accident. The court found that the policy number and the certificate of insurance found on the motor vehicle were genuine. The Magistrate further found that the Appellant was served with the statutory notice and that it was all along aware of the primary suit.

22. The evidence of Appellant`s Head of Legal and Claims Department, Pauline Waruhiu, DW1, was that the Company had issued the subject policy No.30xxx36 to motor vehicle registration No. KBB xxxG under the name of one William Mwaniki. That a perusal of the statement of accounts on payment of premiums and policy extensions showed that the insured was renewing the cover on a week to week basis. That the record indicated that there are periods when the renewals were not done that included the period between 25th June 2012 and 8th July 2012. That during the period when renewals were not done the motor vehicle did not have insurance cover from the Appellant. Therefore, that at the time of the accident on 1st July 2012, the motor vehicle did not have an insurance cover as the same had lapsed on 25th June 2012 and was only renewed on 9th July 2012. That in the premises the Appellant was not liable to satisfy the claim.

23. The witness further told the trial court that though a letter from the Association of Kenya Insurers indicated that the Certificate of Insurance No. A5xxxx12 arising from policy no. 30xxxx6 which the Respondent claimed to have been affixed on the insured motor vehicle at the time of the accident was issued to the Appellant on 26th December 2012, the true position was that they issued the said certificate to the insured to cover the period between 12th and 18th September 2012 which was long after the accident in question had occurred. Therefore, that the certificate did not cover the period of the accident. She however stated that it is not known how the certificate came to be on the subject motor vehicle on 1st July 2012, yet the same was not reported lost or stolen.

24. It is trite law that whoever alleges must prove. The Appellant`s witness DW1 admitted that insurance certificate No.53xxxx12 arising from Policy No.30xxxx36 was issued by their company to motor vehicle registration No.KBB xxxG. Though the witness said that it was issued to cover the period between 12th and 18th September 2012, she could not give an explanation as to why the same was found on the subject motor vehicle on the date of the accident. According to the documents produced in court the certificate was issued by the company`s intermediary called Arnold Kibaara Ngundo. The Appellant did not call the said person as a witness in the case to explain why the same insurance cover was found in the subject motor vehicle on the date of the accident, if it is true that it was issued to the vehicle in the month of September 2012. There was no evidence that the certificate was reported lost or stolen. The Appellant`s evidence on the said certificate does not add up. Without a proper explanation it can only be concluded that they had covered the vehicle at the time of the accident.

25. The Appellant submitted that the trial Magistrate solely relied on the police abstract to find that the Appellant had covered the vehicle at the time of the accident. The burden was on the Appellant to rebut the evidence contained in the police abstract. They failed to do so when they did not adduce evidence that the certificate found on the motor vehicle was forged. In my view the evidential burden of proof did not shift to the Respondent in view of the fact that the Appellant admitted that the certificate was issued by them. I am in agreement of the learned Magistrate that the Appellant was the insurer of the subject motor vehicle at the time of the accident.

Whether the Appellant has a defence to the suit in face of the provisions of Section 10(4) of CAP 405.

26. Section 10(1) of The Insurance (Motor Vehicle Third Party Risks) Act provides as follows:

> "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."

27. The section obligates an insurance company to satisfy a decree where judgment has been obtained against any person insured by a policy of insurance notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy.

28. The law is that an insurer who seeks to avoid a policy has to comply with the provisions of Section 10(4) of Cap 405 which provides that:

> "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;
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>> 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."

29. The Section requires that the insurer should file an action for a declaration that it is entitled to be absolved from liability arising from the insured's acts or under the insurance policy in question. Notice of such declaration should also be given to the plaintiff in the primary suit.

30. What is the effect of non-compliance with the provisions of Section 10(4)? Counsel for the Appellant submitted that the provisions of that section only come into play where there is policy of insurance. That in this case there was no such a policy and therefore the provisions of the section are not applicable.

31. Counsel for Respondent cited several authorities which hold that where an insurer has not obtained a declaratory decree under the provisions of Section 10(4) of AP 405, it has no defence to a declaratory suit. Among these cases is the case of Blueshield Insurance Co. Ltd v Raymond Buuri M'rimberia

(supra), where the Court of Appeal dealt with the issue of a declaratory suit under section 10(1) of the Act and stated;

> “ Although the Appellant did not plead in its defence in the enforcement suit, that it had already sued the insured in H.C.C.C. No.2976 of 1986 for a declaration that it was entitled to avoid the policy and that the said suit was still pending, Mrs. Kiarie did say that in her replying affidavit hereinabove mentioned. Can that allegation in itself be a friable issue? We think not: Under s.10(4) the liability of the insurer to satisfy the judgment under s.10(1) is excluded only if, not only that the insurer had commenced an action within the time scale prescribed thereunder, but also that it has obtained a declaration that it is entitled to avoid its liability under the insurance policy.
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> No declaration has been so far obtained although the declaratory suit was filed some 12 years ago by the Appellant. Mrs. Kiarie's vague explanation for this delay "although the suit has been fixed for hearing a few times it has never taken off" smacks of gross lack of diligence on the part of the Appellant in prosecuting the declaratory suit. Moreover, there is no evidence that a mandatory notice as envisaged by the proviso to s.10(4) had been ever given. The effect of that omission is that even if the Appellant has obtained the said declaration which it has not so far, it may still not be entitled to the benefit of that declaration as against the Respondent.”

32. In Gerald Njurugna Mwaura v Africa Merchant Assurance Co.Limited [2020] eKLR, Mwita J. held the following on the issue:

> 37. The Respondent did not claim that it had avoided the policy or that it had obtained stay of execution of that decree. Rather, its argument was that it was not the insurer of the motor vehicle. That argument, in my respectful view, could not be made in the declaratory suit. Even where it is made, it is the duty of the Respondent, as the person making it, to adduce evidence and show that indeed it was not the insurer. The Respondent did not call evidence to show that it was not the insurer and that the insurance policy of the motor or the certificate of insurance did not belong to it.

33. The effect of failure by an insurance company to obtain a declaration that it is entitled to avoid a policy is that it has no defence to a declaratory suit to satisfy a judgment obtained against its insured. The Appellant herein has not obtained a declaratory order that it is entitled to avoid the policy. The Respondent has shown that the Appellant was served with the statutory notice in the primary suit. In the premises, I find that it had no defence to offer to the Respondent`s declaratory suit that it is liable to satisfy the decree. Besides that, it was proved that the Appellant was the insurer of the accident motor vehicle.

34. The upshot is that there is no merit in this appeal. The judgment of the trial court is therefore upheld and the appeal is dismissed with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 12TH MARCH 2024.

J. N. NJAGI

JUDGE

In the presence of:

Miss Ochieng for Appellant

Mr Kaburu for Respondent

Court Assistant - Amina

30 days Right of appeal