



**Heritage Insurance Company Ltd v Harvis Engineering Ltd (Civil Suit E280 of 2022)
[2024] KEHC 5354 (KLR) (Commercial and Tax) (13 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5354 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E280 OF 2022
FG MUGAMBI, J
MAY 13, 2024**

BETWEEN

HERITAGE INSURANCE COMPANY LTD PLAINTIFF

AND

HARVIS ENGINEERING LTD DEFENDANT

JUDGMENT

1. The plaintiff, a private insurance company claims that it issued the defendant, upon request through a proposal form dated 2nd August 2018, with a Comprehensive Motor Vehicle policy of insurance against third party risks for a Tata LPK Tipper registration number KCR 084G.
2. The terms of the proposal form were that the defendant was seeking a comprehensive commercial general cartage over the insured motor vehicle with an insured value of Kshs. 6,400,000/-; that the insured motor vehicle had been financed by Stanbic Bank Kenya Limited (Stanbic) and the premium sum of Kshs. 357,843/- would be financed through an Insurance Premium Financed Agreement (IPF) by the aforementioned bank to be repaid in 10 monthly instalments; that the premium due for the insurance cover must be paid in full at inception or within 30 days from the inception date before liability attaches as stipulated under Section 156 of the [Insurance Act](#) and that the policy would be renewed automatically each succeeding year.
3. Insurance Policy No. xxxx was issued and renewed for the periods between 2018-2019 and 2019 to 2020, for which premiums were paid through IPF agreements with Stanbic. Under the policy, the premium was Kshs. 314,258/- payable through an IPF from Stanbic in 10 instalments and Stanbic would be noted as the premium financier in respect of the policy for the amount paid by them. The policy also provided that pursuant to deletion of Section 156 (2) of the [Insurance Act](#), cap 487, the premium was required to be paid on or before the renewal date of the policy. It further stipulated that the plaintiff could cancel the policy by issuing 14 days written notice to the defendant and would



- refund the premium for the remaining period subject to no claim or loss having arisen during the policy period.
4. The defendant approached the plaintiff for a renewal of the policy for one more year from 14th December 2020 to 13th December 2021. Accordingly, the plaintiff issued the defendant with a digital Certificate of Insurance No. Bxxxx. Thereafter, the plaintiff was served with a letter dated 30th December 2020 from Stanbic indicating that it had declined to finance the premium of Kshs. 314,258 as the defendant had failed to pay the first instalment. Consequently, the plaintiff issued the defendant with a cancellation notice to the effect that it would cancel the policy if the defendant failed to regularize the IPF account with Stanbic. The defendant failed to do so and the plaintiff was constrained to issue the cancellation letter dated 25th January 2021 pursuant to section 10(2) (c) (iii) of the Insurance (Motor Vehicle Third Party Risks Act and requested the defendant not to display the invalidated digital certificate of insurance.
 5. However, the defendant continued to display the certificate of insurance despite cancellation of the policy. On 31st May 2021, the defendant's authorized driver was driving the defendant's motor vehicle registration number KCR 084G along Kikuyu-Wangige Road. He lost control of the vehicle which veered off the road and knocked three pedestrians, namely, Florence Nyambura Mwangi, Nathan Kimani Mbui and Loise Wambui Mbui, who were injured to varying degrees. This led to the filing of three suits, being Kikuyu CMCC No. E151 of 2022 by Ms. Florence Nyambura Mwangi against the defendant on her own behalf and Kikuyu CMCC No. 152 and 153 as next friend and mother of Nathan Kimani Mbui and Loise Wambui Mbui respectively.
 6. Relying on section 10(4) of the *Insurance (Motor Vehicles Third Party Risks) Act*, the plaintiff asserts that it is and was entitled to avoid the said policy on grounds that the policy was cancelled for non-payment of the premium.
 7. Accordingly, through a plaint and a request for judgment dated 25th July 2022 and 26th June, 2023 respectively, the plaintiff seeks entry of judgment against the defendant for:
 - a. A declaration that policy of insurance number xxxx was terminated on 13th January 2021 for failure to pay the insurance premium.
 - b. A declaration that the Plaintiff is not liable to make any payment under the policy of insurance No. xxxx in respect of any claim against the Defendant arising out of the accident that occurred on the 31st May 2021 involving motor vehicle registration number KCR 084G.
 - c. A declaration that the Plaintiff is not liable to make any payment under the policy of insurance No. xxxx in respect of any claim against the Defendant arising out of any accident that occurred after the 13th January 2021 involving motor vehicle registration number KCR 084G.
 - d. Costs of the suit together with interest thereon.
 8. On 2nd August 2022, the plaintiff effected service of the summons to enter appearance upon the defendant through its email address havisengineering@gmail.com. This was evidenced by the affidavit of service sworn by Advocate Jackson Muema on 2nd August 2022. Nonetheless, the defendant failed to enter appearance nor put in its defence.
 9. On 21st November 2022, the Deputy Registrar issued a ruling with respect to the plaintiff's request for judgment dated 26th September 2022, to the effect that the matter be subjected to formal proof. On 7th March 2023, the Court set aside the default judgment entered on 21st November 2022 and granted



the plaintiff leave to furnish a delivery of receipt in accordance with Order 5 Rule 22B (2) of the Civil Procedure Rules or effect service of summons to enter appearance afresh.

10. On 8th May 2023, the Deputy Registrar allowed the plaintiff's application seeking leave to serve the defendant with notice of the formal proof hearing through substituted service. The plaintiff then served the defendant by substituted service through an advertisement published in the Daily Nation Newspaper on 10th May 2023, evidenced by an affidavit of service sworn by Advocate Beatrice Kavata.
11. On 20th December 2023, when the matter came up for formal proof hearing, there was no appearance for the defendant.
12. On its part, the plaintiff called its claims specialist, Regina Ireri, who adopted her witness statement dated 25th July 2022, similar to the plaint, as her evidence. She also produced the plaintiff's bundle of documents of the same date as PExh 1-11. She prayed for entry of judgment against the defendant as prayed in the plaint.

Analysis and Determination

13. I have considered the pleadings, the evidence on record and the exhibits produced. As earlier stated, the defendant was served with summons but did not enter appearance or file a defence. The suit was set down for formal proof of the claim. In an undefended claim, the Court is obligated to consider whether the plaintiff has met the legal and evidential burden of proof which is on a standard of a balance of probabilities in a civil claim. See Sections 108 and 109 of the [Evidence Act](#).
14. In this matter, the plaintiff seeks a declaration that the policy is void for non-payment of the premiums by the defendant. The plaintiff's agreement with the defendant was that the premium would be paid by Stanbic through the IPF agreement in 10 monthly instalments. However, the plaintiff produced a letter dated 30th December 2020 from Stanbic indicating that it had returned the IPF Application for the defendant that it was unable to process as the first instalment had not been paid.
15. The legal position is that non-payment of premium does not invalidate an insurance contract. The Court is required to consider the provisions of the contract between the parties on the effect of non-payment of the premiums.
16. This Court in *Insurance Company of East Africa V Marwa Distributors Limited*, [2015] eKLR, observed as follows:
 12. What then is the effect of non-payment of the premium? In *Nizar Virani t/a Kisumu Beach Resort V Phoenix of East Africa Assurance Company Ltd*, KSM CA Civil Appeal No. 88 of 2002 [2004] eKLR the Court of Appeal held that the law of Kenya is that the non-payment of premium does not invalidate the insurance contract. It quoted and agreed with MacGillivray & Parkington on Insurance Law, 7th Edition paragraph 861 which states as follows:

There is no rule of law to the effect that there cannot be a complete contract of insurance concluded until the premium is paid, and it has been held in several jurisdictions that the courts will not imply a condition that the insurance is not to attach until payment. It would seem to follow that, if credit has been given for the premium, the insurer is liable to pay in the event of a loss before payment, although, as has been held in a South African decision, the insurer would be entitled to deduct the amount of the premium from the loss payable, at least where the period of credit had expired by that time, since the assured could not insist on payment when in breach of any obligation assumed on his part under the contract.



13. In my understanding, the case does not set out a hard and fast rule that failure to pay premium does not invalidate the policy but underpins the general contract principle that parties are bound by their obligations recorded in the agreement. It means that if the parties do not make provision for the effect of non-payment of the premium, the court will not necessarily imply that the policy is invalid. The effect of non-payment of premium on the policy depends on the intention of the parties expressed in the contract. The recital of the policy subject of the suit states as follows:

Now therefore in consideration of the payment to the company of the premium for the period of insurance mentioned in the schedule and for any subsequent period for which the Company shall accept renewal premium the Company agrees to pay or make good to the Insured or otherwise compensate or indemnify the Insured as hereinafter provided[Emphasis mine]

14. The ordinary and unvarnished meaning of the clause is that the insured must have paid the premium for the period of insurance in order to be indemnified for any loss or damage that occurs during the period of cover. In other words, the policy document issued by the insurer constitutes a contract to insure and the premium is the consideration for the promise to indemnify the insured if the event takes place.
15. Since the premium was not paid, there was no obligation on ICEA to settle the claim by the company. Since the contract was not consummated by the payment of the premium, ICEA could not invoke the cancellation clause in the policy which was invalid in the first place. The trial court therefore erred as it did not direct its mind to the terms of the policy to determine whether in fact the policy was invalid for non-payment of consideration.”
17. In this suit, the subject Policy No. xxxx provides that:
- “Premium Payment Warranty:
- Pursuant to deletion of Section 156 subsection (2) of the *Insurance Act* Cap 487, premium is required to be paid on or before the inception/ renewal date of the policy.”
18. It is clear from the above that the defendant was required to have paid premium for the period of insurance to be indemnified for any loss or damage that occurred during that period on 31st May 2021. The premium was a consideration for the renewal of the policy and the consideration did not pass. Therefore, I find that the policy of insurance number xxxx was terminated on 13th January 2021 for failure to pay the insurance premium. I also find that the plaintiff is not obligated to settle the claim against the defendant arising out of the accident that occurred on the 31st May 2021 involving motor vehicle registration number KCR 084G.
19. The upshot is that judgment is entered for the plaintiff against the defendant for:
- a. A declaration that policy of insurance number xxxx was terminated on 13th January 2021 for failure to pay the insurance premium.
 - b. A declaration that the Plaintiff is not liable to make any payment under the policy of insurance No. xxxx in respect of any claim against the Defendant arising out of the accident that occurred on the 31st May 2021 involving motor vehicle registration number KCR 084G.



- c. A declaration that the Plaintiff is not liable to make any payment under the policy of insurance No. xxxx in respect of any claim against the Defendant arising out of any accident that occurred after the 13th January 2021 involving motor vehicle registration number KCR 084G.
- d. Costs of the suit together with interest thereon.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 13TH DAY OF MAY 2024.

F. MUGAMBI

JUDGE

