APA Insurance Limited v Njenga (Civil Appeal E084 of 2023)
[2024] KEHC 7002 (KLR) (Civ) (11 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7002 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E084 OF 2023

DKN MAGARE, J

JUNE 11, 2024

BETWEEN

APA INSURANCE LIMITED ..... APPELLANT

AND

DAVID NJENGA ..... RESPONDENT

(Appeal arises from the Judgement and Decree of Trial Court delivered on 17/1/2023 in Milimani SCCC No. E1510 of 2022)

JUDGMENT

1. This Appeal arises from the Judgement and Decree of Trial Court delivered on 17/1/2023 in Milimani SCCC No E1510 of 2022.

2. The Trial Court entered Judgement for the Respondent for a Declaration that the Appellant is bound to indemnify the Respondent in the sum of Kshs 314,400/= as per the Decree in SCCC No E963 of 2021.

3. The Appellant being aggrieved by the Award filed this Appeal and preferred 3 grounds in the Memorandum of Appeal dated on 14th February 2023 as doth:

    a. The Trial Court erred in finding that a declaration could be made against the Appellant to settle a claim arising from a decree in a material damage claim.

    b. The Trial Court misapprehended the evidence before her.

    c. The Trial Court erred in law and fact in allowing the declaratory suit.

4. The suit from which the impugned Judgement arose is a declaratory suit. It arose from the Judgment in SCCC No E963 of 2021 which is the primary suit.

5. This Appeal thus challenges the award in the Declaratory suit.

Pleadings

6. In the Claim dated 15th June 2022, the Claimant sought a declaration that the Appellant is bound to indemnify the Respondent in the sum of Kshs 314,400/= as per the Decree in SCCC No E963 of 2021.

7. The claim arose from a road accident that was said to have occurred on 2nd July 2021 when Appellant's insured motor vehicle registration number KCE 668P was so negligently driven that it rammed into the Respondents motor vehicle registration No KCW 694F causing it extensive damage to the rear side.

8. The Appellant filed a response to the claim 21st October 2022 denying the averments in the Claim.

9. The Respondent contended that the subject policy had been cancelled before the accident and was as such inapplicable.

10. It was also pleaded in Defence that a declaratory order would not issue in respect of a non-injury or non-death claim.

Submissions

11. The Appellant filed submissions dated 10th August 2023.

12. It was the submission of the Appellant that the learned magistrate misinterpreted section 10 (1) as read with Section 5(b) of the *Insurance (Motor vehicle Third Party Risks) Act*

13. It was submitted in extension that the said provisions applied only to death or bodily injury.

14. On the part of the Respondent, it was submitted that the learned magistrate correctly interpreted the law. They submitted that there was a valid policy at the time of the accident.

15. Further, it was their case that the Appellant had not placed any material before the court to demonstrate that material damages was not one of the maters covered under the policy as alleged. They relied on *Jubilee Insurance Co Ltd v Walter Tondo Soita* (2021) eKLR.

16. It was also submitted that the policy document provided that the policy was comprehensive and covered property damage to the motor vehicle to a tune of Kshs 500,000/-.

17. Reliance was placed on the case of *Michael Kinyu Njue v APA Insurance Co. Ltd* (2022) eKLR to submit that the declaratory order was issued as per the policy and which was a contract between the parties.

Analysis

18. This Court has considered the pleadings, evidence, submissions and authorities relied on by the parties in support and opposition to the Appeal.

19. The issue that falls for this Court's determination is therefore whether the learned magistrate misapprehended the applicability of Section 5 and 10 of the *Insurance (Motor Vehicle Third Party Risks) Act* Cap 405 Laws of Kenya to the suit as to erroneously allow the declaratory suit.

20. This being a first Appeal, the Court should with judicious alertness re-evaluate the evidence, and consider arguments by parties and apply the law thereto, and, make its own determination of the issues in controversy.

21. Except however, that it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies.

22. In the case of *Selle & another v Associated Motor Board Company Ltd.* [1968] EA 123, the Court stated as follows:

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal form a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the court must 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 this respect, in particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

23. The Appellant contends that pursuant to the provisions of Section 5 (b) of the *Insurance (Motor Vehicle Third Party Risks) Act* as read together with Section 10 (1) of the Act, the Appellant was not entitled to claim under this statute for damages to the motor vehicle as the provisions only apply to bodily injury or death.

24. I will reproduce in extenso the entire provisions of section 5 of the *Insurance (Motor Vehicle Third Party Risks) Act* CAP 405 which stipulates as follows: -

> 5. Requirements in respect of insurance policies
>
> In order to comply with the requirements of Section 4, the policy of insurance must be a policy which –
>
> (a) Is issued by a company which is required under the *Insurance Act*, 1984 (Cap 487) to carry on motor vehicle insurance business; and
>
> (b) Insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road:
>
> Provided that a policy in terms of this section 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

25. On the other hand turning to the provisions of Section 10 (1) of the *Insurance (Motor Third Party Risks) Act*, Cap 405, the same 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.

26. Section 10(2) of the *Insurance (Motor Third Party Risks) Act*, Cap 405 provides:

> " 10(2). No sum shall be payable by an insurer under the foregoing provisions of the section.
>
> (a) in respect of any judgment, unless before or within 14 days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings....."

27. I understand the import of the above provision of the law to be that for liability to accrue under Section 10 of the *Insurance (Motor Vehicle Third Party Risks) Act* CAP 405, there is a 4-fold test to be met. Firstly, that the motor vehicle in question was insured by the Appellant; Secondly, that the Respondent has a judgement in his favour against the insured; Thirdly, that statutory notice was issued to the insurer either at least 14 days before the filing of the suit wherein judgement has been obtained or within 30 days of filing the suit where judgement has been obtained and finally the Respondent was a person covered by the insurance policy.

28. The *Black's Law Dictionary* defines "third Party" as follows:

> " A party who is not a party to a lawsuit, agreement or other transaction but who is somehow implicated in it; someone other than the principle parties."

29. In my view, the purpose of the above provisions and the *Insurance (Motor Vehicle Third Party Risks) Act* CAP 405 was to ensure that a third party who suffered injury or loss due to acts or omission on the part of an insured motor vehicle would be assured of compensation for their injury, loss or inconvenience in circumstances where the owner or driver of the insured motor vehicle has no means to settle the claim. This view is supported by Sir Clement De Lestang, J.A. in *New Great Insurance Co. of India Ltd v Lilian Everlyne Cross & another* (1966) EA, 90 at page 104 as doth:

> " Generally speaking the Act seeks to achieve that object (of making provision against third party risks arising out of the use of motor vehicle on the roads) not by placing the whole burden of compensating third parties injured in accidents on the insurers but by combination of two means namely:
>
> 1. by making it obligatory, on pain of punishment, for any person who uses or causes or permits any other person to use a motor vehicle on the road, to have in relation to the user of the vehicle a policy of insurance which satisfies the requirements of the Act, and
>
> 2. restricting the right of insurers to avoid liability to third parties."

30. It is not in dispute that the policy was a comprehensive insurance cover. The Appellant however did not prove the fact of how Respondent's claim could be excluded from the Application of the *Insurance (Motor Vehicle Third Party Risks) Act* CAP 405. The Appellant, having issued the accident motor vehicle comprehensively cannot thus turn out to disclaim liability, without evidence; on the basis that material damage was not an insurable interest. It is an evasive Defence that cannot repudiate the policy under statute. Lord Denning in *Escoigne Properties Ltd v I.R. Commissioners (15)* [1958] A.C at 565 stated that,

> "A statute is not named in a vacuum, but in a framework of circumstances, so as to give a remedy for a known state of affairs. To arrive at its true meaning, you should know the circumstances with reference to which the words were used, and what was the object, appearing from those circumstances, which parliament had in view."

31. I have perused the policy document whose validity was noted to be from 20th May 2021 to 19th May 2022 and note the provision on liability to third parties' property damage was contained in Section II 1(b) and described to cover any one claim or series of claims arising out of the event. The cover type was also stated to be compressive. The learned magistrate was thus not in error when she found that the Respondent proved that the Appellant was entitled to settle the decree. The terms and conditions of the policy constituted an agreement that bound the Appellant's insured and from which the Appellant would not disclaim liability.

32. On my perusal of the Record of the Appeal, I note that that Respondent did what he was supposed to do. He proved that there was a comprehensive policy that covered material damage and that a third party's motor vehicle was damaged in an accident in which the Appellant was the insurer of the tortfeasor. In the case of *Pius Kimaiyo Langat v the Kenya Commercial Bank of Kenya Ltd* [2017] eKLR the Court of Appeal restated its decision in *William Muthee Muthami v Bank of Baroda* [2014] eKLR to the effect that:

> "In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the in breach."

1. On the other hand, the Appellant had the duty to show by way of evidence that the matters alleged were matters not covered under the policy. This is because the Policy as produced supported the Respondent's case. The initial burden of proof lies on the Plaintiffs, but the same may shift to the Defendant, depending on the circumstances of the case. On the prove of the allegations of breach of contract in *Raghbir Singh Chatte v National Bank of Kenya Limited* [1996] eKLR the Court of Appeal stated thus:

> "When a party in any pleading denied an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum, or any part thereof, or else set out how much he received. And so, when a matter of fact is alleged with divers circumstances, it shall not be sufficient to deny it as alleged

> along those circumstances, but fair and substantial answer must be given."...
>
> ...First of all a mere denial is not a sufficient defence in this type of case there must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given."

34. The evidential burden of proof is captured in Sections 109 and 112 of the same Act as follows:

> 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

35. I therefore find and that the Appellant did not provide evidence that could rebut the Respondent's overwhelming evidence that the policy insured material damage. The comprehensive policy was all inclusive and there was no basis to exclude material damage. I am also fortified by the reasoning of this Court in *Jubilee Insurance Co Ltd v Walter Tondo Soita* (2021) eKLR faced with similar circumstances as follows:

> If the Appellant wanted the Court to believe that material damage is not covered by the policy, it was duty bound to adduce evidence for the court to find in its favour.

36. Based on the foregoing, I find no reason to interfere with the finding of the lower court.

Determination

37. In the circumstances, I make the following Orders.

i. The Appellants Appeal is dismissed.

ii. The Respondent shall have the costs assessed at Kshs 85,000/-.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 11TH DAY OF JUNE, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Ochieng K. for the Appellant

Mr. Odhiambo for the Respondent

Court Assistant – Jedidah