



**Directline Assurance Company Limited v Ngele (Suing as the Administrator of the Estate of Luka Amuli – Deceased) (Civil Appeal E227 of 2023) [2024] KEHC 8233 (KLR) (9 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8233 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E227 OF 2023  
DKN MAGARE, J  
JULY 9, 2024**

**BETWEEN**

**DIRECTLINE ASSURANCE COMPANY LIMITED ..... APPELLANT**

**AND**

**SABINA MALEMBA NGELE (SUING AS THE ADMINISTRATOR OF THE ESTATE OF LUKA AMULI – DECEASED) ..... RESPONDENT**

**JUDGMENT**

1. This is a Judgment from the ruling of Hon. D.O. Mbeja (PM) given on 28/7/2023 in Mombasa CMCC E1581 of 2022. The Appellant was the Defendant in the lower court suit.
2. The Appellant filed a 6 paragraph Memorandum of Appeal contesting the Ruling striking out defence dated 22.11.2022 on grounds that the insured John Raymond Mwabusa was not sued in the primary suit. The grounds are as follows:-
  - a. The Learned trial magistrate erred in law in striking out the Appellant’s Statement of Defence dated 22nd November 2022, notwithstanding that the same had raised triable issues, including that the Appellant’s insured (John Raymond Mwabusa) and the driver of the material date (Jira Mvurya), were never sued in the primary suit, Mombasa CMCC No 1829 of 2017.
  - b. The learned trial magistrate erred in law in striking out the Appellant’s Statement of Defence dated 22nd November 2022, in contravention of the provisions of Section 10 (1) and (4) of the *Insurance (Motor Vehicle Third Party Risks) Act*, which only obligates the Appellant (Insurer), to satisfy judgments entered against its insured.
  - c. The learned trial magistrate erred in law in striking out the Appellant’s Statement of Defence dated 22nd November 2022, yet the Appellant’s insured (John Raymond Mwabusa) was never sued in the primary suit, and hence, the Appellant (insurer) was not obligated under Section



10(1) and (2) of the *Insurance (Motor Vehicle Third Party Risk) Act*, to satisfy a judgement obtained against strangers.

- d. The learned trial magistrate erred in law in striking out the Appellant's Statement of Defence dated 22nd November 2022, when there was no privity of contract between the Appellant (insurer) and the parties sued as defendants in the primary suit, Mombasa CMCC No 1829 of 2017.
  - e. The learned trial magistrate erred in law in striking out the Appellant's Statement of Defence dated 22nd November 2022, thus breaching the Appellant's right to a fair hearing, which is founded on Article 50 of the *Constitution*.
  - f. The learned trial magistrate erred in law by failing to appreciate the express provisions of Section 10(1) and (2) of the *Insurance (Motor Vehicle Third Party Risk) Act*.
3. The Respondent filed suit against the Jubilee Insurance Co. Ltd and Directline Insurance pursuant to the provisions of the *Motor Vehicle (Third Party Risks) Cap 405 Laws of Kenya*. This was in respect to an accident involving KMDH 089N and the insured's vehicle KAY 226H. The accident is said to have occurred on 30/4/2016 while the police were in situ.
  4. The Respondent sued in Mombasa CMCC 1829 of 2017 Sabina Malemba Ngele v Anderson Kahindi Kaingu & 3 others, where a sum of Kshs 5,347,984 was awarded. Of importance is that the insured vehicle was found to be 70% liable. This translates to Kshs 3,645,847.80 before adding costs.
  5. The Respondent sought a sum of Kshs 3,743,588.80/= against the Appellant. The case against Jubilee Insurance is not in this matter. Anderson Kahindi Kaingu was said to be the beneficial owner of Motor Vehicle Registration KAY 226H Nissan Matatu while the 4<sup>th</sup> Defendant was said to be the registered owner. The court entered judgment in favor of the Plaintiff in the primary suit resulting in this case.
  6. The defence given was that the insured John Raymond Mwabusa and driver Jira Mvurya were not sued. I note that they also stated that they are not liable to settle over Kshs 3,000,000/= pursuant to Section 5(b) (iv) of the *Insurance Act*. They stated that they have fulfilled their obligation.
  7. The Respondent moved to have Judgment against the Jubilee Insurance and Directline Insurance through an application dated 11.11.2023. The 2<sup>nd</sup> Defendant filed a replying affidavit where it admitted that it was served with the statutory notice, the insured and the driver were not sued. They stated that they are not liable. They stated that there is no sustainable claim against it.
  8. The Appellant stated that their defence raised triable issues. They asked court to interpret Articles 47 and 50 purposively, to consider the concept of audi alterum patrem.
  9. Parties filed lengthy submissions in the court and in this court. As a consequence of the arguments the court allowed the application on 28/7/2023 with liberty to apply. The Respondents were said to have participated in the primary proceedings.

### **Analysis**

10. I have considered the appeal as well as submissions and authorities filed in court. The issue is whether the lower court erred in the award of general damages, damages for future medical expenses, loss of earning capacity and special damages.
11. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate



court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

12. In the case of *Mbogo and another v Shah* [1968] EA 93 the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

13. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of *Selle and another v Associated Motor Board Company and others* [1968]EA 123, where the law looks in their usual gusto, held by as follows;-

“.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

14. Therefore, the trial court and this court will construct documents in a similar manner as there are no witnesses required to know the content of a document. Therefore, where the findings of the trial Court are consistent with the evidence generally, this Court should not interfere with the same.

15. The sole question for this court is whether the court erred in striking out the Appellant’s defence in the declaratory suit. I agree with the Appellant that the other side should be heard. However, after being heard, it is the court to decide whether there is anything useful they are saying. Being heard is like a tune in Music. A musician has a right to present their music. However, they cannot be allowed to continue if it is a boring soliloque.

16. In the filings before the lower court, the Respondent issued notice under Section 10 of the [Insurance Motor Vehicle \(Third Party\) Risks Act](#) Cap 405. The notice was not responded to. This was to be done via compliance with Section 12 of Cap 405 as follows:

Any person against whom a claim is made in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 shall, on demand by or on behalf of the person making the claim, state whether or not he was insured in respect of that liability by any policy having effect for the purposes of this Act or would have been so insured if the insurer had not avoided or cancelled the policy and, if he was or would have been so insured, give such particulars with respect to that policy as were specified in the certificate of insurance issued in respect thereof under section 7.

17. Failure to comply with Section 12 by the Appellant means that they cannot at this stage raise issue with the identity of the driver. The said motor vehicle was insured by then. They have knowledge of the said insurance but chose to defend the suit and form around at a declaratory stage. They then dropped 2 names with substitution.

18. The question to ask is what risk was insured. The risk that was insured was the one covered under policy of insurance for Motor Vehicle Registration No KAY 226H while in the use of the insured. There had been no declaration made in terms of Section 140 (4) for breach of any policy conditions.



19. Failure to avail any material to show compliance with Section 12 of Cap 405 is fatal to the appeal. I have not seen a copy of the policy. I have no reason to doubt the finding of the court below. No appeal was preferred.
20. Further the insured motor vehicle was sued and its owner had not breached policy. The risk covered was therefore concretized. The insurance companies must comply with Section 12 of the Insurance Motor Vehicle (Third Party) Risks Act Cap 405 or suffer perils.
21. In the circumstances I concur with the court below that there is no single triable issue in the Appellant's defence. Consequently, the Appeal is dismissed with costs of Kshs 175,000/=.

#### **Determination**

22. The upshot of the foregoing is that I make the following orders.
  - a. The Appeal herein lacks merit and as such it is dismissed with costs of Kshs 175,000/= to the respondent payable within 30 days in default execution do issue.
  - b. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 9<sup>TH</sup> DAY OF JULY, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of:

No appearance for parties

Court Assistant – Jedidah

