



Phoenix of E.A Assurance Company Limited v Tuscany Holdings Limited (Civil Appeal E225 of 2021) [2024] KEHC 10646 (KLR) (Civ) (13 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10646 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E225 OF 2021

RC RUTTO, J

SEPTEMBER 13, 2024

BETWEEN

PHOENIX OF E.A ASSURANCE COMPANY LIMITED APPELLANT

AND

TUSCANY HOLDINGS LIMITED RESPONDENT

(Being an appeal from the judgment of the learned Senior Resident Magistrate Hon.Mbeja delivered on the 31.3.2021 in Milimani CMCC case no 364 of 2019)

JUDGMENT

1. This is an appeal arising from the judgment of the lower court in which the court awarded the respondent ksh.1,019,130/= being compensation for the costs of repair for Motor Vehicle Registration No. KBQ 196C damaged as a result of an accident.
2. Being dissatisfied with the trial Court's judgment, the appellant in a memorandum of appeal dated 26th April 2021 seeks that the appeal be allowed; trial court judgment be set aside and the suit be dismissed with costs. The appeal is premised on four grounds as follows;
 - a. That the learned magistrate erred in law in finding the appellant liable to the respondent;
 - b. That the learned magistrate erred in fact and in law in awarding the respondent unproven repair charges of ksh.1,019,130/= contrary to the evidence on record;
 - c. That the learned magistrate erred in fact and in law in failing to hold that the respondent's insurance cover request was deliberately misrepresented to the appellant on the risk to be covered;



- d. That the learned magistrate erred in fact and in law in failing to hold that the respondent had no insurable interest in the subject vehicle and that the policy was voidable and abnitiio.

Background

Plaintiff Case

3. The respondent herein moved the lower court by way of a plaint dated 18.1.2019. It averred that on or about the 8th November 2012 it took out a comprehensive motor-vehicle insurance policy in respect of Motor-vehicle Registration No. KBQ 196C and was issued with policy No. 2012/APC/03599/11. This policy was to run from 8th November 2012 to 7th November 2013. The respondent further averred that the appellant was to indemnify it against any loss or damage to the motor vehicle or its spare parts or accessories occasioned by an accident, or wear and tear.
4. The respondent's case was that on 20th March 2013 he collided with Motor-vehicle Registration No. KBS 257W as a result of which his motor vehicle KBQ 196 C was extensively damaged. Following this, on 26th March 2013 he reported the accident and lodged a claim with the appellant. The appellant upon receipt of accident claim, instructed the firm of Danfield Motor-Tech Loss Assessors to conduct an assessment of the damages and the cost of repairs. This was done and a report dated 22nd April 2013 was issued confirming the repair estimates to be ksh.1,019,130/= which the appellant blatantly refused to indemnify.
5. The respondent then filed a suit to compel the appellant indemnify it the said amount.

Respondent /Appellant's Case

6. The appellant entered appearance and filed its defence dated 25th February 2019. It stated that it issued the insurance subject to the plaintiff observing and complying with the policy terms.
7. Further, that it received a claim form dated 21.3.2013 on the 26.3.2013 as a notification of an accident involving the respondent's motor-vehicle, and appointed an assessor to quantify the damage. In addition, it instructed a private investigator to verify the facts of the accident. On investigation, it was discovered that the policy procured by the respondent on 8th November 2012 was obtained fraudulently without disclosing all material facts.
8. The particulars of fraud against the respondent were set out as follows
- a. Misrepresenting to the defendant that it was the owner of the subject vehicle.
 - b. Failing to disclose that the same vehicle was insured for the same risk simultaneously by CIC General Insurance Ltd for the period between 16th August 2012 to 15th August 2013 and by AIG Kenya Insurance Limited from the 9th November 2012 to 8th November 2013.
 - c. Misrepresenting the vehicle and/or the proposer had no claim history whilst infact it knew the same to be false having been compensated for a damage claim by CIC General Insurance Ltd for an accident that had occurred on 26th November 2012 and by A.I.G Kenya Insurance Limited for an accident that had occurred on 7th December 2012.
 - d. Failing to disclose the 'previous insurance and no claim discount history' deliberately.
9. As a result of the discoveries the said policy was cancelled with effect from 7th June 2013 and hence it was not liable to compensate the respondent, the sum of ksh.1,019,130/=.



10. The matter proceeded to hearing where the appellant's witness Robin Mwenda and the defendant's witness Christine Ndanu testified. Upon the parties closing their respective cases and filing submissions, the trial court held that, it was not satisfied that the plaintiff had met the probability test however the balance of convenience tilted in his favor. Further that the parties had entered into a contract which was reduced into writing and that the appellant had assumed the risk of taking out an insurance policy cover for the motor-vehicle based on the information given which was believed to be true, therefore the original intention of the parties could not be vitiated.
11. The trial court also held that there was a valid indemnity agreement between the parties that existed before the accident, which the court could not re-write. That the appellant had accepted payment of the insurance premiums without any question, therefore the appellant was estopped and precluded from asserting the contrary. Consequently, judgment was entered in favor of the respondent as against the appellant and was awarded the relief sought.

The Appeal.

12. The grounds of appeal have been set out in the earlier paragraphs of this judgment. It was canvassed by way of written submissions. The appellant's submissions are dated 4th July 2023. Notably, from the record before this court, the respondent on 16th May 2024 indicated that they do not intend to file submissions. Hence this being an appeal this court will rely on the record before it.

Appellant submissions

13. The appellant urged this court to re-evaluate the evidence on record to establish whether it shall accept the lower court's decision as was held in the celebrated decision of *Selle & another v. Associated Motor Boat Co. Ltd & others*(1968) EA 123 and in *Peters v. Sunday Post Limited*[1958]EA 424.
14. They submitted that the trial magistrate erred in finding that the appellant had an insurable interest and granted the award of ksh.1,019,130/=, yet it had initially made a finding that the respondent had not proved ownership of the vehicle. That by holding that the respondent had proved on a balance of probabilities the insurable interest the court created a contradiction.,. Further, that the trial court ought to have dismissed the suit once the respondent failed to prove ownership.
15. Counsel placed reliance on the decision of *Concord Insurance Company Ltd v. Jared Wigina t/a Hardwings Services*(2009) eKLR in submitting that the respondent had failed to prove an insurable interest on the motor-vehicle.
16. Lastly they urged this court to find that in the absence of any insurable interest the claim against the appellant fails, and thus should not be held liable under the policy.

Analysis and Determination

17. This being a first appeal, this court is empowered to subject the whole evidence to a fresh and exhaustive scrutiny and make conclusions about it bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & another*(supra).
18. Having perused the record of appeal and the appellant's submissions on record, the only issue for determination is whether the respondent had an insurable interest and if so, was the appellant liable to indemnify the respondent.
19. In the case of *Lion of Kenya Insurance Company Limited v Edwin Kibuba Kihonge* [2018] eKLR the court while relying on the holding in the case of *Anctol v. Manufacture Life Insurance Company* (1899)



AC 604 held that; an insurable interest is defined as a basic requirement of any contract of insurance unless it can be and is lawfully waived. The court observed that; at a general level this means that the party to the insurance contract who is the insured or policy holder must have a particular relationship with the subject matter with the insurance whether that be “a life or property or a liability to which he might be exposed. Every insurance contract requires an insurable interest to support it, otherwise it is invalid. (emphasis added)

20. Based on the above the Courts have abstracted the following rules as the determinants of insurance interest.
 - a. A direct relationship between the insured and the subject matter.
 - b. The relationship must have arisen out of a legal or equitable right or interest in the subject matter.
 - c. The interest bears any loss or liability arising in the event the loss or risk attaches.
 - d. The insured’s right or interest in the subject matter must be capable of pecuniary estimation or quantification.
21. For the respondent to seek compensation from the appellant herein they needed to demonstrate that they indeed had an existing insurable interest with the appellant. Hence to start with this court will seek to establish whether the respondent had a direct relationship between themselves and the subject matter that is the motor-vehicle registration no. KBQ 196C.
22. To prove ownership of motor-vehicle registration no. KBQ 196C, the respondent at paragraph 3 of the plaint averred that it was the registered and or beneficial owner of the said vehicle. In his evidence the respondent testified that the subject motor vehicle was insured by the appellant and that the proposal Form for the insurance was completed by one of the directors of the respondent company called Alex Matu.
23. In response, the appellant stated that the respondent was the insured in this matter. However, upon investigations they found that the policy had been procured fraudulently by failing to disclose material facts which included misrepresentation that the respondent was the owner; failing to disclose that the vehicle had been simultaneously insured for the same risk.
24. Notably, the trial court observed that the respondent did not produce any registration certificate before the court to prove that it was the registered owner of the motor vehicle. The learned magistrate analysed the following issues; whether the plaintiff had an insurable interest at the inception of the policy and whether the defendant can avoid the contract for non-disclosure of a material fact and misrepresentation by the plaintiff? On the first issue the trial court concluded that the respondent had not produced any registration certificate before the court to prove that it was the registered owner, however he went ahead to hold that the respondent had an insurable interest. I find that despite clearly analysing the facts of the case as presented, the trial court arrived at a wrong conclusion in finding that the respondent had an insurable interest in the suit motor vehicle when indeed it held that the respondent had not produced any evidence before the court to prove that it was the registered owner and I do agree with the submission of the appellant.
25. From the evidence on record, it is evident that the subject motor vehicle was never purchased by the respondent herein, the same was purchased by Catherine Njeri Gikonyo on 8th November 2012 through a financing that had been extended by the Respondent. According to the respondent the policy was aimed at safeguarding their pecuniary interest in the vehicle. I note that the trial court observed that the Respondent did not tender a copy of the credit facility agreement or funds transfer



- receipt as evidence that such an agreement existed. The trial court concluded that it was reluctant to and did not find that the Respondent herein was the registered and/or beneficial owner of the vehicle at the inception of the policy that is on 8th November, 2012 a finding that this court agrees with.
26. Having established that the respondent did not have a direct relationship between themselves and the subject matter that is the motor-vehicle registration no. KBQ 196C, it follows that there was no insurable interest to support the contract between the appellant and Respondent thus the same was invalid See, the case of [Lion of Kenya Insurance Company Limited \(Supra\)](#).
27. This then brings me to the second issue whether the appellant was liable to indemnify the Respondent.
28. I reiterate the holding in [Lion of Kenya Insurance Company Limited \(Supra\)](#) that every insurance contract requires an insurable interest to support it without which the contract is invalid. Therefore, in the instant case with no insurable interest, the contract between the appellant and respondent was invalid consequently, the appellant was not liable to indemnify the respondent.
29. Further, evidence on record clearly shows that the respondent herein had insured the impugned motor vehicle with three different insurance companies for the same insured amount at different times as follows:
- a. With AIG insurance company-9.12.2012 to the 8.12.2013
 - b. With Phoenix E.A Assurance Company Ltd-8.11.2012 to 7.11.2013
 - c. With CIC General Insurance Company-16.8.2012 to 15.8.2013
30. Clearly, on the face of the record, the respondent did not insure the subject motor vehicle in good faith but with ill motive to benefit from the three insurance companies. This court finds the respondent to have insured the vehicle with unclean hands.
31. An insurer relies on the utmost good faith of the insured to disclose all information that is likely to affect the decision on whether to insure or not. This principle was emphasized by the Court of Appeal in the [Co-operative Insurance Company Ltd v. David Wachira Wambugu](#) [2010] eKLR where the court quoted Bullen and Leake , Precedents of Pleadings, 14th Ed, Vol. 2 which states as follows:
- “ contracts of insurance are contracts of the utmost good faith. This gives rise to a legal obligation upon the insured, prior to the contract being made to disclose to the insurer all material facts and circumstances known to the insured which affect the risk being run. Lord Mansfield’s words in *Carter v. Boehm*(1766) Burr.1905 have stood the test of time:
- “ insurance is a contract of speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwrite trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist. The keeping back of such circumstance is a fraud and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void; because the risqué run is really different from the risqué understood and intended to be run at the time of the agreement...”



32. In this case and from the evidence on record it has been demonstrated that the respondent had a fraudulent intention when it approached the appellant to insure the same vehicle which had been simultaneously insured with two other insurance firms.
33. This court therefore finds that the trial court erred in finding that the appellant was liable to indemnify the respondent having established that the respondent had no insurable interest in the subject motor vehicle. Further, the trial Court failed to address its mind to the evidence tendered in the primary suit in regard to the Respondent's ill motive to fraudulently benefit from three different insurance companies.
34. Flowing from the above, this court finds that the appellant is not liable to indemnify the respondent and orders as follows.
- i. The Appeal is merited. The judgment delivered on 31.3.2021 in favor of the respondent in Milimani CMCC No. 364 of 2019 is hereby set aside;
 - ii. The respondent's Complaint in Milimani CMCC No. 364 of 2019 dated 18th January 2019 is dismissed with costs
 - iii. Each party bears its costs on the appeal

Orders accordingly;

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 13TH DAY OF SEPTEMBER 2024.

For Appellant:

For Respondent:

Court Assistant:

