



**APA Insurance Co. Limited v Maina (Civil Appeal E391 of 2021)  
[2024] KEHC 11714 (KLR) (Civ) (2 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11714 (KLR)

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

**CIVIL**

**CIVIL APPEAL E391 OF 2021**

**JM NANG'EA, J**

**OCTOBER 2, 2024**

**BETWEEN**

**APA INSURANCE CO. LIMITED ..... APPELLANT**

**AND**

**JOSPHAT NJAU MAINA ..... RESPONDENT**

*(Being an appeal from the ruling of the Chief Magistrate's court  
at Nairobi, Milimani Commercial Courts in Civil Suit No.  
8898 of 2017 delivered by Hon. A. N Makau- PM on 25/6/2021)*

**JUDGMENT**

**Grounds of Appeal and reliefs sought.**

1. By a Memorandum of Appeal dated 30/6/2021, the appellant faults the said trial court's judgment on grounds that may be summarized as hereunder:
  - a. That the learned trial magistrate erred in law and fact by finding and holding that the appellant's defence does not raise triable issues.
  - b. That the learned trial magistrate erred in law and fact by failing to appreciate the law and principles applicable to striking out of pleadings.And
  - c. That the learned trial magistrate erred in law and fact by failing to appreciate settled principles of insurance law governing the limit of an insurer's liability and the fact that the appellant has fulfilled all its obligations under the applicable insurance policy having paid the respondent Ksh. 750,000 being the full extent of its liability.



2. The appellant therefore prays that the appeal be allowed and the judgement of the trial court set aside; that the court does find that the appellant's defence raises triable issues; that an order does issue that the suit before the lower court proceed to hearing on merits; that the court does award the appellant the costs of the appeal and make any other order (s) it may deem just in the circumstances.

### **Analysis and determination.**

3. Learned Counsel for the parties filed submissions which I have perused together with the trial court's record. In the impugned judgment, the trial magistrate struck out the appellant's defence in the said civil suit No. 8898 of 2017 ("the declaratory suit") and entered summary judgement for the respondent in the sum of Ksh. 2,325,060 plus costs and interest. The respondent had sought a declaration that the appellant was liable to satisfy judgement in Kikuyu CMCC No. 92 of 2013 ("the primary suit"); the costs of the suit and interest at the rate of 14% from the date of judgement in the primary suit and any other relief the court deemed apt to grant.
4. In the primary suit the respondent sued the appellant's insured clients in tort for causing him bodily injuries owing to careless or negligent driving of the latter's motor vehicle registration number KBM 913 R in which the former was a passenger. This vehicle was at the material time allegedly insured by the appellant against third party risks under the Insurance ( Motor Vehicle Third Party Risks) Act vide Policy No. BA/800/0000609. The respondent obtained a decree in the sum of Ksh. 3,075,060 inclusive of costs out of which the appellant only settled Ksh. 750,000 thereby leaving a balance of Ksh. 2,325,060 unpaid. The respondent brought the declaratory suit against the appellant as the accident vehicle's insurer to enforce the balance of his decree and fully enjoy the fruits of his litigation.
5. The appellant filed defence dated 1/2/2018 . It traversed the claim of occurrence of the accident giving rise to the cause of action in the primary suit. Moreover, the appellant denies liability to compensate the respondent contending that it was not given notice of institution of the primary suit and neither was it made aware of filing of the suit.
6. The appellant, however, avers that while it may have had in place a policy of insurance with its said insured clients, the policy expressly excluded, pursuant to section 5 of the Insurance (Motor Vehicle Third Party Risks ) Act, the claim as brought by the respondent in the declaratory suit and that, in any case, the policy had a limit. The appellant contends that it nevertheless paid a sum of money to the respondent, without prejudice to its rights under the policy. The sum claimed in the declaratory suit is therefore refuted and the trial court was urged to dismiss the suit with costs.
7. Following the respondent's application dated 4/12/2019 seeking inter alia an order striking out the appellant's defence and entry of judgement in his favour, the trial court agreed with the respondent and found that the appellant had notice of institution of the primary suit. The lower court rejected the appellant's defence to the effect that its insurance cover did not extend to employees of the registered owner of the insured motor vehicle registration number KBM 913 R observing that "the issue of employer and employee relationship never came up in CMCC NO. 93/2019 since the parties recorded consent on liability. Under Cap 405 the cover covers third parties and being a passenger in the said vehicle, the plaintiff/applicant herein was a beneficiary of the policy and the right to be compensated (sic)." The trial court then concluded that the defence does not raise triable issues and entered summary judgement for the respondent. The appellant argued in its reply to the application that the respondent was an employee as salesman of the insured owner of the accident vehicle while the insurance cover didn't extend to employees of the insured.
8. It is trite law that the appellate court has the duty of re-assessing the evidence adduced before the lower court and reaching its own conclusions on matters of fact and law. The court will only interfere with the



trial court's findings if relevant factors were not taken into account or irrelevant factors were considered or the trial court otherwise misdirected itself (see case law in *Selle vs. Associated Boat Company* [1968] EA 123 and *Ocean Freight Shipping Co. Ltd vs. Oakdale Commodities Ltd* (1997) eKLR among many other decided cases reiterating these principles. The Court of Appeal for East Africa in *Peters – vs- Sunday Post Limited* [1958] EA 424 underscored the same principles delivering itself thus:”

- i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
  - ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
  - iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.”
9. The appellant’s advocates submit that the defence filed in the declaratory suit raises triable issues that should be allowed to be ventilated in a full trial. The court was referred to various decided cases including the Court of Appeal decision in *Blue Shield Insurance Company Ltd V. Joseph Mboya Oguttu* (2009) eKLR . In that case as in *John Kagechu Muiruri T/A Muiruri Auto Parts & 5 Others V. Kihumo Property Developers (K) Ltd* (2017) the superior court observed that a suit may only be summarily dismissed in the discretion of the court if it is so hopeless that it plainly and obviously discloses no reasonable cause of action , and is so weak as to be beyond redemption and incurable even by amendment.. The superior court added that if a suit shows a semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a Court of Justice ought not to act without the full facts of the case before it.
  10. The appellant therefore faults the trial court for not considering its defence as amended and finding that it merited trial.
  11. The respondent on his part opposes the appeal maintaining that the appellant’s defence was rightly struck out. Like the trial court, Counsel for the respondent are of the view that the issue of whether or not an employee of the insured was covered by the insurance policy in question didn’t arise in the primary suit in which the parties entered consent on liability therein and therefore the matter cannot be brought up in the declaratory suit.
  12. Citing inter alia case law in *Jubilee Insurance Company Limited V. Walter Tondo Soita* (2021) eKLR , the respondent’s advocates submit that being the insurer of the subject accident vehicle with notice of filing of the primary suit that resulted in the decree in favour of the respondent, and having failed to offer evidence showing that the insurance policy between it and its insured clients did not cover the respondent’s claim, the appellant is liable to settle the claim in law.
  13. The main issue for determination , therefore, is whether the appellant’s defence raises bonafide triable issues that the trial court should have allowed to be canvassed at trial. The substratum of the appellant’s defence is that the respondent’s claim against it is excluded by the insurance policy in issue citing section 5 of the Insurance (Motor Vehicle Third party Risks) Act in reliance.
  14. Section 5 (b) of the Insurance (Motor Vehicle Third Party Risks) Act provides that a policy of insurance under the Act must be a policy “which insures such person, persons or class 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 harm to, any person caused by or arising out of use of the vehicle on a road;

“Provided that a policy in terms of this section shall not be required to cover –  
.....

- (ii) liability in respect of the death arising out of and in the course of 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.
- (iv) liability of any sum in excess of three million shillings arising out of a claim by one person”.

15. Based on section 5 (b) (ii) of the Act supra, it would seem that insurers are not liable to compensate persons injured in the course of employment by the insurer as contended by the appellant. The matter of whether the respondent was an employee of the appellant and was injured in the course of his employment is, however, subject to proof by evidence. Despite its objection, the appellant admits paying a substantial amount to the respondent towards liquidation of the decretal sum which raises questions as to whether it is estopped from contesting the claim. I will also leave this issue to the trial court to determine upon taking the parties’ evidence. The court concurs with the appellant that as it was not a party in the primary suit it was not expected to tender evidence therein. I am satisfied that this is a triable issue in the declaratory suit.

16. The provisions of section 10 (1) of the same Act is also relevant. That enactment enjoins an insurer to satisfy a decree arising from an insurance policy between it and the insured under the Act .... “notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy”. The trial court will also have occasion to deliver itself as appropriate after trial.

**Determination.**

17. All the grounds of appeal accordingly succeed. The trial court’s order striking out the appellant’s defence is set aside and the court will proceed to hear and determine the suit on merits. The appellant gets the costs of the appeal.

**JUDGEMENT DELIVERED VIRTUALLY THIS 2<sup>ND</sup> DAY OF OCTOBER 2024 IN THE PRESENCE OF :**

The Appellant’s Advocate,  
The Respondent’s Advocate,  
The Court Assistant,

**J. M. NANG’EA , JUDGE.**

