



Docwide Business Centre Kenya Limited v APA Insurance & another (Civil Suit E008 of 2020) [2024] KEHC 16924 (KLR) (24 October 2024) (Judgment)

Neutral citation: [2024] KEHC 16924 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E008 OF 2020
F WANGARI, J
OCTOBER 24, 2024**

BETWEEN

DOCWIDE BUSINESS CENTRE KENYA LIMITED PLAINTIFF

AND

APA INSURANCE 1ST DEFENDANT

JUBILEE INSURANCE 2ND DEFENDANT

JUDGMENT

1. The Plaintiff in the Plaint dated 06/10/2020 sued the Defendants for the following orders;
 - a. A declaration that the defendant is bound by Section 5 and 10 of the Insurance (Motor Vehicle Third Party Risk) Act, CAP 405 of the Laws of Kenya to satisfy the judgment that may or are likely to be entered against in its insured in;
 - i. Mombasa SRMCC No. 1107 of 2017; Bwana Adi Abdal vs Dockwide Business Centre Ltd;
 - ii. Mombasa SRMCC No. 403 of 2020; Interpel Investments Ltd v Dockwide Business Centre Ltd;
 - iii. Mombasa SRMCC No. 733 of 2016; Amos Munyoki v Dockwide Business Centre Ltd;
 - iv. Mombasa SRMCC No. 2187 of 2019; Harsam Guyo Kutara v Dockwide Business Centre Ltd;
 - v. Mombasa SRMCC No. 1480 of 2019; James Ochieng Onyango v Dockwide Business Centre Ltd.



- b. An order compelling the 1st and 2nd Defendants to settle the accident claims made by the Interested Parties against the Plaintiff before or after judgment has been delivered in the matters listed in (a) above;
 - c. Cost of the suit;
2. The Defendants filed their statements of Defence, with the 2nd Defendant filing its Counter-Claim against the Plaintiff. After the close of pleadings including interlocutory proceedings, the matter proceeded for hearing. However, the Plaintiff withdrew the suit against all the parties herein.
3. The 2nd Defendant having filed the counterclaim prayed that judgment be entered as per the counter claim where the following orders were sought for;
 - a. A declaration that the plaintiff breached the terms and conditions of the insurance policy numbers P/MSA/2040/2016/17093, P/MSA/2065/2016/17628 and P/104/1001/2019/000016;
 - b. A declaration that the 2nd Defendant is entitled to avoid liability under the insurance policy numbers P/MSA/2040/2016/17093, P/MSA/2065/2016/17628 and P/104/1001/2019/000016, on the grounds that the plaintiff breached the terms and conditions of the insurance policies.
 - c. A declaration that 2nd Defendant is not liable to compensate and/ or the indemnify the Plaintiff for any claims or decrees that arise as a consequence of its breach of the terms and conditions of the insurance policy numbers P/MSA/2040/2016/17093, P/MSA/2065/2016/17628 and P/104/1001/2019/000016;
4. It was directed that the parties do file written submissions. Only the 2nd Defendant complied with the directives. Upon perusal of the pleadings and the written submissions, the only issue for determination is;

a. Whether the 2nd Defendant has proved its case on a balance of probabilities.

Analysis

5. It is not in dispute that the Plaintiff's vehicles were insured by the 2nd Defendant. It is also not in dispute that the vehicles were involved in accidents in various dates. Further, it is also not in dispute that the Interested Parties in the suit filed their respective suits in the lower court claiming compensation for the injuries sustained in the accidents.
6. What is in dispute is whether or not the 2nd Defendant is liable to compensate the Interested Parties and any other claims arising from the accidents. The 2nd Defendant pleaded that the Plaintiff was in breach of the Insurance Policy by failing to report the accidents to them.
7. In its evidence in respect to the 2nd Defendant, the Plaintiff through one of its Directors, Michael Mwakio (PW 1) stated that they had their vehicles insured by the 2nd Defendant for the period in issue. He further stated that the 2nd Defendant did not issue them with the Policy documents, but were only given the Insurance Certificate.
8. On reporting the accidents, the witness stated that they notified the insurance company either by phone or going physically to the office to report, as they shared the same building. He however did not have proof that the said report was made. On Statutory Notice, the witness stated that the Interested



Parties must have served the Statutory Notices to the 2nd Defendant before filing of the suits in the lower court.

9. The 2nd Defendant through its Legal Officer, one Patience Mirara (DW 2) gave evidence that it was impossible to have an insurance cover without an Insurance Policy document. Both documents must accompany each other. The Plaintiff was issued with the said policy documents which were produced as exhibits.
10. Further, she testified that there was a claims clause in the policy that required the insured to report an accident to the insurer within 7 days. The Plaintiff did not adhere to the requirement, hence the 2nd defendant's counterclaim.
11. It is the 2nd Defendant's duty to prove that the Plaintiff was in breach of the insurance policies. Section 107 of the Evidence Act provides as follows;
Burden of proof
 - (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
12. From the evidence adduced in court, the 2nd Defendant stated that the Plaintiff was issued with the insurance policy document, and the Insurance Schedules were produced as exhibits. The 2nd Defendant denied that the accidents were ever reported to them. Though the Plaintiff gave evidence that the accidents were reported, it failed to prove the same, as the witness could not tell whether it was by a phone call to the insurer or a visit to their offices.
13. I am in concurrence with the submissions by the 2nd Defendant and the reliance in the case of *Imara Steel Mills Ltd v Heritage Insurance Co. Kenya Ltd & 38 others* [2016] eKLR and *Intra Africa Assurance Company Limited v Gideon Chepsom* [2024] eKLR, in finding that the Plaintiff was in breach of the requirement that accidents be reported within 7 days after the occurrence.
14. Under the circumstances, I am inclined to enter judgment in favour of the 2nd Defendant as per the Counter-Claim as hereunder;
 - a. A declaration that the plaintiff breached the terms and conditions of the insurance policy numbers P/MSA/2040/2016/17093, P/MSA/2065/2016/17628 and P/104/1001/2019/000016;
 - b. A declaration that the 2nd Defendant is entitled to avoid liability under the insurance policy numbers P/MSA/2040/2016/17093, P/MSA/2065/2016/17628 and P/104/1001/2019/000016, on the grounds that the plaintiff breached the terms and conditions of the insurance policies.
 - c. A declaration that 2nd Defendant is not liable to compensate and/ or the indemnify the Plaintiff for any claims or decrees that arise as a consequence of its breach of the terms and conditions of the insurance policy numbers P/MSA/2040/2016/17093, P/MSA/2065/2016/17628 and P/104/1001/2019/000016;
 - d. Considering that judgment has been entered in favour of the 2nd Defendant on technicality basis, each party is to bear its own costs.

It is so ordered.



DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 24TH DAY OF OCTOBER 2024.

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F. WANGARI

JUDGE

In the presence of;

Kithome Advocate for the Plaintiff

Shikely Advocate for the 1st Defendant

Brian, Court Assistant

