



**Gateway Insurance Company Limited v Njuki (Civil Appeal E389 of 2021)
[2024] KEHC 11731 (KLR) (Civ) (2 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11731 (KLR)

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

CIVIL

CIVIL APPEAL E389 OF 2021

JM NANG'EA, J

OCTOBER 2, 2024

BETWEEN

GATEWAY INSURANCE COMPANY LIMITED APPELLANT

AND

ELIZABETH MUKONYO NJUKI RESPONDENT

*(Being an appeal from the judgement and decree of the Chief Magistrate's
court at Nairobi Milimani Commercial Courts in Civil Suit No.E
6334 of 2020 delivered by Hon. D.O MBEJA (Mr) - PM on 11/6/2021)*

JUDGMENT

Grounds of Appeal and reliefs sought.

1. By a Memorandum of Appeal filed on 26/10/2021, 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 failing to consider in totality the appellant's evidence proffered in the lower court thereby erroneously holding that it was obliged to indemnify the respondent.
 - b. That the learned trial magistrate erred in law and fact by determining the suit before it against the weight of evidence.
and
 - (c) That the learned trial magistrate erred in law and fact by failing to consider the appellant's submissions in the suit.



2. The appellant therefore prays that the appeal be allowed and the said judgement and decree of the trial court set aside. The court is also urged to 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. 6334 of 2020 ("the declaratory suit") and entered summary judgement for the respondent as prayed in the suit. The respondent had sought a declaration that the appellant was liable to satisfy judgement in Limuru CMCC NO. 317 of 2015 ("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 above named Gathonga Joseph in tort for causing the death of Edward Njuki Herman ("the deceased") on 8/11/2012 owing to careless and/or negligent driving of the former's motor vehicle registration number KAN 476 A, in which the deceased was a passenger, resulting in a collision with another motor vehicle registration number GKA 953 F thereby causing fatal injuries to the deceased. This vehicle was at the material time allegedly insured by the appellant against third party risks under the *Insurance (Motor Vehicles Third Party Risks) Act* vide Certificate of Insurance No. 5677769 and Policy No. 030/080/1/033565/2012/1. The respondent obtained a decree in the sum of Ksh. 1,943,079 and a certificate of costs of Ksh. 171,160 in the primary suit which the insured client of the appellant failed to satisfy. The respondent brought the declaratory suit against the appellant as the accident vehicle's insurer to enforce his decree and enjoy the fruits of her litigation.
5. The appellant filed defence dated 12/11/2020 and amended on 20/1/2021. It traversed the claim of occurrence of the accident giving rise to the cause of action in the primary suit and further disputed the averment that the deceased was a passenger in the vehicle at the material time. 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 informed of judgement in the suit.
6. The appellant further avers that the said Gathoga Joseph did take out a third party insurance cover with them on 2/11/2012 and was issued with Certificate of Insurance No. 5677769 and Policy No. 030/084/1/033565/2012/11 in respect of his stated vehicle registration number KAN 467 A . According to the appellant the vehicle was on 8/11/2012 driven contrary to the insurance cover resulting in the accident in issue. Complaining of breach of the insurance policy, the appellant averred that it filed the said Civil Suit No. 432 of 2013 seeking to avoid the Policy and therefore liability to satisfy the decree in the primary suit owing to breach of the terms thereof by the insured. The latter did not defend the suit which was consequently allowed to proceed *ex parte*. It would appear that the suit had not been determined at the time of bringing the declaratory suit as the appellant indicates that it had remained with one witness to close its case.
7. Following the respondent's application dated 5/2/2021 seeking *inter alia* an order striking out the appellant's defence and entry of judgement in her favour, the trial court agreed with the respondent and found that the defence consisted of mere denials not meriting a full trial . The lower court then proceeded to enter judgement for the respondent as stated hereinabove. In the judgement , the court observed *inter alia* that the appellant was served with a statutory notice of institution of the primary suit; that it is not disputed that the appellant was the subject vehicle insurer at the time of occurrence of the accident and further that judgement was entered against the appellant's insured client in the



primary suit which the appellant is legally enjoined to satisfy pursuant to the provisions of section 10 (1) of the Insurance (Motor Vehicles Third Party Risks) Act.

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 v Oakdale Commodities Ltd* [1997] eKLR. As exhorted in these decisions, an appellate court should also bear in mind the fact that it neither heard nor saw the witnesses testifying in order to gauge their demeanour.
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. It is pointed out that the insurance policy issued to the said Gathonga Joseph was No. 030/080/033565/2012/11 and not 030/080/033565/2012/1 as stated in the declaratory suit. According to the appellant, this is a triable issue that ought to have been appreciated by the trial court. The court was referred to various decided cases including the Court of Appeal decision in *John Kagechu Muiruri T/A Muiruri Auto Parts & 5 Others v Kihumo Property Developers (K) Ltd* [2017] in which it was observed that a suit may only be summarily dismissed 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 by amendment'. The superior court added that "if a suit shows a mere 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 her part sides with the trial court in submissions through her advocates. Alluding to the judicial determination the case of *Metro Petroleum Limited v Wamco Petroleum Limited* [2000] eKLR, Counsel urge that the appellant's defence was properly struck out on account of not raising a reasonable cause of action and consisting of mere denials.
12. The appellant's argument that it did not issue the insurance policy in the motor vehicle registration number KAN 476 A belonging to the said Gathoga Joseph is not valid. The error in one of the digits of the policy number is minor and, moreover, the registration particulars of the vehicle and the name of the owner thereof are the same.
13. Pursuant to section 10 (1) and (4) of the Insurance (motor Vehicles Third party Risks Act, the appellant was obliged to satisfy the decretal sum in the primary suit having not moved to lawfully avoid or cancel the policy seeing that the suit it claims to have filed to challenge its liability was not instituted and/or concluded within the 3 months period prescribed in stated statutory provisions.
14. In the premises, the trial court properly considered the material before it and is not to be faulted. All the grounds appeal as set out fail. The respondent will have the costs of the appeal.
15. Judgement accordingly.

JUDGEMENT DELIVERED VIRTUALLY THIS 2ND DAY OF OCTOBER, 2024 IN THE PRESENCE OF:

The Appellant's Advocate,

The Respondent's Advocate,



The Court Assistant,
J. M. NANG'EA
JUDGE.

