



**Lelei v Direct Line Assurance Company Ltd (Civil Case E004 of 2023)
[2024] KEHC 12795 (KLR) (23 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12795 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL CASE E004 OF 2023
E OMINDE, J
OCTOBER 23, 2024**

BETWEEN

NANCY JELIMO LELEI PLAINTIFF

AND

DIRECT LINE ASSURANCE COMPANY LTD RESPONDENT

RULING

1. The Applicant approached this court vide an Originating Summons dated 16th November 2023 seeking the following orders;
 - i. A declaration be and is hereby issued ordering and/or directing the defendant/Respondent to settle the outstanding principal decretal and party and party costs sum of Kshs. 992,136/= and accrued interest of Kshs.2,120,457/= making an aggregate of Kshs.3,481,812/-
2. The Application is premised on the grounds set out on the face of it and the contents of the Supporting Affidavit sworn by the applicant on 16th November 2023.
3. In the said Affidavit, the applicant deposes that there were proceedings in Eldoret CCC No, 572 of 2017 wherein she sought compensation for material damage to her motor vehicle registration no. KCE 893K in the sum of Kshs. 1,781,000 with interest from the date of filing the suit against a defendant who was an insured of the Defendant/Respondents herein. That prior to the institution of the said suit, a Statutory Notice was duly served on the defendant.
4. That upon institution of the suit, the defendant was served with Court Summons and pleadings whereupon he proposed an out of court settlement which never bore fruit. The respondent herein then opted to secure legal representation for its insured, the defendant in the said suit. Their Counsel subsequently filed a defence and the matter preceded to full hearing.



5. The deponent states that judgment was entered in her favour in the sum of Kshs. 1,744,486/- with interest at 14% per annum from the date of filing the suit. That the defendant took responsibility of the decree by settling a sum of Kshs. 1,000,000/- leaving an outstanding balance of Kshs. 3,481,812 which includes the accrued interest as at 15th November 2023.
6. It is the applicant's case that despite being contractually bound to satisfy the decree the respondent has declined to settle the outstanding balance arguing that its obligation to its insured under the Policy that was in existence between them and their insured to settle its liabilities was up to a sum of Ks. 1,000,000/- only.
7. The applicant deposed that it would be unconscionable if the respondent shall be permitted to set its limitation to its liability against insured persons because such action affronts the doctrine of fair and equitable administration of justice.
8. The deponent stated that by dint of collusion between the Applicant and its insured, the insured's whereabouts remains unknown despite several attempts to impress upon the Respondent to either provide contact or the physical location and whereabouts of the insured.
9. Further, that in the absence of plausible reason to justify the limitation of the Respondents' liability in satisfying the decree, it is fair and just that the Application be allowed.

The Defendant's Response

10. The Respondent filed a Grounds of Opposition dated 23rd January 2024 as well as a Replying Affidavit sworn by one Rayn Wendo, a Senior Claims Officer at the Defendant on 27th February 2024 through the firm of Messrs Cootow and Associates Advocates.

Grounds of Opposition

11. In their Grounds of Opposition, the respondent contends as follows;
 - a. That the Application is frivolous, an abuse of the court process, and ought to be dismissed with costs to the defendant/respondent.
 - b. That the Affidavit sworn by Nancy Jelimo in support of the Application and commissioned by the firm of KOMM Advocates is fatally and incurably defective in law as it is not sworn before a Commissioner for Oaths as required by sections 2(1), 3 and 4(1) of the [Oaths and Statutory Declarations Act](#), CAP 15 of the Laws of Kenya hence the same cannot stand or be ventilated before this court.
 - c. That as such, the Application is incompetent and bad in law as it is not supported by an affidavit and is therefore without any evidential foundation and should be dismissed with costs.
 - d. That the liability sought to be enforced by this suit is thus not within the purview of liability enforceable via a Declaratory suit against an Insurer as envisioned by section 5 (b) of The Insurance (Motor Vehicle Third Party Risks) Cap 405 of the laws of Kenya which is the basis of Declaratory suits by 3rd Parties against an Insurer. The liability covered under the said provisions is limited to claims relating to death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road. The liability DOES NOT extend to material damage claims as the case herein.



Replying Affidavit

12. The deponent of the Replying Affidavit deposes that the Application seeks to enforce a judgment said to have been entered in favour of the Plaintiff against the Defendant's Insured in Eldoret CMCC No. 572 of 2017 which suit relates to a material damage claim by the Plaintiff/Applicant arising from an accident said to have occurred on 27th April 2017 involving motor vehicles registrations number KCE 893K and KCF 752R.
13. He further deposed that the defendant provided a Third-Party Insurance Policy cover to the Owner of motor vehicle registration number KCF 752R to the extent that the terms of the policy were in compliance with the Laws of Kenya in particular CAP 405. Under the said Insurance policy, the obligation of the Defendant to indemnify the Insured was capped at Kshs. 1,000,000/= for third party material damage claims.
14. He deposed that the Plaintiff instituted Eldoret CMCC NO. 572 of 2017 against the Defendants insured seeking compensation for damage to her motor vehicle registration number KCE 893K in the sum of Kshs. 1,781,000/= and upon entry of judgment therein, the Defendant promptly paid to the Plaintiff the sum of Kshs. 1,000,000/- in line with the policy.
15. That upon payment of the said sum/ the Defendant fully discharged its obligation under the Insurance Policy hence it is not liable to settle the Kshs. 3,481/812/- sought by the Plaintiff because the said sum is over and above the policy limit already paid hence the Plaintiff should pursue the said sum against the insured directly and nothing stops the Plaintiff from doing so,
16. Further, the deponent stated that the Plaintiff's suit seeks to enforce against the Defendant a Judgment arising from a material damage claim which is not within the purview of liability enforceable vide a Declaratory suit against an Insurer as envisioned by section 5(b) of The Insurance (Motor Vehicle Third Party Risks) Cap 405 of the laws of Kenya which is the basis of such suits.
17. That the liability covered under the said provision is limited to claims relating to death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road. The liability does not extend to material damage claims as is the case herein.
18. In response to paragraph 11 of the Plaintiff's Supporting Affidavit, the deponent averred that the contents are baseless since the Defendant has not filed any Statement of Defence in this matter as purported.
19. In response to paragraph 12 of the Plaintiff's Supporting Affidavit, the deponent states that despite the Plaintiff not being privy to the Insurance Contract between the Defendant and its Insured, it is the said contract that defines the relationship between the Defendant and its insured hence, the obligation of the Defendant to indemnify the Insured against 3rd Party claims arising under the policy is subject to the terms of the policy and the Defendant cannot be bound to settle claims by third parties that exceed the policy limit.
20. In response to paragraph 18 of the Plaintiffs Supporting Affidavit, the deponent reiterated that that the Plaintiff had sufficient notice of the policy limit capped at kshs.1, 000,000/- but that instead of the Plaintiff pursuing the balance of her claim directly against the insured instead waited for almost two years for interest to accumulate on the said sum to exorbitant levels then chose to institute this suit against the Defendant who is not liable to settle the said sum.
21. The deponent stated that the allegations under paragraph 19 of the Plaintiff's Supporting Affidavit are oppressive, scandalous and not supported by any evidence and ought to be struck out.



22. Further, the defendant deposes that the Plaintiff has not availed any proof whatsoever before the court of the purported collusion between the Defendant and its insured, or that she has made efforts to execute the Decree against the Respondent's insured considering that the Plaintiff successfully served pleadings upon the said Insured personally in the primary suit meaning the Plaintiff is well aware of the Insured's whereabouts.
23. Further to the foregoing, the deponent stated that the said Insured only had an Insurance Contract with the Defendant in the year 2017 hence it would be unjust to expect the Respondent to know his whereabouts 5 years down the line.
24. The deponent maintained that the Plaintiff's Application is misconceived and otherwise bad in law as it discloses no reasonable course of action against the Defendant and the same should be dismissed with costs to the Defendant.

Applicants' Further Affidavit

25. Counsel for the Applicant Edward Felix Ombima filed a further affidavit dated 5th March 2024 where he deposed inter alia, that subject to The Insurance (Motor Vehicle Third Party Risks Act Cap 405 of the Laws of Kenya, the Respondent is statutorily obligated fully to indemnify the Applicant in the event of an accident resulting to personal injury to a third-party person and material damage to a third-party motor vehicle; arising from negligent action(s) or omission(s) on the part of its insured.

Hearing of the Application

26. The parties prosecute the Application by way of written submissions. The Applicant filed submissions through the firm of Messrs Ombima & Co Advocates whereas the Respondent filed submissions through the firm of Messrs Cootow & Associates Advocates.

Applicants' Submissions

27. The Applicant submitted that the Application is made under Order 37 Rule 11, 14, 15 and 16 of the Civil Procedure Rules which provided for approaching the Court by way of Originating Summons which is intended for simpler, shorter and speedier process.
28. Further, that the order sought by the Applicant is a declaration to compel the Respondent to satisfy the decree issued in Eldoret CMCC No. 572 of 2017. The respondent had partially satisfied the decree and therefore, the issue for determination by the court is whether the Respondent is liable to settle the outstanding decretal sum.
29. He urged that this is a precise and simple matter to be determined by way of affidavit evidence and neither party has demonstrated an intention and /or intends to call witnesses. The Application is therefore properly filed before the Court and merits a determination by way of Originating Summons.
30. In response to the ground that the affidavit filed in support of the Application is fatally and incurably defective, Counsel submitted that the said affidavit bears a stamp of the respective law firm, who are Commissioners of Oaths.
31. Counsel submitted further that under Article 159 of *The Constitution* of Kenya (2010) and Sections 1A, 1B, 3A and 3(B) of the *Civil Procedure Act*, Cap 21, the Court ought to be progressive in the administration of justice and find that this ground is hinged on what is essentially a procedural requirement and so in the spirit of ensuring inter alia that justice ought to be administered without undue regard to procedural technicalities dismiss this ground of opposition.



32. On the opposition to the suit as filed, Counsel submitted that this is not a declaratory suit, within the meaning and scope of section 5(b) of the Insurance (Motor Vehicle Third Party Risks Act), Cap 405, as alleged by the Respondent.
33. That instead, it is an application seeking a declaration within the meaning of an Originating Summons. Further, that the import of the Application is not a trial against the Respondent arising from an injury envisioned under section 5(b). On the contrary, the summons merely seeks to invoke the Court's power to declare that the Respondent is legally obligated to fully settle the decretal sum to wit; the Respondent has partially satisfied.
34. Counsel submitted that the Respondent acknowledges the existence and/or intention to enter into a contract of insurance between it and its insured in the Replying Affidavit and provided an alleged Third-Party Insurance Policy Cover issued to its insured pursuant to Cap 405 which Policy, the defendant alleges caps its obligation to indemnify its insured for 3rd Party material damage claims at Ks. 1,000,000/-
35. Counsel submitted that a closer examination of the said contract of insurance however reveals that it was not signed and/or executed by its insured and that by reason of this omission and/or mistake, the alleged contract is therefore invalid and to that end, the limitation set out in the schedule of the contract are neither binding upon the insured or the applicant.
36. Counsel urged that notwithstanding the mistake, the Respondent proceeded to secure legal representation on behalf of its insured in Eldoret CMCC No. 572 of 2017 and filed a defence to the suit and in that defence, the defendant did not mention or plead any intended contractual limitation(s) to be apportioned between himself and the defendant/Respondent.
37. Counsel further submitted that being an interested party in that suit, the Respondent had the opportunity to join the proceedings and declare its intended limitation on liability if a decree is passed by the Court. It did not. That the applicant on her part was not made aware of the existence of such intended contractual limitations on indemnity and neither given an opportunity to contest or test that evidence.
38. That for the alleged contract to bear any evidentiary weight and/or value, it ought to have been produced in evidence in the main trial where pursuant to Section(s) 107 and 108 of the [Evidence Act](#), the burden of proof rested on the defendant/Respondent to prove the existence of a valid and enforceable contract, a critical fact relevant to the proceedings in determining the realisation of a decree if made in favour of the plaintiff/Applicant.
39. Counsel urged that the general rule in Civil Procedure practice is that parties are bound to their pleadings and can only depart from their pleadings when granted leave to amend the same and in this regard then, the Respondent is bound by the defence filed in Eldoret CMCC no. 572 of 2017.
40. Counsel submitted that taking into account the Law of Contract, the Court cannot attach intrinsic value to an invalid document. Further, that the impugned contract is invalid for want of execution, has not been disputed and/or rebutted by the Respondent in their responses.
41. That in order for the Court to render a plausible assertion that the intended policy cover had a contractual limit on the sum payable in a material damage claim, it is critical that the Respondent produced before Court a valid contract of insurance, executed between itself and its insured. That it shall be unfair to deny the Applicant realisation of her entire decree on the basis of an invalid contract to which, she is not privy to.



42. Counsel urged that the burden to ascertain the validity of the alleged contract lies entirely upon the Respondent. On the face of the record, the Respondent has failed to prove that the policy schedule contained in the policy document is binding upon it's insured and so in the absence of any legally enforceable contractual limitation, the Respondent is obligated to fully settle the outstanding decretal sum including the accrued interest from the date of filing the suit in Eldoret CMCC No. 572 of 2017.
43. Counsel submitted that efforts by the Applicant to trace the insured have been futile as his whereabouts are unknown. That the disingenuous actions of both the insured and the Respondent demand that they both be hold jointly and severally liable to satisfy the decree. He urged that the Application be allowed with costs to the Applicant.

Respondents' Submission

44. Learned counsel for the Respondent submitted that from the pleadings and evidence adduced herein, the following issues beg the determination of this Honourable Court:
- (a) Whether the Supporting Affidavit filed by the Plaintiff herein is fatally and incurably defective having been commissioned by a law firm.
 - (b) Whether there was a valid insurance policy cover between the Defendant and Kenani Onchari, the Defendant in Eldoret CMCC 572 of 2017
 - (c) Whether the liability sought to be enforced by the Plaintiff herein falls within the purview of section 5(b) of CAP 405 Laws of Kenya as to liability enforceable vide declaratory suits against an Insurer.
 - (d) Whether costs and Interest are payable as sought in plaint.
45. On the defendant's opposition to the Supporting Affidavit to the Application for the reasons already herein summarised, Counsel cited the provisions of Section 2(1), 3 and 4(1) of the [Oaths and Statutory Declarations Act](#) which requires that the name of the Advocate commissioning an Affidavit must be clearly indicated. He submits that requirement has not been satisfied in the applicant's case and that this omission is fatal.
46. In support of this submission, Counsel cited the holding in Election Petition Appeal No. 1 of 2018 Geoffrey Githinji Mwangi & 2 others v Jubilee Party & 11 others [2018] eKLR
And Matrimonial Property Cause 49 of 2019 AWM v TGK [2021] eKLR.
47. On the validity of the insurance policy, counsel submitted that the Defendant has availed before Court insurance policy schedule, policy document and policy endorsement marked as Exhibits RW-1(a), 1 (b) and 1(c) confirming that the Defendant indeed issued an Insurance policy cover to the said Kenani Onchari. The introductory clause of the policy schedule dated 8th July 2016 clearly shows that the schedule is sent to the insured in acceptance of the Insured's proposal to take an insurance policy cover with the Defendant herein. Consequently, the Policy Schedule needed not to have been signed by the Insured for it to be valid.
48. Further, Counsel submits that the Plaintiff cannot on the one hand deem an insurance policy as valid for purposes of seeking compensation and on the other hand deny its validity when it suits her. Counsel further pointed out that the Policy schedule, at page 1 sets out the policy limit for third party property damage claims at Ks. 1,000,000/- and this is the sum that the Defendant paid to the Plaintiff upon delivery of judgment in Eldoret CMCC 572 of 2017.



49. That the sum over and above Kshs. 1,000,000/= did not form part of the insurance contract between the Defendant and its insured hence the said sum should be claimed directly from the insured. Counsel in support of this submission relied on Civil Appeal 78 of 2019 Kenyan Alliance Insurance Company Limited v Naomi Wambui Ngaira & another (Suing as the Legal Representatives and Administrators of the Estate of Nelson Macharia Maina (Deceased) [2021] eKLR
50. Counsel in his submissions reiterated the defendant's position that the liability sought to be enforced by this suit is not within the purview of the liability envisioned by section 5(b) of The Insurance (Motor Vehicle Third Party Risks) Cap 405 of the Laws of Kenya which is the basis of Declaratory suits by 3rd Parties against an Insurer. The liability covered under the said section does not extend to material damage claims as the case herein.
51. Counsel also cited Section 10 of Cap 405 which he submits provides the duty of the insurer to satisfy judgements against persons insured and he emphasised that this section too mandates an insurer to satisfy judgements "in respect of any such liability as is required to be covered by a policy under paragraph (b) of Section 5" thus excluding claims for material damage.
52. Counsel relied on the case of David Kinyanjui & 2 Others Vs Meshack Omari Monyori [1998] eKLR to buttress the above submission that the Plaintiff has no reasonable cause of action against the Defendant since a judgment in a material damage claim cannot be enforced against an Insurer under Cap 405 as the provisions of Cap 405 are only limited to liabilities arising from death or physical injury claims.
53. He stated that although the Plaintiff denies that the suit herein is a Declaratory Suit within the meaning of CAP 405, he fails to set out the specific substantive provisions of Law forming the basis for his claim. Other than Article 159 of *the Constitution* and section 3 and 3A of the *Civil Procedure Act* which are general provisions of law relating to expeditious resolution of disputes, she relies on section 11A of the *Civil Procedure Act*, which is non-existent and section 63(e) of the *Civil Procedure Act* which relates to Court's power to make such other interlocutory orders as may appear to the court to be just and convenient, which is not applicable herein as the Orders sought by the Plaintiff in the instant suit are final in nature.
54. Counsel urged that based on the foregoing, the Plaintiff's suit against the Defendant is baseless, a nullity, illegal and otherwise an abuse of court process hence should be dismissed with costs to the Defendant, Further, that the Plaintiff having failed to prove its case then the costs and interest are not awardable to her in the circumstances.

Analysis & Determination

55. Having considered the pleadings, the submissions and the authorities cited, it is my considered opinion that the following are the issues that arise for determination.
- i. Whether the application is incurably defective
 - ii. Whether there was a valid insurance policy cover between the Defendant herein and the Defendant in Eldoret CMCC 572 of 2017
 - iii. Whether the liability sought to be enforced by the Plaintiff herein falls within the purview of section 5(b) of CAP 405 Laws of Kenya as to liability enforceable vide declaratory suits against an Insurer.
 - iv. Whether the Respondent is obligated to settle the balance of the judgment sum.



Whether the application is incurably defective

56. Section 2 of the [Oaths and Statutory Declarations Act](#) provides for appointment of commissioners for oaths. It states in subsection (1) thereof as follows;

“(1) The Chief Justice may, by commission signed by him, appoint persons being practising advocates to be commissioners for oaths, and may revoke any such appointment.”

57. Section 3 of the Act provides;

“Every advocate appointed a commissioner for oaths shall, on appointment sign a roll, which shall be kept by the Registrar of the High Court.”

58. Section 4 of the Act sets out the powers of a commissioner for oaths. Subsection (1) thereof states -

“(1) A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act or otherwise...”

59. Section 5 provides that:

“Every Commissioner for Oaths before whom any oath or affidavit is taken or made ... shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”

60. In Election Petition Appeal No. 1 of 2018 Geoffrey Githinji Mwangi & 2 others v Jubilee Party & 11 others [2018] eKLR, the Court rendered itself as follows on the issue of the requirement that the that an Affidavit be commissioned by an individual advocate

“As we have already seen in the relevant provisions of the [Oaths and Statutory Declarations Act](#), the Chief Justice will appoint as commissioners individual advocates in practice, not their firms. Such commission is personal to the particular advocate so appointed. The commission is not issued to his firm. An affidavit therefor ought to show that it was taken by an individual advocate and commissioner for oaths, not by a firm of advocates. If affidavits were to be taken by a firm of advocates, what would prevent any member of that firm, be they advocates who have not been appointed commissioners for oaths, or clerks and secretaries, from purporting to take affidavits on behalf of such firm? That would clearly be against the clear provisions of the [Oaths and Statutory Declarations Act](#).”

61. I have considered and addressed my mind at length to the relevant provisions of the [Oaths and Statutory declarations Act](#) as I have reproduced above. In my considered view, in none of these provisions is there an express and direct requirement that the individual advocate commissioning or attesting a document indicates his/her name on the said document.

62. Indeed as observed by the court in the authority cited above, this is an implied requirement from the reading of the said provisions of the law. In my considered opinion therefore given the implied nature of this requirement, non-compliance with the same would not render an affidavit fatally defective



63. I say this more particularly because notwithstanding the above provisions of the *Oaths and Statutory Declarations Act* and the authority cited, Order 19 Rule 7 of the Civil Procedure Rules, 2010 states as follows-

“The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect of misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.”

64. This provision of the Civil Procedure Rules again in my well-considered view gives the Court the discretion to receive or not to receive any such affidavit and that in making such a determination, as is required in all cases where a Court in exercising discretion is required to act judicially, the Court should have in mind the overriding objective of the Parent Act upon which the Rules are premised which in this case of the *Civil Procedure Act*.

65. That overriding objective is as laid out in Sections 1A, 1B and 3A of the said Act and broadly put is that Courts should at all times endeavour not to sacrifice the need to render substantive justice upon the alter of technicalities. Section 1B thereof is particularly relevant and it is as follows;

Duty of Court

- (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
 - (a) The just determination of the proceedings;
 - (b)
 - (c)
 - (d)
 - (e)

66. This provision of the *Civil Procedure Act* as read together with the provisions of Article 159 2) (d) of *the Constitution* of Kenya 2010 which provides that justice shall be administered without undue regard to procedural technicalities leads me to the finding that the fact that the particular advocate in the law firm that commissioned the affidavit sworn in support of the applicant’s application did not indicate his name does not render the said Affidavit fatally defective.

Whether there was a valid insurance policy cover between the Defendant herein and the Defendant in Eldoret CMCC 572 of 2017

67. Briefly, as has been demonstrated above, Counsel for the applicant holds that because the contract of insurance between the Defendant and it’s insured was not signed by the insured, then there is nothing binding upon which the Defendant can then base its argument that the policy between itself and the insured was capped at Ks. 1,000,000/- for any liability for material damage.

68. It should be noted that if the Court were to find in favour of this argument and invalidate the contract of insurance, then the sum total of that finding would be that there then would be no contract at all as between the defendant herein and the defendant in Eldoret CMCC 572 of 2017 the upon which this application by the applicant by its very nature would be premised.



69. In this regard, do agree with Counsel for the Defendant that the applicant cannot seek to rely on the contract of insurance to claim from the defendant and then seek to have the same invalidated when it does not suit her and seek instead that the Court reads into the contract and construe for itself what the parties implied be binding upon them.
70. The case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another* [2001] eKLR is particularly instructive on what the applicant would seek that the Court does on behalf of the parties. The Court rendered itself as follows on whether a Court should imply conditions into a contract entered into between parties;
- “A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved”.
71. Seeing as none of the conditions laid out therein have been imputed in this case, the Court hereby declines the invitation by the applicant to read into and make its own assumptions as to the he contract of insurance between the defendant and its insured.
72. However, and of greater import, it is my considered opinion that on this issue, especially considering that based on the said contract, the Defendant paid out to the Applicant Ks. 1,000,000/- in fulfilment of the judgement in Eldoret CMCC 572 of 2017 .
73. The applicant accepted and acknowledged the amount as part payment towards the execution of the judgement. The balance of the payment is in fact the subject matter of this suit. By her conduct therefore, the applicant is estopped from seeking that that contract be invalidated by the Court to the extent that it places a cap on the defendant’s liability to 3rd parties.
74. Whether the liability sought to be enforced by the Plaintiff herein falls within the purview of section 5(b) of CAP 405 Laws of Kenya as to liability enforceable vide declaratory suits against an Insurer.
75. The relevant provision of Section 5 of the *Insurance (Motor Vehicles Third Party Risks) Act*, Chapter 405 of the Laws of Kenya provides as follows;
- Requirements in respect of insurance policies.
- In order to comply with the requirements of section 4, the policy of insurance must be a policy which—
- a. is issued by a company which is required under the *Insurance Act* (Cap. 487) to carry on motor vehicle insurance business; and
 - b. insures such person, persons or classes 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 injury to, any person caused by or arising out of the use of the vehicle on a road:

Provided that a policy in terms of this section shall not be required to cover—

 - i. liability in respect of the death arising out of and in the course of his 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; or
 - ii. except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of
 - iii. employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arose; or



- iv. any contractual liability;
 - v. liability of any sum in excess of three million shillings, arising out of a claim by one person.
76. The relevant provision of Section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act*, Chapter 405 of the Laws of Kenya provides as follows -
- 1. If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of Section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.
77. Having considered and addressed my mind to the submissions made by both Counsel on this issue, it is my considered opinion that the authority cited by Counsel for the Respondent is relevant to the issue at hand.
78. I find it relevant particularly because it does in essence resonate very well with the provision of Sections 5 and 10 of Cap 405 which are the legal provisions upon which both Counsel have relied. The Court therein held as follows;
- “It must be borne in mind that in respect of a material damage claim the party suffering damage cannot eventually proceed against the tortfeasor's insurer as there is no provision in our law for such eventuality. The *Insurance (Motor Vehicles Third Party Risks) Act*, Cap 405, Laws of Kenya gives right to such a person to file a declaratory suit against the tortfeasor's insurer if the claim is for physical injuries or death.”
79. In finding the holding above to be relevant, I associate myself with it and find in this regard that the Respondent is not at all obligated to settle the balance of the judgment sum. This finding is aside from the fact that the Respondent maintains that the partial settlement was as a result of the terms of the insurance contract under the policy the subject matter of this Originating summons.
80. My finding above is premised on the holding of the Court of Appeal in *Musimba Investments Limited v Nokia Corporation* [2019] eKLR wherein the Court stated thus:
- “One of the principles of contractual interpretation is that parties have the freedom to contract; to contract even to resolve their disputes away from the courts; and that courts should not re-write terms of a contract for them....”
81. In conclusion, the upshot of all my findings above is that the application herein is misconceived and lacks merit. The same is accordingly dismissed in its entirety with costs to the Respondent.

READ, DATED AND SIGNED AT ELDORET ON 23RD OCTOBER 2024.

E. OMINDE

JUDGE

