



Madison Insurance Company Limited v KHS East Africa Limited (Civil Appeal 552 of 2019) [2024] KEHC 11992 (KLR) (Civ) (7 October 2024) (Judgment)

Neutral citation: [2024] KEHC 11992 (KLR)

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

CIVIL

CIVIL APPEAL 552 OF 2019

JM NANG'EA, J

OCTOBER 7, 2024

BETWEEN

MADISON INSURANCE COMPANY LIMITED APPELLANT

AND

KHS EAST AFRICA LIMITED RESPONDENT

((Being an appeal from the judgement and decree of the Chief Magistrate's court at Nairobi Milimani Commercial Courts in Civil Suit No. 4175 of 2016 delivered by Hon. K. I Orenge (Mr) -SRM on 30/8/2019)

JUDGMENT

Grounds of Appeal and reliefs sought.

1. By a Memorandum of Appeal filed on 25/9/2019, 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.

The parties' pleadings in the lower court.

3. In the impugned judgment, the trial magistrate entered judgement for the respondent in the sum of USD 42,000 together with the costs of the suit and interest at court rates. The respondent had sued the appellant over a Travel Insurance Policy No. 041202 it had taken with the appellant in favour of its 34 Technicians who were travelling to Kinshasa in the Democratic Republic of Congo to install and commission a glass bottling line on behalf of its client. One of the technicians (Mr John Gacheru Kamau) was injured in the course of duty when a fork hit him injuring his left leg while he was operating an offloading equipment. The respondent averred that the information was given to the appellant as well as its said agent and Re-insurer, Asistencia S.A Compania De Seguros Y Reaseguros Mapfre, (hereinafter referred to as "Mapfre") who were thereafter provided with regular updates of medical treatment accorded to the victim in Kinshasa. The respondent further averred that under the policy, Mapfre was to take charge of " transferring the insured to a properly equipped health centre or repatriating to his /her country of residence" (sic).
4. In line with the stated policy of insurance, the respondent further avers that it became necessary to urgently repatriate the injured worker to his home country of Kenya for specialized treatment after his condition deteriorated and it informed the appellant of the developments. The appellant's response was that work injury claims were excluded under the insurance policy and therefore it would not cover the medical costs including those related to repatriation of the injured Technician.
5. The respondent was disagreeable and after several attempts at settling the dispute which came a cropper, the respondent decided to shoulder medical costs including the costs of repatriating their injured worker who faced possible amputation to Kenya at a cost of USD 42,000, and brought the suit before the lower court. The appellant is said to have apologized to the respondent on 2/11/2015 for apparent misrepresentation in the terms and conditions of the policy of insurance that accidents occurring during manual labour were covered under the policy. The suit thus became necessary to recover the medical and repatriation costs. The respondent alleged several particulars of negligence and misrepresentation by the appellant including deliberate misrepresentation that the insurance policy was specifically tailored as a "Travel Insurance Cover" for its employees in the Democratic Republic of Congo.
6. The appellant averred in its statement of defence that it was made aware of the respondent's need for Travel Insurance Cover which it was willing to offer "on behalf of and as an agent" of Mapfre. The appellant, however, contends that the contract was never completed. It further confirms receiving information about the injured worker but contended that the circumstances in which the injury occurred was not covered by the policy. Moreover, the appellant contends that it was Mapfre's obligation to transfer an insured client for treatment and/or repatriate him/her where necessary as confirmed by the respondent in its plaint. The appellant therefore contends that it was not under a contractual obligation to meet the claimed treatment and repatriation costs. It also contested the respondent's claim that it was aware of the nature of the work the former's workers were to undertake in Kinshasa observing that it was the respondent's duty to reveal the kind of work to be performed. The appellant traversed all the other material claims in the suit.
7. For the above reasons inter alia the trial court was urged to dismiss the suit with costs.



The parties' evidence in the lower court.

8. The respondent reiterated its averments in the suit. Its General and Service Manager (PW1) insisted that its employees working in Kinshasa were given insurance cover for risks including illness, and injuries in the course of duty and repatriation costs. While admitting under cross-examination by the appellant's Counsel that premium attaching to the cover was not paid either before or after the occurrence of the alleged insured event, PW1 told the court that they had been given a grace period of 30 days to pay agreed premium and that the accident in issue occurred within that period.
9. The said John Gacheru Kamau (PW2) also testified confirming that he was injured in the course of duty on 25/10/2015 on behalf of the respondent in Kinshasa. The witness added that his medical and repatriation costs were paid by the appellant. He didn't know the details of the contractual relationship between his employer and the appellant.
10. In support of the respondent's evidence, a copy of the insurance policy in question showing the terms and conditions thereof were tendered and admitted.
11. The appellant called its head of Travel Insurance (DW1). He told the court that they refused to pay the claimed costs because the executed policy excluded work-related injuries for which premiums were not paid.. The witness explained that travel insurance policy issued by the appellant covers travel risks when an insured is transported by bus or flight while in Kinshasa. The appellant had had similar insurance policies with the respondent before.
12. 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 v 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.
13. Learned Counsel for the parties filed written submissions. The appellant's advocates maintain that the policy of insurance between the parties did not crystallize and none was executed . Moreover, the court is told that an insurance contract cannot be legally binding on insurer if applicable premium is not paid (see *Halsbury's Laws of England* (4th Edition) Vol.25 alluded to in the appellant's submissions). This position is reiterated in *Roy Transporters Ltd V. Kenya Tea Development Authority* (2007) eKLR also referred to in the appellant's submissions in which this court added that where a grace period is given for payment of insurance premium the policy document will stipulate whether or not indemnity is provided in case the insured event occurs during the grace period.
14. It is further the appellant's submissions that were what it calls proposed insurance cover in existence, it expressly excluded "accidents due to a physical or manual risk (paid or not) such as: driving of vehicles, use of machinery, loading and unloading, work in heights/levelling or confined locations, assembly of machinery, undertaking work onfloating or under water/sub-aquatic platforms, mines or quarries, use of chemical substances, laboratories of any kind and any other dangerous activities "as per page 11 (d) of the exhibited policy".
15. For the stated reasons inter alia the appellant denies liability to indemnify the respondent and faults the trial Magistrate's finding to the contrary.
16. The respondent on its part submitted that the trial court rightly found in its favour. Contrary to the appellant's evidence and submissions that it had no privity of contract with the respondent and that



Mapfre was the one that had a contractual relationship with the respondent. The respondent contends that it only recognized the appellant as its insurer in relation to the insurance policy in issue. Learned Counsel for the respondent cited and relied on the case of *William Muthee Muthani V. Bank of Baroda* (2014) eKLR which sets out the following exceptions to the doctrine of privity of contract:

- i. One must show existence of a collateral contract to the one in question to which he was a party.
 - ii. An agency relationship in which the parties transacted has to be demonstrated.
 - iii. A trust by which the claimant contracted and held property in trust has to be shown.
- And
- iv. One who seeks to avail himself of the benefit of exception from the doctrine of privity of contract must demonstrate an express or implied term in the agreement made for the benefit of another person.

17. The respondent asserts that the appellant cannot avail itself of the benefits of any of the stated exceptions on the evidence and in the circumstances of this matter. It is further the submissions of the respondent's advocates that an insurance policy is valid regardless of immediate non-payment of premiums and that there can be no insurance without payment of premiums, immediately or afterwards as may be agreed (see MacGillivray & Parkington as well as section 156 (1) of the *Insurance Act* referred to in Counsel submissions).
18. In finding for the respondent, the learned trial magistrate observed that there is no evidence that the exclusion clause the appellant relies upon was agreed between the parties and so the respondent was not aware that the policy did not cover compensation for workers' injuries and repatriation costs. In any event, the court noted that the respondent's evidence that the policy in question covered illness and injury at the work place was not challenged.
19. Citing various local and international legal authorities including the case of *United India Insurance Co. Ltd v. M.K. Corporation* (1996) 6 SCC India 428 and *Securicor Courier Kenya Ltd V. Onyango & Another* being Civil Appeal No. 323 of 2012, the trial court stressed that parties to a contract of insurance have equal obligations of disclosure of material information in good faith that may influence the decision whether or not to enter into the contract in line with the famous insurance principle of *uberrimae fidei*. The stated authorities also posit that where there are exclusion clauses in such a contract, the exemption must be clear and unambiguous and should not be couched in a manner that completely excludes liability or indemnity. For these reasons *inter alia* the trial court therefore found no lawful justification for the appellant's refusal to indemnify the respondent. The appellant was determined to be in breach of the insurance contract.

Determination

20. I must concur with the appellant. It is not in dispute that the parties didn't execute a formal insurance contract and the respondent did not pay the requisite insurance premium. Whether or not the accident in issue occurred during the said grace period, the respondent was obligated to pay the applicable premium before or after the time of occurrence of the purported insured event as may be agreed by the parties. Moreover, the terms of any agreement between the parties regarding any grace period allowed to the respondent were not placed before the lower court.
21. In the result, the appeal is allowed. The judgement and decree of the lower court is set aside and substituted with an order dismissing the suit with costs to the appellant. Since it appears that the appellant did not properly advise the respondent on the insurance cover it wanted, the parties will bear their own costs incurred in this appeal as well as in the lower court.



22. Judgement accordingly.

JUDGEMENT DELIVERED VIRTUALLY THIS 7TH DAY OF OCTOBER 2024 IN THE PRESENCE OF :

The Appellant's Advocate,

The Respondent's Advocate,

The Court Assistant,

J. M. NANG'EA

JUDGE.

