



**Sanlam General Insurance Co. Ltd v Owurwa (Civil Appeal
E027 of 2022) [2023] KEHC 3201 (KLR) (13 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3201 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E027 OF 2022
WA OKWANY, J
APRIL 13, 2023**

BETWEEN

SANLAM GENERAL INSURANCE CO. LTD APPELLANT

AND

JANE KWAMBOKA OWURWA RESPONDENT

*(Being an Appeal against the Judgment of Hon. M. C. Nyigei – SRM
Nyamira dated and delivered at Nyamira on the 2nd day of March 2022 in
the original Nyamira Chief Magistrate’s Court Civil Case No. 140 of 2018)*

JUDGMENT

Background

1. The Appellant herein, Sanlam General Insurance, sued the Respondent before the Lower Court seeking the following orders: -
 - (a) A Declaration that the Plaintiff is not liable to indemnify the Defendant and/or pay any claim in respect of damages arising from Nyamira CMCC No’s 31, 36, 37, 38, 41, 65, 83 and 85 all of 2018 and any other suits that may have been filed herein before and those that may be filed hereinafter pursuant to the road traffic accident that occurred on 15/12/2017 involving Motor Vehicle Reg. No. KBR xxxL Toyota Station Wagon.
 - (b) Costs of this suit.
 - (c) Interest on (b) above.
2. The Appellant’s case was that it issued the Respondent with a private Motor Insurance Policy No. 053/070/1/245334/2015/09 for the Respondent’s motor vehicle Registration No. KBR xxxL which policy stipulated that the motor vehicle was for private use only.



3. It was the Appellant's case that contrary to the express terms of the policy document, the Respondent used the said motor vehicle to ferry fare paying passengers.
4. The Appellant averred that on 15th December 2017, the Respondent's said motor vehicle was involved in a Road Traffic accident whereby it was reported that several fare paying passengers were injured while others died.
5. The Appellant averred that the Respondent did not notify it of the accident in breach of the terms of the insurance contract and further, that several claimants had filed suits thus necessitating the filing of the suit seeking orders for a declaration that the Appellant is not liable to indemnify any of the said claimants in respect of any third party claims arising from the said accident.
6. The Respondent did not defend the suit before the trial court and after considering the evidence presented by the Appellant, the trial court dismissed the Appellant's suit while noting that the Appellant did not prove that the passengers in the suit motor vehicle were fare paying passengers.
7. Aggrieved by the decision of the trial court, the Appellant filed the instant appeal and listed the following grounds in the Memorandum of Appeal: -
 1. That the learned Trial Magistrate erred in law and fact in dismissing the Appellant's suit.
 2. That the learned Trial Magistrate erred in law and fact by failing to appreciate that the Appellant had discharged its burden of proof to the required standards.
 3. That the learned Trial Magistrate erred in law and fact by failing to make a finding that the Respondent was in breach of the insurance policy terms and conditions.
 4. That the learned Trial Magistrate erred in law and fact by failing to make a finding that the Respondent's motor vehicle Reg. No. KBR 081L was being used outside the purpose for which it was insured; in breach of the terms of the policy.
 5. That the learned trial Magistrate erred in law and fact by not evaluating and analyzing the entire evidence on record adequately hence arriving at an erroneous decision.
 6. That the learned Trial Magistrate erred in law and fact in failing to consider the Appellant's submissions and legal authorities relied upon in support of their case which failure occasioned a miscarriage of justice.
 7. That the learned Trial Magistrate erred in law and fact in making an erroneous decision that had no backing in law.
 8. That the learned Trial Magistrate erred in law and fact by making its decision without addressing herself to the law and facts of the case.
 9. That the learned Trial Magistrate's decision albeit, a discretionary one was plainly wrong.
8. The Appellant canvassed the appeal by way of written submissions while the Respondent did not participate in the appeal.
9. On whether the trial court erred in finding that the Respondent was not in breach of the insurance policy terms, the Appellant submitted that the trial court failed to consider all the evidence on record especially the investigation report (P Exhibit 3) which indicated that the suit motor vehicle had been hired to ferry relatives of one Fridah Nyabate to her graduation.



10. According to the Appellant, since the Respondent had obtained a private motor insurance policy, the vehicle ought to have been used for private use only and not for hire.
11. It was submitted that the insurer was not liable in respect of any accidents, loss, or liability incurred when the vehicle was being used contrary to the limitations of use clause. For this argument, the Appellant cited the decision in *Monarch Insurance Company Limited v Swaleh Moi Juma* [2020] eKLR where the court upheld the trial court's declaration to repudiate the cover on liability against any risks or claims filed under the policy of insurance; wherein, pursuant to an investigation conducted by the appellant, it had been found that the motor vehicle was in the business of ferrying fare paying passengers along the said road.
12. It was further submitted that the Respondent also breached the terms of the insurance policy by carrying excess passengers when the motor vehicle had the capacity of 5 passengers.
13. The Appellant noted that the investigation report revealed that the motor vehicle had carried 8 adults and 2 minors a fact which the trial Magistrate acknowledged in her judgment.
14. It was submitted that by carrying excess passengers, the Respondent contravened General Exception (2) of the policy contract which provided that the insurer will not incur any liability where the vehicle was carrying more than its authorized capacity.
15. The Appellant maintained that since the Respondent had breached the terms of the insurance policy, it was entitled to the declaration that it was not liable to indemnify the Respondent for claims arising from the accident that occurred on 15th December 2017.
16. It was submitted that the trial court erred by failing to evaluate the entire evidence on record thereby occasioning a miscarriage of justice.
17. The Appellant asserted that it proved its case to the required standards.
18. I have carefully considered the Record of Appeal and the Appellant's submissions.
19. The main issue for determination is whether the trial court arrived at the correct decision in dismissing the Appellant's suit.
20. As I have already stated in this judgement, the Respondent did not defend the suit before the trial court. A perusal of the Lower Court's proceedings reveals that interlocutory judgment was, on 23rd January 2019, entered in favour of the Appellant.
21. The case then proceeded for formal proof on 15th December 2021 when the plaintiff's witness Mr. Geoffrey Ngatia (PW1) testified that: -
 - “ 1. The premium that was charged did not include the loss that occurred on 15/12/2017. It was insured for private use and not for fare paying passenger. It is contrary to part 3 of the policy that was signed.
 2. It contained part 5 of the proposal where the client did indicate that the motor vehicle was to be used as a private car.
 3. The client declared that the information she declared was true to the best of her knowledge.
 4. It also contravened Limitation as to use the..... I have documents to support this proposal;



Form exhibit – 1.Policy documents – Exhibit 2.Investigation Report – Exhibit 3.Certificate of insurance for KBRO – Exhibit 4.Repudiation Notice 2/6/2018 – Exhibit 5.Renewal endorsement – Exhibit 6.Claims in respect to Nyamira CMCC 31, 36, 37, 38, 41, 65, 83, and 85 of 2018 – Exhibit 7 (a-h).Demand letters for CMCC 31 – 85 of 18 – Exhibit 8 (a-h).Police Abstract – Exhibit 9.Motor vehicle copy of records for KBR xxxL – Exhibit 10.”

22. A perusal of the Investigation Report (P Exhibit 3) reveals that the suit motor vehicle had been hired to ferry the relatives of one Fridah Nyabate Moindi to a graduation ceremony.
23. *Black’s Law Dictionary* defines interlocutory judgement as provisional, temporary not final judgment. Upon entry of interlocutory judgement, a claimant is required to formally prove his claim.
24. In this case, I note that the Appellant presented both oral and documentary evidence in support of its case.
25. The Appellant’s case was that the Respondent’s motor vehicle was, at the time of the accident, being used outside the policy terms and conditions to ferry fare paying passengers yet it had been insured for private use only.
26. The Appellant further averred that the Respondent failed to notify it of the accident, an act which constituted breach of the terms and conditions of the insurance contract.
27. The Appellant further listed the particulars of breach by the Respondent as follows: -
 - a) Allowing her Motor Vehicle Reg. No. KBR xxxL to be used as a Matatu and or Taxi while she knew perfectly that it had been insured for private use only.
 - b) Using her Motor Vehicle Reg. No. KBR xxxL for hire and gain when she knew that was not insured for hire and gain.
 - c) Ferrying fare paying passengers in a Motor Vehicle which she knew had been insured for private use only.
 - d) Failing to notify the insurer of the said accident as required under the policy terms and conditions.
 - e) Willfully and knowingly breaching the terms of the policy contract.
28. The trial court held as follows in the impugned judgment: -

“It is therefore my finding that the plaintiff has not proved that the defendant had fare paying passengers in the motor vehicle at the time of accident.

Evidence has also been led to show that KBR xxxL had excess passengers at the time of the accident. This fact has actually been proved from 8 claims that have been filed in court. Suffice it to say, babies carried by their mothers are usually not counted in the sitting arrangement of any motor vehicle. Having proved this, in my opinion, does not mean that the insurer is indemnified from making good the claim. To the contrary, the insurer is at liberty to make good the claims to the limit of the passenger capacity of the motor vehicle insured.

For the above reason, and for failure by the plaintiff to prove that indeed these were fare paying passengers and not just lawful passenger, I will find that the plaintiff has not proved



his case against the defendant on a balance of probabilities and proceed to dismiss the case. The defendant never appeared and so there will be no order as to costs.”

29. My finding is that the trial court did not correctly evaluate the pleadings and the evidence presented before it when arriving at the verdict that the Appellant did not establish that there were fare paying passengers in the suit motor vehicle. I say so because, besides the issue of fare paying passengers, the Appellant also enumerated and proved other particulars of breach of the terms of the insurance contract which entitled it to repudiate the contract. Indeed, the Appellant established that it sent its notice of repudiation of contract (Exhibit 5) which notice the Respondent did not dispute or contest.
30. In a nutshell, I find that the Appellant proved its case against the Respondent before the Lower on a balance of probabilities. The evidence on record shows that the Respondent was using the suit motor vehicle for purposes other than those declared in the proposal form. A vehicle that had been clearly insured for private use was not only converted to be a vehicle for hire but also carried excess passengers contrary to the passenger limit allowed by the cover.
31. Consequently, I find that the appeal is merited and I therefore allow it and set aside the judgement of the Lower Court delivered on 2nd March 2022.
32. In view of the fact that the Respondent did not enter appearance before both this Court and the Lower Court, I make no orders as to costs.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS 13TH DAY OF APRIL 2023.

W. A. OKWANY

JUDGE

