



Madison Insurance Company Kenya Limited v Kiarie & another (Civil Appeal E077 of 2021) [2023] KEHC 17553 (KLR) (16 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17553 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E077 OF 2021**

FROO OLEL, J

MAY 16, 2023

BETWEEN

MADISON INSURANCE COMPANY KENYA LIMITED APPELLANT

AND

LILIAN WANJIRU KIARIE 1ST RESPONDENT

ROBERT NJIRU & RACHAEL WANJIKU (BEING THE ADMINISTRATORS OF THE ESTATES OF PURITY MWIHAKI MAINA; DOROTHY MUTHONI & JOEL MAINA - DECEASED) 2ND RESPONDENT

(BEING AN APPEAL FROM THE JUDGMENT AND DECREE OF HON. Y. M BARASA(S.R.M.) DELIVERED ON 2ND DECEMBER 2021 IN NAIVASHA CMCC NO 661 OF 2017)

JUDGMENT

1. The Appellant was the Plaintiff in the primary suit, where they sued the 1st respondent as the registered owner and beneficial owner of Motor vehicle KBG 326L (hereinafter referred to as “the suit motor vehicle”) which was insured by the appellant under insurance policy number CTY/701/084543/2015. It is averred that the 1st respondent despite being aware of the policy conditions blatantly disregarded the same and used the suit motor vehicle for hire, reward and/or commercial travelling in gross violation of the terms of the insurance policy/contract. The appellant therefore pleaded that it should not be held liable to settle any claim arising therefrom by virtue of the doctrine of subrogation. The Appellant sought for the following orders;
 - a. A declaration do and hereby issue that the Plaintiff is entitled to repudiate the Policy No. CTY/701/084543/2015 for breach of the insurance contract.



- b. Corollary to the foregoing, a declaration do and hereby issue that the plaintiff is not liable to make any payment under Insurance policy number CTY/701/084543 in respect to any claim against the Defendant in the unlawful use of motor vehicle Reg No. KBG 326L
 - c. Costs and incidental to this suit together with interest thereon.
2. The 1st respondent did not enter appearance nor did she file a statement of defence. Interlocutory judgment was entered as against her and the matter proceeded for trial without her participation.
3. The Interested parties filed a defence on 24.2.2020 in which they admitted that the 1st Respondent was insured by the appellant but denied that the motor vehicle was being used for hire, reward and or commercial travelling in gross violation of the policy document and the particulars of breach of the insurance policy. They contended that the motor vehicle was given to the deceased freely for use on the material date and was not being used as a self-drive or taxi and asked that the suit be dismissed.
4. After the hearing, the learned magistrate in his judgment delivered on 2nd December 2021 found that the appellant had failed to prove its claim on a balance of probability and dismissed the suit with no orders as to costs.
5. The Appellant being dissatisfied by the judgment filed their memorandum of Appeal on 21st December, 2021 seeking to have the judgment reversed and the suit be allowed in its entirety. They further sought that they be awarded costs of the suit in Naivasha CMCC No 661 of 2017 and costs of the Appeal.
6. The Appellant raised grounds of appeal namely: -
 - a. That the Learned Trial Magistrate erred both in law and in fact by dismissing the suit even though interlocutory judgment had been entered against the 1st Respondent and the suit proceeded as an undefended cause.
 - b. That the Learned Trial Magistrate erred both in law and in fact by misapprehending himself on the facts and the law leading to an erroneous determination.
 - c. That the Learned Trial Magistrate erred both in law and in fact by misapprehending the provisions of the Insurance (Motor Vehicles Third Party Risks) and disregarding the import of section 5 (b) of the said Act.
 - d. That the Learned Trial Magistrate erred both in law and in fact by adopting a blanket application of section 10 (4) of the *Insurance (Motor Vehicles Third Party Risks) Act*.
 - e. That the Learned Trial Magistrate erred both in law and in fact by disregarding and purporting to re write the policy of insurance between the Appellant and the 1st Respondent.
 - f. That the Learned Trial Magistrate erred both in law and in fact by finding that the Appellant could not repudiate claims arising from use of insured motor vehicle contrary to conditions of the insurance policy.
 - g. That the Learned Trial Magistrate erred both in law and in fact by finding that an insurance policy cannot be separated from any claim arising from it to entitle an insurer to repudiate a claim arising from use of insured motor vehicle contrary to policy conditions.
 - h. That the Learned Trial Magistrate erred both in law and in fact by failing to distinguish between repudiating a policy and repudiating a claim in insurance.



- i. That the Learned Trial Magistrate erred both in law and in fact by failing to fully consider and sufficiently appreciate the merits of the Appellant's filed written submissions dated 22.10.2021 leading to an erroneous determination.
- j. That the Learned Trial Magistrate erred both in law and in fact by failing to be bound by the doctrine of stare decisis thus delivering a judgment devoid of relevant and recent case law
- k. That the Learned Trial Magistrate erred both in law and in fact by misapprehending the role and extent of an interested party's involvement in a suit.

Facts at Trial

7. The appellant called one witness. GATU CHARLES, a legal officer at Madison Insurance. He testified that he knew Betty Mugure, the deputy manager who had filed her witness statement and asked to have it adopted as it captured the appellant's evidence to be relied on in the suit. He stated that they insured the suit motor vehicle and after the accident occurred, commissioned investigations to be carried out to inquire and ascertain the circumstances under which the accident occurred. The investigations findings were that the insured breached the policy by hiring the vehicle contrary to what it had been insured for which was for private use. Due to breach of policy terms they were entitled to repudiate the policy.
8. The witness further pointed out that the particulars of the breach were specified in the plaint and the 1st Respondent had withheld information when she filled the claim form. The doctrine of utmost good faith was thus also breached. It was his evidence that once they repudiate a claim, they were not liable to compensate any victim and the insured should handle the claim on her own. Their decision to repudiate the claim was based on breach of the insurance policy and the finding of the investigations they undertook. He produced the policy document and the investigation report into evidence.
9. Upon cross examination, he stated that the policy was issued and was valid from 18.4.2015 to 17.4.2016. The accident occurred on 4.10.2015 when the policy was still in force. There were many suits filed by the victims of the accident being; CMCC N0 862, 864 and 866 of 2015, and some filed in 2016. He stated that the suit was brought under section 10 of Cap 405 and he was aware that the insurance company was to file the suit within 3 months of a claim being lodged for the suit to be avoided. Civil suit 864 was filed on 15.9.17 therefore out of time. He also did not have evidence have evidence that notices served under section 10 (4) *Insurance (Motor Vehicles Third Party Risks) Act* were received.
10. Upon re- examination PW1 stated that they issued notices via email before filing the suit. The said notices were issued to B.G Wainaina Advocate. The interested party did not call any witness but by consent, the interested parties' documents were produced into Evidence.

Appeal Submissions

11. The Appellant filed submissions on 24.01.2023 and submitted that the suit involved a contract between the Appellant and the 1st Respondent thus the 2nd Respondent were strangers to the insurance contract as far as breach of the insurance terms is concerned. The 1st Respondent did not challenge the claim against her and thus interlocutory judgment was entered against her on 5.08.2019. It was submitted that the hearing was purely for purposes of producing documentary evidence which the Appellant relied on. This evidence, was not challenged by the 1st Defendant.
12. Further due to the principal of privity of contract the 2nd Respondent was excluded from raising issue and/ or objecting to declarations touching on breach of contract. The Trial court failed to appreciate the limited role the interested party had in the suit. Reliance was placed on the cases of James Ithale



Akothee vs Abidiwele Ali Abdi & Another [2020] e KLR, Jerotich Seli & 7 others vs Kenya Power & Lighting Company Limited & 3 others [2020] e KLR, Kenya Women Finance Trust vs Benard Oyugi Jaoko & 2 others [2018].

13. It was also submitted that section 5(b) of the Act was not appreciated by the Trial Court. That clause MOT003 of the insurance contract provided as follows;

LIMITATIONS AS TO USE- PRIVATE & PROFESSIONAL USE : Use for social, domestic and pleasure purposes and for insured's business. The policy does not cover for racing, competitions, rallies or trials (or use for practice for any of them) or the carriage of passengers for hire or reward.

14. That the contract specified at the top of its first page that it covered motor private class. It was also submitted that the investigation report revealed that the motor vehicle was being used for hire and reward of Kshs 9,000 was paid out as the hire fee. The evidence presented was uncontroverted and thus the appellant was entitled to repudiate the claim. Further, the appellant submitted that through an email dated 3.06.2016, they communicated with the 2nd Respondent's advocate, B.G Wainanina & Co Advocates that they would not indemnify her in respect of claims arising from the accident. Reliance was placed on the case of Kenya Power & Lighting Company Limited vs Rassul Nzemer Mwadzaya [2020] e KLR AND Kenyan Alliance Insurance Company Limited vs Pizzaro Kaungnania & Another [2018] e KLR.
15. Also, while relying on the case of JKG & Another vs General Accident Insurance Company Limited [2019] e KLR, Patrick Gukura Muraya vs Co-operative Insurance Com Limited [2019], Kenya Orient Insurance Company Limited vs Caroline Wanjiru Mwaniki & Another [2021] e KLR and m'mairanyi 7 otehers vs Blueshield Insurance Company Limited [2005] 2 EA 280 it was submitted that the trial court failed to appreciate that an insurer may admit validity of an insurance contract/policy but deny being under any obligation to settle claims arising from the admitted insurance policy, that the Trial court failed to comprehend and differentiate the provisions of section 5(b) and 10(4) of the *Insurance (Motor Vehicles Third Party Risks) Act*.
16. Lastly, it was submitted that the Trial court failed to appreciate the doctrine of stare decisis and failed to consider the pertinent settled issues raised in the Appellant's submissions. The case of Consolata Awino Ogotu vs South Nyanza Sugar Co Limited [2019] e KLR on this doctrine was cited.
17. The 2nd Respondent filed submissions on 19.01.2023 and raised 3 issues. As to whether the Appellant's suit was filed out of time, it was submitted that the action would only be valid if the insurer had within fourteen (14) days of the filing of the primary suit given notice to the Plaintiff in that matter that it was not liable as per Section 10 (4) of the *Insurance (Motor Vehicles Third Party Risks) Act*. It was submitted that repudiation of liability was twofold, first by way of giving notice to the Plaintiff in the primary suit and secondly by filing a declaratory suit before or not more than three months following commencement of the primary suit.
18. The primary suits in this case, Naivasha civil suit 862 of 2016, 864 of 2016 and 866 of 2016 were filed on 28.9.2016 and the Appellant filed its suit on 15.09.2017, a year after. Therefore, the finding of the Trial court that it lacked jurisdiction to entertain the matter was not an error. Reliance was placed on the case of Mombasa HCC no 92 of 2015, Pacis Insurance Company Limited vs Mohammed F. Hussein, Kajiado HCCC No114 of 2017 Britam General Insurance Co Kenya Limited bs Josephat Ondieki, Nyamira HCCC No 1 of 2019 the Kenya Alliance Insurance Company Limited vs Eunice Nyaboke Nyaribari & Cleophas Nyamongo, Kisii HCCA No 18 of 2018 Geminia Insurance Company Limited vs EN (Minor Suing through this father and next friend AAO).



19. Secondly, it was submitted that the Appellant's suit could only proceed under Order 10 Rule 9 of the Civil Procedure Rules where there is a prayer for liquidated damages and in this case there was none therefore the interlocutory judgment was irregular and had no basis in law and the Trial court was justified to ignore the same. This point was buttressed by the case of Solomon Mwobobia Nkuraaru vs Jacob Mwiti (2015) e KLR.
20. Thirdly, it was submitted that the onus of proving the case was on the Appellant despite non participation of the 1st Respondent. The only evidence was the investigation report by PARITY LOSS ASSESSORS which contained statements made by people who were not called as witnesses in support thereof. Further that the contents amounted to hearsay and such inadmissible. It was also based on information the investigator was told by other people and not what he knew personally. The 2nd Respondent relied on the case of Homabay Civil Appeal No 50 of 2015 William Okoth Abatha (legal representative of Pamela Atieno Nyakongo – deceased vs Pioneer Assurance Company Limited.

Analysis & Determination

21. I have considered the pleadings, evidence presented and submissions of the parties in this appeal, this court has a duty to subject the whole proceedings to fresh scrutiny and make its own conclusions.
22. This duty was reshaped in the case of *Selle & Another Vs Associated Motor Boat Co Ltd & others* (1968) EA 123 where it was stated that;

“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the high court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. (*Abduk Hammed saif V Ali Mohammed Sholan*(1955), 22 E.A.C.A 270.

23. From the onset, it is important to set out what is not disputed. It is not in contention that the Appellant is the insured of Motor vehicle KBG 326L which is owned by the 1st Respondent under insurance policy number CTY/701/084543/2015. It is also not contested that there are suits that have been filed following an accident that occurred involving the interested parties and the said motor vehicle being Naivasha civil suit 862 of 2016, 864 of 2016 and 866 of 2016. The current status of the said cases was not disclosed.
24. Pertinent to the determination of issues are the pleadings, which form the basis of the party's respective cases before the trial court. In *Wareham T/A A.F Wareham & 2 others Vs Kenya post office savings Bank* {2004} 2 KLR 91, the court of appeal stated in this regard that;

“we have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or court on the basis of those pleadings pursuant to provisions of Order XIV of the civil procedure



Rules. And the burden of proof is on the plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail. {Emphasis added}

25. The issues as discerned from the pleadings and which fall for determination before this court are thus;
 - i. Whether appellant proved its case on balance of probability.
 - ii. Privity of contract and scope of interested party participation in these proceedings.
 - iii. Whether the trial court misapprehended the difference between the provisions of Section 5 (b) and 10 (4) of the Insurance Motor vehicle (third party risk) Act.
 - iv. Whether a declaration should be issued as regard indemnity of the Appellant to the 1st Respondent.
 - v. Who should pay costs of the suit.
26. It is trite law that the duty of proving any allegation lay on the person that alleges it to be true. In this case the Appellant contends that there was breach of the insurance contract by the 1st Respondent. The onus was thus on the Appellant to prove the allegations they has raised. Sections 107, 108 and 112 of the Evidence Act provide as follows;
 107. Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.
 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.
 112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.
27. This was also stated by the Court of Appeal in Jennifer Nyambura Kamau v Humphrey Mbaka Nandi NYR [2013]eKLR as follows;

“We have considered the rival submissions on this point and state that section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the Evidence Act provides that “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.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side.”



28. In cases of this nature the standard of proof is said to be on a balance of probabilities hence what is required is that it must carry a reasonable degree of probability. Kimaru, J in *William Kabogo Gitau vs. George Thuo & 2 Others* [2010] 1 KLR 526 stated that:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

29. The appellant pleaded that the 1st respondent leased out the suit motor vehicle for financial gain and therefore breached pertinent terms of the contract of insurance. They were thus justified to cancel and repudiate the same. They called a witness who testified and produced the investigation report and the insurance policy. Their evidence was not challenged.

30. The insurance policy under clause MOT003 provides as follows;

LIMITATIONS AS TO USE- PRIVATE & PROFESSIONAL USE :

Use for social, domestic and pleasure purposes and for insured's business. The policy does not cover for racing, competitions, rallies or trials (or use for practice for any of them) or the carriage of passengers for hire or reward.

31. The investigation report indicates at the conclusion as follows;

“We recommend declination of the lodged claim due to breach of the use clause as the vehicle was generally used for private/public hire- both taxi and on self-drive basis yet it was privately insured.”

32. Justice Majanja in the case of *Kenyan Alliance Insurance Company Limited v Pizzaro Kaungania & another* [2018] Eklr observed that;

“A significant feature of an insurance contract is that it is founded on utmost good faith. It is often referred to as a contract *uberrimae fidei*. The requirement for each party to disclose material facts and not to misrepresent facts before the insurance contract is concluded was settled in the old case of *Carter v Boehm* [1766] 3 Burr 1905 by Lord Mansfield who stated that:

Insurance is a contract upon speculation. The special facts upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the underwriter trusts to his representation, and proceeds upon the confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact, and his believing the contrary.

12. Once there is non-disclosure or misrepresentation of material facts, the insurer is entitled to avoid the insurance contract. The terms upon which the insurer is entitled to avoid the insurance contract were expressed in *Pan Atlantic*



Insurance Co. Ltd and Another v Pine Top Insurance Co. Ltd [1994] 3 ALL ER 581,638:

If your Lordships accept this conclusion, the position will be as follow. Whenever an insurer seeks to avoid a contract of insurance or re-insurance on the ground of misrepresentation or non-disclosure, there will be two separate but closely relate questions. (1) Did the misrepresentation or non-disclosure induce the actual insurer to enter into the contract on those terms? (2) Would the prudent insurer have entered into the contract on the same terms if he had known of the misrepresentation or non-disclosure immediately before the contract was concluded? If both questions are answered in favour of the insurer, he will be entitled to avoid the contract, but not otherwise.”

33. I have perused the insurance contract between the Appellant and the 1st Respondent, it expressly provided for that the insured motor vehicle will be used for private use and not be put for commercial hire. As it stands, the 1st Respondent used the motor vehicle for hire. The investigation report, which was admitted into evidence and was unchallenged indicated that the motor vehicle was hired out through the 1st Respondent’s boyfriend one Mr. Mwangi Nderitu and Mr. Martin Kabra of Vimar Tours.

34. The consequence of the 1st Respondent failing to file a defense and/or tendered evidence to rebut the appellants case means that the evidence of the Appellant remained uncontroverted and unfortunately, it is not the place of the interested party to deny the claim on her behalf. The issue of uncontroverted evidence was espoused in the case of Karuru Munyororo vs. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988, where Makhandia, J (as he then was) held that:

“The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff’s evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon.”

35. If the 1st Respondent at the time of taking out the policy knew that the vehicle was going to be used for the purpose of hire and/or reward but did not disclose this, the failure to do so clearly amounted to the failure on her part to disclose to the insurer a fact material to the risk. On the other hand, if the 1st Respondent put to use the vehicle for a purpose for which it was not insured, that would amount to a breach of the terms and conditions of the policy. Either way the Appellant herein, would not be liable. The reason for this, as was held in The Motor Union Insurance Co. Ltd. vs. A K Damba [1963] EA 271 is that this is because had the proposer disclosed all the relevant and material information in the proposal form, the plaintiff insurance company might very well have taken a different attitude to the risk.

36. The court in Nairobi HCCC No. 9 of 2004 - Gateway Insurance Co. Ltd -vs- Albert J. N. Njagi held that:

“In so far as the vehicle had been put to use other than that for which it was insured, I hold that the defendant did obtain the policy of insurance through non-disclosure of a material fact. And, to the extent that the vehicle was used to carry passengers whilst it was only supposed to carry the defendant’s own goods, the defendant is deemed to have made representations of fact which were false in material particulars. Accordingly, the plaintiff cannot be under an obligation to honour its part of a contract of insurance which had been founded on material non-disclosure. I therefore grant the declaration that the plaintiff is not liable to



make payment under the policy of insurance, in respect to any claim by any passenger in the motor KSW 814, arising from an accident on 29th October 2001”

37. Accordingly, the balance of probability having been achieved in favor of the Appellant. I find that the contract was breached by the 1st Respondent and the Appellant was entitled to repudiate the claim.

Privity of contract and scope of interested party participation in these proceedings.

Privity of contract.

38. The appellant did submit that the suit before the trial magistrate was with regard to a contract of insurance between the appellant and the 1st respondent. It was only the 1st respondent who could have rightfully objected to the declarations sought in the plaint. The 2nd respondents were strangers to the said contract as far as interpreting the contract and due to privity of contract they were excluded from raising issues and/or objecting to declaration sought as the contract did not involve them.
39. In support of the said submissions on privity of contract the appellant relied on the citation of Kenya women Finance Trust Vs Benrnard oyugi Jaoko & 2 others (2018) eklr at page 11 guided by the precedent from the court of Appeal in ;

The court of appeal has had an opportunity to deliberate on the doctrine of privity at length in Savings & loan {k} Liimited Vs Kanyenje Karangaita Gakombe & Another {2015} Eklr. The court rendered itself as under;

“In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party.

40. Also in the court of appeal decision in the case of Aineah Liluyani Njirah Vs Aga Khan Health Service {2013} Eklr, The court stated that;

“Privity of contract is a long-established part of the law of contract. In the early part of the last century, it was identified by viscount Haldane LC as one of the fundamental principles of the English contract law. See Dunlop Pneumonic Tyre Vs selfridge and co Ltd. It was stated therein that (1) The essence of the privity rule is that only the people who actually negotiated a contract (who are privy to it) are entitled to enforce its terms. Even if a third party is mentioned in the contract, he cannot enforce any of its terms nor have any burdens from that contract enforced against them.”

41. In the proceedings before the trial court the interested filed its statement of defence and opposes the suit as if it were doing so on behalf of the 1st respondent. The interested party obviously was not privy to the contract as between the appellant and the 1st respondent and therefore had no basis of challenging the appellants suit or challenging the evidence tendered with respect to violation of the insurance contract. I find that the interested parties had no locus standi and were not competent to challenge this suit.

Scope of interested party participation in the proceedings

42. In the plaint at paragraph 9 the appellants pleaded that its policy with the 1st respondent did not cover racing competition, rallies, or trials (or use for practice for any of them) or the carriage of passenger’s for hire or reward it should not be held liable by virtue of the doctrine of subrogation



should the defendant be found liable in Naivasha CMCC 866 of 2016 , 864 of 2016 and 862 of 2016. In the prayers the appellant then sought for orders that it was entitled to repudiate the policy No CTY/701/084543/2015. This was an issue of breach of contract.

43. The 2nd respondent were enjoined in the primary suit and filed their defense dated 20th February 2020 denying the appellant's claim. At paragraph 9 thereof they averred that any declaration obtained in this suit by the plaintiff will not be binding on the interested parties for non-compliance with the mandatory provisions of section 10(4) of Cap 405 laws of Kenya.
44. The role of the interested party in any proceedings has been discussed. In the case of Jerotich Seii & 7 others v Kenya Power & Lighting Company Limited & 3 others [2020] eKLR where the court stated that;

“However, the substantive issues in any litigation are those raised by the principal parties. It must be appreciated that the role of interested parties is minimal and peripheral. This is informed by the definition of an interested party by Rule 2 of the Mutunga Rules as follows: a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation.?”

51. Interested parties cannot introduce their own issues into the proceedings of the principal parties. This principle was stated by the Supreme Court in Francis Kariuki Muruatetu & another v Republic & 5 others [2016] eKLR as follows:

(42) Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues, or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court.”

45. The appellant did not plead that they wanted to repudiate the contract based on provisions of Section 10(4) of the insurance (Motor vehicle Third Party Risks) Act and the court was wrong to so assume as it was still open for them to repudiate the said contract under Sec 5(b) of the Insurance {Motor vehicle third party Risks} Act as the core issue raised was on breach of contract.
46. I do find and hold that the issue repudiating the contract under provisions of Section 10(4) of the insurance (Motor vehicle Third Party Risks) Act was an issue expressly brought up by the third parties in their pleadings as pointed out above. It was a clear misdirection for the trial court to make this issue the central point of determination of the suit, yet the law expressly bar the same. See Jerotich seii & 7 others Vs Kenya Power & lighting company limited & 3 others (2020) Eklr & Francis Muruatetu & Another Vs Republic & 5 others {2016}Eklr

Whether the trial court misapprehended the difference between the provisions of Section 5 (b) and 10 (4) of the Insurance Motor vehicle (third party risk) Act.

47. The Appellant contends that the Trial court misdirected itself by misapprehending the provisions of the Act and disregarded the import of section 5(b) The *Insurance (Motor Vehicles Third Party Risks) Act*. That further, the Trial court failed to appreciate the difference between the provisions of Section 5 (b) and 10 (4) of the *Insurance (Motor Vehicles Third Party Risks) Act*.



48. Section 5 of the *Insurance (Motor Vehicles Third Party Risks) Act*, provides as follows;

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*, 1984 (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 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
- (iii) any contractual liability;
- (iv) liability of any sum in excess of three million shillings, arising out of a claim by one person.

49. On the other hand Section 10 (1), (2) and (4) provides that

- 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.

Provided that the sum payable under a judgment for a liability pursuant to this section shall not exceed the maximum percentage of the sum specified in section 5(b) prescribed in respect thereof in the Schedule

(1A)

(1B)

- (2) No sum shall be payable by an insurer under the foregoing provisions of this section—



- (a) in respect of any judgment, unless before or within thirty days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings; or
 - (b) in respect of any judgment, so long as execution thereon is stayed pending an appeal; or
 - (c) in connection with any liability if, before the happening of the event which was the cause of the death or bodily injury giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provision contained therein, and either—
 - (i) before the happening of the event the certificate was surrendered to the insurer, or the person to whom the certificate was issued made a statutory declaration stating that the certificate had been lost or destroyed; or
 - (ii) after the happening of the event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer, or the person to whom the certificate was issued made such a statutory declaration as aforesaid; or
 - (iii)
- (4) No sum shall be payable by an insurer under the foregoing provisions of this section if in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto.

50. Ringera, J (as he then was) in Gateway Insurance Company Limited vs. Sudan Mathews Nairobi HCCC NO. 1078 of 2000 held that:

“Under Section 5 of the Insurance (Motor Vehicle Third Party Risks) Act, Cap. 405 the Statutory third party cover is not required to extend to the risks of death or bodily injury to employees of the insured arising out of or in the course of their employment; or to the death or injury to passengers except in the case of motor vehicles in which such persons are carried for reward or hire or in pursuance of a contract of employment; or to any contractual liability. Where the motor vehicle in question is insured for the purposes of being used for social, domestic and pleasure purposes and not for hire and reward or the carriage of employees the risk of injury or death to a passenger therein is not compulsorily required to be covered under Cap 405 and if such risk is not actually covered the insurance company is not obliged to indemnify the insured against any claim by the passengers.”



51. Having considered the two sections of the said Insurance (Motor vehicle Third party Risks) Act , the Trial court ought to have taken into consideration that under section 5(b) of the Insurance (Motor vehicle Third party Risks) Act, the appellant could repudiate the contract under certain conditions including where the motor vehicle is used for hire as was the case herein. That constituted a breach of contract. Section 10 of the said Act, applies mostly when the policy is sought to be cancelled due to non-disclosure of material facts or false misrepresentation of facts or when before the happening of the event the insurance certificate was surrendered.
52. In Kenya Orient Insurance Co ltd Vs Caroline Wanjiru Mwaniki & Another {2021} Eklr, Lady Justice Githua While referring to the court of appeal decision in M'mairanyi & others Vs Blueshield Insurance Company Ltd {2005} 1EA. 280 stated that
- “Being guided by the holistic reading of the *insurance (Motor vehicles Third party Risks) Act* and the cited precedents; we submit that the three months statutory timeline in section 10{4} of Cap 405 applies only when an insurer is repudiating a policy itself and not a claim arising from unlawful use of insured motor vehicle.”
53. In the suit filed what the appellant sought to decline was the claims arising from the policy and not to repudiate the policy itself, a position they were perfectly entitled to take and could not be faulted. The trial magistrate thus erred to find that the policy was being repudiated under Section 10(4) of the Insurance (Motor vehicle Third party Risks) Act.

Disposition

54. In the end, the Appeal succeeds, the judgment of the Trial court delivered on 2.12.2021 by Hon Y.M. Barasa SRM is set aside and I hereby allow the prayers sought in the plaint as follows;
- a. A declaration is hereby issued that the Plaintiff is entitled to repudiate the policy No. CTY/701/08453/2015 for breach of the insurance contract.
 - b. A declaration is hereby issued that the Plaintiff is not liable to make any payment under insurance policy no. CTY/701/08453/2015 in respect to any claim against the Defendant in the unlawful use of the motor vehicle Reg. No. KBG 326L.
 - c. Each party shall bear their own costs.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 16TH DAY OF MAY 2023.

RAYOLA FRANCIS

JUDGE

Delivered on the virtual platform, Teams this 16th day of May, 2023.

In the presence of;

.....for Appellant

.....for Respondent

.....Court Assistant

