



**Phoenix East Africa Assurance Co. Ltd & another v Nderitu & another (Civil Case 18 of 2018) [2023] KEHC 18593 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18593 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
CIVIL CASE 18 OF 2018  
JN NJAGI, J  
JUNE 15, 2023**

**BETWEEN**

**PHOENIX EAST AFRICA ASSURANCE CO. LTD ..... 1<sup>ST</sup> PLAINTIFF**

**PHOENIX EAST AFRICA ASSURANCE CO. LTD ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**DAVID GICHUKI NDERITU ..... 1<sup>ST</sup> DEFENDANT**

**DAVID GICHUKI NDERITU ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff herein has instituted this suit against the defendant as a repudiatory claim wherein they are seeking for:
  - a. A declaratory that the defendant has breached fundamental warranties of insurance policy number 839/15 thereby discharging the plaintiff from liability in respect of any claims arising from the accident involving motor vehicle registration number KCF 332E on August 29, 2016.
  - b. A declaration that the Plaintiff is not liable to satisfy any judgment claims arising out of an accident which occurred on August 29, 2016 involving motor vehicle registration number KCF 332E.
  - c. A declaration that the accident on August 29, 2016 involving the defendant's motor vehicle registration number KCF 332E has not been reported and documented by the defendant which was in breach of the warranties of insurance policy number 839/215.
  - d. Costs of this suit.
2. The case for the Plaintiff is that they insured the Defendant's motor vehicle for a comprehensive cover for one year. That it was a condition precedent for the defendant to comply with the terms, conditions



and warranties stipulated in the policy document if the insurance policy was to be valid and have any binding legal effect. That it was an express provision of the policy document that-

“The company shall not be liable to indemnify any person unless such person shall observe, fulfill and be subject to the terms and conditions of this policy in so far as they can apply.”

3. That the policy further provided that –

“In the event of any occurrence which may give rise to a claim under this policy the insured shall immediately but in any case within 7 days give notice thereof to the company with full particulars. Every letter, claim writ summons and process shall be notified or forwarded to the company immediately on receipt, notice shall also be given to the company immediately the insured shall have knowledge of any impending prosecution inquest or fatal inquiry in connection with any occurrence. In case of theft or other criminal act which may give rise to a claim under this policy the insured shall give immediate notice to the police and cooperate with the company in securing the conviction of the offenders”

4. That the plaintiff later discovered that the defendant’s motor vehicle was involved in an accident on the August 29, 2016 and the defendant did not report to the plaintiff the occurrence of the accident and failed to document the accident which amounted to a fundamental breach of express and implied terms and warranties of the insurance policy. The Plaintiff states that an action has been brought by the estate of a deceased by name Edward Kibe Ngunjiri in Nairobi CMCC No7590 of 2017 claiming for damages. That as a result of the Defendant’s breach the Plaintiff has been exposed to the risk of liability, loss and damages arising from the claim by the estate of the above-named deceased. The plaintiff hence filed this suit seeking for orders stated above. They further sought for a declaration that defendant should settle or otherwise be liable to pay for any claims, liability, damages, costs, indemnity and or compensation that may arise or otherwise become payable to any person as a result of or arising from factors connected with the defendant’s conduct and breach of the policy of insurance.

5. It was the case for the plaintiff that their evidence is unchallenged as the defendant ignored and or neglected to file a defence after entering appearance.

6. The matter proceeded to formal proof wherein the deceased called one witness, George Karatu, PW1 who is its legal claims officer. The witness in his evidence relied on his written statement and reiterated the evidence stated above. He produced the following documents as exhibits – the proposal form, the policy documents, summons and pleadings in CMCC No7590/2017.

7. The advocates for the Plaintiff, Ombati Ong’au & Co. Advocates, submitted that there was a breach of express and implied terms and warranties of the insurance policy in the failure by the defendant to report to the defendant and to document the accident. The Plaintiff relied on the case of *National Bank of Kenya Limited v Pineplastic Samkolit (K) Ltd & another*, Civil Appeal No95 of 1999 (2001) eKLR where the Court of Appeal held as follows:

“....A court of law cannot rewrite 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. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the clause.



8. The Plaintiff also cited the case of *UAP Insurance Company Ltd v Nancy Wakuthi Kago* (2019) eKLR where Muchemi J. held that:

18. The plaintiff in seeking to avoid the policy is relying on clause 6 of the “General Exceptions” found in page 5 as well as the “Exceptions” clause found on page 8 of the Policy document. It was a clear and unambiguous clause of the insurance policy contract to which the parties committed themselves to and which bind them.
19. In entering into a contract, the basis of any terms between parties who engage is trust that the other party will honour the terms of the bargain and such terms cannot be interfered with unless the contract was made under coercion, fraud or undue influence which must be pleaded and proved. In this case there was no suggestion of employment of coercion, fraud, or undue influence in regard to the terms of the insurance policy. The terms of engagement in my view must be enforced joining to both ends of bargain.....
23. I find that the plaintiff has proved on the balance of probabilities that the defendant breached the conditions and terms of the policy as set out in paragraph 8 of the plaint in regard to the use of the insured motor vehicle registration number KCE 200T.

9. It was consequently submitted that the defendant did not meet his end of the bargain and hence exposed the plaintiff to risk of liability, loss and damages. That the defendant did not file a defence in the case which means that the evidence of the plaintiff is uncontroverted.

10. The Plaintiff submitted that the application has met the threshold for grant of orders repudiating liability as provided in Section 10(4) of the *Insurance (Third Party Motor Vehicle Risks)* which provides that:

- (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.



11. The Plaintiff cited the case of *Blue Shield Insurance Co. Ltd v Samuel Nyaga Ngurukiri* (2008) eKLR where Justice Okwengu stated as follows:

Under Section 10(4) of the Insurance (Motor Vehicle 3<sup>rd</sup> Party Risks) Cap 405 the appellant was entitled to avoid liability by obtaining a declaratory judgment that he was entitled to avoid liability under the policy on the ground that there was non-disclosure or misrepresentation of a material fact. No such suit was however filed by the appellant nor has the appellant ever served any mandatory notice of any intention to file such suit. Thus the appellant cannot seek solace under Section 10(4) of Cap 405.

12. It was submitted that the Plaintiff has met the threshold provided under section 10(4) because they filed this suit after discovering that the defendant's motor vehicle covered by the subject policy was involved in a traffic accident and the defendant failed to inform them of the same which constituted a fundamental breach of the policy.

### **Analysis and determination -**

13. I have considered the grounds in support of the suit. The Plaintiff seeks for a declaration to repudiate the policy of insurance between it and the defendant on the ground that the defendant failed to notify it of an accident that had taken place on the August 29, 2016 which was a breach of the policy of insurance. The defendant did not enter a defence in the case after filing memorandum of appearance. The matter proceeded by way of formal proof. The issue for determination is whether the plaintiff has proved his case on a balance of probabilities.
14. The kind of evidence required to be adduced in a case conducted by formal proof is as was stated by Emukule J. (as he then was) in *Samson S. Maitai & Another v African Safari Club Ltd & Another* [2010] eKLR where he tried to distinguish between "proof" in the ordinary sense and "formal proof". Said he:

...In a formal hearing, all rules of evidence and procedure are observed and the party to a suit has to adduce evidence sufficient to sustain the suit. In adducing this evidence, the party has to raise a presumption that whatever is claimed is true and this therefore goes to the merits of the case. The Court considering a full hearing, to determine the matter based on the evidence that is presented before it by parties. In contrast, at a formal proof hearing, if the party with the onus of adducing evidence fails to satisfy the truth threshold, the matter would stand to be dismissed on the basis that it was unmeritorious and did not raise sufficient proof of any issues of fact or law. It would be heard and determined on its merits.

15. The suit is brought under the provisions of section 10 of the *Insurance (Motor Vehicle Third Party Risks) Act*. The Section obligates an insurance company to indemnify an insured for any claims covered under the policy that may be adjudged against them. The section provides as follows:

10 (1) "If, after a policy of insurance has been effected, judgement 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 judgement 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.



16. Under this section, an insurance company can only avoid liability if the conditions stipulated in section 10(4) of the Act are met. The same provides as follows:

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.

17. By virtue of the provisions of this section, an applicant has to establish that their action for declaratory orders was brought before or within three months of the filing of the primary suit by claimants against the insured and meet the conditions stated therein. In interpreting the provisions of this section, the Court of Appeal in Intra Africa Assurance Company Limited v Simon N Njoroge Avertana Da Costa NRB CA Civil Appeal No 41 of 1996 [1997] eKLR stated as follows:

[The] Plain meaning of s.10(4) is that no sum shall be payable by an insurer under the earlier provisions of s.10 if (a) he has filed an action either before, or within three months after, the commencement of proceedings in which the judgment for damages was given and (b) has obtained a declaration that apart from any provisions contained in the policy he is entitled to avoid it on the ground that the policy was obtained by the non- disclosure of a material particular or by a representation which was false in some material fact.

18. In Britam General Insurance Co (Kenya) Ltd v Josephat Ondiek KJD HCCC No 14 of 2017 [2018] eKLR stated the following on the section:

The procedure provided under Section 10(4) of the Act as I understand it presents the following scenarios, first, it creates an obligation on the part of the insurer to avoid the policy in respect of liability and anything arising from the accident which is in breach of the policy agreement. Secondly, it creates a condition precedent to the insurer right of action to the in breach by bringing an action within 3 months of the claim against the insured being instituted. Thirdly, the claim to indemnify the insured or third party insurance which falls within the exceptions provided in the policy of insurance. Fourthly, the proviso that Section 10(4) stipulates that the insurer shall not be liable in respect of the accident, loss or liability unless before or within the days he gives notice to the insurer in the said proceedings.



19. The section requires the insurance company to issue the third party who has filed the primary suit with a notice that it wishes to avoid liability. This notice is mandatory as was observed by Ibrahim J. (as he then was) in *Gateway Insurance Co. Ltd –v- Moses Jaika Luvai* (2008) eKLR, where he stated that:

“The plaintiffs in the suits which the insurer seeks to avoid liability under Section 10(1) by way of declaratory suit must be notified of the institution of the declaration suit and after which the said Plaintiffs are entitled to be made parties to the Insurer’s suit if they think fit. The provision is mandatory and the Court has no discretion on the matter. The discretion and election lies with the Plaintiffs who have sued the insured for damages and losses arising from motor accidents. It is a right which none of the parties or the Court can take away.”

20. The same finding was reached in *Fidelity Shield Insurance Company Limited v Joseph Iba Wanja* [2018] eKLR it was held that:-

Section 10(4) is mandatory that a person who has been given notice of the proceedings to repudiate liability shall be entitled if he thinks fit to be made a party thereto. It means that if such a party wishes to be enjoined in the suit, the court has no discretion, it has to allow such a party to be enjoined in this suit. I am in agreement with the decision of Justice Ibrahim as he then was in the case of *Gateway Insurance Co. Ltd –V- Moses Jaika Luvai*, (Supra) that if the party applies to be joined in the suit the court is without discretion, it must allow him. Where a party has been given a right by a statutory provision to be enjoined in a suit, the plaintiff or the party cannot take away the right. I am in agreement with the counsel for the interested parties that the interested party has the legal basis in Section 10(4) of Insurance Act to be enjoined in this suit.”

21. According to the plaintiff’s pleadings in this matter, the primary suit was filed on the October 19, 2017 and the suit herein filed on the January 29, 2018. The suit herein was therefore not filed within three months of the filing of the primary suit by the third party and no leave of the court was sought to file the suit out of time. Secondly, there was no notice served on the plaintiffs in the primary suit as required by the Act. The Plaintiff therefore has not complied with the provisions of section 10(4) of the *Insurance (Motor Vehicle Third Party Risks) Act*. It is thereby the view of this court that the suit is incompetent and improperly before this court.

22. The end result is that the Plaintiff has not proved that it is entitled to the prayers sought and in the premises the suit is dismissed.

**DELIVERED, SIGNED AND DATED AT NAIROBI THIS 15<sup>TH</sup> DAY OF JUNE 2022.**

**J. N. NJAGI**

**JUDGE**

In the presence of:

Ms Susan Njoroge for Plaintiff

No appearance by the Respondent

Court Assistant -Amina

30 days right of appeal.

