Directline Assurance Company Limited v Muli (Civil Appeal E088 of 2024)
[2024] KEHC 13928 (KLR) (Civ) (8 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13928 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E088 OF 2024

BM MUSYOKI, J

NOVEMBER 8, 2024

BETWEEN

DIRECTLINE ASSURANCE COMPANY LIMITED ..... APPELLANT

AND

JANET WANZA MULI ..... RESPONDENT

(Being an appeal from judgment and decree of Honourable R.C. Mwachi (RM) in the Small Claims Court at Milimani civil case number E2497 of 2023 dated 22-12-2023)

JUDGMENT

1. This appeal arises from judgment of the adjudicator in milimani small claims court case number E2497 of 2023 dated 22-12-2023. The respondent filed the claim in the lower court praying for judgment against the appellant for a sum of Kshs 500,656.00 being the cost of repairs to her motor vehicle registration number KDH 720E which had been involved in an accident on 13-01-2023. The respondent had taken a comprehensive insurance cover with the appellant who is an insurance company. The respondent pleaded that the appellant was under legal and contractual obligation to compensate her for the loss as per the insurance contract. The appellant admitted that it had insured the respondent's motor vehicle but was only obligated to pay Kshs 236,255.00 with the respondent absorbing the difference as the vehicle had been underinsured.

2. The trial court found for the respondent and entered judgement for her as against the appellant plus costs and interest. Being dissatisfied with the judgement, the appellant has preferred this appeal vide memorandum of appeal dated 20/01/2024 raising eight grounds as follows;

    1. The learned adjudicator erred in fact and in law in holding that the appellant was liable to satisfy the decree obtained in milimani small claims case number E2497 of 2023 and ordering the applicant to satisfy the said decree to the tune of Kshs 500,656/= plus interest and costs

in total disregard to provision of Section 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act (Cap 405) and under the insurance policy.

2. The learned adjudicator erred in fact and law in holding that the appellant failed to discharge its burden to prove that it supplied the respondent with the policy document.

3. The learned adjudicator erred in fact and law in holding that the appellant failed to disclose and explain material terms of the policy of insurance contract to the respondent, and the consequences of underinsuring the motor vehicle registration number KDH 720E, when no evidence was led by the respondent in support of such a conclusion.

4. The learned adjudicator erred in fact and law in holding that the appellant's actions were in contravention of the principle of uberrimae fidei by failing to disclose the terms of the policy of insurance contract to the respondent ab initio, when no evidence was led by the respondent to support such a conclusion.

5. The learned adjudicator erred in fact and law in holding that the appellant is bound to indemnify the respondent for the loss/damage suffered in respect of the motor vehicle registration number KDH 720E.

6. The learned adjudicator erred in fact and law by failing to consider the appellant's submissions thereby arriving at an erroneous decision.

7. The learned adjudicator grossly misdirected himself in awarding the respondent special damages of Kshs 500,656 plus interest thereon.

8. The learned adjudicator's judgment was delivered per incuriam.

3. This is a first appeal where the position in law is that the appellate court should re-examine and re-analyse the evidence produced before the trial court and come to its own independent conclusion. However, the court should warn itself that it did not take the evidence of the witnesses or have advantage of observing their demeanour. It is in a manner of re-trial safe that the appellate court does not take the evidence of the witnesses except where an application to adduce additional evidence has been made and granted. In John Teleyio Ole Sawoyo v David Omwenga Maobe (2013) eKLR the Court of Appeal held that;

> 'This being a first appeal, we have the duty to reconsider both matters of fact and of law. On facts, we are duty bound to analyse the evidence afresh, re-evaluate it and arrive at our own independent conclusion but must bear in mind that the trial court had the advantage of hearing the witnesses testify and seeing their demeanour and should make allowance for the same.'

4. With the above in mind, I must in addition be alive to the position that the mandate of this court is restricted by the provisions of Section 38(1) of the *Small Claims Court Act* which restricts appeals to this court from the small claims court to matters of law only. In that case, in re-examining the evidence from the trial court, I must sieve out those issues which are on fact and only deal with issues of law. This is a position both parties seem to be oblivious of as the memorandum of appeal and submissions by both parties have dwelt on both issues of law and facts. The evidence of the parties is reproduced in an abridged version in the following paragraphs.

5. For better flow of the evidence, I will begin with the evidence of the respondent. The respondent adopted her witness statement dated 2-06-2023. The respondent told the court that by an insurance policy number 00337253, the appellant issued her with an insurance cover in respect of her motor

vehicle registration number KDH 720E. The motor vehicle was involved in an accident on 13-01-2023 when she was driving as a result of which the vehicle was extremely damaged. After the accident, the respondent engaged the appellant to take over and have the car repaired but the respondent insisted that she should contribute 31.8% of the cost of repairs.

6. The respondent added that when the appellant became adamant, she engaged a motor vehicle assessor who assessed the damage to the car at Kshs 500,656.00. Since the appellant would not take up responsibility, she proceeded to pay for the repairs as assessed by her appointed assessor and demanded reimbursement from the appellant which was not honoured. The proceedings show that the respondent produced documents listed in her list of documents dated 2-06-2023 as exhibits 1 to 4 safe for assessment report which was marked for identification. However, the said list has four documents and excepting the assessment report from the list would leave three exhibits which are the police abstract dated 16-01-2023, demand letter dated 17-05-2023 and receipt in support of the damages. She also produced as exhibit 5, a thread of emails listed in her list of documents dated 28-02-2023.

7. The respondent went on to tell the court that when she approached the appellant for insurance cover, she was told to give a rough estimate of the value of the motor vehicle which she gave as Kshs 750,000.00. She added that she was referred to a valuer who put the value of the vehicle at Kshs 1.1 million but she told the appellant that she was comfortable with the value of Kshs 750,000.00 upon which she was told that the maximum value she would get in case the car was a write off was Kshs 750,000.00. According to her, she was not told that she would contribute if the damage would be less than Kshs 750,000.00 which issues came up for the first time after she reported the accident. She confirmed that an email was sent requiring her to pay Kshs 113,253/=. According to the respondent, the only thing she was given was a copy of the valuation report, insurance sticker and Mpesa payment details and that she was never given the policy document.

8. In cross-examination, the respondent admitted that the figure she gave as value was an estimate and that the appellant was to come back to her on the value. She also confirmed that the value of 1.1 million was given to her and she was given choices of retaining her estimate value or the value given by the appellant. She added that her letter dated 18-05-2022 stated that she did not want to add any money above Kshs 750,000.00. She also stated that she did not pay the difference and further that she was given the policy schedule and policy document after the accident and that the request to top up was oral.

9. PW2 was one Patrick Ng'ang'a Mwangi who said that he was a motor vehicle assessor working with Quantum M. Assessors. He stated that he assessed motor vehicle registration number KDH 720E on 7-03-2023 and prepared a report to that effect which he produced as an exhibit. The same was marked as exhibit 2(a) and receipt for the assessment as exhibit 2(b). In a short cross-examination, he stated that the pre-accident value of the vehicle was Kshs 1,080,000.00.

10. The appellant called one Kelvin Wambugu Ndegwa who was a deputy claims manager. He testified by adopting his statement dated 21-08-2023. He produced documents contained in the appellant's bundle of documents dated 27-07-2023 as exhibit 1 to 4 and others in bundle dated 24-10-2023 as exhibit number 5 and 6. These documents are listed as; copy of policy schedule, letter dated 25-02-2023, letter dated 18-05-2022, proposal form dated 12-05-2022, undated policy document and policy schedule and/or endorsement. My look at the bundle of documents dated 27-07-2023 does not have any policy schedule so number 1 seems to not have been properly produced and I believe the schedule should be the same document produced as exhibit 6.

11. The witness added that the appellant was the insurer of the respondent's motor vehicle. He said that as per the policy, the indemnity was not a blanket one as it had its limits as per implied and express terms of

the policy. He relied on the policy for purpose of proof of the terms. When the respondent approached the appellant for the cover, she proposed Kshs 750,000.00 as the insured value of the vehicle as the parties waited for valuation to determine the actual value. After the valuation was done, the vehicle was valued at Kshs 1,100,000/= upon which the respondent was informed and advised to enhance the premium to match the actual value of the vehicle but she declined the offer and chose to retain the earlier value.

12. After the appellant was notified of the accident, it took the stand that the respondent would share the cost of repairs proportionally with the appellant since the motor vehicle was underinsured. The witness however denied that the repair costs were Kshs 500,656.00 and that the respondent paid that much. According to the witness, the proportionate liability for the appellant was Kshs 236,255/- whereas the respondent was to bear Kshs 113,253.00. The respondent declined this offer. The witness completed by stating that it was the respondent who breached the insurance contract by failing to top up the premium or pay the proportionate share for the repairs.

13. In cross-examination, the witness stated that the policy document was not signed by the respondent. He also conceded that the appellant was under an obligation to supply the policy document to the respondent at the time of getting the insurance cover to enable her understand the terms of the contract. He could not tell whether the policy document was supplied to the respondent but he insisted that a letter signed by the respondent showed that she was explained the contents of the policy document. He admitted that he was not in the meeting where the explanation was done and that he was not aware of the facts of the conversation. He confirmed that the respondent replied to the appellant's exhibit 2 which was letter dated 25-02-2023 with a letter dated 28-02-2023. He also confirmed that the claim was reported to the appellant on 18-01-2023 upon which they wrote to the respondent. He also stated that the vehicle stayed in the garage for two weeks after which the respondent repaired the same and that the appellant did not carry out any assessment.

14. As indicated elsewhere in this judgment, this court will only deal with the issues of law raised in the appeal. The first ground of appeal is out of tune with the facts of the matter. The same seems to have been lifted from another memorandum which was challenging a judgement of the trial court in a declaratory suit based on Insurance (Motor Vehicle Third Party) Risks Act. I am unable to see a trace of relationship between that provision of the law and the present appeal. Although the ground raises matters of law, the same is not related to this appeal and this court is unable to make sense out of it.

15. The other grounds of appeal revolve around the application of the principles of uberrimae fidei and indemnity and whether in applying these principles, the respondent was entitled to compensation at Kshs 500,656.00. I have gone through the evidence and the issues raised by the appellant on these grounds and I am satisfied that the same raise matters of law as the principles aforementioned are established principles of law. I therefore have jurisdiction to handle the appeal on those aspects.

16. I find it convenient to handle the said grounds together. On the application of the principle of uberrimae fidei, the adjudicator was convinced that the appellant did obverse the tenets of the principle because there was no evidence that it explained to the respondent that in case there would be a loss, she will only be a paid a proportionate percentage. She also found that there was no evidence that the policy document was given to the respondent. I find these findings to be matters of facts and by virtue of section 38(1) of the *Small Claims Court Act*, I would not dwell on them. I however wish to mention for purposes of the matters of law I have identified that, the respondent had brought the claim on the basis of existence of the contract of insurance which is admitted and which appears to me to be a common ground on the matter. In my view, the only departure by the parties on existence of the contract, is whether the terms of the contract entitled the respondent to full compensation of the amount claimed to be the cost of repairs.

17. There is an important question of law which needs to be answered in order to ascertain whether the appellant had a duty to explain to the respondent the contents of the contract. The question in my mind is whether or not a party to a contract should be explained the consequences of a contract to which he has freely entered. I hold the position that each party to a contract has a duty and obligation to himself to read and understand the contract he is entering into before executing it or accepting the same. The principle of uberrimae fidei in my opinion, does not extend to the duty of a party to explain the meaning or implication of contents of the contract. The principle postulates that a party has a duly to disclose all material facts and not to explain their legal consequences.

18. The honourable adjudicator cited Directline Assurance Co. Ltd vs Peter Micheni Muguo (2018) eKLR where honourable Justice R.K Limo according to the adjudicator found that an insurer has advantageous position to exercise due diligence. This may be the position but I must distinguish that holding from the matter before me. In that case, the appellant had accepted premium and was trying to avoid responsibility based on the failure by the insured to disclose material facts. In the matter before me, the appellant accepted the premium and issued a cover and has not denied responsibility. What is in dispute is interpretation of the effect of underinsurance of the motor vehicle and the extent of liability to be borne by the appellant.

19. The respondent argued that she was not even given a copy of the insurance policy. It is conceded that the policy was not signed by the respondent. It will therefore be correct for one to conclude that the policy document was not the basis of the contract between the appellant and the respondent because for a contract to be binding, parties must bind themselves to its term either by appending their signatures or by any other sign of free will. The respondent has disowned the contents of the policy document and in that case, I hold that the terms therein were not enforceable against either of the parties except those which could be implied by operation of the law or conduct of the parties as it is common ground that there was a contract of insurance between the parties.

20. The respondent has already disowned the policy document which I agree cannot form the basis of the contract between the parties. It is illogical that the respondent sought before the trial court and in this court to rely on the same policy in her argument that the appellant breached the principle of uberrimae fidei by failing to disclose the terms of the same policy. I say illogical because if the respondent's basis of her claim was failure to be supplied with a policy document and that she had not signed such a contract, then the appellant would have been within its rights to deny existence of a contract between the parties and decline to take responsibility at all. But the appellant has acknowledged existence of the contract except that the policy document is by lack of signature of the respondent not a contract.

21. Although I have held that the policy document could not be the basis of the terms and conditions of the contract between the parties, I think it is important I say something in regard to the respondent's complaint that according to what she understood, as long as her claim was not above the insured value, she would be indemnified of the same in full. In this context and that of the questions I have identified above, was the appellant under legal duty to explain the imports of clauses to the insurance contract? Further, it is my position that the respondent was equally able and under obligation to follow up a copy of the policy. It is my position that the respondent had a duty to seek legal and other professional advice on the policy before signing them whether they are standard form contracts or normal negotiated contract. No party should be heard to say that it took up a contract without full knowledge of what it meant or entailed. The only exception would be where the party is challenging the conscionability of the agreement which would defeat or negate the concept of free will or provisions of the law.

22. Having said the above, there is left a question, that is, what type of contract was there between the parties. The insurance industry is regulated by the law and established principles of insurance and

where a contract is implied as I have held in this matter, a court will resort to these sources of the law. In this case, the only contest is whether the respondent was entitled to compensation at the full costs incurred in the repair of her motor vehicle or a percentage. In the case before me, the principle that calls for application is the principle of indemnity. This principle postulates that a party will only be compensated for its actual loss and may not benefit from the loss.

23. The principle of indemnity, in the context of this appeal is intertwined with the concepts of over insurance and underinsurance. As per these concepts, even where one has paid insurance premiums for a value higher than the true value of the insured property, they cannot be compensated for over and above the true value simply because they paid a higher premium. Similarly, where a party has underinsured their property, they can only be compensated at the insured value as they would not have paid premium commensurate with the true value of the property. The latter is the case in this matter.

24. The respondent has claimed that she was entitled to be compensated because the costs of repairs did not exceed the insured value. It is my view that this is a misconception of the principle of indemnity. The respondent has not denied that she was informed of the true value of the vehicle after the same underwent valuation. She did not challenge the valuation then except to say that she was comfortable with Kshs 750,000.00 as the value. A simple calculation would show that the respondent insured 68.18% of the value of the vehicle which I round of to 68.2%. In my view, pursuant to the principle of indemnity, it is only fair, just and prudent that she gets compensated at a percentage of the value she insured.

25. It is a matter of judicial notice that in the insurance industry, when the costs of repairs go beyond 50% of the value, the damaged vehicle should be declared uneconomical to repair or in other words a write off. If the vehicle was worth Kshs 750,000.00 it would have been declared a write off instead of being repaired. Even the respondent's own assessor had put the pre-accident value at Kshs 1,080,000.00. It is my finding that demanding or expecting the appellant to pay the full amount of repair costs will be against the principle of indemnity. If she had insured the vehicle for its true value, it would have meant that she be compensated for the full value of the vehicle. By being paid a sum of Kshs 500,656.00 and still keep the motor vehicle, the respondent would obviously benefit more than what she had insured. This will be unjust enrichment which the law detests. In Lake Victoria North Water Services Board & Another vs Africa Merchant Assurance Co. Ltd (2023) KEHC 26166 (KLR), the court restated the importance of this principle while citing Crisp V Security Nat'l Ins. Co, 369 S.W. 2d 326 (1963) thus;

> 'On the issue of quantum, it is imperative for this court to bear in mind whether the plaintiffs claim was up to the liability limit. In respect of each loss, one has to take the approach, as illustrated in the case of Crisp V Security Nat'l Ins. Co, 369 S.W. 2d 326 (1963), the court stated that;
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> > 'Indemnity is the basis and foundation of insurance coverage not to exceed the amount of the policy, the objective being that the insured should neither reap economic gain or incur a loss if adequately insured.'"

26. Further in Gianfranco Manenti & Antonietta Farinato v Africa Merchant Assurance Co. Ltd (2018) KEHC 873 (KLR), the court in analysing the definition of contract of insurance stated as follows;

> 'The Court of Appeal in Madison Insurance Company Limited v Solomon Kinara t/a Kisii Physiotherapy Clinic (2004) eKLR; Civil Appeal No. 263 of 2003 (Kisumu) after quoting

a passage from Law of Insurance, 2nd Edition at page 4 by Preston and Colinvaux provided its own definition of a contract of insurance as follows;

> ...the passage nevertheless brings out the basic concept underlying a contract of insurance, namely that the party whose property is being insured pays premium not with the intention of making any profit out of the transaction but rather with the intention that were the items assured to be destroyed, stolen or damaged, the other party offering the policy would replace the solen or destroyed item or pay the reasonable charges for its repair'".

27. The respondent has submitted that it could only pay 236,000.00 which was its proportionate contribution for the loss. I have gone through the proceedings and exhibits produced before the trial court and the submissions of the parties in this appeal and I am unable to see where this figure was plucked from. The appellant did not commission an assessor to assess the damage and cost of repairs. Instead, it embarked on back and forth arguments with the respondent on how much they should pay without explaining the basis for its figures. In my opinion, the appellant should have commissioned its assessor to ascertain the damage before getting into the issue of determination of how much was its share of restitution. In absence of an alternative report from the appellant, the court has no option other than going by the report produced by the respondent.

28. The totality of my above analysis is that, the court erred in finding that the respondent was entitled to compensation to the tune of Kshs 550,656/= as that would amount to breach of the principle of indemnity. It is also my finding that the appellant has an obligation of settling 68.2 % of the loss incurred by the respondent which comes to Kshs 341,447.40 and I hereby enter judgement judgment for the respondent for the said sum.

29. In conclusion, this appeal partly succeeds and I consequently set aside the trial court's judgment and substitute therefor the following orders;

    a. Judgement is entered for the respondent against the appellant for Kshs 341,447.40.

    b. The above sum shall attract interest at court rates from the date of filing the claim in the trial court until payment in full.

    c. The respondent shall have the costs of the suit in the trial court.

    d. The appellant shall have half costs of this appeal.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF NOVEMBER 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of:

Mr. Awino holding brief for Mr. Kahiti for the appellant; and

Miss Owino for Miss Mutuku for the respondent.