



Mbula t/a Tamarillo Junior Academy v Africa Merchant Assurance Company Limited; Indusu (Interested Party) (Civil Case 48 of 2019) [2024] KEHC 14283 (KLR) (18 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14283 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL CASE 48 OF 2019
JRA WANANDA, J
NOVEMBER 18, 2024**

BETWEEN

DORA MBULA T/A TAMARILLO JUNIOR ACADEMY PLAINTIFF

AND

AFRICA MERCHANT ASSURANCE COMPANY LIMITED DEFENDANT

AND

HILLARY NYABALI INDUSU INTERESTED PARTY

JUDGMENT

1. The Plaintiff's claim is contained in the Plaint dated 13/12/2019 and filed herein on 16/12/2019 through Messrs Aloo Romanus & Co. Advocates. The same seeks Judgment as follows:
 - a. A declaration that the Defendant is legally bound to settle the decretal sum and costs, among other costs arising from Eldoret CMCC No. 888 of 2018 Hillary Nyabali Ndusu v Dora Mbula t/a Junior Academy which arose from an accident involving the Plaintiff's motor vehicle registration number KAP 496Q and the Interested Party herein on or about 24th May 2018.
 - b. Compensation for breach of contract.
 - c. Costs of the suit.
 - d. Any other Relief that the Court may deem fit to grant.
2. In the Plaint, it was pleaded that the Interested Party is the Plaintiff in the said Eldoret CMCC No. 888 of 2018, that at all material times, and the Plaintiff was a Policy holder No. AM3/080/1/008795/2011 with the Defendant in respect to the said motor vehicle registration number KAP 496Q. The Plaintiff pleaded further that on 24/05/2018, the said motor vehicle was involved in an accident thereby



injuring the Interested Party and the Defendant was duly notified thereof, that consequently, the said suit was filed against the Plaintiff by the Interested Party, and that the Defendant then instructed Messrs E. J. Kemei & Co. Advocates to defend the Plaintiff in the suit and which Advocates acted as such up to conclusion of the case. The Plaintiff further pleaded that Judgment in the said suit was entered in favour of the Interested Party on 4/10/2019 to the tune of Kshs 528,900/- and costs at Kshs 138,975/-, that the total sum payable to the Interested Party is now Kshs 764,500/- and that she duly notified the Defendant of the Judgment and has on several occasions requested it to pay the same but the Defendant has refused and/or neglected to do so. She contended further that as a result of foregoing, she was served with a Proclamation notice and warrants of attachment of her property and that even after notifying the Defendant, it has neglected and/or refused to settle the same. According to the Plaintiff therefore, the Defendant's refusal to settle the said decretal sum is a flagrant breach of the contract of insurance, and unreasonable as the Plaintiff had a valid Policy with the Defendant and the motor vehicle was being used within the limits thereof.

3. The Defendant filed its Statement of Defence on 12/05/2022 through Messrs Cheboryot & Co. Advocates. The Defendant denied that it had insured the motor vehicle or issued the Policy, denied any knowledge of the accident and averred, in the alternative, that if such a Policy was issued, then the same was not in effect and/or extend cover to the suit. The Defendant also denied knowledge of the said Eldoret CMCC No. 888 of 2018 or the entry of Judgment therein or being notified of the same.
4. After close of pleadings and determination of several interlocutory Applications, the matter eventually proceeded to trial. The Plaintiff testified on her own behalf while the Defendant did not call any witness.

Plaintiffs' Evidence

5. Led by Mr. Nabei, her Advocate, PW1 (the Plaintiff) adopted her Witness Statement and reiterated the matters set out in the Plaint. She testified that she took the insurance cover on 2/05/2018 and then produced the exhibits contained in her List of documents. The Defendant's Counsel objected to the Plaintiff producing a copy of the insurance sticker but I overruled the objection on the ground that the Defendant never gave any notice of intention, during pre-trial, or at any mention, to raise any such objection. Pursuant thereto, the Plaintiff produced the sticker. She then testified that the cover was to run from 2/05/2018 to 3/01/2019 and the accident occurred on 24/05/2018, that she informed the Defendant about it and even paid the "excess" item upon the Defendant's insistence and that the Defendant even appointed Advocates to act for her in the said Magistrates Court suit.
6. In cross-examination by Mr. Kipkorir, Advocate for the Defendant, the Plaintiff was shown a copy of the letter dated 30/08/2018 from the Defendant written on a "without prejudice" basis and contained in the Plaintiff's own List of documents and which letter the Plaintiff had produced as her own exhibit. When asked about the letter, she confirmed its authenticity and also conceded that in it, the Defendant had contended that the Plaintiff never reported the occurrence of the accident to it. The Plaintiff also conceded that she had not produced evidence to prove that she did pay the "excess" as alleged. She also insisted that she sent a demand letter to the Defendant but conceded that she had not produced any evidence to prove that the letter was received by the Defendant.

Submissions

7. Pursuant to agreed directions, the Plaintiff filed her Submissions on 15/03/2023 but on the part of the Defendant, up to the date of concluding this Judgment, I had not come across any Submissions filed by or on its behalf.



Plaintiffs' Submissions

8. The Plaintiff's Submissions is basically a recap of what has already been set out both in the Plaintiff and in the Plaintiff's testimony. I therefore do not deem it necessary to recount the same.

Determination

9. The issue in this suit is "whether the Defendant was, at all material times, the insurer of the Plaintiff's motor vehicle the subject hereof and whether therefore, the Defendant should be ordered to satisfy the Judgment entered in a road/traffic accident against the Plaintiff herein as owner of the said insured motor vehicle".

10. In determining the said issue, it is relevant to appreciate that this suit is anchored on the provisions of Sections 10(1) of the [*Insurance \(Motor Vehicle Third Party Risks\) Act*](#) which provides as follows:

" 10. Duty of insurer to satisfy judgments against persons insured

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."

11. The obligation of an insurer to satisfy or settle decrees passed against its insured is therefore a statutory duty which emanates from the said Sections 10(1) of the [*Insurance \(Motor Vehicle Third Party Risks\) Act*](#).

12. However, Sections 10 (2), (3A), and (4) of the same [*Act*](#) provide as follows:

(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 connexion 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) either before or after the happening of the event, but within a period of twenty-eight days from the taking effect of the cancellation of the policy, the insurer has notified the Registrar of Motor Vehicles and the Commissioner of Police in writing of the failure to surrender the certificate.
- (3A). No judgment or claim shall be payable by an insurer unless the claimant had, before determination of liability at the request of the insurer, subjected themselves to medical examination by a certified medical practitioner.
- (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.”

13. From the foregoing, it is evident that, notwithstanding the provisions of Section 10(2) above, an insurer is exempted or can avoid liability to satisfy a decree passed against its insured where there is an order stay of execution, or where the policy has been cancelled and the certificate of insurance surrendered or where no notice of institution of the suit giving rise to the judgment sought to be enforced was served, either before institution of the suit or within 14 days after institution thereof, or where the insurer has obtained a decree entitling it to avoid liability under the policy.
14. In this case, as aforesaid, the Defendant filed a Statement of Defence denying that it had insured the motor vehicle or issued the Policy or that it had any knowledge of the accident. The Defendant also pleaded, in the alternative, that if such a Policy was issued, then the same was not in effect and/or extend cover to the said suit, Eldoret CMCC No. 888 of 2018. The Defendant also denied knowledge of the said suit or the entry of Judgment therein or being notified of the same. However, the Defendant did not call any witness. In the circumstances, all that was averred in the Statement of Defence remained just that, mere denials and bare allegations. The Defendant did not therefore demonstrate that it is in any way entitled to avoid satisfying the decree by virtue of the matters pleaded in the Statement of Defence or on the basis of any of the exemptions recognized under the provisions of Sections 10 (2), (3A), and (4) of the *Insurance (Motor Vehicle Third Party Risks) Act* as set out above.
15. On her part, the Plaintiff produced copies of the Judgment dated 4/10/2019 and warrants of attachment dated 14/02/2020 issued in the said Eldoret CMCC No. 888 of 2018, thus confirming the existence of that suit. The Judgment also confirms that the amount awarded was Kshs 528,900/-



and the warrants of attachment indicates that the decretal sum, as at that date, had reached a figure of Kshs 764,500/-. The documents exhibited also indicate that the Auctioneers demanded a fee of Kshs 163,071/-. The Plaintiff also produced a copy of the insurance sticker demonstrating that the motor vehicle registration number KAP 496Q, the subject hereof was, at all material times, indeed insured by the Defendant under the Policy No. AM3/080/1/008795/2011 with the cover commencing on 2/05/2018 and expiring on 3/01/2019. The Plaintiff also produced a copy of a Police Abstract demonstrating that the accident involving the said motor vehicle occurred on 24/05/2018 thus during the pendency of the policy. The Plaintiff also produced a copy of the Memorandum of Appearance filed in the said suit by Messrs E.J. Kemei & Co. Advocates whom the Plaintiff alleges was appointed by the Defendant to defend her in the suit. Also produced is a copy of the demand letter dated 10/11/2019 issued by the Plaintiff's Advocates prior to filing of this suit.

16. Since the Defendant did not call any witness, the above evidence, testimony given by the Plaintiff and exhibits produced, remain uncontroverted. I therefore have no material to disbelieve the same.
17. As aforesaid, during cross-examination, the Plaintiff was referred by the Defendant's Advocate to the letter dated 30/08/2018 from the Defendant and contained in the Plaintiff's own List of documents and which letter the Plaintiff had produced as her exhibit. Although written on a "without prejudice" basis, since the Defendant's Counsel opted to refer to, and to cross-examine on it, the "privilege" appears to have been waived by the Defendant thus allowing the Court to consider it. I therefore consider it and in doing so, I note that indeed, the letter confirms the appointment by the Defendant of Messrs E.J. Kemei & Co. Advocates to act for the Plaintiff herein in the Magistrates Court case (as Defendant). The letter also instructs the Plaintiff to pay "third party excess fee" of Kshs 15,000/-. Having not repudiated liability and having not withdrawn the said Advocates from the suit up to its conclusion, the Defendant cannot now feign ignorance thereof.
18. In the circumstances, and in the absence of any evidence that the Policy was not valid or that the motor vehicle was, at the material time, not being used within the limits of the Policy or that the Defendant was entitled, under the law, to avoid the obligation of satisfying the decree, I have no grounds to find otherwise other than that the Defendant's refusal to settle the said decretal sum is a breach of the contract of insurance the subject hereof.

Final Orders

19. The upshot of my findings above is that this suit succeeds and I enter Judgment as follows:
 - i. A declaration is hereby issued that the Defendant is legally bound to settle the decretal sum, interest thereon and costs, awarded in Eldoret CMCC No. 888 of 2018 - Hillary Nyabali Ndusu v Dora Mbula t/a Junior Academy which arose from an accident involving the Plaintiff's motor vehicle registration number KAP 496Q and the Interested Party herein on or about 24th May 2018.
 - ii. The prayer for compensation for breach of contract is declined as no evidence was led in respect thereto.
 - iii. I award costs of this suit to the Plaintiff, to be borne by the Defendant.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 18TH DAY OF NOVEMBER 2024

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:



N/A for Plaintiff and Interested Party

Kipkorir for Defendant

Court Assistant: Brian Kimathi

