

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
COMMERCIAL & TAX DIVISION
CIVIL APPEAL NO. E345 OF 2023

HUNKAR TRADING COMPANY LTD APPELLANT

-VERSUS-

KENYA ORIENT INSURANCE LTD 1ST RESPONDENT

FAMILY BANK LTD 2ND RESPONDENT

(Being an Appeal against the entire Judgment and Decree delivered by Hon. J.W. Nasimiyu, Adjudicator on 20 November 2023 in Nairobi Small Claims No. E2434 of 2023)

JUDGEMENT

1. This appeal arises from a suit filed in the Small Claims Court by the Appellant against the Respondents seeking the following reliefs:
 - (i) Judgement in the sum of Kshs 650,000/-;
 - (ii) Costs of the claim;
 - (iii) Any other appropriate relief.

Brief Background

2. On or about 2 October 2020, the Appellant secured a loan facility from the 2nd Respondent which included an Insurance Premium Finance (IPF) component of Kshs 6,875,945/=. Under this arrangement, the 2nd Respondent paid insurance premiums directly to the 1st Respondent to secure insurance cover for the Appellant's fleet of motor vehicles, including Toyota Camry registration number KBU 853P. Pursuant

thereto, the 1st Respondent issued a comprehensive insurance policy covering the said motor vehicle for the period from 31 August 2020 to 30 August 2021. The Appellant was to repay the IPF facility to the 2nd Respondent in 10 monthly instalments.

3. On 28 November 2020, while the insurance policy was in force, the motor vehicle was involved in an accident and sustained substantial damage. The Appellant lodged a claim with the 1st Respondent, who commissioned an investigation. The Investigation Report concluded that the accident was fortuitous and the claim was admissible.
4. Following this determination, the 1st Respondent formally admitted liability *vide* letter dated 19 January 2021, declared the motor vehicle a write off and made an offer to settle the claim for a net sum of Kshs 650,000/=. Contemporaneously, the Appellant had defaulted on its loan repayment obligations to the 2nd Respondent from inception of the facility. This default prompted the 2nd Respondent, *vide* letter dated 23 January 2021, to instruct the 1st Respondent to cancel all insurance policies financed under the IPF agreement and refund the unutilised premiums.
5. Acting on this instruction, the 1st Respondent declined to honour its commitment to indemnify the Appellant, leading to the suit filed in the Small Claims Court.
6. In its judgement, the trial court held that the insurance policy was inextricably linked to the loan facility and that the 2nd Respondent, as the financier, had a priority interest that entitled it to instruct the 1st Respondent to cancel the policy upon the Appellant's default. The trial court concluded that this cancellation extinguished any and all claims

that the Appellant had against the 1st Respondent, including the claim that had arisen from the accident on 28 November 2020. Consequently, the Appellant's suit was dismissed.

7. Aggrieved by the Judgement, the Appellant lodged an appeal on the following grounds:
- (i) The Learned Adjudicator/Magistrate erred in law and misdirected herself in the manner that she framed the issues for determination;
 - (ii) The Learned Adjudicator/Magistrate erred in law and misdirected herself when she approached the issues in the matter as if it was a dispute between the Claimant and the Third Party rather than as an issue between the Claimant and the Respondent on one hand and between the Respondent and the Third Party on the other hand;
 - (iii) The Learned Adjudicator/Magistrate erred in law and misdirected herself when she considered the issue as to whether there was breach of a loan facility between the Claimant and the Third Party rather than whether there was breach of a contract of insurance between the Claimant and the Respondent;
 - (iv) The Learned Adjudicator/Magistrate erred in law in failing to consider and/or find that as at the time of the road accident in issue, there was a valid contract of insurance between the Claimant and the Respondent;
 - (v) The Learned Adjudicator/Magistrate erred in law in failing to find that the Respondent was in breach of the existing contract of insurance after failing to indemnify the Claimant of the loss of the vehicle especially when it had expressly undertaken to do so;

- (vi) The Learned Adjudicator/Magistrate erred in law and misdirected herself when she failed to find that the subsequent cancellation of the insurance policy by the Third Party after the occurrence of the subject traffic accident did not in any way extinguish the rights that had accrued prior to the said cancellation;
 - (vii) The Learned Adjudicator/Magistrate erred in law in failing to appreciate that with the Respondent having not indemnified the Third Party of the loss of the Motor Vehicle, it had no basis in failing to indemnify the Claimant for the subject loss.
 - (viii) The Learned Adjudicator/Magistrate erred in law in finding that the Respondent had committed to indemnify the Claimant in error;
 - (ix) The Learned Adjudicator/Magistrate erred in law in wading into an irrelevant issue as to whether the repudiation of the contract after the subject accident was necessary or not, yet the said issue was not a matter for determination;
 - (x) The Learned Adjudicator/Magistrate erred in law in dismissing the Appellant's case in its entirety;
 - (xi) The Learned Magistrate/Adjudicator erred in law in failing to consider the Appellant's submissions and materials provided;
 - (xii) The learned Magistrate/Adjudicator erred in law in condemning the Claimant to pay the costs of not only the Respondent but also the Third party yet it had not made any claim against the Third party.
8. The appeal was canvassed by way of written submissions.
9. The Appellant submitted that the trial court erred in law in 3 fundamental aspects. Firstly, by misconstruing the nature of the dispute as a loan default issue rather than a straightforward claim for indemnity under a contract of insurance between the Appellant and 1st

Respondent. Secondly, by failing to apply the legal principle that the Appellant's right to indemnity accrued and vested at the moment the insured accident occurred, and that this vested right could not be extinguished by a subsequent cancellation of the policy. The Appellant cited the case of ***National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] KECA 362 (KLR)*** for the proposition that courts must enforce the terms of a contract. Thirdly, by failing to apply the doctrine of estoppel, arguing that the 1st Respondent, having admitted liability in writing, was legally precluded from later repudiating the claim.

10. The 1st Respondent did not participate in this appeal. Its position, as per the trial court record, was that it was contractually bound to act on the 2nd Respondent's instructions to cancel the policy due to the financier's priority interest under the IPF agreement.
11. The 2nd Respondent submitted that the IPF agreement created an indivisible tripartite relationship. The Appellant's admitted default was a fundamental breach of the IPF agreement, which, under clause 11 of the Letter of Offer, legally empowered the 2nd Respondent to demand the cancellation of the policy it was financing. The 2nd Respondent cited the case of ***Co-operative Bank of Kenya Limited v Thomas Ngui & another [2020] KEHC 9626 (KLR)*** in support of a financier's right to protect its commercial interests. The Respondent further urged the Court to draw an adverse inference in law against the Appellant for failing to produce the insurance policy document, suggesting its terms may have favoured the financier, a principle that is supported by the case of ***Dar Iman Limited v Clasico Builders (K) Limited [2021] KEHC 13263 (KLR)***.

Analysis and Determination

12. This being an appeal from the Small Claims Court, the jurisdiction of the Court is circumscribed in section 38 of the Small Claims Court Act. Section 38 of the Small Claims Court Act provides as follows:

(1) A person aggrieved by the decision or an order of the Court may appeal against that decision or an order to the High Court on matters of law;

(2) An appeal from any decision or order referred to in sub section (1) shall be final

13. The above provision means that this Court can only intervene if the evidence on record does not reasonably support the conclusions made by the trial court. That provision circumscribes the Court's mandate, limiting the right of appeal to matters of law only. Consequently, this Court will not delve into a re-evaluation of the evidence or disturb the findings of fact made by the trial court, unless it is demonstrated that such findings were based on no evidence at all, which would itself constitute an error of law. This appeal raises significant points of law concerning the interplay between contracts of insurance, insurance premium financing agreement, and the fundamental principles of accrual of rights and estoppel. The central question of law is whether an insurer, having admitted liability for a claim, can lawfully repudiate that claim on the subsequent instructions of a premium financier who cancels the policy due to the insured's default on loan repayments.

14. The right of an insured to be indemnified arises as a matter of law as soon as the event insured against occurs. At that moment, a debt accrues from the insurer to the insured, and the insured's right to that

indemnity becomes a vested legal right. In this case, the insured event occurred on 28 November 2020. At that time, the policy was valid and in force. Therefore, on that date, the Appellant's right to be indemnified for the loss of its motor vehicle crystallised and vested.

15. The cancellation of an insurance policy operates prospectively, not retrospectively. It terminates the insurer's obligations to cover future risks from the date of cancellation. It cannot, as a matter of law, operate to extinguish rights that have already matured and vested in the insured. The 2nd Respondent's instruction to cancel the policy was issued on 23 January 2021, nearly two months after the right to indemnity had accrued. The fact that the 1st Respondent refunded unutilised premiums to the 2nd Respondent is an admission that the premium for the period up to the cancellation was utilised because it was on risk. Since the loss occurred during the period for which the premium was earned, the liability for that loss remains. The trial court's finding that the subsequent cancellation extinguished the accrued claim was, therefore, a fundamental error of law.
16. Further, the 1st Respondent's letter of 19 January 2021 was a clear and unequivocal representation that the claim was admitted and would be paid. It confirmed the vehicle was a total loss, quantified the indemnity and invited the Appellant to submit documents for payment. In reliance on this representation, the Appellant acted to its detriment by taking steps to procure the required documentation. It is unconscionable in law to permit the 1st Respondent to admit liability one day and deny it the next day based on an extrinsic event that had no legal bearing on the accrued claim. Having made its election to accept the claim, the 1st Respondent was estopped from subsequently denying it.

17. The 2nd Respondent asserted that it was exercising its right to protect its interests as financier, having registered all assets debenture over the Appellant's assets. This Court acknowledges the holding in the **Thomas Ngui case (supra)** that it would be prejudicial to drag a financier through trial when their registrable interest is limited to safeguarding their commercial interests in an asset. However, the issue here is not the liability of the financier to the Appellant, but the liability of the insurer to the Appellant.
18. In **Insurance Company of East Africa v Marwa Distributors Limited [2015] KEHC 4512 (KLR)**, facing almost similar facts, the Court stated thus:

“The main issue for consideration is whether the policy issued by ICEA was valid for non-payment of the premium. It is not in dispute that ICEA issued a policy to the Company. According to the schedule to the policy the premium to be paid was Kshs. 35,000/-. The receipts produced by the Company confirm that it paid two instalments of Kshs. 77.830.00 but the policy numbers reflect other policies other than Policy No. 021/914/10/21974/2005 which was the policy subject of this suit. ICEA had raised an affirmative defence that the Company had not paid the premium hence the Company had to produce evidence to rebut this contention. It did not do so hence I find and hold that the premium was not paid for the specific policy.

*What then is the effect of non-payment of the premium?
In Nizar Virani t/a Kisumu Beach Resort v Phoenix of East*

Africa Assurance Company Ltd KSM CA Civil Appeal No. 88 of 2002 [2004]eKLR the Court of Appeal held that the law of Kenya is that the non-payment of premium does not invalidate the insurance contract. It quoted and agreed with MacGillivray & Parkington on Insurance Law, 7th Edition paragraph 861 which states as follows:

“There is no rule of law to the effect that there cannot be a complete contract of insurance concluded until the premium is paid, and it has been held in several jurisdictions that the courts will not imply a condition that the insurance is not to attach until payment. It would seem to follow that, if credit has been given for the premium, the insurer is liable to pay in the event of a loss before payment, although, as has been held in a South African decision, the insurer would be entitled to deduct the amount of the premium from the loss payable, at least where the period of credit had expired by that time, since the assured could not insist on payment when in breach of any obligation assumed on his part under the contract.”

In my understanding, the case does not set out a hard and fast rule that failure to pay premium does not invalidate the policy but underpins the general contract principle that parties are bound by their obligations recorded in the agreement. It means that if the parties do not make provision for the effect of non-payment of the premium, the court will not necessarily imply that the policy is invalid. The effect of non-payment of premium on the policy depends on the intention of the parties expressed in the contract.

The recital of the policy subject of the suit states as follows;

Now therefore in consideration of the payment to the company of the premium for the period of insurance mentioned in the schedule and for any subsequent period for which the Company shall accept renewal premium the Company agrees to pay or make good to the Insured or otherwise compensate or indemnify the Insured as hereinafter provided[Emphasis mine]

The ordinary and unvarnished meaning of the clause is that the insured must have paid the premium for the period of insurance in order to be indemnified for any loss or damage that occurs during the period of cover. In other words, the policy document issued by the insurer constitutes a contract to insure and the premium is the consideration for the promise to indemnify the insured if the event takes place.

Since the premium was not paid, there was no obligation on ICEA to settle the claim by the company. Since the contract was not consummated by the payment of the premium, ICEA could not invoke the cancellation clause in the policy which was invalid in the first place.”

19. In ***Chambuni v Gemini Insurance Company Limited [2023] KEHC 21419 (KLR)***, the Court held thus:

:There is, though, the issue of the non-payment of premiums. The payslips for March 2017 and April 2017

were produced. The accident happened in January 2017. I can state definitively whether or not there was proof of non-payment of premiums. Whatever the case, the law in Kenya is that stated in Virani t/a Kisumu Beach v Phoenix of East Africa Assurance Company Limited [2004] eKLR (Omolo, O’Kubasu & Waki, JJA) and Insurance Company of East Africa v Marwa Distributors Limited [2015] eKLR (Majanja, J), that non-payment of premiums does not invalidate the insurance contract, unless there is an express term in the contract on that. The respondent did not display any such contract which could carry such a term.”

20. A similar observation was made in ***Heritage Insurance Company Ltd v Harvis Engineering Ltd*** [2024] KEHC 5354 (KLR).
21. I have carefully perused the Record of Appeal and in particular, the letter of offer dated 2 October 2020. The same indicates that the loan facility extended to the Appellant was for Kshs 19,798,065/=, part of which comprised the insurance premium financing. The loan was secured by various instruments including a charge over property, an all-asset debenture and several guarantees. What is conspicuously missing is an express term invalidating the contract due to non-payment of monthly instalments. Equally, the 1st Respondent did not produce any policy document containing such a term.
22. For the foregoing reasons, this Court finds that the trial court erred on several points of law. The appeal is, therefore, meritorious. Accordingly, I issue the following orders:

- (i) The appeal is hereby allowed;
- (ii) The Judgement and decree of Hon. J.W. Nasimiyu delivered on 20 November 2023 in Milimani Small Claims Court No. E2434 of 2023 is hereby set aside in its entirety;
- (iii) That in its place, judgement is hereby entered for the Appellant against the 1st Respondent in the sum of Kshs 650,000/=;
- (iv) That the above sum shall attract interest at court rates from the date of filing suit in the Small Claims Court until payment in full;
- (v) The Appellant is awarded costs of the suit;
- (vi) The Appellant is awarded costs of this appeal assessed at Kshs 40,000/=

Dated and Delivered at Nairobi this 24 day of OCTOBER 2025.

**HELENE R. NAMISI
JUDGE OF THE HIGH COURT**

Delivered on virtual platform in the presence of:

For the Appellant: N/A
For the 1st Respondent: N/A
For the 2nd Respondent: Mr. Orende
Court Assistant: Lucy Mwangi