REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

CIVIL APPEAL NO. **E057** OF 2024

C.I.C. GENERAL INSURANCE CO. LTD..……APPELLANT

-VERSUS-

PATRICK KAVERI NJIHIA…….....RESPONDENT

(Being an appeal from the judgment and decree in the Chief Magistrate's Court at Thika (Hon. P. Mutua SPM) dated 21st February 2024 in civil case number E006 of 2023)

JUDGMENT

By plaint dated 31st December 2022, the plaintiff sued the respondent in the lower court claiming the following;

1. A declaration that the defendant is not entitled to be indemnified by the plaintiff in respect to Insurance Policy no. BC/17/070/9/002979/2021/12 and more specifically any judgment, claims or liability that have arisen, may arise or arising as a result of the accident involving motor vehicle registration number KBR 628M.

2. A declaration that the plaintiff is not bound to satisfy any judgement/decree that may be granted to the plaintiffs in CMCC Nos E562 and 563 of 2022 Thika respectively or any other suit that may be filed subsequent hereto in respect to the same accident.

3. Costs of this suit.

The matter proceeded *ex-parte* after the respondent failed to enter appearance or file defence. The proceedings show that one Moses M. Kavisi the legal officer with the appellant and the only witness for the appellant testified by adopting his statement dated 31st December 2022 and producing documents in its list of documents dated the same date. In the said statement, it is recorded that the respondent was the registered owner of motor vehicle registration number KBR 628M which he had insured with the appellant under the insurance policy referred to in the plaint. It was a private motor vehicle cover which was in respect of any liability which would be incurred by the respondent arising out of damage, death, bodily injury to any person caused by or arising out of the use on the road of the said motor vehicle.

The appellant stated that it was an express and/or implied term of the insurance contract that the appellant shall not be liable in respect of any accident, injury, loss, damages or liability if the vehicle was carrying more than its authorized capacity which term the respondent had committed to fully comply with.

The witness added that around 25th June 2022, the appellant received a report that the motor vehicle was involved in an accident along Thika superhighway where there were injuries and fatalities following which the victims filed suits for recovery and there were prospects of more suits. The witness added that, at the time of the accident, the respondent was in breach or in violation of an express term and condition of the policy by carrying excess or more passengers than the authorized capacity as it had 8 passengers and a driver where its capacity was five. For this reason, the appellant asked that the court to grant the declarations. The witness concluded by producing policy document dated 20-12-2021, pleadings in

Thika Cmcc numbers E562 and E563 of 2022, its investigations report and claim form.

The appeal was disposed of by way of written submissions. The appellant filed submissions dated 15th August 2025 while the respondent did not appear in this appeal just the same way he did not appear in the trial court. I have read the said submissions, the record of appeal including the proceedings and judgement of the trial court. In granting prayer 1 and dismissing prayer 2 of the plaint, the Honourable Magistrate held that the appellant had not brought its case under Section 10(4) of the Insurance (Third Party Motor Vehicle Risks) Act (hereinafter referred to as 'the Act') as according to him the appellant's pleadings were based on reliance to the policy contract which is contrary to Section 10(4) of the Act.

Having read the appellant's submissions and the judgment of the trial court, I form the opinion that the borne of contention in this matter is the interpretation and purport of Section 10(4) of the Act and whether the appellant could benefit from provisions of Section 10(2) of the same Act. Section 10(4) of the Act 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.'

It is clear to me that the appellant's case could not fall under the above Section because the provisions therein are limited to circumstances where the policy is avoidable for having been obtained by false representation or non-disclosure of material facts. The case herein was based on breach of the policy terms and not the process of securing the policy. The appellant has and had not pleaded false representation or non-disclosure. I therefore agree with the trial court that the appellant had not brought itself under the provision of Section 10(4) of the Act.

The appellant has submitted that the Honourable Magistrate erred by holding that the only precondition for granting the orders sought in prayer 2 was failure by the appellant to serve the statutory notice within the prescribed time thereby disregarding the legal effect of a proven breach of the policy terms by the insured. According to the appellant, the Section should be read holistically and inclusive of all the subsections. It argues that the breaches in question fell in the ambit of Section 10(2) and the court erred in limiting itself to section 10(4) of the Act.

I have not seen anything in the judgement that suggests that the Honourable Magistrate based his judgment on failure to serve statutory notice or where he discussed the effect of failure to serve a statutory notice. In that case, do not understand where the appellant is coming from in its submissions on that aspect. As far as I understand provisions of Section 10 of the Act, the instances where an insurer can avoid payment of decretal sums to a victim are quite limited and are not dependent on the insurer's right to cancel or avoid the policy. In ***Blueshield Insurance Co. Ltd v Raymond M'rimberia (1998) KECA 280 (KLR),*** the Court of Appeal held that;

> *'Thus once statutory liability under s.5(b) is covered by the terms of the policy, which in the instant case was, and is not denied by the appellant, the insurer is obliged under s.10(1) of the Act to satisfy the judgment obtained against the insured and pay to the person entitled to the benefit of that judgment all sums payable thereunder with costs and interest, notwithstanding that the insurer may be entitled to avoid or cancel the policy vis a vis the insured or may have even avoided or cancelled it.'*

The appellant has faulted the trial court for basing its judgment on Section 10(4) of the Act instead of Section 10(2). If I understand the appellant well, it admits that it was not entitled to the prayer two based on Section 10(4) but on Section 10(2) of the Act. Section 10(2) provides that;

> *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) 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.

Of importance in this appeal, the trial court held as follows;

'The issue here is whether the plaintiff has brought itself within the provisions of Section 10(4) so as to be entitled to the declaration. From the plaint, paragraph 7 states that it was an express term of the policy that the plaintiff shall not be liable in respect of any accident, injury, loss, damage or liability if the vehicle is carrying more than its authorized capacity. It is

clear then that the plaintiff is relying on the terms of the policy contrary to clear terms of Section 10(4) of the Act.'

I do agree that the trial court should not have restricted its judgment to Section 10(4) only simply because the appellant had pleaded as cited above. The provisions of the Act and its interpretation and application in the case is a matter of law which needed not be pleaded. Order 2 Rule 9 of the Civil Procedure Rules gives a party liberty to elect to plead a point of law or not.

Flowing from the above, it is my holding that, the trial court had the duty to address the import and application of the circumstances of the case in relation to the other provisions of the Act. I will proceed to determine whether the appellant was entitled to prayer 2 of the plaint on account of provisions of Section 10(2) which I have reproduced above. In its submissions, the appellant has zeroed on subsection 2(c).

Under the said subsection, it cannot in my view be disputable that the insurer can only avoid liability if the policy had been cancelled by consent or pursuant to provisions therein before the happening of the event which was the cause of death, or injury. I do not see any difficulty in placing this matter in its place vis a vis this provision. The accident in question occurred 25th June 2022. The appellant proceeded to carry out investigations and came up with the results that the motor vehicle was at the time of the accident carrying excess passengers.

The appellant did not demonstrate that the policy was cancelled either by mutual consent or pursuant to the terms therein before the accident occurred. In fact, the evidence produced by the appellant is clear that the policy was in force at the time

of the accident. Actually, there is no evidence that the same was ever cancelled as the appellant did not provide any correspondence on cancellation. What the appellant stated is that it communicated that it had avoided the liability. Cancellation of policy or insurance cover is different from avoidance of liability. Cancellation would entail recalling the entire contract such that the insurer would not be liable for any liability involving the vehicle while avoidance is restricted to the event in question. If the appellant cancelled the policy for whatever reason, the same must have come after the happening of the accident. In view of this, the appellant's case falls outside the provisions of Section 10(2) of the Act specifically subsection 2(c) which it has relied on in its submissions.

In addressing similar issue in ***Kenya Alliance Insurance Company Limited v Naomi Wambui Ngira & another (Suing as the Legal Representatives and Administrators of the Estate of Nelson Macharia Maina (Deceased) [2021] KEHC 7044 (KLR),*** the Honourable Justice EM Muriithi stated that;

> *'However, the said repudiation is not a blanket one, requiring to be done whenever an insurer has been served with a notice. This Court finds that the requirement for an insurer to file a declaratory suit is intended for only those liabilities for which the insurer is entitled to repudiate and/or avoid for reasons beyond the express provisions of the policy, specifically being that there was non-disclosure of material facts or a misrepresentation of a material fact. The liability in issue in this case is not one such contemplated by the said Section.'*

In view of the above, I find that the trial Magistrate did not err in disallowing prayer 2 of the plaint and consequently this appeal is lacking in merits and the same is hereby dismissed with no orders as to costs.

Dated, signed and delivered at Nairobi this **16th** day of **January** 2026.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Mr. Ochieng for the appellant and in absence of the respondent.