Royal Hisham Kenya Limited v Sanlam General Insurance Ltd & another (Civil Appeal E057 of 2023) [2025] KECA 118 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KECA 118 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E057 OF 2023

AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA

FEBRUARY 7, 2025

BETWEEN

ROYAL HISHAM KENYA LIMITED .... APPELLANT

AND

SANLAM GENERAL INSURANCE LTD .... 1ST RESPONDENT

DIAMOND TRUST BANK KENYA LIMITED .... 2ND RESPONDENT

(Being an appeal against the Ruling and Orders of the High Court of Kenya at Mombasa (Olga Sewe, J.) dated 25th October 2022 In HCCC No. E006 of 2021)

JUDGMENT

1. The genesis of the appeal before us is the Originating Summons dated 2nd June 2018 and filed by the 1st respondent, Sanlam General Insurance Limited, in Mombasa CMCC No. 1227 of 2018 against the appellant, Royal Hisham Kenya Limited, pursuant to section 10(4) of the *Insurance (Motor Vehicles Third Party Risks) Act*, Revised 2022 (1945) (the Act) seeking a declaration that it was entitled to avoid policy No. 010/080/1/253902/17/11 in respect of the appellant's motor vehicle Registration No. KBK 692E on the ground that it was obtained by non-disclosure of a material fact that the motor vehicle was being used for hire and reward by entities and persons other than the appellant.

2. However, in the affidavit in support of the Originating Summons aforesaid, it was deponed that the 1st respondent had insured the appellant's motor vehicle KCF 647S with a Commercial Cover policy, and was issued with a Class B Certificate No. B8731528; that the appellant had made out a declaration that the motor vehicle was to be used purely for its own purpose, which declaration was false; that, on 7th January 2018, the appellant had hired out the motor vehicle to Kenya Ports Authority when it was involved in a road traffic accident; that the appellant was carrying passengers in the motor vehicle contrary to the insurance policy; that the passengers had since filed 23 cases in the Chief Magistrate's Court at Voi seeking compensation for loss and damage suffered as a result of the said accident; and that,

in the circumstances, the 1st respondent was entitled to a declaration that it could avoid any liability that would otherwise accrue to it under section 10(4) of the Act.

3. We take note of the disparity, albeit inconsequential, in the description of the subject motor vehicle in prayer (a)(i) of the Summons as "KBK 692E" and "KCF 647S" as described in paragraph 2 of the affidavit in support of the Summons. However, it is evident from the record as put to us that the correct subject matter of insurance and of the competing claims in issue is motor vehicle Registration No. KCF 647S.

4. In response to the 1st respondent's Summons, the appellant filed an application challenging the jurisdiction of the Chief Magistrates Court and sought to have the Originating Summons dismissed on the grounds that it amounted to an abuse of the court process. In a ruling dated 4th February 2019, the court held that it had the requisite jurisdiction to hear and determine the 1st respondent's Summons.

5. The appellant moved on interlocutory appeal to the High Court of Kenya at Mombasa in Mombasa HCCA No. 32 of 2019 challenging the ruling of the trial court aforesaid. In its judgment dated 8th May 2020, the High Court held that the claim was improperly brought by way of Originating Summons thereby rendering the suit improper, irregular and fatally defective. Consequently, it set aside the ruling and allowed the appellant's application. However, the learned Judge observed that the 1st respondent remained at liberty to agitate its claim through an ordinary civil suit by way of a plaint. Notably, that decision was not challenged.

6. With its Summons struck out on account of the jurisdictional challenge pegged on the alleged formal and procedural infractions, the 1st respondent filed a fresh suit against the appellant in Mombasa HCCC No. E006 of 2021 vide a plaint dated 14th January 2021 in which it averred that, between 1st December 2017 and 30th November 2018, it insured the appellant's motor vehicle registration No. KCF 647S with a Class "B" Motor Commercial cover (covering commercial own goods, general cartage and institutional buses) as opposed to a Class "A" PSV cover (covering, inter alia, ride-hailing service taxis, tour buses and buses for hire); that the motor vehicle was issued with a Class B Certificate No. B8731528 and policy No. 010/080/253902/17/11; that the 1st respondent indicated that the vehicle was to be used purely for the appellant's own domestic institutional use and not for hire out to a third party as a public service vehicle; and that, between 2nd November 2015 to 1st November 2016, the motor vehicle was previously insured by Invesco Insurance Company Limited and issued with a Motor Vehicle Public Service Cover (PSV).

7. The 1st respondent further averred that, on 7th January 2018, the subject motor vehicle was involved in a road traffic accident; that the claim arising from the accident was outside the scope of its insurance cover; that the 1st respondent filed Mombasa CMCC No. 1227 of 2018 against the appellant, whose interlocutory ruling was the subject of an appeal in the High Court in HCCA No. 32 of 2019; and that, in the said appeal, the Judge struck out the case but allowed the 1st respondent to file a fresh suit, which order had not been set aside or appealed against.

8. In its plaint, the 1st respondent prayed for: a declaration that the policy of insurance issued to the appellant under the insurance agreement between them was a Class "B" Motor Commercial cover covering commercial own goods, commercial general cartage and institutional buses; a declaration that the policy issued to the appellant was not a Class "A" Public Service Vehicle cover and, therefore, it did not provide cover when the appellant's motor vehicle was used as a hire bus and that, consequently, the 1st respondent was not bound to compensate the hirers of the motor vehicle in the event of an accident; and costs of the suit.

9. In response to the suit, the appellant filed a Notice of Motion dated 5th May 2021 pursuant to Order 2 rule 15 and Order 7 rule 1 of the Civil Procedure Rules seeking orders that the 1st respondent's plaint be struck out for contravening section 10(4) of the *Insurance (Motor Vehicles Third Party Risks) Act*; that the plaint be struck out for being res judicata Mombasa CMCC No. 1227 of 2018; and that the costs of the application and the suit be borne by the 1st respondent.

10. The appellant's Motion was founded on the grounds that the 1st respondent had no reasonable cause of action; that the plaint may prejudice, embarrass or delay the fair trial of the action; that the plaint was otherwise an abuse of the court process; that the cause of action was time barred; and that the matter was res judicata Mombasa CMCC No. 1227 of 2018.

11. The appellant's Motion was supported by the annexed affidavit sworn on 5th May 2021 by Husna Rashid Al-Namaani, the appellant's Chief Operations Officer, who deponed that the 1st respondent instituted proceedings seeking to repudiate the contract of insurance in respect of motor vehicle registration No. KCF 647S; and that, according to the provisions of section 10(4) of the *Insurance (Motor Vehicles Third Party Risks) Act*, such repudiation or avoidance is founded if the insurer obtains a declaration avoiding the policy in an action commenced before, or within three months after the commencement of the lower court proceedings in which judgment was given; and provided that an insurer who has obtained such a declaration shall not become entitled to benefit from the said provision as respects any judgment obtained in proceedings commenced before the commencement of that action unless, before or within 14 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.

12. The Chief Operations Officer further deponed that the 1st respondent's claim was filed on 27th January 2021, well outside the prescribed time limits, thereby making the prayers sought untenable as the claims filed in relation to the accident in the Voi Magistrate's courts were filed in 2018 and 2019; that, in the entire documentation supplied by the 1st respondent, the statutory notice envisaged in section 10(4) of the *Insurance (Motor Vehicles Third Party Risks) Act* had not been served on the appellant; that, therefore, the 1st respondent had no reasonable cause of action in the suit; that the matter was res judicata Mombasa CMCC No. 1227 of 2018 where the action was struck out on appeal by virtue of having been taken out by originating summons; and that, once a matter is struck out, it cannot be re-litigated, unlike in circumstances where it is dismissed.

13. In addition to the Motion aforesaid, the appellant filed a Chamber Summons application dated 5th May 2021 seeking leave to serve a third party notice upon the 2nd respondent (Diamond Trust Bank Kenya Limited). The application was allowed whereupon the 2nd respondent entered appearance as the third party vide a Memorandum of Appearance dated 7th July 2021.

14. In response to the application, the 1st respondent filed a replying affidavit sworn on 6th August 2021 by Janette Awidhi, its Claim Manager, deponing that the suit was not brought under section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act*, but under the *Law of Contract Act*; that the suit did not seek to repudiate or cancel the policy, but that it was seeking the court's interpretation of the contract and a declaration as to what kind of a contract it was; that there were no third parties in the case and that, therefore, the application was based on failure to understand or comprehend the suit before the court; that Mombasa CMCC No. 1227 of 2018 was a distinct suit from the current one as it was brought under the provisions of the Insurance (Motor Vehicles Third Party Risks) Act and not the *Law of Contract Act*; that, in any event, the Judge sitting on appeal in Mombasa HCCA No. 32 of 2019 allowed the 1st respondent to file a fresh suit, and that the learned Judge's statement in that regard was not appealed against; that cases based on contract have a limitation period of 6

years, which had not lapsed and, therefore, the court could proceed to interpret the contract between the parties; that, since the parties did not agree on the facts and on the nature of the contract of insurance policy entered into, this was not a plain and obvious case, but one that required witnesses to testify and be cross-examined; that the plaint raised triable issues, the least of which was whether policy No. 010/080/1/253902/17/11 was Class B or Class A; that, even if it was true as alleged by the appellant that the 1st respondent could not avoid liability against third parties under the contract, the 1st respondent could still seek compensation from the appellant for any monies expended; that the application was an abuse of the court process, incompetent and incurably defective as it did not state under which sub-rule of Order 2 rule 15 it was brought.

15. The 2nd respondent's supported the appellant's Motion and filed a replying affidavit sworn on 22nd March 2022 by Joram Kilwanda, its Senior Officer – Debt Recovery, and in which he deponed that the suit was not about the interpretation of the insurance contract; that the 1st respondent was craftily seeking to circumvent section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act*; that, through its suit, the 1st respondent was clearly seeking to repudiate its obligations under the insurance contract between itself and the appellant, which could only be exercised under section 10 of the Act; that, in Mombasa CMCC No. 1227 of 2018, the 1st respondent had sought to avoid the policy on the ground that the motor vehicle's insurance policy was a Class B policy whereas the appellant was using the motor vehicle for hire; and that, in this case, the 1st respondent was similarly seeking a declaration that the motor vehicle was being used outside the scope of the insurance policy cover; and that, therefore, the 1st respondent was not obligated to honour the insurance policy.

16. The application was canvassed by way of written submissions after which the High Court (O. Sewe, J.) delivered its ruling dated 25th October 2022, holding that in Mombasa CMCC No. 1227 of 2018 between the same parties, the 1st respondent sought a declaration that it was entitled to avoid the said policy on the ground that it was obtained by non-disclosure of a material fact that the motor vehicle was being used for hire and reward by entities and persons other than the appellant; that the subject matter in the earlier suit and the suit before the court could not be the same; and that the suit in the lower court was not heard and determined on its merit, but was struck out on appeal on a technicality of form and procedure; that the 1st respondent was at liberty to file a competent suit; and that the subsequent suit was not res judicata.

17. In addition, the learned Judge held that there was no basis for pinning down the suit as one for repudiation of the policy when the 1st respondent had not explicitly disclosed such a cause of action in the plaint; and that the ground that the suit ought to have been filed within 3 months as required, or that the appellant ought to have been served with a 14 days' notice before commencement of the suit under section 10(4) of the Act was untenable and had no merit.

18. Finally, the court held that that it was inappropriate for the appellant to include other prayers in addition to the prayer that the suit be struck out pursuant to Order 2 rule 15(1) (a) of the Civil Procedure Rules in respect of which no evidence is envisaged by dint of rule 15(2) of the Civil Procedure Rules; and that the said provision was couched in peremptory terms and could not be cured by invoking Article 159(2) (d) of *the Constitution*. Consequently, the court dismissed the application and ordered that the costs thereof be in the cause.

19. Aggrieved by the learned Judge's decision, the appellant moved to this Court on appeal vide its Memorandum of Appeal dated 24th April 2023 on the grounds that the learned Judge erred in law and in fact: by failing to appreciate the import of section 10(4) of the *Insurance (Motor Vehicles Third Party Risks) Act*, especially on the issue of strict timelines and notice to the insurer; in her conclusion on the nature of the claim by the 1st respondent and its relation to section 10(4) of the Act; by accepting

and concluding that the 1st respondent's claim was not for repudiation without any basis; and by not appreciating the nature of the application before the court and of the facts of the case. It prays that the appeal be allowed, the ruling set aside, and that the costs of the appeal be borne by the 1st respondent.

20. Learned counsel for the appellant, M/s. Ambwere T. S. & Associates, filed written submissions and a List of Authorities dated 5th December 2023 in support of the appeal while learned counsel for the 1st respondent, M/s. Jengo Associates, filed written submissions and a List of Authorities dated 21st December 2023. No submissions were filed on behalf of the 2nd respondent.

21. Having considered the record as put to us, the grounds on which the interlocutory appeal is founded, the rival submissions, the cited authorities and the law, we find the following to be the issues that commend themselves for our determination, namely: whether the learned Judge erred in her conclusions as to the nature of the claim and its relationship to the provisions of section 10(4) of the Insurance (Motor Vehicle Third Party Risks) Act; and whether the learned Judge erred by not appreciating the nature of the appellant's application and the facts of the case.

22. On the 1st issue as to whether the learned Judge erred in misconstruing the nature of the 1st respondent's claim and its relation to section 10(4) of the Act, counsel for the appellant submitted that: the cause of action in the 1st respondent's suit could be gleaned from the prayers sought, namely a declaration that the policy issued by the 1st respondent to the appellant was not a Class "A" Public Service Vehicle, and that it did not provide cover when the motor vehicle was used as a hire bus and that , therefore, the 1st respondent was not bound to compensate hirers of the motor vehicle in the event of an accident as was the case here; that the 1st respondent essentially sought to avoid the insurance contract, and was therefore bound by section 10(4) of the Act, which is couched in mandatory terms mandating the insurer to give notice or obtain a declaration that he or she is entitled to avoid the policy but that, in this case, the 1st respondent did not obtain a declaration to avoid the policy.

23. Counsel further submitted that the 1st respondent's suit to which the impugned ruling relates was filed on 27th January 2021, more than 2 years and 6 months after the Originating Summons filed in July 2018 was struck out; that no statutory notice was served as required by law, nor any suit filed within 3 months allowed for commencement of proceedings; that the 1st respondent had a duty to issue notice to the insured within 14 days after commencement of the action; and that the original suits in respect of the policy were filed in July 2018 and, to this day, the 1st respondent has not issued the requisite mandatory notice to the plaintiffs in the primary suits in Voi Chief Magistrate's Court. In view of the foregoing, counsel urged the Court to find that section 10(4) of the Act in relation to third parties is the only legal provision under which a court can find that the 1st respondent was not bound to compensate hirers of the motor vehicle in the event of an accident.

24. Counsel contended that the finding by the learned Judge that a declaration that the policy does not apply as pleaded in the plaint and a repudiation of the contract are different claims is not good law; that it is a distinction without a difference; that the ultimate result of a declaration that the insurance policy does not apply is to declare or sanction repudiation; and that the results would be to expose third parties to huge losses while the insurer turns a blind eye to an insurance policy intended to protect third parties.

25. According to counsel, the provisions of section 10(4) of the Act were enacted with a view to aid third parties to obtain protection by indemnity in the event of an accident resulting in loss and damage. Counsel cited the case of Pacis Insurance Company Limited v Malaki Odhiambo Dullo aka Malachi Odhiambo Dullo; Elias Mwailong Kiseu & James Mwatha Githogo (Interested Parties) [2019] KEHC 2715 (KLR) for the proposition that the primary purpose of Cap 405 as envisioned in the title to the

Act and the provisions imposing a compulsory insurance scheme is to protect third parties from risks of injury by motor vehicles; that it behoves every underwriter of such risk to meet the purposes of the act in every event, save for the limited instances provided by law under Section 10 of the Act; and that the obligation of an insurer is that, once a policy is issued under the Act, the insurer has to compensate the injured third party except and unless it obtains a declaration that he is not bound to compensate him/her.

26. Opposing the appeal, counsel for the 1st respondent submitted that the appellant failed to show any reason as to why this Court should interfere with the exercise of the Judge's discretion in the impugned ruling. Counsel cited the case of Patriotic Guards Ltd v James Kipchirchir Sambu [2018] KECA 799 (KLR) where this Court set out the principles upon which this Court can interfere with the exercise by a learned Judge of his discretion, namely: if the Court is satisfied that the judge misdirected himself on law; or that he misapprehended the facts; or that he took into account considerations of which he should not have; or that he failed to take into account considerations which he should have; or that his decision, albeit a discretionary one, was plainly wrong.

27. Turning to the merits of the appeal, counsel submitted that a reading of the supporting affidavit and the affidavit in reply, it is evident that the parties differed on the subject matter of the suit before the trial court; that the issues in dispute could only be determined upon full hearing; that it was therefore necessary to call evidence and subject it to cross-examination; that the issue before the court was simply the interpretation of the contract between the parties, who interpreted it differently; that the dispute had nothing to do with section 10(4) of the Act; and that the court was being called upon to determine the nature of the contract between them.

28. Counsel further contended that, once the nature of the contract was determined, the other legal consequences would automatically follow; that it is only at that point that section 10(4) of the Act would be invokedif found to be applicable to the type of contract in issue; and that the interpretation of the contract is a triable issue and that, therefore, the trial judge was right in so holding. Counsel cited the case of D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] KECA 3 (KLR), submitting that striking out a suit is a draconian jurisdiction, and that courts should only do so in the plain, obvious and clearest of cases; that a court of justice should aim at sustaining a suit rather than terminating it.

29. Upon consideration of the submissions on this issue, we agree with the learned Judge that the parties were not in agreement as to the exact nature of the dispute before the trial court. On the one hand, the appellant urged the Court to find that the appellant craftily pleaded a dispute over the nature of the contract of insurance when its real intention is to seek repudiation while, on the other hand, the 1st respondent denied approaching the court for repudiation under section 10 of the Act. In our considered view, the learned Judge cannot be faulted for concluding that the 1st respondent's suit could not be pinned down to the strictures of section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act* when the 1st respondent did not explicitly disclose such a cause of action in the Plaint, and that it was necessary to call evidence to determine the nature of the contract and the consequences drawing therefrom.

30. Turning to the 2nd and last issue as to whether the learned Judge erred by not appreciating the nature of the appellant's application and the facts of the case, we hasten to observe that the contested procedural infractions apparent on the face of the appellant's Motion count for little in the face of our finding on the 1st issue. The Motion to strike out the 1st respondent's suit having failed, it matters not, for the purposes of the instant appeal, the form in which it was presented or the propriety of the compound prayers therein contained. In effect, nothing turns thereon.

31. That said, the pivotal decision of this Court in Co- Operative Merchant Bank Ltd. vs. George Fredrick Wekesa (Civil Appeal No. 54 of 1999) (UR) cannot go unobserved, and for good reason. In that case, the Court had this to say:

> "Striking out a pleading is a draconian act, which may only be resorted to, in plain cases…Whether or not a case is plain is a matter of fact… Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court… A court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment."

32. Having considered the record of appeal and the grounds on which it was anchored, the impugned ruling, the rival submissions, the cited authorities and the law, we find that the appeal fails and is hereby dismissed with costs to the 1st respondent. Consequently, the ruling and orders of the High Court of Kenya at Mombasa (Olga Sewe, J.) dated October 25, 2022 is hereby upheld. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF FEBRUARY, 2025.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR