Kenya Orient Insurance Limited v Barasa (Civil Appeal E024 of 2024)
[2025] KEHC 3961 (KLR) (27 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3961 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CIVIL APPEAL E024 OF 2024

WM MUSYOKA, J

MARCH 27, 2025

BETWEEN

KENYA ORIENT INSURANCE LIMITED ..... APPELLANT

AND

JOSEPH OCHIENG BARASA ..... RESPONDENT

(An appeal arising from the judgment of Hon. EA Nyaloti, Chief Magistrate, CM, delivered on 23rd May 2024, in Busia CMCCC No. 57 of 2018)

JUDGMENT

1. The suit, at the primary court, was initiated by the respondent against the appellant, for a declaration that the appellant was in breach of an insurance contract it had entered into with the respondent, an order to compel the appellant to indemnify the respondent, on account of the loss he incurred, following an accident to his insured motor vehicle registration mark and number KCF 938J, by paying the full insured amount as per the policy of insurance, special damages and interests. His case was that the motor vehicle was comprehensively covered by the appellant, it had an accident during the duration of the cover, and the appellant had declined to settle the claim, accusing the respondent of having breached the terms of the insurance contract.

2. The appellant filed a defence, in which it denied liability, and everything pleaded in the plaint. In the alternative, it was pleaded that the respondent had breached the terms of the insurance contract between him and the appellant, by carrying passengers for hire and reward.

3. A trial was conducted, in which the respondent testified, and called witnesses. 1 witness testified for the appellant. Judgement was delivered on 23rd May 2024. The claim was allowed, on the basis that the policy was valid, and there was no proof that the respondent had breached the terms of the insurance contract. The claim for Kshs. 43,000.00, special damages, was also allowed, and costs and interests were awarded.

4. The appellant was aggrieved, hence the instant appeal. The grounds, in the memorandum of appeal, dated 12th June 2024, revolve around the trial court ignoring the written submissions filed by the appellant; failing to analyse the evidence and make findings; failing to identify issues for determination, the decisions on the issues, and reasons therefor; ignoring the investigation report; giving vague and unenforceable remedies; ordering indemnity without evidence of the damage suffered; awarding special damages that had not been pleaded nor proved; making a decision that was not supported by the law, pleadings and the facts; and not realising that the cause of action was improperly and vaguely pleaded.

5. Directions were given, on 18th December 2024, for disposal of the appeal by way of written submissions. There has been compliance. Both sides have filed their respective written submissions.

6. The appellant has flagged several issues for determination, being whether the trial court identified the issues and analysed the evidence before concluding; the trial court failed to consider all the evidence; the remedies sought could not be granted; and damage was not proved.

7. Godffrey Gatere Kamau v Peter Mwangi Njuguna [2008] KECA 202 (KLR) [2008] eKLR (Bosire, Githinji & Aluoch, JJA), Francis Barasa Lurare & another v Dennis Nyongesa Maloba [2020] KECA 189 (KLR) [2020] eKLR (Nambuye, Musinga & Kairu, JJA), Directline Assurance Company Limited v Isaac Okonda Mang'ula [2018] KEHC 3347 (KLR) [2018] eKLR (W. Korir, J), Abutalib Musajee t/a Alison Builders Maamiry [2022] KEHC 14979 (KLR) (Janet Mulwa, J), Joseph Karisa Baya v Cefis Giorgio & another [2020] KEHC 7264 (KLR) [2020] eKLR (Nyakundi, J), Concord Insurance Company Limited v David Otieno Alinyo & another [2005] KECA 291 (KLR) [2005] eKLR (Omolo, Tunoi & Githinji, JJA), Nkuene Dairy Farmers Coop Society Limited & another v Ngacha Ndeiya [2020] eKLR (Bosire, Onyango Otieno & Nyamu, JJA), Delta Haulage Services Limited v Complast Industries Limited & another [2015] KEHC 7310 (KLR) [2015] eKLR (Mabeya, J) and David Bagine v Martin Bundi [1997] eKLR (Gicheru, Shah & Pall, JJA) are cited.

8. The respondent, in his written submissions, largely supported the decision of the trial court. It is submitted that the appellant did not establish entitlement to avoid the policy, for there was no evidence that fare paying passengers were being transported, the appellant did not file suit to obtain a declaratory order that it was entitled to avoid liability under the policy. Section 10(4) of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405 (Laws of Kenya) and Britam General Insurance Company Limited v Josephat Ondiek [2018] eKLR (Nyakundi, J) are cited.

9. The principal argument by the appellant is that the policy of insurance was breached, and that that is what the trial court should have found.

10. Was there a breach of the policy? Or, to put it differently, was there evidence that the policy was breached?

11. It was common ground that there was a contract of insurance between the 2 parties, and a copy of the policy was in fact produced by the appellant. It was also common ground that the said policy was still valid as at the date of the accident. The same covered the insured against material damage to the vehicle. The policy restricted the use of the vehicle, by excluding its use for hire or reward, in clause MOT006/01. The appellant conceded the accident, but it was argued that the vehicle was ferrying passengers, and was being hired, contrary to or in contravention of the terms of the policy.

12. The defence was filed on 7th June 2018, simultaneously with a list of documents, dated 23rd May 2018. Among the documents, the appellant was to rely on, was an investigation report. A copy was filed together with the list of documents, and it was dated 17th March 2016, done by Factline Insurance

Investigators. When the respondent testified, in cross-examination, on 17th August 2021, he denied using the vehicle for hire. He acknowledged that the vehicle had a tracking device, inserted as it was on hire purchase, but said he did not know whether the investigators hired by the appellant had access to it. The issue of the tracking device was critical, as the principal conclusions, in the investigation report, were founded on it. The appellant called only 1 witness, its legal officer. She produced the investigation report, dated 17th March 2016.

13. The investigation report was produced by the appellant, as an exhibit, and there was no opposition from the respondent. It is part of the trial record. See Raymond Muindi Simon v Takaful Insurance of Africa [2019] eKLR (N. Mwangi, J). It carries detailed information of the matter of the subject vehicle, right from when it was imported, registered in Kenya, sold to the respondent, how it was paid for and insured, its use after it was bought, how it was involved in the accident and the activities that followed thereafter. The log, from the tracking device, which is attached to the report, points to that vehicle having been used for purposes other than personal and leisure uses. It made several trips to Kisumu, contrary to the allegation by the respondent, that it was on its maiden trip to Kisumu when the accident occurred. Based on that report, there was adequate material that the vehicle was used for hire and reward, in breach of clause MOT006/01 of the insurance policy, and the appellant was entitled to repudiate the policy, by failing or refusing to make good the loss suffered by the respondent.

14. The remedy available to an insured person, whose policy has been repudiated by the insurer, is to sue to recover damages for the loss flowing from the repudiation. The suit by the respondent was in that context.

15. I have seen the submission, by the respondent, that the appellant should have filed a declaratory suit, to establish that it was entitled to repudiate or avoid the policy. There is reliance on section 10(4) of the Insurance (Motor Vehicle Third Party Risks) Act. With respect, the Insurance (Motor Vehicle Third Party Risks) Act does not apply here. The decision that the respondent relies on, Britam General Insurance Company Limited v Josephat Ondiek [2018] eKLR (Nyakundi, J), is equally inapplicable, for it turns on the provisions of the Insurance (Motor Vehicle Third Party Risks) Act. The claim by the respondent was not on motor vehicle third party risks. It had nothing to do with third party liability. The appellant was under no obligation to move the court for a declaration.

16. The trial court did not analyse the investigation report and decide on whether to rely on it or not. The court merely concluded that there was no evidence of the breach. Yet, there was. The appellant produced the investigation report as an exhibit, to support the claim that there was a breach. The trial court ought to have scrutinised that piece of evidence and evaluated it one way or the other. There was material in there, which pointed to there being a breach of the policy. Had the court trained its mind to that, it would, probably, have come to a different conclusion.

17. Did the respondent prove his claim, that risk attached, his vehicle was damaged, the vehicle was a total loss, hence he was entitled to make the claim?

18. In cases of this nature, where there is a policy of insurance covering material damage to a vehicle, the insurance principle that applies is that of reinstatement, where the insurer is under a duty, upon the risk attaching, of reinstating the insured to the position that he was in before the accident occurred.

19. That means 2 things.

20. The first is, where the damage is reparable, the obligation would be repairing the vehicle, to return it to its pre-accident condition. Where the damage is extensive, so that it would be uneconomical to repair the vehicle, reinstatement would take the form of a monetary compensation. It would be considered uneconomic to repair a vehicle, where the cost of repair would exceed the market value of the vehicle.

Where repairing the vehicle would be uneconomical, the insurer would write-off the vehicle or declare it to be a total loss. Whereupon the insured would be entitled to financial reinstatement, to the position that he was in pre-accident, which would take the form of the pre-accident value of the vehicle, less salvage value.

21. To determine the mode of reinstatement to be adopted, the insurer must get information on the extent of the damage caused, an estimate of the cost of repairs, the pre-accident value of the vehicle and the post-accident or salvage value of the vehicle. See Macharia v Kiruthi [2024] KEHC 3685 (KLR) (Mohochi, J). That would require the services of experts in that area, of motor assessment, valuation and loss adjustment, to assess the damage, the cost of repairing the damage and the value of the remains of the vehicle after the accident. See Hersi v Toyota Kenya Limited & another [2023] KEHC 19247 (KLR) (Meoli, J). If the damage is not severe, and can be remedied by repairing the vehicle, a physical reinstatement would be adopted. Where the damage is severe, and the experts decree that it would be uneconomical to carry out a physical reinstatement of the vehicle, the option of financial reinstatement would be adopted.

22. Where the insurer repudiates the contract, on grounds of breach, such as the case here, and declines to get involved in whichever way, and the insured decides to resort to court action, he, the insured, would be expected to go through the same motions. He should have the damage assessed and the cost of repairs estimated, where he is aiming for physical reinstatement, so that he can sue the insurer to recover the cost for repairs. Where he perceives the loss to be total, he should have the damage assessed, the cost of repairs estimated and have the pre-and-post-accident valuation of the vehicle done, so that he can sue the insurer too recover the pre-accident value of the vehicle, less the salvage value, subject to the insured amount.

23. Those are documents that the respondent required to have to prove his case against the appellant. There is adequate evidence that there was an accident, in which his vehicle was damaged. The police records were adequate, on the damage, as indicated above. But the extent of the damage, in financial terms, was not determined, by way of getting the pre-and-post- accident values of the vehicle, and an estimate of what it would cost to repair the damage. See Murage v Equity Bank Limited [2024] KEHC 325 (KLR)(Muchemi, J). The respondent was alleging that the vehicle had been rendered a total write-off. He provided no evidence of that. He did not claim to be a qualified motor vehicle assessor or valuer. He did not present any report from an assessor or valuer, declaring that the damage to his vehicle was not economical to repair or that the vehicle was a total write-off. See Hersi v Toyota Kenya Limited & another [2023] KEHC 19247 (KLR) (Meoli, J). At the hearing, on 17th August 2021, he conceded that he did not do an assessment of the damage, to provide basis for the conclusion that the vehicle was written off.

24. The respondent appears to be of the notion that his entitlement was the total contract sum, of Kshs. 1,000,000.00. However, that is not how the insurance contract works. The insured would only be entitled to the actual loss suffered. Where it is a case of financial reinstatement, rather than repair of the vehicle, his entitlement would not be the contract or insured sum, but the difference between the pre-accident value of the vehicle and its post-accident value. I have seen no documentation on the 2.

25. The respondent argues that the vehicle was new, having been bought just 2 months prior to the accident, and, therefore, according to him, the pre-accident value was the price that he paid when he bought the vehicle. That could be so. However, the price paid for a vehicle is not an accurate way of determining its value. There could be many variables. It could have been sold at an under or over value. Probably the sale was forced. The other consideration could be that the vehicle was in use during the 2 months prior to the accident, which had the potential of devaluing the vehicle. Either way, the respondent should have subjected the vehicle to valuation, to determine what its pre-accident value

was, and its post-accident value as well. He conceded at the trial, on 17th August 2021, that the vehicle had depreciated. He claimed that a valuation had been done, but he produced no document.

26. The court could only act based on reports from experts on the cost of repairs and the value of the vehicle post-and-pre-accident. The trial court could only work out what the respondent was entitled to from documentation on such. Without the documents, that claim could not be established. The court had no evidence before it that the vehicle was a total write-off or a total loss. See Hersi v Toyota Kenya Limited & another [2023] KEHC 19247 (KLR) (Meoli, J). As it is, the trial court did not have before it, material upon which it could grant the orders it made, with respect to the respondent being indemnified the cost of the motor vehicle and the loss he suffered.

27. Loss and damage to a motor vehicle, arising out of an accident, is quantifiable. A claim to recover compensation or damages for it must be quantified, so that the claimant seeks special damages, by way of a specific sum of money. See Nkuene Dairy Farmers Coop Society Limited & another v Ngacha Ndeiya [2020] eKLR (Bosire, Onyango Otieno & Nyamu, JJA), Hersi v Toyota Kenya Limited & another [2023] KEHC 19247 (KLR) (Meoli, J) and Luganje v Omugah [2024] KEHC 12368 (KLR) (Omido, J). The claim by the respondent was not quantified. He agreed as much in court on 17th August 2017. It is trite that special damages are to be specifically pleaded and specifically proved. See David Bagine v Martin Bundi [1997] eKLR (Gicheru, Shah & Pall, JJA). The respondent did not specifically plead the special damages, neither did he produce documents that would have specifically proved entitlement to special damages.

28. The appellant devoted a significant part of its submissions on the structure of the judgement of the trial court, around identification of issues, analysis of the evidence and assigning reasons to the determinations made. These are required by Order 21 rule 4 of the Civil Procedure Rules. Of course, a decision by a court should not be vitiated merely on account of non-compliance with these provisions, for the court may not comply with them, but still come to a determination which is sound, looked at from the perspective of the evidence recorded.

29. However, compliance with these provisions is critical. Parties come to court to have their disputes resolved. Resolution is not just about getting a decision or determination. The process matters. It is about justice and fairness. It is about being heard. It is about, upon being heard, the evidence tendered, and the arguments made, being analysed and considered. Parties should never be left with the sense that the decision of the court was simply plucked from the air. It must be anchored on the evidence and the arguments. That anchorage must be evident from the judgement, in terms of identification of the issues or of the points for determination, analyses of the evidence, consideration of the arguments, and allocation of reasons to the determination. It ought to be clear, from the judgement, that the court handled the material judicially and judiciously, before coming to whatever decision.

30. Is it true, that the trial court did not have regard to Order 21 rule 4 of the Civil Procedure Rules? I see that the trial court did identify or frame the issues that it was to determine. However, it did not analyse the material that the parties placed before it, as against the issues framed, to enable it to resolve the issues one way or other. No reasons were given for the conclusions arrived at. There was no trail of the route, by way of reason, founded on the evidence, that took the court to its final determination.

31. At paragraph *18*, the court merely says, "I am satisfied that the plaintiff has proved his case on a balance of probability." The evidence, tendered by the respondent, is not analysed, to demonstrate that he had proved its case. Not a single principle of law is mentioned. Not a single judicial authority or precedent is cited. The same applies to paragraph 19 of the judgement, which dwells on the case by the appellant, where it is concluded that no evidence was on record proving that the respondent had breached the conditions of the policy. The appellant had presented a witness and produced a document, yet there

is no analysis of the testimony of that witness, nor evaluation of the document produced, before that conclusion is arrived at.

32. It is true, the trial court was not faithful to Order 21 rule 4 of the Civil Procedure Rules.

33. There is a submission about the remedies sought being not capable of granting. The appellant did not submit on this. I have considered the prayers in the plaint, and I am not persuaded that they are not capable of being granted. The court could declare that the appellant was in breach of the contract of insurance, if there was evidence of such breach. The court could make an award for special damages, so long as the same was specifically pleaded and proved. The court could order payment of interests on any monetary awards and impose costs. The prayer, on the appellant being compelled to indemnify the respondent, is not elegantly phrased, but it is not altogether meaningless, and an order can be made on it, so long as there is evidence of the policy being valid, the risk attaching and the damages being sought having been properly pleaded and proved.

34. Overall, I find and hold that there is merit in the appeal herein. I, accordingly, therefore, allow it, set aside the orders made in the judgement delivered in Busia CMCCC No. 57 of 2018, on May 23, 2024, and substitute them with an order dismissing the said suit. Each party shall bear their own costs. Orders accordingly.

DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 27TH DAY OF MARCH 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Ms. Barasa, instructed by Peter M. Karanja, Advocate for the appellant.

Mr. Mulanya, instructed by Mulanya Maondo & Company, Advocates for the respondent.