Directline Assurance Company Limited v Nzioka (Civil Appeal E316 of 2023) [2025] KEHC 7986 (KLR) (29 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7986 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E316 OF 2023

EN MAINA, J

MAY 29, 2025

BETWEEN

DIRECTLINE ASSURANCE COMPANY LIMITED ..... APPELLANT

AND

JACKSON NTHATU NZIOKA ..... RESPONDENT

(Being an appeal from the judgment of Hon M. Thibaru (Adjudicator) delivered on 20 th November 2023 in Machakos Small Claim Court Case No. E355 of 2023)

JUDGMENT

1. By a Statement of Claim dated 15th August, 2023, the Respondent herein obtained a declaratory judgment to the effect that the Appellant herein was liable to settle the decree arising from a primary suit Machakos SCC no E428 of 2022 Jackson Nthatu Nzioka v Samuel Njoroge Burigu & Gravitus Sacco. The said decree was for a sum of Kshs 210,114, interest and costs. The Respondent's cause of action against the Appellant was premised on Section 10(1) and (2) of the *Insurance (Motor Vehicle Third Risks) Act.*

2. The Appellant had vehemently resisted the claim on the ground that such a declaratory judgment could only be obtained against the insurer of the vehicle in respect to the persons sued in the primary suit which was not the position in the claim. It contended that whereas it had initially insured the defendants in the primary suit when that policy was renewed for the period 25th May 2022 to 31st May 2022, which is the period within which the risk insured occurred, the insured was one Charles Mutua. It asserted that no evidence was adduced to prove that there was, at the time of the accident, a valid policy of insurance issued to Samuel Njoroge Burugu and Gravitus Sacco the defendants in the primary suit, as would attach liability to itself.

3. Being aggrieved by the decision of the Adjudicator, the Appellant has appealed on the following grounds:

a. That the learned Adjudicator erred in fact and in law in holding that the Appellant was liable to satisfy the decree obtained in Machakos SCC No E428 of 2022 and ordering the Appellant to satisfy the decree to the tune of Kshs 210,114 plus interest and costs in total disregard to the provisions of section 10(1) of the *Insurance (Motor Vehicle Third Party Risks) Act* Cap 405 and under the insurance policy.

b. That the learned Adjudicator erred in law and on fact in holding that the Appellants' denial of liability came late and outside the statutory periods set out in the *Insurance (Motor Vehicle Third Party Risks) Act*.

c. That the learned Adjudicator erred in law and on fact in wholly disregarding the evidence adduced on behalf of the Appellant.

d. That the learned Trial Magistrate grossly misdirected herself in failing to consider the principles applicable and relevant authorities on the application of section 10(1) of the *Insurance (Motor Vehicle Third Party Risks) Act* to the case herein.

e. That the learned Trial Magistrate consequently erred in law and in fact in awarding costs and interest thereto

f. That the learned Trial Magistrate's judgment was rendered/delivered per incuriam.

4. The Counsel for the parties consented to canvassing this appeal by way of written submissions.

Submissions

5. Vide submissions dated 21st August 2024, Learned Counsel for the Appellant stated that the effect of Section 10 (1) and (2) of *Insurance (Motor Vehicle Third Party Risks) Act*, that judgment in respect of liability to which an insurer is liable should be obtained against a person insured by the policy of that insurer. Counsel urged that in regard to this case it had not insured the persons found liable in the primary suit and hence it was not liable to satisfy the decree that arose from that litigation. Further, that it was not proved that the said persons were agents of its insured. To support his arguments Counsel placed reliance on the cases of *Madison Insurance Company Limited v Augustine Kamanda Gitau* (2020) eKLR and *Philip Kimani Gikonyo v Gateway Insurance Company Limited* (2007) eKLR, *Revital Healthcare (EPZ) Limited v Barclays Bank of Kenya Limited* [2020] eKLR, *Mwangi v Wambugu* (1984) KLR 453, *Directline Assurance Company Limited v Danson Karanja Kibe* HCCA E315 of 2022.

6. Additionally, Counsel submitted that the Respondent was not entitled to the costs of the claim as the case had not been proved to the required standard. For this argument reliance was placed on the case of *Farah Awad Gollet v CMC Motor Group Limited* (2018) eKLR.

7. For the Respondent it was argued firstly, that the Appellant has not come to court with clean hands in that upon being served with a statutory notice on 3rd June 2022, as provided by Section12(1A) of the *Act* , the Appellant did not act as required by either admit or deny liability. This court was therefore urged to dismiss this appeal as the Appellant ought not to benefit from Section 10 of the *Act* when it did not itself disregarded its obligation under Section 12(1a) of the *Act*. This court was urged to apply the doctrine of Equity that he who comes to equity must come with clean hands and hence dismiss this case.

8. Secondly, learned Counsel for the Respondent argued that the Appellant was liable to settle the claim as from the documents issued to the Claimant, the accident motor vehicle was insured by the Appellant and that in the response to the Statement of claim the Appellant admitted it was the insurer of

that motor vehicle vide a policy No 00305569. Counsel contended that the Certificate of Insurance obtained by the Claimant indicated Gravitus Sacco was the insured. Counsel asserted that it must not be lost to this court that the policy document and the certificate of insurance all emanated from the Appellant. Counsel urged this court, to just like the Adjudicator, find that there could have been a mistake in the documents produced by the Appellant in so far as the name of the insured was concerned; that the Appellant should not be permitted to take advantage of his own wrong.

9. Counsel further urged this court to be persuaded by the Adjudicator's construction of Section 10(4) of the *Act* to find that the Appellant was liable and hence dismiss this appeal with costs to the Respondent.

Determination.

10. Before the Adjudicator, the claim proceeded on the basis of documents and submissions only under Section 30 of the *Small Claims Court Act*. I have considered the material placed before the court, the grounds of appeal, the rival submissions of learned Counsel, the cases cited and the law. AS an appellate court exercising jurisdiction under the Small Claims Court I do so under Section 38 of the *Small Claims Court Act* which states-

> " 38. Appeals
>
> (1) A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.
>
> (2) An appeal from any decision or order referred to in subsection (1) shall be final.

11. The accident giving rise to the declaratory suit which is the subject of this appeal occurred on 26th May2022. The police abstract issued to the Respondent by the police indicated that the accident motor vehicle was insured by the Appellant herein. Therefore, prima facie, the Appellant being the insurer of the vehicle was liable to compensate any third party in respect to any risk that may have arisen from the use of that vehicle and conversely any judgment arising therefrom. That is as provided in Section 10 (1) of *Insurance (Motor Vehicle Third Party Risks) Act* which states-

> " 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.
>
> Provided that the sum payable under a judgment for a liability pursuant to this section shall not exceed the maximum percentage of the sum specified in section 5(b) prescribed in respect thereof in the Schedule."

12. The Act does not stop at Section 10(1) above. It goes ahead to stipulate the circumstances under which an insurer can avoid such liability. Firstly, Section 12(1) of the *Act* makes it mandatory for the insured party to give the particulars of insurance to the person claiming and in this case those particulars were supplied to the Claimant by the police. It is also mandatory for the Claimant to have given notice of the judgment to the insurer (see section 10(2)(a) of the *Acts*. It is also mandatory that once served with

the notice the Insurer indicate whether it admits or denies liability (see Section 12(1A) of the Act. In my considered view, the absence of an indication of such denial or admission, within the prescribed timeline, connotes that the insurer admits liability. In this case there is evidence that the Appellant was served with a statutory notice on 6th June 2022. The demand letter and the statutory notice are part of the documents that were tendered by the Respondent and they have the stamp of the Appellant to signify that they were received.

13. The Appellant's allegation that the process in the lower court cannot be further from the truth as those served were the Respondents in that claim. It is instructive that upon being served with the process made no indication that they were not the insured. The policy that the Appellant seeks to rely upon to avoid the claim was also not produced in the primary suit. The Respondent could only rely on such documents as were available to him. Moreover, it is conceded that there was, at all material times, in force a policy in respect of third party risks and if indeed the Appellant was not liable then it ought to have itself sought a declaration that it was entitled to avoid liability as provided in Section10(4) of the *Act*. The section states-

> "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....."

14. In view of the above it is my finding that the Appellant is liable to satisfy the judgment in the lower court and that the Adjudicator did not err in so finding. This appeal has no merit. In the premises, it is dismissed with costs to the Respondent.

It is so ordered.

JUDGMENT SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 29TH DAY OF MAY 2025.

E. N. MAINA

JUDGE

In the presence of:

Ms Kahiti for the Appellant.

Ms Muturi HB for Anne Kiusya for the Respondent.

Geoffrey- Court Assistant.