Kenya Orient Insurance Limited v Channan Agricultural Contractors (Civil Appeal E120 of 2024) [2025] KEHC 9336 (KLR) (27 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9336 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E120 OF 2024

A MABEYA, J

JUNE 27, 2025

BETWEEN

KENYA ORIENT INSURANCE LIMITED ..... APPELLANT

AND

CHANNAN AGRICULTURAL CONTRACTORS ..... RESPONDENT

(Being an appeal from the Judgment of Hon. E.A. Obina PM delivered on the 4/6/2024 in the Ksm CM's Case No. 984 of 2001, Channan Agricultural Contractors v Kenya Orient Insurance Limited)

JUDGMENT

1. The respondent sued the appellant in the primary suit alleging that it was insured by the appellant and thus sought an order for indemnification of the decretal amount together with costs awarded and paid in Bungoma CMCC No. 144 of 1999 as well as professional fees paid to the advocates in the suit.

2. The appellant entered appearance and filed its defence dated 19/10/2001 in which it denied the respondent's allegations and averred that the respondent breached the contract of insurance between them by amongst others failing to pay the premiums in time as agreed.

3. In its judgment delivered on the 4/6/2024, the trial court held that that there were policies of insurance taken by the respondent from the appellant which could not be invalidated, nullified or made inoperative due to failure to pay premiums. That efforts by the respondent to refer the dispute to arbitration bore no fruits and therefore, the respondent had proved its case against the appellant on a balance of probabilities and proceeded to award the orders sought.

4. Being dissatisfied with the said Judgment/decree, the appellant lodged this appeal vide the Memorandum of Appeal dated 12/6/2024 raising a total of 11 grounds of appeal. However, the same can be collapsed into 3 as follows: -

a. That the trail court erred in failing to find that the respondent had not proved its case that there were valid and enforceable contracts of insurance.

b. That the trial court erred in failing to find that there was no notification of the claim to the appellant by the respondent.

c. That the trial court erred in failing to find that the reference to arbitration was a condition precedent to lodging the suit.

5. The appeal was disposed of by written submissions which were ably hi-lighted by Leaned Counsel. The appellant submitted that the evidence of payment of premiums was contained in documents not produced in court but marked for identification. That in the premises, the holding that premiums were paid to Nyanza brokers was based on non-credible evidence. The appellant cited the case of Kenneth Nyaga Mwige v Austin Kiguta & 2 Others [2015] eKLR where the Court of Appeal held that a document which is not formally produced has no evidential value.

6. Further, that the holding that non-payment of premiums does not invalidate a policy was incorrect in law as was held in the case of Insurance Company of East Africa v Marwa Distributors Limited [2015] eKLR. That the issuing of policy document did not constitute a contract as the payment of premium constitutes the consideration for the promise to indemnify the insured if the event insured takes place.

7. That even if valid policies existed, the appellant was entitled to be notified of the event leading up to its liability and also, of the institution of any claim against the respondent. That the letters allegedly sending the documents to the appellant were not produced but were only marked for identification thus they could not be relied on.

8. The appellant submitted that there was a condition precedent, arbitration, before a suit could be commenced. Reliance was placed on the case of Bhaijee & Another v Nondi & Another [2022] KECA 119 (KLR) where the Court of Appeal held that, where a dispute resolution mechanism exists outside courts, it has to be exhausted before the jurisdiction of court is invoked.

9. On its part, the respondent submitted that the appellant did not at any time cancel the policies of insurance between itself and the respondent and that the said policies could not be invalidated due to failure to pay premiums as was held in the case of Virani T/A Kisumu Beach Resort v Phoenix of East Africa Assurance Company Ltd 2004 eKLR.

10. That the arbitration clause was applicable to the respondent as much as it was to the appellant and thus the appellant was not exonerated by the respondent's failure to refer the dispute to arbitration.

11. That its claim was based on the circumstances of the case and the doctrines of equity.

12. This being a first appeal, the Court is duty bound to evaluate the evidence before the trial court afresh and come to its own independent findings and conclusions. See Selles & Anor vs. Associated Motor Boat Co Ltd & Others [1968] EA 123.

13. I have considered the evidence tendered before the trial court and the submissions made before me.

14. The respondent sued the appellant seeking indemnification following a decree and costs awarded and paid in Bungoma CMCC No. 144 of 1999 as well as professional fees.

15. In its defence, the appellant contended that the respondent breached the contract of insurance by amongst others failing to pay the premiums in time as agreed and also failing to notify it of the events leading up to it incurring liability. Further, that the respondent ought to have referred the matter to arbitration in line with the arbitration agreement in the policy agreement.

16. At the trial, Epainito Okoyo testified as Pw1. He adopted his witness statement dated 15/5/2018 as part of his evidence in chief. His testimony was that two policies were issued to the respondent viz Policy Nos. 119940047 and 133940045 covering Workmen's Compensation and Employers Liability (Common Law). That the said policies were for indemnity for any claims for injuries sustained, costs and expenses in any litigation against the respondent.

17. That a one of the respondent's drivers was involved in an accident on 2/9/1997. On 7/3/1998, the respondent forwarded the requisite documents to the agent which were forwarded to the appellant on 12/3/1998. A suit, BGM CMCC No. 144 of 1999 was lodged against the respondent and judgment entered on 24/10/2000. For a decretal sum of Kshs.269,810/-.

18. That the respondent settled the claim, sought arbitration between 15/2/1999 and 30/9/2000 but the appellant failed to oblige. He produced copies of the endorsements of the two Policies. He also produced the proceedings in the subject case in Bungoma. He also produced receipts to show payment for the premiums for the two Policies on 30/4/1997.

19. In cross-examination, he admitted that before 1/4/1998, the respondent had not complied with the conditions of the insurance. He further admitted that he had not produced any letter to show how the Summons and suit in the Bungoma Case was sent to the appellant. He further admitted that the insurance policies required the reference to arbitration before lodging any suit within 12 months. He admitted that the appellant had disclaimed liability in December, 1998.

20. On 21/3/2024, the parties agreed that the evidence of Dw1 in case No. 983/2004 do apply in the suit.

21. I will start with the 3rd ground of appeal. That the trial court erred in failing to find that arbitration was a condition precedent to the filing of the claim. It was submitted that since no arbitration was preferred within the 12 months stipulated in the Policies, the claim was deemed to have been abandoned. On its part, it was submitted for the respondent that there was nothing that barred the suit from being filed after the lapse of the 12 months.

22. In raising the issue of arbitration, the appellant was questioning the jurisdiction of the trial court to handle the respondent's claim. It is clear that jurisdiction is everything and without it, the court has no right to take even one step. See Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited (1989) IKLR.

23. There is no dispute that Policies the subject of the suit contained an arbitral clause in at paragraph *10*. The respondent argued that it was not exclusively upon it to initiate arbitration but that the appellant could have also initiated the same.

24. In National Bank of Kenya Ltd v Pipeplastic SamKolit (K) Ltd & Anor [2000] eKLR, it was held: -

> " A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract; unless coercion, fraud or undue influence are pleaded and proved..."

25. Further, Sections 3(1) of the *Arbitration Act* defines an "Arbitration Agreement" as follows:

> " Arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not".

26. In the case of James Heather – Hayes v African Medical and Research Foundation (AMREF) [2014] eKLR, the Court held that: "it would be unnatural to oust arbitration, an internationally recognized practice of Alternative Dispute Resolution".

27. In the present case, after the dispute arose, the respondent wrote several letters requesting for reference of the matter to arbitration but it fell on deaf ears. The agreement was that the reference be within 12 months of the rising of a dispute.

28. Under section 12 of the *Arbitration Act*, there is nothing that prevented the respondent from pursuing the arbitration ex-parte if the appellant had turned recalcitrant. For it to wait for the period agreed to refer the matter to arbitration then resort to filing the suit was a shot on its foot. There was no requirement that it required the concurrence of the appellant in order to continue with the alternative mode of dispute resolution the parties had agreed to.

29. In any event, it is the law that where an alternative mode of dispute resolution has been provided for or agreed to by the parties, the court will refuse to assume jurisdiction, or there is no jurisdiction for a court to entertain the dispute until that route has been exhausted. See Bhaijee & Another v Nondi & Another [2022] KECA 119 (KLR). That ground succeeds.

30. The foregoing is enough to have determined this appeal but since I am not the last Court of resort, the Court of Appeal would want to have my determination on the other two grounds.

31. The next ground was that the trial court erred in failing to find that the respondent had not proved its case against the appellant to the required standard. That it failed to consider that there was no evidence to show that the respondent notified the appellant of the claim or the circumstances that would have led to liability under the Policies.

32. From the testimony of Pw1, it came out clear that the notices of the claim were not sent to the appellant promptly. That was a fundamental breach of the contract of insurance between the parties. Insurance contracts are about contracts of indemnity. The requirement for swift notification of the circumstances that may lead to liability is well founded. It enables the insurer to take precipitate steps or action at the earliest to mitigate its losses. These include advance investigations as well as providing in its accounts for the possible liability. This enables the insurer to meet the claims once the same crystalize. By delaying in making the notification, the insured prejudices the insurer and may be a basis for an insurer disclaiming liability.

33. In the present case, the respondent's witness admitted that there was no prompt notification. That while the accident the subject of the primary suit occurred on 2/9/1997, it is not until the 7/3/1998 that the respondent sent the notification to the broker who allegedly forwarded them to the appellant on 12/3/1998. In any event, those documents were only marked and were not produced in evidence.

34. Section 107 of the *Evidence Act* Cap 80, Laws of Kenya is categorical. He who alleges must prove. It was incumbent upon the respondent to prove the existence of the Policies, their provision for indemnity, that the risk covered attached, that it notified the appellant of the same and the latter had failed to perform its obligation of indemnifying it. By failing to prove the required notification, it cannot be said that the respondent had proved its case to the required standard. That ground also succeeds.

35. The final ground was that the trial court erred in holding that the contract of insurance was in force yet no premiums had been paid. In the present case, the respondent's witness testified that premiums were paid and marked the documents in respect thereof for identification. He also referred to a statement of account of the appellant dated 30/4/1997 showing that the premiums were paid up-to 1/4/1998. However, although those documents were marked for identification, they were not produced.

36. In *Omar & another v Wachira (Civil Appeal 67 of 2022)* [2023] KEHC 25664 (KLR) (23 November 2023) (Judgment), the Court held that: -

> "It is trite that a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. Further, in not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value."

37. The documents relating to the payment of the premium, and therefore the Policies being in force were only marked and not produced. The trial court erred in relying on such documents in proof of the respondent's case. Those documents could not be relied on or referred to until and unless they were produced. The respondent did not even make any attempt to have them produced. To that extent, they remained to be mere surplusage in the court record of little if any probative value in proof of the respondent's case. That ground also succeeds.

38. In view of the foregoing, I find that the appeal is meritorious and I allow the same with costs.

39. Since the parties had agreed that this appeal was related to Kisumu Civil Appeal E121 of 2024 between the same parties, the Court directs that this judgment also applies to that appeal as well.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF JUNE, 2025.

A. MABEYA, FCI Arb

JUDGE