Geminia Insurance Company Limited v Oile & another (Civil Appeal E027 of 2024) [2025] KEHC 11215 (KLR) (29 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11215 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL E027 OF 2024

HI ONG'UDI, J

JULY 29, 2025

BETWEEN

GEMINIA INSURANCE COMPANY LIMITED .... APPELLANT

AND

AMBROSE JAGALO OILE .... 1ST RESPONDENT

RIFT PLY LIMITED .... 2ND RESPONDENT

(Being an appeal from the judgment of Hon. Kelly Aoma – PM – delivered on 2nd April 2024 in Naivasha CMCC Number E638 of 2021)

JUDGMENT

1. Ambrose Jagalo Oile the 1st Respondent was the plaintiff while the Geminia Insurance Company Ltd the appellant was the defendant in the lower court. The 1st respondent sued the appellant in a declaratory suit claiming fulfilment of the judgment in Naivasha CMCC No. 691 of 2019 Ambrose Jagalo Oile v Rift Ply Ltd (2nd respondent).

2. In the said judgment the 1st respondent herein was awarded Kshs.4,393,090/= with costs and interest. Liability was at 100% against the appellant's insured (2nd respondent).

3. The declaratory suit (the subject of this Appeal) vide the judgment delivered on 2nd April 2024 found in favour of the 1st respondent. The appellant was found liable to satisfy the judgment in the primary suit Naivasha CMCC No. 691 of 2019 Ambrose Jagalo Oile v Rift Ply Ltd being Kshs.4,692,252/= together with interest from 21st July 2021 until settlement in full. The court ordered the appellant and 2nd respondent to pay the costs of the declaratory suit plus interest from the date of filing of the primary suit.

4. Being dissatisfied with the said judgment the appellant filed the amended appeal dated 10th June 2024 on the following grounds:

1. That the learned trial court erred in law in failing to find that an insurance policy is in principle contractual relationship between an insured and an insurer.

2. That the learned trial court erred in law and in fact in failing to find that failure of consideration negated any contractual relationship between the appellant and the defendant in the primary suit inter se.

3. That the learned trial court erred in law and in fact in failing to find that the appellant had validly cancelled the certificate of insurance that the appellant had issued the said defendant in advance of payment of premiums which premiums were never paid leading to cancellation of the certificate of insurance, pre-dating the subject road traffic accident as there was no binding insurance contractual relationship between these parties for failure of consideration.

4. That the learned trial court erred in law and in fact in finding that issuance of a certificate of insurance constituted a valid irrevocable contractual relationship between an insurer and an insured.

5. That the learned trial court erred in law and in fact in failing consider the broader public interest by exposing insurance companies to liabilities to satisfy claims against parties to whom they had no contractual relationship within the 4 corners of a valid contract. The court in essence read contractual relationship to a relationship where there was none.

6. That the learned trial Magistrate erred in law and in fact in failing to find that the appellant had validly cancelled the certificate of insurance issued to the defendant in the primary suit on extreme technicalities and allowed the said defendants to, in effect, benefit from his own illegal acts/omissions/or criminal acts and this against the policy of the law.

7. That the learned trial magistrate, in any event erred in law in finding the appellant statutory liable beyond the statutory limit set position by Section 5 (2)(b) of the Cap 405 of the laws of Kenya.

5. A summary of the evidence before the trial court is as follows. The 1st respondent (the plaintiff) filed Naivasha CMCC No. E638/2021 seeking the following orders:

   a. A declaration that the defendant (2nd respondent) is bound to satisfy the judgment and decree in Naivasha CMCC No. 691 of 2019 Ambrose Jagalo Oile vs Riftply Ltd being Kshs.4,692,252/= together with interest from 21st July 2021 until settlement in full.

   b. Costs of the suit plus interest.

   c. Any other further relief as the honourable court may deem just and fit to grant.

6. The appellant (defendant) filed a defence dated 5th November 2021 denying the claim. It argued that at the time of accident it was no longer our insurer of the motor vehicle KBP 494v for the reason that the policy No. Cv/01/1666973/1C01 had been cancelled on 15th November 2018. It denied having been issued with any statutory notice since the policy was not in existence. It also denied being issued with notice of the entry of Judgment.

7. The matter was heard with the 1st respondent testifying as the only witness for the plaintiff. He confirmed that at the time of filing the primary suit he did not know the policy had been cancelled. He learnt of it via an email of 1st July 2022.

8. The appellant in defence called one witness DW1 – James Kalonzo its assistant manager. He produced the policy documents (DExB1 & 2) and stated that they did a letter to the 2nd respondent demanding

for payment of premiums but this was not honoured (DEXB3). After 14 days the policy was cancelled vide a letter dated 15th November 2018 (DEXB4). In cross examination he said they relied on clause 10 of Cap 405 to cancel the policy. He explained that non-payment of premiums means there is no cover. The 2nd respondent who was the interested party in the lower court never participated in the said proceedings.

9. The appeal was canvassed through written submissions.

Appellant's submissions

10. Through the firm of M/s G. & G Advocates the appellant filed two sets of submissions. The first is dated 20th September 2024 while the second one is dated 11th March 2025. On whether the 1st respondent satisfied the conditions set out under Section 10 as read together with Section 5(2)(b) of the Insurance (Motor vehicle Third Party Risks) Act Cap 405, Counsel submitted that the appellant was in compliance. That the appellant demonstrated that the cancelation notices were duly served upon the 2nd respondent and the relevant authorities (DEXB3 &4).

11. He argued that the notification having been made, the appellant could not be called upon to shoulder a liability ensuing thereafter. Reference was made to:

    i. Phoenix of East Africa Assurance Co. Ltd v Alfred Onyango Obondo [2011] eKLR

    ii. Insurance Company of East Africa Ltd v Abdalla Hassan Haga & another [2018] eKLR.

12. He faulted the trial court for finding that there was no proof of service of the notices. He referred to the evidence of DW1 which was that the notices had been sent to the insured's last known address as shown at page 29 – 30 of the record of appeal. It is thus his submission that the cancellation of the policy on the basis of non-payment of premiums was a valid reason. He disagreed with the trial court's finding that there was no clause allowing of failure to pay premiums. He invited the court to consider the decision in the Court of Appeal in virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Company Ltd [2004] eKLR which while finding that non-payment of premiums would not be ground for consideration found the claim to be for a material loss and so adopted the principles set out in Mac Gillivray & Parkington on Insurance law, 7th Edition at Paragraph 85. He contended that the finding in the said case was that the insurer would deduct the premiums owing/due from the loss payable. To him the current scenario can be distinguished from the case relied on by the trial court.

13. Further on whether the appellant was required to avoid the policy, counsel submitted that the trial court erred in interpreting the importance of Section 10(2) (c) which provided that an insurer is under no obligation to satisfy/assume liability in instances where the policy was cancelled before the event/risk. Counsel while relying on Kenyan Alliance Insurance Company Ltd v Naomi Wambui Ngira Ngira & another (suing as the legal representatives and administrators of the estate of Nelson Macharia Maina (deceased) [2021] eKLR, which held that in instances where the cancellation is on the premises of an express provision of the contract, then an avoidance sent is not necessary. He thus submitted that no avoidance was necessary in the instant case.

14. Finally, counsel submitted that the trial court's judgment offends Section 5(b) 9iv) of the *Insurance (Motor vehicles Third Party Risks) Act* which sets the limit payable at Kshs.3 million. That the said provision was upheld in Gateway Insurance Co. Ltd v Janida Suleiman & another [2018] eKLR.

Respondent's Submissions

15. There are two (2) sets of submissions filed by Mutai & Company Advocates on behalf of the 1st respondent. They are dated 23rd September 2024, and 26th November 2024. On whether the appellant validly cancelled the insurance policy as provided for in the insurance contract, he referred to the evidence of DW1 and where he admitted that there was no certificate of postage in respect to DEXB3 & 4. Reliance was placed on the case of Madison Insurance Company Ltd v Mwai (Civil Appeal No. 30 of 2019 [2022] KECH 9862 (KLR) where the court held thus:

> " The fact that the appellant never demonstrated that the notice for cancellation was served and that the same was sent through registered post to the last known address and that the appellant had not shown the certificate of posting, I do therefore find that the respondent was entitled to the compensation as per the policy."
>
> Also see: Gavanango Sacco v National Transport & Safety Authority [2019] eKLR.

16. On whether the appellant adhered to the laid down statutory procedure on cancellation of the insurance policy, counsel while referring to Section 10(1) & 2 of Cap 405 submitted that the statutory requirements for avoidance were not met. This he said was based on the fact that the policy was effected by the appellant, the liability herein was covered by the terms of the policy and lastly there is a judgment in respect of the said liability. Further that in compliance with Section 10(2) (a) of Cap 405, the appellant was served with the statutory notice on 15th July 2019 before commencement of the primary proceedings. Receipt was acknowledged as at page 10 of the Record of Appeal. Additionally, no cancellation was done by mutual consent in line with Section 10(2) (c) of the Act.

17. Counsel further argued that besides not availing any certificate of postage of the cancellation of the policy, the certificate of insurance displayed on the vehicle was never surrendered to the insurer prior to the accident, and neither was there any statutory declaration made by the 1st respondent stating that the certificate had been lost or destroyed. This he said is a requirement under Section 10(2) (c) (i) of the Act. He further, submitted that the certificate in question was still on display on the vehicle at the time of accident. Still on the issue of the certificate and while referring to Section 10(2) (c) (ii), counsel submitted that the certificate ought to have been surrendered to the appellant after the accident but before the expiration of a period of fourteen (14) days from the taking effect of the alleged cancellation. That it was never done and that is how the police obtained the details from it.

18. Lastly, that as no notification was served on the Registrar of Motor vehicles and Commissioner of Police on the failure to surrender the certificate within 28 days of the cancellation of the policy, it was thus a breach of Section 10(2) (c) (iii) of the Act. Reference was made to the case of Phoenix of East Africa Assurance Co. Ltd (supra) where it was held:

> " The appellant was required by Section 10(2) (iii) to notify the registrar of motor vehicles and Commissioner of Police that it had cancelled the policy and that the insured had refused to surrender the policy in writing. The requirement is mandatory."

It was therefore his submission that the appellant did not meet the mandatory requirements of cancellation or avoidance in the circumstances.

19. Counsel argued that besides meeting the statutory requirements the appellant would still have been required to obtain declaratory orders to the effect that it was entitled to cancel or avoid the policy.

On this he referred to the case of Kenindia Assurance Company Ltd v Joseph Amudavi [2017] eKLR where it was held:

> "The appellant did not file any suit to seek to avoid the respondent's claim. Due notice was given to the appellant before this suit was filed. The appellant ought to satisfy the respondent's claim."

It was counsel's contention that the appellant ought to satisfy the respondent's claim.

20. Finally, it was submitted that the appellant could not rely on its wrong to defeat an otherwise valid claim of another. That the appellant should be ordered to pay the entire decretal sum, and to recover the excess above the statutory limit from their insured if at all. On this he referred to the case Aba Chiaba Mohammed v Mohamed Bwana Bakari & 2 others [2005] eKLR.

    However, counsel further argued that if the court finds that the appellant can only settle up to Kshs.3,000,000/=, then the appellant should be compelled to settle costs and interest over and above the Kshs.3,000,000/= from the date of the award in the primary suit being 21st July 2021. He prayed for costs of the appeal.

Analysis and determination

21. This is a first appeal and so this court has a duty to re-evaluate and re-consider the evidence before the trial court and arrive at its own independent conclusion. It must also be remembered that unlike the trial court, this court did not have the advantage of hearing and/or seeing the witnesses testify. This was the holding in Selle & another v Associated Motor Boat Co. Ltd & others [1968] E.A 123 which stated:

    > "A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand."

22. Having carefully considered the evidence on record, the grounds of appeal, both parties' submissions, cited decisions and the law, I find the issues falling for determination to be the following:

    i. Whether the vehicle registration No. KBP 494v belonging to the 2nd respondent was insured by the appellant as at 31st January 2019, when the accident involving the 1st respondent occurred.

    ii. Who should settle the decree in Naivasha CMCC No. 691/2019 Ambrose Jagalo Oile v Rift ply Ltd?

    iii. Can an insurer pay a claim that is beyond the limit of Kshs.3,000,000/= as set out in Section 5(b) (iv) of the *insurance (Motor vehicles Third Party Risks) Act*?

23. The proceedings on record show that the 2nd respondent (Rift ply Ltd) who was the 3rd party in the declaratory suit did not participate in the proceedings therein. In fact, interlocutory judgment was entered against it on 20th June 2022, but in the final judgment, the trial court did not make mention of the 2nd respondent.

24. On the first issue as to whether the motor vehicle KBP 494v was insured by the appellant, I will first deal with the defence by the appellant dated 5th November 2021 where it denied the allegation that it had insured the said vehicle. In the later paragraphs of the defence it admitted having insured the said vehicle but later cancelled the policy for failure by the 2nd respondent to pay the required premiums.

25. DW1 on behalf of the appellant testified that a letter dated 1st November 2018 (DEXB3) was written to the 2nd respondent asking it to pay the pending premiums totaling Kshs.108,988/= within 14 days, which was never done. This resulted in the appellant cancelling the policy vide their letter dated 15th November 2018 (DEXB4). In cross examination he admitted that he had no evidence to prove that (DEXB3 & 4) were served on the 2nd respondent. Indeed, the letters show that they were sent by registered mail. It is common knowledge that whenever an item is sent by registered mail a clear postage receipt is issued.

26. What was the difficulty in availing the postage receipt to the court? DW1 also claimed that the letter DEXB3 was copied to NTSA Nairobi and the Commander, Traffic Department Nairobi. It is true the letter on the face of it shows it was copied to the two offices. Other than copying the two offices there was nothing to show that they were ever served with the said letter.

27. How then was the 2nd respondent to know that its insurance cover with the appellant had been cancelled? It was not automatic or obvious because from the evidence this policy ought to have run from 16th July 2018 to 16th July 2019. And if anything, ever happened to render it in-operational then both parties i.e. the insurer and the insured had to be in the know.

28. In its own policy under clause 10 and on the issue of cancellation of the policy relevant to this case it provides:

    (b) We may cancel the polity by issuing fourteen (14) days written notice to your last known address. We will refund your premium for any remaining period of insurance based on the applicable rates. You must return to us immediately the original and duplicate certificate of insurance provided the refund is subject to no claim on loss having the current period of insurance.

29. The question to be asked is besides writing DEXB3 & 4 is there evidence of anything else that the appellant did in respect of the policy in question? When after issuance of DEXB3 & 4 there was no response did it follow up on the 2nd respondent to get the original and duplicate certificate of insurance? There is no evidence of such action having been taken.

30. From the above analysis it is clear that there is no evidence of service of the demand letter (DEXB3) and the letter cancelling the polity (DEXB4). That being the case therefore the 2nd respondent could not have been aware of the cancellation of the policy whether he had paid the outstanding premiums or not. The appellant failed in its duty of notifying the 2nd respondent. The same was the position in the case of Madison Insurance Company Limited (supra) where Sergon J. held that where the notice for cancellation of the policy was not shown to have been posted the same could not be considered to have been served.

31. The above being the position I do find that the appellant cannot run away from its responsibility as an insurer. The policy No. Cv/01/1666963/ICO/1 in respect of motor vehicle KBP 494v Tata Lorry had not been cancelled as at the 31st January 2019 when the accident in question occurred. The appellant is thus liable to compensate the 1st respondent by settling the decree in Naivasha CMCC No. 691 of 2019 Ambrose Jagalo Oile v Rift Ply Ltd.

32. As to the 3rd issue on the claim limit, I agree with the appellant that the awards should be within the limit provided for under Section 5(b) (iv) of the Act which is Kshs.3,000,000/=. It is not clear how the court in the primary suit arrived at the stated figure of Kshs.4,393,090/= less costs, against the appellant. The trial court in the primary suit should have complied with the provisions of the law, in respect of the insurer's liability.

33. I therefore find that as far as the insurer (appellant) is concerned it is only liable to settle the sum of Kshs.3,000,000/= plus costs and interest from the date of judgment in the primary suit which was 21st July 2021. It is so ordered. The 1st respondent and 2nd respondent should sort out the rest of the claim between themselves.

34. The Appeal therefore partially succeeds. The 1st respondent will get half costs of the appeal.

35. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 29TH DAY OF JULY 2025 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE