



**Intra Africa Assurace Company Limited v Chepsom (Civil Suit
E002 of 2021) [2024] KEHC 2074 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2074 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CIVIL SUIT E002 OF 2021
RB NGETICH, J
FEBRUARY 29, 2024**

BETWEEN

INTRA AFRICA ASSURACE COMPANY LIMITED PLAINTIFF

AND

GIDEON CHEPSOM DEFENDANT

JUDGMENT

1. The Plaintiff which is a limited liability company duly incorporated in Kenya under the [Companies Act](#) cap 480 Laws of Kenya and licensed to carry out insurance business instituted this suit against the Defendant seeking the following reliefs: -
 - a. declaration that the Plaintiff is and has at all material times been entitled to avoid the aforesaid Policy of Insurance 18/KIA/ HO/TPO/PC/ROO14-18/NK/KIA/TP/C/0055 any provision contained therein on the ground that the terms of the policy do not cover death or bodily injury to members of the insured's household arising out of the use of motor vehicle registration number KAT 271Q.
 - b. A declaration that the Plaintiff is not liable to make any payment under the aforesaid Policy of Insurance No, 18/KIA/ HO/TPO/PC/ROO14-18/NK/KIA/TP/C/0055 in respect of any claims against the Defendant herein arising out of the injuries sustained as a result of the accident on 30th June, 2013 involving the Motor vehicle Registration Number KAT 271Q and/or from any accident involving the motor vehicle during the pendency of the said insurance policy.
 - c. Any other or further relief that this Honourable court may deem fit to grant.
 - d. Cost of this suit and Interest thereon.



2. The Plaintiff avers that they entered into a Motor Vehicle Comprehensive Policy contract with the defendant in respect of motor vehicle registration number KAT 271Q under policy number 18/KIA/HO/TPO/PC/ROO14-18/NK/KIA/TP/C/0055 effective from the 10/02/2018 to the 09/02/2019.
3. And it was an express term of the insurance policy cover that the Plaintiff would indemnify the Defendants for any loss or damage to their motor vehicle and/or death, bodily injury or loss or damage to property of third parties arising out of the use of motor vehicle registration number KAT 271Q subject to the Defendant reporting the loss or damage as soon as is reasonable.
4. That on or about the 30th June,2018, the defendants' motor vehicle registration number KAT 271Q was involved in a road traffic accident wherein it hit a pedestrian occasioning bodily injury to Carolyne Jepkurui Cheboi alias Carolene Chepkemoi and under the terms of the insurance policy cover, the defendant was required to report the accident as soon as was reasonably possible but failed to report.
5. That the Plaintiff only became aware of the accident upon being served with a mention notice dated 14th October,2021 for Case no. Eldama Ravine Civil suit number ES of 2020 filed against the Defendant in relation to the above-mentioned accident.
6. That the action and/or inaction of the defendant amounts to breach of contract by the Defendant and specifically breach of clause 4 of page 7 of the policy document and Plaintiff's suit is for an order of declaration that the defendant is not entitled to plaintiff honouring and/or paying any sums arising by way of claim against the said defendant in the present suit or in any other suit erroneously believed to be covered under the aforesaid policy cover and/or in favour of the named Plaintiff therein.
7. In response, the defendant denied the plaintiff's claim of breach of policy terms and maintains that he complied with the terms of the policy and the plaintiff is under a duty to indemnify him; that he did not at any material time conceal material fact or misrepresented any information as to breach terms of the policy and argue that the plaintiff's suit is premature, a gamble, scandalous, vexatious and frivolous.
8. During the hearing on 27th September 2023, pw1 who is the Plaintiff's legal officer testified in court and produced documents as filed in court. Pw 1 to testify was one Solomon Mbogo Mwangi the plaintiff's Claims Officer at the Plaintiff's Company. He adopted his written statement and also produced documents dated 26th November, 2021. On cross examination, he confirmed that they insured Gideon Chepsum and that they filed a defence in Eldama Ravine CMCC No. E8 of 2021 through lawyers Kinyua Maingi Advocates. He confirmed that they instructed their lawyers to represent the plaintiff and they filed defence; that they started by filing declaration suit and then filed defence because they decided to assist the client though they expected him to defend suit through own lawyer because they were not liable.
9. He testified that they instructed the lawyer to withdraw from the case as they expected the defendant to proceed with the case. He said they did not cancel the contract that year and that it was the Insured who brought the summons and the moment they got it they wrote a letter dated 22nd October,2021 advising that they could not take up the matter as he had not reported the matter as required by the policy. That they invoked condition number 4 of policy of not complying and that is why they repudiated liability.
10. In defence, DW1 adopted witness statement dated 19th June,2023 and produced his Documents as EXB 1, 2, 3, 4 and 5. He stated that he had motor vehicle G-Touring KAT 271Q at time of accident and insurance was Intra Africa Assurance Company but the broker was Kabirer Insurance agent when the accident occurred and he immediately reported to agent Kabirer and paid excess fee of Kshs 7,500. He stated that he had concluded this case at Eldama Ravine Court then he found himself sued again



by Intra Africa the plaintiff herein. He stated that he had settled the claim with complainant/plaintiff and have no issue with the plaintiff herein He prayed that the case be dismissed and he be paid costs.

11. On Cross-examined by Ms. Achieng, he stated that the accident occurred on 30th June,2018 and he was charged in court in the year 2021 and he does not have documents to show that he reported the accident to the Insurance. He stated that he reported through the agent and he has misplaced the receipt. He said he went to the agent for duplicate receipt but he did not find it. He confirmed that only one person was involved in the accident but he had no document on record to prove that one person was injured; he also confirmed that he had settled the case with the plaintiff in the accident claim and that he did not involve Insurance in the settlement because he had been left by the insurance.

Plaintiff's Submissions

12. In submissions, the Plaintiff identified the following as issues for determination: -
 - a. whether the Defendant entered into contract with the Plaintiff to issue him with a policy of insurance in respect of Motor Vehicle Registration Number KAT 271Q and whether the said policy was issued to the Defendant by the Plaintiff,
 - b. Whether there is a breach of Insurance contract by the Defendant
 - c. Whether CAP. 405 of the Laws of Kenya is applicable in the circumstances that the Defendant breached fundamental terms and conditions of the policy by non-disclosure of material facts.
 - d. Whether the Plaintiff is entitled to avoid the policy.
 - e. Whether the Plaintiff is entitled to the costs of the suit.
13. On the first issue, the plaintiff submit that as corroborated by the pleadings of both parties and by the testimonies of both PW I and DWI it is not in contention that at the bequest of the defendant, a contractual relationship was entered into by the Plaintiff and the defendant wherein a policy of Insurance in respect to Motor Vehicle Registration Number KAT 271Q to wit a policy number 18/KIA/ HO/TPO/PC/ROO14-18/NK/KIA/TP/C/0055 covering the period of 10/02/2018 and 09/02/2019 was issued.
14. On whether there was breach of the insurance contract by the defendant, the plaintiff submit that it was a term of the contract under general exceptions, page 7 of the- policy document that the Defendant was to report to the Plaintiff any accident, injury, loss or damage involving his vehicle as soon as was reasonably possible. That the genesis of this suit is due to the fact the Defendant failed to report the accident which occurred on the 30th June,2018 to the Plaintiff and the Plaintiff only became aware of the suit on the 14th October, 2021 when a primary suit number Eldama Ravine Civil suit no. ES of 2020 was filed a period of over two years after the occurrence of the accident.
15. The Plaintiff submits that the defendant is guilty of non-disclosure of material facts by failing to report the accident and delaying to report for a period of over 2 years.
16. As to whether CAP. 405 of the Laws of Kenya is applicable in the circumstances that the defendant breached fundamental terms and conditions of the policy by non-disclosure of material facts, the plaintiff argues that Sections 10 (3A) & (3B), of CAP 405 Laws of Kenya verbatim provides that: -

“(3A) No judgment or claim shall be payable by an insurer unless the claimant had, before determination of liability at the request of the insurer, subjected themselves to medical examination by certified medical practitioner.



(3B) An insurer shall have a right to obtain or verify information from the institution which issued the documents intended to be used to prove the claim and this right shall enforceable fore judgment is passed Provided that such verification shall be done within a month."

17. That in the event that the subject accident occurred on 30th June 2018 and the same was only brought to the insurer's attention nearly two years after the fact; it is notable that the Plaintiff insurance company was at a loss of conducting its own due diligence investigations so as to establish the facts of the circumstances surrounding the accident that is alleged to have occurred on 30th June 2018.
18. The Plaintiff draws the courts attention to section 10(2) of the Insurance (Motor Vehicle Third Party Risks) Act CAP 405, Laws of Kenya and wish to state that the Plaintiff herein has never received Statutory Notice or Notice of Institution of suit contrary to law and if the accident occurred on 30th June, 2018, it was brought to the insurer's attention in the years 2021 a period of over 2 years after the fact.
19. That any allegation that the defendant herein reported the same to the insurance is false and allegation that insurance policy excess was paid after reporting the incident is not corroborated with neither dates nor proof of transaction from the alleging party.
20. That the failure by the defendant to disclose the material facts to the Plaintiff discharges the Plaintiff from Liability arising out of the accident that occurred on the 30th June, 2018. The plaintiff prays for a declaration that the Plaintiff is entitled to rely on the provisions of Section 10(4) of the Insurance (Motor Vehicle Third Party) risks to absolve the Plaintiff from any other liability arising from the accident.; that the Plaintiff is not Liable to compensate third parties who were injured in respect to the accident that occurred on the 30th June 2018 involving defendant's motor vehicle registration number KAT 271Q. That the Plaintiff is entitled to avoid the policy and should be awarded costs of the suit.

Defendant's Submissions

21. The Defendant submit that the plaintiff filed suit dated 26th November 2021 seeking to avoid a contract of insurance between the parties herein for want of being notified of an accident that occurred on 30.6.2018 involving the motor vehicle registration no. KAT 271Q.
22. That the effect would be that the plaintiff would not defend or compensate the defendant who was sued in Eldama Ravine CMCC no. E008 OF 2020. That the plaintiff also sought a declaration that it is entitled to rely on Section 10(4) of *Insurance (Motor Vehicles Third Party Risks) Act* Chapter 405.
23. The defendant submit that the plaintiff has admitted that a contract existed between the plaintiff and the defendant at the time of the accident. On whether there was a breach of insurance contract by the defendant, the defendant submits that according to the plaintiff, the defendant failed to report an accident which occurred on 30.08.2018 therefore being in breach clause 4a at page 7 of the contract which required the defendant to report the accident as soon as is reasonably practicable but argue that the plaintiff failed to avail before court any material to prove that the defendant did not report the accident as was reasonably possible making the probability that the defendant never reported the matter very improbable. On the other hand, the defendant said he reported the accident and even paid excess fee and further stated that he had resolved the issue of the accident amicably with the injured person.
24. That defendant further submit that the plaintiff never laid any procedure for reporting. That assuming the defendant reported orally to the plaintiff, the plaintiff did not satisfactorily prove that the defendant



never reported to it and further argue that assuming that it is true that the defendant never reported the matter, they submit that failure to report a claim although a condition in the policy cannot assist an insurer to avoid a policy and cited the case of *Imara Steel Mills Ltd v Heritage insurance Co. Kenya Ltd & 38 others* [2016] eKLR where the court held that:-

“In the circumstances of the law, the defendant can avoid the policy to indemnify the plaintiff on ground of late notification by seeking to establish the reasons. What the guidelines seem to state as regards insurance contract is for the party to show that delay has occasioned prejudice. The defendant did not discharge that burden in this case. The statutory provisions and guidelines are meant to avoid a situation where insurers can rely on mechanical irregularity of procedure to deny protection to claimants for which the insured has paid the required premium.

I am of the considered view that a provision in the policy on failure to give notice required to be given within the prescribed period repudiates the claim without first establishing reasons for late notification cannot be construed in favour of the insurer.”

25. That the holding in the above case is that failure to notify the insurer of a claim is not enough reason to repudiate a policy of insurance unless prejudice is shown by the insurer. That the plaintiff never demonstrated any prejudice it suffered for late reporting but issue of prejudice has only appeared in the submissions where plaintiff submit that they are not able to conduct due diligence and investigations to establish the facts leading to the accident due to late reporting. The defendant however argue that the accident was reported to the police station who conducted investigations and nothing prevent them from conducting investigation as the victims of the accident, police abstract and medical documents are available for their perusal and investigation.
26. Further that the defendant’s explanation that the matter has been resolved as between him and the victim of the accident is a sufficient reason to justify the failure to report and the same done in good faith without any intention to expose the plaintiff to any losses and do not therefore think that failure to be notified of the accident was prejudicial to the plaintiff at all.
27. That of importance is that the defendant paid for the premium and his expectation remains that the plaintiff would compensate him for the losses he sustained while using the vehicle and the court in the above case further stated as follows:-

First the unfairness emanating from the insurer permitted to disclaim liability when the insured breach of a condition precedent has not occasioned prejudicial. Secondly, the insurer on entering into the contract makes premium to cover the risk in the future in allowing the insurer to rely on procedural provision to deny compensation to the claimants for which the insured paid premium would be unfair and unjust. Thirdly, the considerable effect by insurer leaving victim of accidents uncompensated by their paid up for insurance coverage by the insured.
28. The defendant argue that the plaintiff failed to demonstrate on a balance of probabilities that the defendant never reported the accident within reasonable time as what is reasonable time was not stated and in their view, a reasonable time is the time one needs to institute a claim for tort which is 3 years.; and if it turns out that the defendant never reported the matter to the insurer, the non-reporting is not sufficient ground for the plaintiff to avoid that policy of insurance for the reasons stated above and also for the reason that the circumstances of the loss and the accident are unconnected with the breach and quoted Regulation 7.10 of the Guidelines On Claims Management For The Insurance Industry June 2012 (page 6)which provides as follows:-

“7. 10. An insurer shall not decline a claim on the grounds of:



- (a) non-disclosure of material facts which a policyholder will not reasonably be expected to have known.
- (b) misrepresentation unless it is fraudulent or negligent misrepresentation of material facts.
- (c) breach of warranty or condition where the circumstances of the loss are unconnected with the breach.
- (d) late reporting without establishing and considering the reasons for the late notification.
- (e) expiry of a driving license at the time of the accident provided that the driver was not disqualified from holding such a license at the time of the accident and has not contravened the requirements of the *Traffic Act* CAP 403 as far as the validity of the driving license applies”

29. Defendant’s argument is that in view of the above guidelines, failure to report is not fatal as there is no prejudice the plaintiff will suffer and since the occurrence of the accident and the purported breach are unconnected, the plaintiff is not entitled to repudiate the policy at all.
30. On whether Cap 405 of the law of Kenya is applicable as between the plaintiff and the defendant, the defendant submits that from the documents produced by the plaintiff, the policy issued by the plaintiff to the defendant is a Third-party policy and Cap 405 would apply in this case. However, they have an issue with the application of Section 10(3a and b) of Cap 405 which provisions have been produced in the plaintiff’s submissions. That from their understanding of the provisions, the provisions apply to a claimant who sues the insured in this case the claimant in Eldama Ravine CMCC No. E008 of 2020. That in this matter, the defendant is not a claimant neither is he a claimant in Eldama Ravine CMCC No. E008 of 2020 and the provisions are therefore inapplicable.
31. That the plaintiff also referred to Section 10(2) of Cap 405 on the issuance of a statutory notice before the institution of a suit. That to their understanding, that provision applies to the claimant who institutes a suit against the insured in this case the claimant in Eldama Ravine CMCC No. E008 of 2020. That the defendant is not a claimant in Eldama Ravine CMCC No. E008 OF 2020. That the plaintiff in this matter can raise that issue in Eldama Ravine CMCC No. E008 of 2020 because that is where the provision is applicable. That the plaintiff therefore misconstrued the application of the cited sections of Cap 405 and urges the court to find so.
32. On whether the plaintiff had notice of the terms of the policy insurance ,the defendant argue that the plaintiff failed to demonstrate that the defendant was aware of the terms of the policy as the defendant submit that the policy is only signed by the director of the plaintiff but not signed by the defendant and cited the famous English case of L’Estrange v Graucob [1934] 2 KB 394 where the court held that the plaintiff was bound by the clause because he signed the document. It did not matter that he had not read the document before signing; that the plaintiff cannot therefore claim that he failed to notify them of the accident contrary to the terms of the policy of insurance and urged this court to dismiss the plaintiff’s suit with costs.

Determination

33. I have carefully considered the pleadings, evidence and submissions by the rival parties. It is not in dispute that the plaintiff had a valid insurance policy/contract with the defendant under policy number



18/KIA/ HO/TPO/PC/ROO14-18/NK/KIA/TP/C/0055 effective from 10th February, 2018 to the 9th February, 2019. I consider the following as issues for determination: -

- a. Whether the plaintiff proved on a balance of probability that the defendant breached the terms of the insurance policy.
 - b. Whether the Plaintiff is deserving of the reliefs sought.
 - i. Whether the plaintiff proved on a balance of probability that the defendant breached the terms of the insurance policy
34. Record show that the plaintiff and defendant entered into a contract of insurance vide a policy cover number 18/KIA/ HO/TPO/PC/ROO14-18/NK/KIA/TP/C/0055 effective from 10th February, 2018 to the 9th February, 2019. It is not disputed that the plaintiff paid the required premiums for the policy and the policy was valid at the time of the accident. However, the plaintiff's argument is that the defendant failed to report accident involving the insured's motor vehicle registration number KAT 271Q which occurred on 30th June, 2013 occasioning bodily injuries to pedestrian CAROLYNE JEPKURUI CHEBOI alias CAROLINE CHEPKEMOI who filed civil suit for compensation in Eldama Ravine CMCC No. E008 OF 2020.
35. The plaintiff argued that contrary to terms of the policy, they learnt of the accident when served with mention notice of the case dated 14th October, 2021 for Case no. Eldama Ravine Civil suit number ES of 2020 filed against the defendant in relation to the above-mentioned accident; that the defendant acted in breach of clause 4 at page 7 of the policy document and is therefore entitled to repudiate the policy. The defendant's argument is that he reported the accident and even paid excess fee of Kshs 7,500.
36. In Apperian (Insurance Law and Practice at pg 2 – 5 (Revised Edition 1981) it stipulates on notice as follows:
- “The purpose of a policy provision requiring the insured to give the company prompt notice of an accident or claim is to give the insurer an opportunity to make a timely and adequate investigations of all the circumstances of the occurrence, and further if the insurer is thus given the opportunity for a timely investigation reasonable compromises and settlements may be made, thereby avoiding prolonged and unnecessary litigation.”
37. In the persuasive authority of *Kidsons v Lloyds Underwriters* [20080 AU ER the English Court of Appeal observed on notification circumstances: -
- “First is that the insured must be subjectively aware of the circumstances. Second is that the circumstances must objectively be material in that it is likely to it may give rise to a claim. Awareness therefore is a matter of fact to trigger notification by the insured to the insurer.”
38. There is no dispute that plaintiff and defendant covenanted to be governed by the terms of the insurance policy. They voluntarily agreed to be bound by the terms of the contract and it would not be proper for the court to rewrite terms agreed by the parties. At page 7 of the- policy document, the defendant was required to report to the Plaintiff any accident, injury, loss or damage involving his vehicle as soon as is reasonably possible. The plaintiff has indicated that they learnt of the accident after two years that an accident occurred and a pedestrian was injured and had filed suit number Eldama Ravine CMCC No. E008 OF 2020.



39. Insurance Act of Kenya Cap 487 of the Laws of Kenya provided for Insurance Regulatory Authority to develop guidelines and regulations for conduct of insurance business in Kenya and Section 3A (a) (b) and (e) of the Insurance Act the authority has issued the following guidelines: -

- “(a) The insurer shall not decline a claim on the ground of breach of warranty or condition where the circumstances of the loss are unconnected with the breach.
- (b) Secondly no claim should be declined on grounds of late reporting without establishing and considering the reasons of late notification.”

40. From the above, late reporting of an accident as required under the policy would not invalidate any claim or repudiate the policy if reasons for late notification are given. From record herein, reason for reporting the accident after about 2 years from date of occurrence have not been explained by the defendant. He only said he reported to the agent and paid excess fee but he failed to produce any document to prove that he reported the accident nor paid excess fee. This could explain why he proceeded to settle the claim by the injured pedestrian. and in evidence said he has no issue with the plaintiff as he has settled the claim arising from the accident.

41. In my view, delay for a period of 2 years is prolonged and I agree with the plaintiff’s argument that the delay deny the applicant an opportunity to investigate the accident and defend the suit in court and therefore stand to suffer prejudice.

42. From the foregoing I find that the plaintiff has proved that the defendant acted in breach of the terms of the insurance contract and the plaintiff was entitled to repudiate the insurance policy.

43. Final Orders:

- 1. I hereby declare that the plaintiff is entitled to avoid Policy of Insurance No,18/KIA/HO/TPO/PC/ROO14-18/NK/KIA/TP/C/0055 in respect of any claims against the Defendant herein arising out of the injuries sustained as a result of the accident on 30th June,2018 involving the Motor vehicle Registration Number KAT 271Q.
- 2. Each party to bear own costs of this suit.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET

THIS 29TH DAY OF FEBRUARY 2024.

.....
RACHEL NGETICH
JUDGE

In the presence of:

Ms Achieng for Plaintiff.

Ms Matoke holding brief for Mr Otwere for Defendant.

Kibet – Court Assistant.

