



**Directline Assurance Company Limited v Kombo (Civil Appeal E832 of 2022)
[2024] KEHC 1743 (KLR) (Civ) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1743 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E832 OF 2022**

JN MULWA, J

FEBRUARY 22, 2024

BETWEEN

DIRECTLINE ASSURANCE COMPANY LIMITED APPELLANT

AND

MULWA MSANIFU KOMBO RESPONDENT

*(Being an Appeal from the Judgment of Hon Judith Omollo delivered
on 15th July 2022 in Nairobi Small Claims Court No. E685 OF 2022)*

JUDGMENT

1. On 1/10/2018 the Respondent while driving Motor Vehicle Registration KBH 751K from a steep climb parking at Mirage Towers Nairobi lost control of the said vehicle, rolled back and knocked Motor Vehicle KBU 856Y that was behind it damaging its left wing. The matter was reported to Parklands Police Station by both parties and a police abstract issued. The Respondent also informed his insurance agent one Rose Wangari Kihumba for further communication to Direct Line Insurance Co. Ltd as the vehicle he was driving was covered under a third-party insurance policy issued on 27/07/2018. The insurance company failed to pay the damage assessed at Kshs. 228,596/= The owner of motor vehicle/ Respondent in this instituted Claim No. E612 of 2021 seeking special damages for the damage caused to her vehicle. The Court awarded the sum of Kshs. 228,596/= plus interest and costs. This award was not settled. The Respondent instituted a declaratory suit vide SCC E685 of 2022 against the Appellant as it had failed to honour its obligation to indemnify him as it claimed that he had failed to pay an excess of Kshs. 10,000/= as stipulated in the Insurance Policy. The trial court in its Judgment of 15/07/2022 found in favour of Respondent and directed the Appellant to pay the sum of Kshs. 228,569/=.
2. Being aggrieved by the trial court's decision the Appellant filed a Memorandum of Appeal dated 30/01/2023 raising the following grounds;



1. That the learned trial magistrate erred in law and in fact by shifting the burden of proof of evidence to the Appellant thereby misdirecting herself in law and thus arriving at a completely erroneous decision.
2. That the learned trial magistrate erred in law and in fact by failing to consider all the material facts that had been placed before the court and thereby failed to take into account relevant matters that she ought to have considered and instead considered irrelevant matters and as a result arrived at a completely erroneous decision.
3. That the learned trial magistrate erred in law and in fact in holding the Appellant liable to pay the sum of Kshs. 228,569.00 when in fact no evidence was placed before the trial court to support such a finding.
4. That the learned trial magistrate erred in law and in fact by misdirecting herself on the principles of who an insurance broker acts for thereby leading to an erroneous finding when the evidence adduced did not support such a finding.
5. That the learned trial magistrate erred in law and in fact in failing to appreciate or take into consideration the Appellant's submissions or at all.
6. That the learned trial magistrate grossly misdirected herself in ignoring the principles applicable and relevant authorities on quantum cited in the written submissions presented filed by the Appellant.
7. That the learned trial magistrate erred in awarding the sum of Kshs. 228,569.00 in the absence of evidence to support such a finding.
8. That the learned trial magistrate consequently erred in law and in fact in awarding cost and interests thereto

The Appellant prays that the Appeal be allowed and the Judgment in favour of the Respondent be set aside and be substituted with an order dismissing the suit in the trial court.

3. The Respondent's case was urged through the evidence of CW1 Mulwa Msanifu Kombo. In his testimony he adopted his list and bundle of documents as evidence. During Cross Examination Mr. Mulwa testified Rose Kihumba was an agent representing the Appellant. He also testified that he only became aware of the need to pay the excess of Kshs. 10,000/= in October 2021 when his agent Rose Wangui sent him a message informing him that three letters had been sent to her office on that date.
4. Appellant's case was adduced by RW1 Kelvin Ngure an Assistant Claims Manager of the Appellant. In his testimony he adopted his witness statement as evidence together with the documents produced before the court. He further testified that communication dated 20/5/2019 informing the insured of the need to pay the excess of Kshs. 10,000/= failure to which his claim would be dismissed was sent to Rose Kihumba although he confirmed that she was not the Appellant's agent but had only brought them the insured. Ngure also testified that a letter dated 8/10/2021 informing the Respondent of his breach for non-payment of excess was sent to Rose Kihumba as the certificate had the name of the agent and the Appellant only managed to come across the Respondent's email address on 10/11/2021.

The parties filed submissions which have been considered together with the evidence adduced before the trial court against the grounds of appeal.

Analysis and Determination

5. Section 38(1) of the Small Claims Act provides as follows:



- (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.

A perusal of the grounds of appeal upon which the appeal is based are all couched as matters of law and fact. The question therefore that this court has to determine is whether it is seized with the necessary jurisdiction to entertain the appeal as filed. As the first appellate court, this court is mandated to subject the whole evidence to fresh and exhaustive scrutiny and make its own findings of fact and conclusion as stated in *Selle & another v Motor Boat Co. Ltd & others* 1968 EA123.

By doing so the court will without a doubt look into the factual evidence adduced by both antagonists. The court is not permitted by dint of Section 38 (1) of the *Small claims court act*, 2016 to interrogate the contentious issues of facts that the appellant faults the trial adjudicator for failing to consider in her judgment. This position was taken by the court (Majanja J) in *Momentum Credit Limited v Teresia Nduta Kabuiya* (2022) eKlr.

6. According to Black's Law Dictionary 10th Edition, "A matter of fact is a matter involving a judicial inquiry into the truth of alleged facts. A Matter of Law is a matter involving a judicial inquiry into the applicable law"

In the case *M'Iriungu v R* (1983) KLR455, the court of Appeal considered the meaning of the above definitions of matters of law and matters of fact and had the following to say:

In conclusion, we would agree with the views expressed in the English case of *Martin vs Glyneed Distributors Ltd t/a MBS Fastenings....* that where a right of appeal is confined to questions of law only, an appellate court has loyally to accept the findings of fact of the lower courts and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law

7. Consequently the court finds and holds that the appeal herein does not meet the requirements of Section 38 1 of the small claims court. This court is therefore barred by statute to entertain the said Appeal. It is dismissed with costs to the Respondent.

Orders accordingly.

DATED DELIVERED AND SIGNED IN NAIROBI THIS 22ND DAY OF FEBRUARY 2024.

J. N. MULWA

JUDGE

