



**Directline Assurance Co Ltd v Mutai (Civil Case E186 of 2023)  
[2024] KEHC 6389 (KLR) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6389 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL CASE E186 OF 2023  
TW CHERERE, J  
MAY 30, 2024**

**BETWEEN**

**DIRECTLINE ASSURANCE CO LTD ..... APPELLANT**

**AND**

**JANET KATHURE MUTAI ..... RESPONDENT**

**JUDGMENT**

1. Respondent obtained judgment in TIGANIA PMCC NO.90 OF 2019 against the Appellant's insured for in the sum of KES. 338,938/- arising out of damages occasioned to Respondent's vehicle KCK 661P which collided with the Appellant's insured's motor vehicle KCE 168 S.
2. Subsequently, Respondent filed Tigania PMCC No. E004 of 2021 seeking an order of declaration that Appellant was liable to satisfy the decree against its insured in TIGANIA PMCC NO.90 OF 2019.
3. By judgment dated 02<sup>nd</sup> October, 2023, the trial court rendered its judgment and declared that Appellant was liable to satisfy the decree against its insured in TIGANIA PMCC NO.90 OF 2019.
4. The judgment provoked this appeal mainly on the ground that the trial court erred in holding the Appellant liable in total disregard of the provisions of Section 5(b) and 10 (1) of the *Insurance (Motor Third Party Risks) Act* Cap 405 Laws of Kenya.
5. This court directed that the appeal be disposed off by way of written submissions. Appellant filed its submission and Respondent opted to rely on submission filed during the trial.
6. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts



in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

7. I have considered the provisions of Section 10 of the *Insurance (Motor Third Party Risks) Act* which provide as follows:

Section 10 Duty of insurer to satisfy judgments against persons insured

1. 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.
8. The liability by an insurer by application of Section 5 (b) of the Act arises in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the insured vehicle on a road.
9. In *David Kinyanjui & 2 Others v Mesback Omari Monyori*[1998]eKLR, the court of Appeal held that  
“It must be borne in mind that in respect of a material damage claim the party suffering damage cannot eventually proceed against the tortfeasor's insurer as there is no provision in our law for such eventuality. The *Insurance (Motor Vehicles Third Party Risks) Act*, Cap 405, Laws of Kenya gives right to such a person to file a declaratory suit against the tortfeasor's insurer if the claim is for physical injuries or death.”
10. And in *Republic v Commissioner of Insurance & 3 others Ex-parte Martin K Ngari* [2014] eKLR - Misc Application 1434 of 2004, Majanja J held that a material damage claim was outside the purview of the *Insurance (Motor Vehicles Third Party Risks) Act*.
11. There is no doubt that the decree that the Respondent sought to execute against the Appellant arose from a material damage claim which is outside the purview of the *Insurance (Motor Vehicles Third Party Risks) Act* and which Appellant would not be required to settle.
12. In the case of *Mwangi v Wambugu*, [1984] KLR 453:  
“A Court of Appeal will not normally interfere with a finding of fact by the trial Court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding; .....”
13. From the totality of the evidence presented before the trial court, I find that the learned trial magistrate erred in issuing a judgment that was clearly in contravention of 5(b) and 10 (1) of the *Insurance (Motor Third Party Risks) Act* Cap 405 Laws of Kenya.
14. Section 27(1) of the *Civil Procedure Act* gives courts unfettered discretion to determine by whom costs are to be paid. It is trite that costs follow the event and a successful litigant ought not to be denied costs



unless for good cause to be shown. (See [Farab Awad Gullet v CMC Motors Group Limited \[2018\] eKLR](#)).

15. In the end, I find that the appeal has merit and it is hereby ordered:

1. The orders contained in the judgment in Tigania PMCC No. E004 of 2021 dated 02<sup>nd</sup> October, 2023 are set aside in entirety and substituted with an order dismissing the Respondent's suit in total
2. Costs of the trial and of the Appeal shall be borne by the Respondent

DELIVERED IN MERU THIS 30<sup>th</sup> DAY OF May 2024



**WAMAE.T. CHERERE**

**JUDGE**

**Appearances**

**Court Assistants - Kinoti/Munene**

**For Appellant - N/A for COOTOW & Associates**

**For Respondents - Mr. Muthomi for John Muthomi & Company Advocates**

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