



**Ngojine v Pioneer General Insurance (Civil Appeal E073 of 2022)
[2024] KEHC 8976 (KLR) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8976 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E073 OF 2022
AB MWAMUYE, J
JUNE 27, 2024**

BETWEEN

BILLY NGOJINE APPELLANT

AND

PIONEER GENERAL INSURANCE RESPONDENT

*(Being an Appeal against the Ruling of the Hon. S.I. Ismael (Adjudicator/
RM) delivered on 24th November, 2022 in SCCC No. E72 of 2022)*

JUDGMENT

Background

1. The Small Claims Court (SCC) has been successful in enhancing access to justice in Kenya by providing a simplified adjudicative platform for resolving qualifying civil and commercial disputes. Litigants have flocked to the Small Claims Court, attracted by its uncomplicated procedures, low costs, and expedited timelines. The jurisdiction of the Small Claims Court is set out under Section 12 of the *Small Claims Court Act*, 2016; while Section 13 of the *Act* proceeds to list the type of disputes that cannot be expressly excluded from the jurisdiction of the Small Claims Court.
 1. Therefore, the jurisdiction of the Small Claims Court is matters falling within Section 12 of the *Act* and which are also not excluded by virtue of Section 13 of the *Act*. While this should be a simple and straight-forward matter, questions continue to abound as to the proper interpretation of the inclusions and exclusions of Section 12 and Section 13 respectively.
 2. The present Appeal stems from one such controversy. Specifically, can a claim be brought before the Small Claims Court by a claimant who wants the Respondent, his/her insurance company, to satisfy a decretal sum awarded in another case involving damage caused by an insured motor vehicle?



3. The Appellant herein was sued in Nyeri SCCC No. E028 of 2022 following a road traffic accident involving his motor vehicle, which was insured by the Respondent herein, and that of another party, the claimant therein. An interlocutory judgment was entered in favour of the claimant therein, and the Appellant herein was required to pay the sum of KShs.638,454.00 as per a Decree dated 7th July, 2022.
4. The Appellant sought to have Respondent settle that decretal amount to no avail. The Appellant then filed Nyeri SCCC No. E072 of 2022 in an effort to compel the Respondent to settle the decretal sum in Nyeri SCCC No. E028 of 2022; but that Claim elicited a Preliminary Objection by the Respondent challenging the jurisdiction of the Small Claims Court to hear and determine that matter.
5. The Respondent’s Notice of Preliminary Objection dated 11th November, 2022 is contained at page 40 of the Record of Appeal dated 28th January, 2023. The one sentence objection read as follows:

“Take notice that the Respondent objects to the jurisdiction of this Honourable Court due to the nature of the subject matter.”
6. The Respondent buttressed its Notice of Preliminary Objection through written submissions dated 15th November, 2022. The Respondent’s submissions argued that:
 - a. The Small Claims Court lacks jurisdiction to determine a matter based on a declaratory suit;
 - b. In any case, the Claimant had not provided evidence that he had settled the decretal amount specified in the other matter;
 - c. Section 10(1) of the *Insurance (Motor Vehicles Third-Party Risks) Act* excludes material damage claims from being enforced in the nature sought in the claim.
2. In response, the Appellant filed written submissions dated 16th November, 2022. The Appellant situated the Small Claims Court’s jurisdiction in the matter as arising under Section 12(1)(c) of the *Small Claims Court Act* due to the claim being one that involves a liability in tort in respect of loss or damage caused to any property. The Appellant also argued that the Respondent had not present any authority expressly stating that the lower court had no jurisdiction.
3. The Respondent filed further written submissions dated 22nd November, 2022 as a rejoinder to the Appellant’s written submissions dated 16th November, 2022. The Respondent sought to distinguish the decision of the High Court in *Hezbon Obare Nyakundi v Trident Insurance Company Limited*, [2019] eKLR that had been cited by the Appellant in his written submissions by stating that the decision could not apply to the Small Claims Court due to the fact that the court derives its jurisdiction from Section 12 of its establishing statute and not from the *Judicature Act*, which was the statute at issue in the aforesaid court case.
4. Setting out the background and progression of the Preliminary Objection before the lower court is critical for understanding the Hon. Adjudicator’s Ruling dated 24th November, 2022. The Hon. Adjudicator stated that the Appellant had not convinced the court through evidence that a loss within the meaning of Section 12(1)(c) of the *Small Claims Court Act*, 2016 was at issue between the parties. From the Ruling, the court’s position on the question of the matter being a declaratory suit is somewhat unclear but it would appear that the Hon. Adjudicator was persuaded by the Respondent’s position that the Small Claims Court cannot hear such matters. Lastly, the Hon. Adjudicator stated



that there was no evidence that the decretal sum had been settled by the Appellant and thus there was no basis for him to lay claim for it from the Respondent.

5. On those grounds, the Trial Court upheld the Respondent's Notice of Preliminary Objection dated 11th November, 2022 and thereby struck-out the Appellant's Statement of Claim dated 27th October, 2022. The Trial Court separately issued an Order dated 24th November, 2022 to that effect.

The Appeal and Parties' Contentions

6. Aggrieved by the Ruling and the Order both dated 24th November, 2022 the Appellant approached this Court vide a Memorandum of Appeal dated 16th December, 2022 whose three grounds I summarize as follows:
 - i. The Hon. Adjudicator erred in law and in fact by failing to find that the court had jurisdiction pursuant to Section 12(1)(a) of the *Small Claims Court Act*, 2012;
 - ii. The Hon. Adjudicator erred in law and in fact by holding that the Claim ran contrary to Section 10(1) of the *Insurance (Motor Vehicles Third-Party Risks) Act*; and
 - iii. The Hon. Adjudicator erred in law and in fact by allowing a Preliminary Objection that did not meet the requisite legal threshold and which depended on facts that required to be proved during a full trial.
7. The parties applied these three grounds as their issues for determination in the written submission they filed and exchanged in the Appeal. The Respondent largely tread the same ground as its submissions before the Small Claims Court, save as to underscoring that the Preliminary Objection raised before the lower court was on a pure point of law and there was no need for the lower court to delve into facts that required to be ascertained in order to determine it.
8. The Respondent also countered the Appellant's assertion that an insurance policy is a contract for the supply of services and thus a matter falling under Section 12(1)(a) of the *Small Claims Court Act*, 2016 by reiterating the submission made before the lower court that the jurisdiction of the court was ousted by virtue of Section 10(1) of the *Insurance (Motor Vehicles Third-Party Risks) Act*.
9. The Appellant also largely reproduced his earlier written submissions, save for expounding on his critique of the nature of the Preliminary Objection and also buttressing his argument that the Small Claims Court had jurisdiction under Section 12(1)(a) of the *Act* and omitting the argument for jurisdiction under Section 12(1)(c) of the *Act* that had been made before the Trial Court.

Analysis and Determination

10. Jurisdiction is no small matter. It is the foundation upon which a court exercises the power to hear and determine a matter before it. If a court does not have the requisite jurisdiction to hear and determine that particular matter before it but it nonetheless proceeds to do so, even unwittingly, the proceedings are null and void notwithstanding the court acting in good faith and with the best of intentions.
11. A court must be absolutely sure it is the proper forum to hear and determine the matter brought before it. Any doubts as to jurisdiction should result in the court finding that it does not have jurisdiction. The issue of jurisdiction is so fundamental to the sanctity and probity of the judicial process that it cannot be based on conjecture, guess work, or chance. A court must be certain beyond any doubt that it has jurisdiction, and anything less than that should lead to the court finding that it does not. It is better to err on the side of caution rather than to proceed on and run the risk of having the time, labour, and treasure of the parties lead to nought on appeal.



12. The Hon. Adjudicator erred on the side caution in finding that the Small Claims Court did not have jurisdiction. However, the matters involved in the Appellant’s Statement of Claim dated 27th October, 2022 most certainly fall within the ambit of Section 12(1)(a) of the *Small Claims Court Act*, 2016.
13. Insurance is a service rendered by an insurance company such as the Respondent to an insured person such as the Appellant. The policy document is a contract between those two parties. Thus, a claim brought before the Small Claims Court alleging the non-performance of contractual obligations owed to the claimant by an insurance company that is the respondent fits is a dispute relating to a contract for sale and supply of goods and services within the meaning of Section 12(1)(a) of the Act.
14. The question of declaratory suits and the import of Section 10(1) of the *Insurance (Motor Vehicles Third-Party Risks) Act* did not come out clearly in the Hon. Adjudicator’s Ruling. However, it is a moot point as Section 12(1)(a) is clear and in the absence of an express ouster under Section 13 of the Act there was no need for the lower court to read into the particulars of another statute; particularly when the Trial Court thereafter misinterpreted Section 10(1) of the *Insurance (Motor Vehicles Third-Party Risks) Act* as a basis to wrongly oust jurisdiction.
15. In *Charles Makenzi Wambua v Africa Merchant Assurance Co. Ltd & Another*, [2014] eKLR the High Court stated as follows:

“The provisions of Section 10 (1) of *Insurance (Motor Vehicle Third Party Risks) Act*, Cap 405 are clear that notwithstanding that the defendant may be entitled to avoid or may have avoided the policy, it nevertheless must pay to the persons holding judgment against the defendant and therefore any purported restriction or limitation on the extent of the quantum it can pay is not supported by laws as the rights of the third (interested) parties under the Act override the insurer’s and the insured’s contractual rights under the policy of insurance.

To allow the third/interested parties execute decrees against the plaintiff in my view, in the glare of the provision of Section 10 (1) would be occasioning him unnecessary hardship and not to mention, would be to assist the defendant avoid a contract whose terms are expressly dictated by statute and therefore rendering the statute impotent. The insurer has a remedy under Section 10 (2), (3) and (4) to (after paying third parties), recoup from the insured what it has paid over and above the sum assured.”
16. In *Ndonye v Invesco Assurance Co. Ltd* [2022] KEHC 416 (KLR) the High Court stated as follows at Paragraph 31 of its Ruling:

“I must however state that the primary obligation of settling the decree falls squarely on the Applicant and in the event the Defendant as his insurer fails to satisfy the decree, the Applicant will still be called upon to satisfy the same. The mere fact that the Defendant is bound both contractually and statutorily to satisfy the decree does not absolve the Applicant from meeting his obligations under the tort of negligence. It must be noted that nothing prevents the Applicant from settling the decretal sum and then suing the Defendant for compensation or reimbursement.”
17. As that limb of the impugned Ruling involves questions of fact that may be revisited at a trial, I will say no more on that point other than to say in law the Hon. Adjudicator erred in finding that Section 10(1) of the *Insurance (Motor Vehicles Third-Party Risks) Act* was a basis for a finding of a lack of jurisdiction.



18. I also note that in determining the Preliminary Objection dated 11th November, 2022 the Trial Court inadvertently strayed into matters of contested facts rather than limiting itself to pure points of law that do not require findings on contested facts. Faced with such a situation, a court should dismiss the Preliminary Objection but reserve the issues for consideration in its final decision and after hearing and considering evidence. It is sometimes the case that a challenge on jurisdiction requires contested facts to be tested before the court can ascertain that it lacks jurisdiction. This is one of the great limitations of preliminary objections.
19. At this appellate stage, the Appellant changed his argument on what provision of the *Small Claims Court Act* gave the Trial Court jurisdiction. Before the Trial Court he made an argument that the nature of the Claim and the action before the court was tortious, while in these proceedings he shifted the jurisdictional argument to one of contract. While both the lower court as well as this one are not limited to the provisions of law and arguments of parties in determining questions of jurisdiction, and a party can argue a new point on jurisdiction at the appellate stage provided that it does not change the essential nature of their overall argument on the question of jurisdiction; I take the view that having denied the lower court the opportunity to consider that new basis the Appellate herein should not benefit from costs.
20. Consequently, I allow partially allow the Appeal, and I do so as follows:
- a. The Ruling and Orders of the Small Claims Court dated November 24, 2022 in Nyeri SCCC No. E072 of 2022 with respect to the Preliminary Objection dated 11th November, 2022 are set aside and substituted with a finding that the Small Claims Court has jurisdiction to hear and determine that matter;
 - b. Nyeri SCCC No. E072 of 2022 is reinstated, and the matter shall be heard and determined within the statutory period, which time shall begin to run from the date that the file shall be first mentioned before the Small Claims Court;
 - c. The matter shall be mentioned before the Nyeri Small Claims Court on July 8, 2024;
 - d. The Small Claims Court shall in hearing and determining that matter shall be at liberty to revisit the question of jurisdiction in its final decision if the same is warranted based on evidence led before the court; and
 - e. Each party shall bear its own costs in this appeal, as well as in the proceedings in the Small Claims Court with respect to the Preliminary Objection dated November 11, 2022.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI

THIS 27TH DAY OF JUNE, 2024.

BAHATI MWAMUYE

JUDGE

In the presence of:

Ms. Wambui Mwai Counsel for the Appellant

Mr. Ngechu Counsel for the Respondent

Mr. Guyo, Court Assistant

