AIG Kenya Insurance Co. Limited v Outsourced Professional Services Ltd (Civil Appeal E1038 of 2022) [2024] KEHC 8229 (KLR) (Civ) (26 June 2024) (Judgment)

Neutral citation: [2024] KEHC 8229 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1038 OF 2022

JK NG'ARNG'AR, J

JUNE 26, 2024

BETWEEN

AIG KENYA INSURANCE CO. LIMITED ..... APPELLANT

AND

OUTSOURCED PROFESSIONAL SERVICES LTD ..... RESPONDENT

(Being an appeal from the judgment and decree of the Small Claims Court at Nairobi by Hon. Caroline Ndumia delivered on 14/12/2022 in Nairobi SCC No. E1664 of 2022)

JUDGMENT

1. The respondent had filed a declaratory claim in Nairobi SCC No. E1664 of 2022 against the appellant having obtained judgment on 31/1/2022 in SCC No. E640 of 2021. The respondent sought declaratory orders that the appellant ought to have settled the decretal amount having being the insurer of motor vehicle KAY 199U which had been involved in accident on 14/5/2020 along Outer Ring Road and caused damages on motor vehicle no. KCW 300Y. Vide judgment dated 14/12/2022, the court allowed the claim and found that the appellant was liable to settle the award in the primary suit SCC No. 640 of 2021.

2. Aggrieved with the trial court's decision, the appellant lodged a memorandum of appeal dated 20/12/2022 and raised twelve grounds of appeal which can be summarized as: the trial court erred in arrogating herself jurisdiction to entertain a claim that was outside her scope; the trial court erred in entertaining a declaratory claim for repair costs as the same was precluded under Section 10(1) and Section 5(b) of CAP 405 which limits itself to claims relating to death and bodily injury thus the adjudicator lacked jurisdiction to determine the claim; that the trial court erred in failing to appreciate that the claim was not enforceable as it did not fall within the ambit of Section 10(1) of Cap 405; and that the trail court erred in failing to consider the parties submissions and evidence that the respondent

in the primary suit was a mechanic and not authorized to drive the insured's vehicle thus erroneously found that the vehicle was driven by an authorized driver.

3. The appellant thus prayed that the appeal be allowed with costs and the judgment of the trial court delivered on 14/12/2022 be set aside and an order be issued that the appellant is not obligated to honor the respondent's small claim.

4. The appellant filed submissions dated 26/3/2024 whereas the respondent's were dated 15/4/2024. I have considered those submissions alongside the entire record. Though the appellant framed 12 grounds for appeal, the main issue in contention is whether material damage claims fall within the ambit of Section 10 (1) and 5 (b) of Cap 405 such that the appellant was liable to settle the decree in the primary suit.

5. On this, the appellant submitted that material damage claims are not one of the third-party risks contemplated under Section 5(b) of Cap 405 which only limits itself to a third-party claims relating to death or personal injury claims. That the appellant in the primary suit was not a party to the insurance contract between the respondent and the insured thus the respondent therein could not impose an obligation on the appellant to settle the claim. The respondent on the other hand submitted that the appellant had not raised any of the defences available to it including repudiation of the statutory notice by the appellant. That there was a valid insurance policy at the time of the accident and judgment was entered against the insured thus the appellant was liable to settle the decretal amount.

6. This being a firs appeal, it is by way of a retrial, and parties are entitled to this court's reconsideration, reevaluation and reanalysis of the evidence on record in order to reach its own conclusions on that evidence. The court should however bear in mind that the trial court had the advantage of seeing the witnesses testify and give due allowance for that. In *Williamson Diamonds Ltd and another v Brown* [1970] EA 1, the court held that:

> " The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion."

7. In order to determine whether there was any such duty, this Court has considered the provisions of Section 10 of the Act which provides as follows: -

> " 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.
>
> Provided that the sum payable under a judgment for a liability pursuant to this section shall not exceed the maximum percentage of the sum specified in Section 5 (b) prescribed in respect thereof in the Schedule."

8. Section 5(b) of the said Act provides: -

> "In order to comply with the requirements of section 4, the policy of insurance must be a policy which insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road."

9. The provisions of Sections 107 and 108 of the *Evidence Act* come into play. If the appellant wanted the court to believe that material damage is not covered by the policy, it was duty bound to adduce evidence for the court to find in its favour. It was thus upon the appellant to proof that the liability in question, that is, liability in a material damage claim, was not covered under the insurance policy. The appellant did not adduce any evidence to proof that under the insurance policy, material damage claims were not covered. See *The Great Insurance Company of India Ltd –vs- Lilian Everlyn Cross and Another* [1966] E.A 90. There was also no allegation that the insurance policy was invalid. The only defence that the appellant raised was that it was unaware of the accident, and the trial court rejected that defence in light of the evidence of service of the statutory notice which was duly stamped by the appellant.

10. Section 10 (4) of the Act requires of an insured who wants to deny liability to obtain a declaration either before or not more than three (3) months following commencement of the primary suit. The way to obtain such declaration is by filing a declaratory suit in Court. Furthermore, this action would only be valid if the said insured had within fourteen (14) days of the filing of the primary suit, had given notice to the Plaintiff in that matter that it was not liable. In essence, repudiation of liability is two-fold, first, by way of giving notice to the Plaintiff in the primary suit, and secondly, by way of filing a declaratory suit. It is by following that process that the appellant would have pleaded that there was either a non-disclosure of material facts as regards to the cover on material claims, or there was a misrepresentation of a material fact. It then follows that pursuant to the above provisions, the appellant who was the insurer was required to settle the decretal amount as awarded and in accordance with the provisions of the Act.

11. I do note that the respondent brought sufficient evidence before the trial court to proof that the subject motor vehicle KAY 199U was insured by the appellant. There was also evidence that the statutory notice was served upon the appellant thus its defence that it was unaware of the accident of 14/5/2020 failed. The appellant also failed to raise any of the defences available to it under the Act. Relying on the case of *James Akhatioli Ambundo vs. Lion of Kenya Insurance Co. Limited* (2021) eKLR, the trial court correctly found that even though the appellant's insured was withdrawn from the primary claim, it did not absolve the respondent from settling the claim. In that case, the court found that the law requires the insurer to satisfy the claim of the third party so long as the damage can be attributed to the accident vehicle as per Section 10 of the Act. See also *Kenindia Assurance Co Ltd v James Otiende* [1987]2 KAR 162 and Kasereka v Gateway Insurance Co Ltd (2003) 2 EA 502 as well as *Philip Kimani Gikonyo v Gateway Insurance Co Ltd* HCCA 746/2002 Nairobi where the courts alluded to the provisions of Section 10 of Cap 405 Laws of Kenya emphasizing that the Insurance Company can only settle decree against its insured and that the duty of the insurers is to satisfy judgments against persons insured.

12. Having there been sufficient evidence to proof that the appellant was the insurer of the subject motor vehicle, I see no reason to interfere with the trial court's decision. I also note that the appellant did not invoke any of the available defences to avoid the claim. In the circumstances, I find that the respondent proved its claim sufficiently and the trial court did not err in its findings.

13. In the circumstances, I find that the appeal is not merited and the same is hereby dismissed with costs to the respondent.

It is so decreed.

DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF JUNE, 2024.

J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of:-

Isiolio for the Appellant

No appearance for the Respondent

Court Assistant – Peter Ong'idi

Further Order;

30 days stay granted.

J.K. NG'ARNG'AR, HSC

JUDGE