Madison General Insurance Kenya Ltd v Sadera (Civil Appeal 182 of 2022) [2024] KEHC 13547 (KLR) (31 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13547 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 182 OF 2022

H NAMISI, J

OCTOBER 31, 2024

BETWEEN

MADISON GENERAL INSURANCE KENYA LTD ..... APPELLANT

AND

PIROS OLE SADERA ..... RESPONDENT

(Being an Appeal from the judgement Hon. B. A. Luova, Adjudicator on 10 November 2022 in Machakos Small Claims Case No. E392 of 2022)

JUDGMENT

1. The appeal herein arises from a claim filed in the Small Claims Court by the Respondent against the Appellant seeking the following reliefs:

   i. Judgement in the sum of Ksh 230,519/=;

   ii. Compensation (general damages) (to be determined by the court)

   iii. Costs of the claim (to be assessed by the court)

   iv. Other appropriate relief

   v. Interest at the court rate from filing to payment in full

2. The Respondent's claim arose a primary suit (Machakos SCC E061 of 2022) in which the Respondent sued one, Maureen Kiberenge, following a road traffic accident involving the Respondent's motor vehicle KCX 953B and the Defendant therein motor vehicle registration number KBK 101F. The primary suit was heard and determined and judgement entered in favor of the Respondent herein in the sum of Kshs 230,519/=.

3. The Appellant entered appearance in the trial court and filed their Response to Statement of Claim dated 5 September 2022. In its response, the Appellant averred that the since the claim was for declaration in respect of the Appellant's alleged statutory liability under the provisions of *Insurance (Motor Vehicles third Party Risks) Act*, Cap 405 Laws of Kenya, the Court is not clothed with the jurisdiction to adjudicate on the same within the purview of the provisions of section 12 of the *Small Claims Court Act*, 2016. Further, the Appellant averred that since the claim relating to damage of the Respondent's motor vehicle and not death of or bodily injury to a person, the same is not a liability covered under a policy of insurance requited to be issued pursuant to the provisions of sections 4 and 5(b) of the *Insurance (Motor Vehicles third Party Risks) Act*.

4. The Appellant filed a Notice of Preliminary Objection dated 12th September 2022 on the ground that the court lacked the jurisdiction to hear and determine the matter within the purview of Section 12 of the *Small Claims Court Act*, 2016. Both parties filed their submissions to the Preliminary Objection. From the Record of Appeal, it would appear that parties agreed to have the Preliminary Objection determined together with the suit itself. It was agreed that the matter would proceed by way of documents and written submissions.

5. The trial court then delivered a Ruling and Judgement on 10 November 2022. In its Ruling, the trial court held that the court has jurisdiction to entertain a material damage claim under sections 12 (2) of the *Small Claims Court Act*, which empowers the court to exercise civil jurisdiction as may be conferred to it by any other written law. The Preliminary Objection was dismissed with costs to the Respondent.

6. In its judgement, the court noted that no evidence had been presented before the court to show that the policy by the Appellant had been alleged repudiated, as required by section 10(2) of the Act. It also noted that there was no policy schedule presented to the court to prove that the policy contract did not cover material damage as averred by the Appellant. Consequently, the trial court entered judgement in favor of the Respondent as follows:

    i. A declaration do and is hereby issued that the Respondent is bound to honour and satisfy the judgement entered in Machakos SCCC No. E061 of 2022, in the sum of Kshs 230,519/= as decreed;

    ii. The Claimant will have cost of the claim and interest from the date of the judgement in the primary suit.

7. Being aggrieved by the judgement of the trial court, the Appellant lodged an appeal on the following grounds:

    i. That the learned Honourable Adjudicator erred and misdirected herself in law in failing to consider or sufficiently consider and appreciate that the Claimant's claim before her was for enforcement of the Appellant's alleged statutory liability under Section 10 of the *Insurance (Motor Vehicles third Party Risks) Act*, Cap 405 Laws of Kenya, and therefore she lacked jurisdiction to adjudicate the matter within the scope of section 12 of the *Small Claims Court Act*, 2016;

    ii. That the learned Honourable Adjudicator erred and misdirected herself in law in failing to consider or sufficiently consider and appreciate that the Claimant's loss and damage which arose from a material damage loss and not death of or bodily injury to a person is not a liability covered under a policy of insurance required to be issued in accordance with provisions of sections 4 and 5(b) of the *Insurance (Motor Vehicles third Party Risks) Act*, Cap 405 Laws of Kenya and therefore section 10 thereof had no application in the matter;

iii. That the learned Honourable Adjudicator erred and misdirected herself in finding and holding that it was necessary for the Appellant to have invoked the provisions of section 10 (2) of the *Insurance (Motor Vehicles third Party Risks) Act*, Cap 405 Laws of Kenya;

iv. That the learned Honourable Adjudicator failed to appreciate or properly appreciate the Appellant's case as pleaded before her and/or consider or sufficiently consider the submissions made on the Appellant's behalf;

v. That the learned Adjudicator erred and misdirected herself in law in failing to consider or sufficiently consider and appreciate that the Appellant herein bears no statutory liability to satisfy the judgement and decree issued in the Claimant's favor in Machakos SCC E061 of 2022 pursuant to and within the meaning of the provisions of Section 10 of the *Insurance (Motor Vehicles third Party Risks) Act*, Cap 405 Laws of Kenya;

8. Parties were directed to canvass the appeal by way of written submissions. The Appellant filed submissions. I did not have the benefit of reading the Respondent's submissions since the same were not in the court file nor were they traceable on the filing portal.

Analysis & Determination

9. Section 38 of the *Small Claims Court Act* provides as follows:

1. A person aggrieved by the decision or an order of the Court may appeal against that decision or an order to the High Court on matters of law;

2. An appeal from any decision or order referred to in sub section (1) shall be final.

10. In the case of Otieno, Ragot & Company Advocates -vs- National Bank Kenya Ltd [2020] eKLR, the Court of Appeal addressed the duty of a court considering points of law.

> " This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. (See: Stanley N. Muriithi & Another versus Bernard Munene Ithiga (2016) eKLR)."

11. Similarly, in the case of *Mwita v Woodventure (K) Limited & another (Civil Appeal 58 of 2017*) [2022] KECA 628 (KLR) (8 July 2022) (Judgment), the Court of Appeal stated:

> " This is a second appeal. Accordingly, the jurisdiction of this Court is limited to consideration of matters of law. As was held in the case of Stanley N. Muriithi & Another v Bernard Munene Ithiga [2016] eKLR, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the court below considered matters it should not have considered, or failed to consider matters it should have considered, or looking at the entire decision, it is perverse. See also Kenya Breweries Limited v Godfrey Odoyo [2010] eKLR in which it was held that: "In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."

12. The duty of this Court, in this instance, is similar to that stated herein above, which is essentially on points of law. In the case of J N & 5 Others -vs- Board of Management, St. G School Nairobi & Another [2017] eKLR, in addressing a point of law and a point of fact, Justice Mativo stated thus:

> " In law, a question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to interpretation of the law. Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts.
>
> In law, a question of fact, also known as a point of fact, is a question that must be answered by reference to facts and evidence as well as inferences arising from those facts. Such a question is distinct from a question of law, which must be answered by applying relevant legal principles. The answer to a question of fact (a "finding of fact") usually depends on particular circumstances or factual situations."

13. Turning to the appeal herein, there is one clear issue of law for determination by this Court; Whether the Appellant bears any statutory liability to satisfy the judgement and decree issued in favor of the Respondent pursuant to and within the meaning of the provisions of Section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act*, Cap 405 Laws of Kenya.

14. Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act relates to the duty of an insurer to satisfy judgements against persons insured and provides as follows:

    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.

       (1A).....

       (1B)The percentage of the sum specified in section 5(b) and prescribed in the Schedule under this Act shall include but not limited to the medical expenses on the judgment or claim.

    2. No sum shall be payable by an insurer under the foregoing provisions of this section—

       a. in respect of any judgment, unless before or within thirty days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings; or

       b. in respect of any judgment, so long as execution thereon is stayed pending an appeal; or

       c. in connection with any liability if, before the happening of the event which was the cause of the death or bodily injury giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provision contained therein, and either—

i. before the happening of the event the certificate was surrendered to the insurer, or the person to whom the certificate was issued made a statutory declaration stating that the certificate had been lost or destroyed; or

ii. after the happening of the event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer, or the person to whom the certificate was issued made such a statutory declaration as aforesaid; or

iii. either before or after the happening of the event, but within a period of twenty-eight days from the taking effect of the cancellation of the policy, the insurer has notified the Registrar of Motor Vehicles and the Commissioner of Police in writing of the failure to surrender the certificate.

15. In comprehending section 10, one must also read section 5 of the Act, which provides as follows:

> In order to comply with the requirements of section 4, the policy of insurance must be a policy which—
>
> a. is issued by a company which is required under the *Insurance Act* (Cap. 487) to carry on motor vehicle insurance business; and
>
> b. 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 the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road:
>
> Provided that a policy in terms of this section shall not be required to cover—
>
> i. liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or
>
> ii. except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arose; or
>
> iii. any contractual liability;
>
> iv. liability of any sum in excess of three million shillings, arising out of a claim by one person.
>
> (emphasis mine)

16. The import of these two sections is that an insurer can be held statutorily liable for a claim relating to personal injury or death. The Court of Appeal in the case of David Kinyanjui & 2 Others -vs- Meshack Omari Monyori [1998] KECA 104 (KLR) stated thus:

> "It must be borne in mind that in respect of a material damage claim the party suffering damage cannot eventually proceed against the tortfeasor 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."

17. This position was reiterated in the cases of Lelei -vs- *Direct Line Assurance Company Ltd (Civil Case No E004 of 2023*) [2024] KEHC 12795 (KLR) and Directline Assurance Co Ltd v Mutai (Civil Case E186 of 2023) [2024] KEHC 6389 (KLR).

18. The Respondent's decree having arisen from a material damage claim falls outside the purview of the *Insurance (Motor Vehicles Third Party Risks) Act*. The Appellant is, therefore, not required to settle the same.

19. The upshot is that the appeal is meritorious. I, hereby, make the following orders:

    i. The judgement in Milimani SCCOMM E392 of 2022 dated 10 November 2022 is hereby set aside in its entirety and substituted with an order dismissing the Respondent's suit in total.

    ii. Costs of the trial and appeal herein shall be borne by the Respondent.

DATED AND DELIVERED AT MACHAKOS THIS 31 DAY OF OCTOBER 2024.

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

Ms. Pyoko..... for the Appellant

Ms. Kariuki h/b Mugo..... for the Respondent