



Wairimu v Xplico Insurance Company Limited; JN (Suing as the mother and next friend of MN) & 10 others (Interested Parties) (Civil Suit 30 of 2020) [2024] KEHC 5789 (KLR) (16 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5789 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL SUIT 30 OF 2020
SM MOHOCHI, J
MAY 16, 2024**

BETWEEN

ROSE WAIRIMU PLAINTIFF

AND

XPLICO INSURANCE COMPANY LIMITED DEFENDANT

AND

JN (SUING AS THE MOTHER AND NEXT FRIEND OF MN)MARY NJERI INTERESTED PARTY

JOYCE NJERI KIMANI (SUING AS THE NEXT FRIEND OF SAMUEL KIMANI)SAMUEL KIMANI INTERESTED PARTY

GWK (SUING AS THE MOTHER AND NEXT FRIEND OF MM) INTERESTED PARTY

JNK (SUING AS THE MOTHER AND NEXT FRIEND OF FW) INTERESTED PARTY

GLADYS WANJIRU KIMONDO INTERESTED PARTY

GEOFFREY KABUI KANYI INTERESTED PARTY

CHARLES WERU INTERESTED PARTY

DIVINA KERUBO INTERESTED PARTY

SARAH WANJIKU KAMAU INTERESTED PARTY

JOSEPH KARIUKI MAINA INTERESTED PARTY

JOSEPH KIMANI KARIUKI INTERESTED PARTY



RULING

1. By a Plaint dated 30th June, 2020 and filed in Court on 29th July, 2020 the Plaintiff seeks judgment and declaratory orders against the Defendant, to satisfy judgements and consequential orders in Nakuru CMCC No's 384, 385, 386, 387, 388, 389, 390, 391, 392, 393 and 394 all of 2019 plus costs of the suit and any other relief that the Court may deem fit to grant.
2. The facts of the case are that, the Plaintiff was the lawful owner of motor vehicle registration number KBC 842L Toyota Matatu and which was insured by the Defendant under the Insurance Policy number XPL/020001692. That during the term of the policy, the motor vehicle was involved in a self-involving accident on 24th January, 2019 at Mbaruku Echaria Center within Nakuru County where the 1st to 11th Interested Parties who were passengers in the subject vehicle sustained serious injuries. The 1st to 11th Interested Parties instituted Nakuru CMCC No's 384, 385, 386, 387, 388, 389, 390, 391, 392, 393 and 394 all of 2019 seeking special and general damages, costs of the suit as well as interests.
3. The Defendant registered the claims under claim reference number 002465/PSV and went ahead to appoint the firm of M/s Kamoing' & Co. Advocates to defend the Plaintiff in the suit. Ex-parte judgements were obtained in Nakuru CMCC No's 385, 386, and 389 all of 2019 and vide a ruling dated 31st October, 2010 the Plaintiff was allowed to put in her defence on condition she pays throw away costs of Kshs 15,000 per suit. This wasn't done by the Defendant and the final judgments were obtained on 29th June, 2020 which necessitated institution of the instant suit.
4. The Defendant did enter appearance through the firm of M/s Ilham Advocates but failed to file a Defence.
5. The Plaintiff Rose Wairimu James testified on oath as PW1 that she lives in Pipeline Nakuru County. She relied on her Witness Statement recorded on 30th June, 2020 and produced list of documents dated 30th June, 2020 as P-Exh 1-7. She stated that she was the Defendants insured, had brought documents for cover, the insurance policy and excess and expected that the Defendant would underwrite her risk. That her car was involved in an accident and she was sued. She stated that her insurance instructed an advocate that absconded the case. She prayed that the Court does take action against the Defendant as pleaded.
6. On cross examination, she stated that she was the owner of the vehicle that was involved in the accident and she had an agreement with the Defendant though she had not produced the contract. The contract would establish the relationships and the persons entitled to compensation. She stated she could not recall the amount she was to pay the Defendant and that she does not blame the Interested Parties.
7. In re-examination she stated that she included in her bundle proof of payment showing the payment for the insurance, excess and cover.

Submissions

8. The Plaintiff in her written submissions dated 20th February, 2024 and filed on 24th February, 2024 submitted on three (3) issues. The first issue was on the extent and scope of the cover between the Plaintiff and the Defendant. She argued that there was a valid cover issued at the time of the accident and that certificate of insurance is proof that there existed an insurance contract and that it was upon the Defendant to act in good faith. She relied on *Richard Makau Ngumbi & Another v Cannon Assurance Co. Ltd* [2011] eKLR, *Kenya Alliance Insurance Co. Ltd v Thomas Ochieng Apopa (Suing*



as Administrator of the Estate of Pamela Agola Apopa (deceased)) [2020] eKLR, *Paul Mutsya v Jubilee Insurance Company of Kenya Limited* [2018] eKLR. and *Century Automobiles v Hutchins Biemer Ltd* (1965) EA 305. The Court in these decisions held that a certificate of insurance is proof of insurance and that a contract of insurance requires utmost good faith. According to the Plaintiff, the Defendant is estopped from denying liability and indemnify the Interested Parties for their claims.

9. The second issue was submitted that Section 10 (4) of the *Insurance (Motor Vehicle Third Party Risks) Act* had been satisfied and that since the Defendant has not disclaimed liability it can therefore not avoid liability. In support of this contention, the Plaintiff relied on the case of *APA Insurance Limited v Gabriel Opondo Ogenga (suing as Legal Representative of Jane Akinyi Saida – Deceased)* [2018] eKLR and *APA Insurance Company v Vincent Nthuka* [2018] eKLR.
10. On the final issue, it was the Plaintiff submission that the Plaintiff ought to be indemnified based on the strength of the evidence adduced and the decision in *Margaret Gakenia Mwaniki v Kenya Orient Insurance Limited* [2020] eKLR. where the Court held that the insurance company ought to indemnify the Plaintiff based on the existence of an insurance cover.
11. The Interested Party too filed written submissions dated 16th January, 2024 and submitted that it was incumbent on the Plaintiff to produce an insurance policy/contract as proof of her assertions of there being a relationship between herself and the Defendant and therefore in absence of the proof she fell short of the requirements under Section 107 of the *Evidence Act*.
12. It was also the Interested Party's argument that the receipts produced as evidence did not bear revenue stamps as contemplated under the *Stamp Duty Act* and are thus not admissible. it was submitted that the Plaintiff has not proved her case on a balance of probability and ought to be dismissed.

Determination

13. The Court has considered pleadings on record, the evidence adduced, the submissions of the Plaintiff and those of the Interested Parties as well as the decisions relied on. The suit herein is a declaratory suit, brought under the provisions of the Insurance (Motor Vehicles Third Party Risks) Act, herein "The Act" seeking to have the Defendant, an insurance company settle the claims in Nakuru CMCC No's 384, 385, 386, 387, 388, 389, 390, 391, 392, 393 and 394 all of 2019 against the Plaintiff who claims that at the material time was insured by the Defendant.
14. The issues therefore that arise for determination are: -
 - a. Whether there was valid insurance contract between the Plaintiff and the Defendant.
 - b. Whether the policy covered the material risk which is the accident that occurred on 24th January, 2019;
 - c. Whether the receipts adduced as evidence are admissible.
 - d. Can the prayers sought be allowed?
15. On whether there was valid insurance contract between the Plaintiff and the Defendant, the Interested Party has disputed there being a valid insurance contact or policy between the Defendant and the Plaintiff for the reason that the Plaintiff has not produced in evidence the insurance policy or an agreement that shows there existed a relationship between the two.
16. The Plaintiff produced the Certificate of Insurance as P-Ex1 commencing 22nd January, 2019 and Expiring 21st February, 2018 under the Policy number XP1/02001692 for registration number KBC



- 842L PSV Matatu. She also produced the copies of payment receipts as P-Ex2 all bearing the stamp of the Defendant and for the subject motor vehicle with the latest dated 9th May, 2019. She also produced as P-Ex3 Police Abstract dated 2nd April, 2019 which indicated that the accident vehicle bore Policy number XP1/02001692 and of registration number KBC 842L.
17. The Plaintiff further also produced in evidence as P-Ex5 several correspondences from the Defendant to M/s Kamoing’ & Co. Advocates all dated 31st May, 2019 where the Defendant is instructing the advocates to take up the matters Nakuru CMCC No’s 384, 385, 386, 387, 388, 389, 390, 391, 392, 393 and 394 all of 2019. The Defendant in those letters confirmed that the Plaintiff was its insured.
 18. The Plaintiff has adduced ample evidence to support her contention. The evidence has also not been challenged by the Defendant. In the premise, the Court does find that the Plaintiff did have had a valid insurance policy/contract with the Defendant.
 19. On the second issue, the Defendant did not file any defence or adduce any evidence to rebut the Plaintiffs assertions. The Court in the case of *Karanja v Xplico Insurance Company Limited; Chai & Another* [2023] KEHC 24563 (KLR) cited with authority the case of *Isaac Katambani Iminyia v Firestone East Africa* (1969) Limited [2015] eKLR, which outlines the effect of failure to adduce rebuttal evidence.
 20. The Defendant had an obligation to advice whether there was a valid contract or policy with the Plaintiff or highlight what was covered in the policy or not. As such having found that there was a valid insurance policy and in the absence the Plaintiff’s evidence going unchallenged, the Defendant is liable to cover any material risks arising during the pendency of the policy.
 21. Thirdly, the Interested Party has questioned the validity of the receipts adduced in evidence for lacking a revenue stamp. The Interested Party submitted that the Court should not consider the receipts without revenue stamps being affixed on them under the provisions of the *Stamp Duty Act*.
 22. The Court is persuaded to adopt the postulate in *Muela Kimono V Daniel Kipkirong Tarus & Another*, [2015] eKLR where the Court expressed itself thus: -

“Under the *Stamp Duty Act*, Chapter 480 Laws of Kenya it is not specifically provided that payment receipts in respect of services rendered must be stamped. Section 88 of the Act, in my opinion, it is the duty of the receiver of monies who has a duty to affix revenue stamps, not the payee – who cannot be penalized for omissions of the receiver. I am guided by the cases *Benedetta Wanjiku Kimani -v- Chanaw Cheboi & Another* HCCC No 373 of 2008 and *Irene Ngombo Mshingo-v- Miriam Kadogo* (2000) KLR where the Learned Judges held that a document does not cease from being admissible for lack of affixation of a revenue stamp.”
 23. The Plaintiff cannot be penalized and faulted for what was the duty of the Defendant who was the recipient of the payments to affix revenue stamps. Further, the Defendant’s correspondences with its advocates confirm the Plaintiff as its insured. The Defendant would not have taken up the Plaintiff as an insured without the Plaintiff first paying the required premiums.
 24. On the final issue, the Court is alive to the fact that Section 10 of the Act provides for the duty of an insurer to satisfy judgments against persons insured. It states thus:-

“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.”

25. The reading of this section is that where judgment is obtained against an insured after issuance of insurance policy, the duty of the insurer is to satisfy the judgment and decree and any liability covered within the terms of the policy.

26. The Act further in Section 10(2) of the Act provides that: -

“(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 fourteen days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings;”

27. Under Section 10(4) of the Act the liability to satisfy the judgment under Section 10(1) is excluded in this case if the Defendant had obtained a declaration that it is entitled to avoid its liability under the insurance policy. The Defendant did not do such thing in fact as claimed by the Plaintiff the Defendant did not disclaim the claim.

28. The Court in Cannon Assurance Company Limited v. Peter Mulei Sammy [2020] eKLR in interpreting the provision held as follows:

“Being guided by the above provisions and noting the fact that the Appellant has never exercised its right by filing the requisite declaration to avoid the policy on any ground in the policy in the primary suit, I find that the time to do so in the proceedings before the trial Court the subject of this appeal is not available at that stage. The Appellant did not provide any evidence to the effect that it had sought to set aside the proceedings in the primary suit or that an appeal had been lodged. The trial Court was thus left with no option but to find for the Respondent herein. The finding by the learned trial magistrate was therefore not in error as suggested by the Appellant.”

29. From the record there is a Notice of Institution of Suit for Civil Suit No. 386 of 2019 dated 25th April, 2019. The suit is instituted by the 3rd Interested Party. The Plaintiff adduced evidence to confirm that the Defendant was aware of the existence of all the suits including the instant suit however the Defendant it just chose not to take part in the proceedings. The Court therefore finds that the Defendant is required to settle claims arising from accident against the Plaintiff. See Kenindia Assurance Co Ltd v James Otiende [1987]2 KAR 162.

30. As regards prayer (b) of the Plaint, the Plaintiff is seeking to be exempted from making any payments or honour any judgments or decree in and any and all eventual awards be borne by the Defendant.

31. Section 5(b)(iv) of the Act states as follows:

“In order to comply with the requirements of section 4, the policy of insurance must be a policy which-(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 harm 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. ...
- ii. ...
- iii.
- iv. liability of any sum in excess of three million shilling arising out of a claim by one person.”

32. This section in essence caps compensation by insurance companies at Kshs. 3,000,000. The Plaintiff, who is the insured in this case would therefore be liable to settle decretal amounts in excess of what the Defendant is liable to pay arising out of a claim by an individual. The Court in *Law Society of Kenya v Attorney General & 3 others* [2016] eKLR stated that:

“What the Principal Act has done is cap the amount of money that the insurer pays to the injured person. Nothing in the Principal Act stops a litigant or the injured person from pursuing a claim against the insured individual where an award in excess of the amount recoverable from the insurer is made...It only limits who pays how much by apportioning a maximum of Kshs. 3,000,000/= to be paid by the insurer and the additional if any by the insured.”

33. This prayer can therefore not issue.

34. The Court is nevertheless satisfied that, the Plaintiff has proved her case to the required standards and consequently, judgment is entered for the Plaintiff and against the Defendant and grants: -

- i. A Declaration that the Defendant is bound to satisfy judgements and any eventual awards in Nakuru CMCC No’s 384, 385, 386, 387, 388, 389, 390, 391, 392, 393 and 394 all of 2019
- ii. Costs of the suit together with interests.

Orders accordingly.

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 16TH DAY OF MAY 2024

MOHOCHI S.M
JUDGE

