NORTON ROSE FULBRIGHT

The Big Read Book series Volume 20

Norton Rose Fulbright South Africa Inc. in collaboration with Walker Kontos: review of 2021 - 2023 insurance judgments of Kenya

July 2024

Introduction

Dearest Reader

Welcome to Norton Rose Fulbright's The Big Read Book Series.

This is Volume 20 of the Series – A review of insurance judgments of Kenya (2021-2023).

Like our Zimbabwe edition, which you can access here, the cases discussed in this edition are binding in Kenya but not in South Africa. The findings in some of the judgments do not match South African law and the case law should not be relied on in South Africa.

An online version of this publication is available through our Financial Institutions Legal Snapshot blog at https://www.financialinstitutionslegalsnapshot.com/. By subscribing to our blog you can also keep up with developments in insurance law including South African judgments and instructive judgments from other countries.

You can access the previous volumes in the series, here.

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Kenyan Insurance Law

Insurance law in Kenya is largely governed by their Insurance Act (Chapter 487 of the Laws of Kenya) (the Act). The Act empowers the Cabinet Secretary of National Treasury and Planning to make regulations providing for all matters prescribed by the Act.

The Act establishes the Insurance Regulatory Authority (IRA), which is tasked with ensuring the effective administration, supervision, regulation and control of insurance and reinsurance business in Kenya.

The IRA licenses those involved in insurance business including insurers, reinsurers, brokers, agents, risk managers, loss adjusters and assessors, insurance surveyors, and claims settling agents. The Act prescribes the minimum capital requirements that insurance companies carrying on insurance business in Kenya must comply with.

All insurers are required to reinsure a proportion of each policy of insurance issued or renewed in Kenya in such proportion, manner and subject to such terms and conditions as prescribed with the Kenya Reinsurance Corporation Limited established under the Kenya Reinsurance Corporation Act (Chapter 487A Laws of Kenya).

The Insurance (Motor Vehicles Third Party Risks) Act (Chapter 405 Laws of Kenya), which deals with third party risks arising out of the use of motor vehicles, also serves as a source of insurance law in Kenya.

Kenya follows the doctrine of precedent. Kenyan insurance law is therefore supplemented by the decisions of Kenyan courts, which offer valuable insights into the practical application of insurance principles in varied contexts. Apart from the courts, the Insurance Tribunal has been established under the Act, to deal with insurance matters expeditiously, and has powers similar to a magistrate's court.

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Brokers

Mburu v Britam General Insurance Company Limited and Njoroge T/A Fast Target Insurance Agency (2023)

(Civil Appeal E1007 of 2022) [2023] KEHC 21726 (KLR) (Civ) (25 August 2023)

Keywords: motor vehicle policy / theft of motor vehicle / payment of premium / broker as agent

The insured sued their broker and the insurer for compensation arising from the loss of a motor vehicle due to theft. The insurer rejected the claim on the basis that the premium had not been paid fully. The policy was arranged through a broker. The insured had an arrangement with the broker to pay the premiums to the broker in four instalments, and had paid two instalments when the vehicle was stolen.

The insured argued that the broker was acting as an agent for the insurer. Therefore, even though the policy stated that the insurer would not assume any risk until the entire premium was paid, the policy was varied by the broker's action of allowing the premium to be paid in instalments. The policy was further varied by mutual agreement of the parties, when the annual cover was changed to monthly cover, evidenced by monthly covernotes issued by the insurer.

It is a requirement that all vehicles in Kenya be insured, for at least third party insurance. Motor vehicle insurance stickers are usually affixed to cars to aid road traffic police in verifying that a vehicle is insured. The insurer submitted that insurance certificates and insurance stickers cannot be the binding agreement. The terms of the contract are contained in the policy and could only be varied in writing. Extrinsic evidence could not be produced to negate the explicit terms of the written contract.

The court found that the broker was validly acting as agent of the insurer when it purported to vary the contract. The evidence showed that the motor vehicle had valid one-month cover at the material time. The clause stating that the full premium had to be paid before the insurer would assume the risk was also not brought to the insured's attention when she entered into the contract. The court confirmed that a party cannot be bound by a contract, and

especially particularly onerous clauses, that have not been brought to their attention. The party seeking to enforce such a clause must show that they took reasonable steps to bring it to the other party's attention, or the condition does not become part of the contract. Further, there is no law to the effect that there cannot be a complete contract of insurance concluded until the premium is paid. The insurer is bound by the terms of the contract agreed between its agent and the insured.

The court ordered the insurer to pay the claim.

Muvanya v Jubilee Insurance Company Limited (2022)

(Civil Appeal 225 of 2018) [2022] KECA 146 (KLR) (18 February 2022)

Keywords: broker / commission / tender / legality of contract

The appellant broker sued the respondent insurer for the commission she alleged was due to her for assisting it in procuring a tender to provide medical insurance cover. The broker claimed that she was appointed as the insurer's agent and was entitled to 10% of the tender value.

The insurer did not dispute that the broker was its agent – the dispute related to whether the broker was involved in procuring the tender and whether she was entitled to commission. The insurer denied the broker's involvement in the tender process and alleged that she did not have access to the confidential information she would have needed to prepare the tender documents, as she alleged. The appellant only acted as intermediary after the tender process had concluded, by delivering staff medical cards and other documents to the insurer, weekly, for some time.

The court found that the appellant could not have brokered the tender because, in terms of the Public Procurement and Assets Disposal Act, the tender had to be an open one, and there is no place in the process for a broker to assist. The broker was only appointed to "canvas" for general business for the insurer. Canvassing for business from private persons would be legal, but canvassing from public entities, as the appellant alleged she did, would be illegal. The appellant was therefore seeking to enforce an illegal contract.

The appellant's claim failed.

Association of Insurance Brokers of Kenya v Cabinet Secretary for National Treasury & Planning and 4 others (2021)

(Petition 288 of 2019) [2021] KEHC 451 (KLR)

Keywords: brokers / collection of premium / broker commission / legislative amendments / constitutionality

The Association of Insurance Brokers of Kenya petitioned the court to declare section 156 of the Insurance Act, as amended by the Insurance (Amendment) Act, 2019, to be unconstitutional for discriminating against insurance brokers and intermediaries. The amendment criminalised insurance brokers handling premiums, which the petitioners alleged would lead to massive closures of insurance brokerage firms, jeopardising their constitutional rights. They also claimed that the amended section would frustrate Government's policy of encouraging insurance penetration in Kenya.

Section 156 of the Act deals with advance payment of premiums. In terms of the amendment, no insurer may assume an insurance risk unless and until it receives the premium payable. Intermediaries could not receive premiums on behalf of an insurer, as doing so would constitute an offence. Instead, insurers would need to pay intermediaries commission within 30 days of receiving the premium.

The section previously said that an insurer could not assume an insurance risk unless and until the premium payable had been received or was guaranteed to be paid within a set time period, or unless a deposit had been paid. Agents were not allowed to collect premium or signify acceptance of risk unless they had been authorised by the insurer to do so. Nothing in the section prevented an agent from collecting premiums and transmitting them to an insurer. The premium collected by the agent simply had to be deposited with the insurer before the insurance cover commenced.

The court noted that the amendment had three visible effects on the insurance industry:

1. absolving the insurer from liability on risk claims that arose from premiums not directly received by them from the insured;
2. removing intermediaries' powers to collect premiums; and
3. introducing criminal sanctions to any directors or officers of intermediaries who contravened the section.

The primary intention of the amendment was to protect insurers from assuming risks through rogue intermediaries who failed to remit premiums.

The evidence displayed brokers' vital role in ensuring the continuity and success of the Kenyan insurance industry. The court therefore considered the mischief the amendment aimed to remedy – this included reducing moral hazard, underwriting and claim assessment costs, as well as insurance fraud.

The court held that because the amendment prevented intermediaries from handling premiums while allowing insurers to retain commissions payable to intermediaries, the amendment discriminated against intermediaries. Further, while brokers who received premiums were criminally sanctioned, it was not an offence for an insurer to fail to pay commission within 30 days of receiving the premium.

The amendment was therefore found to be disproportionate for achieving its intended aims, especially in light of the contribution brokers make to the Kenyan insurance industry.

Although there were cases of insurers rejecting claims due to intermediaries failing to transfer premiums, those were limited instances and all brokers cannot be punished for the wrongdoing of a few errant ones.

The court found that the amendment infringed on brokers' rights to commission, and that this affected their constitutional right to property.

The petition was therefore allowed. The court held that the amended provision is unconstitutional, and issued an order of permanent injunction, staying the operation and implementation of the provision.

Medical insurance

G. O v Norbert Odhiambo & another (2022)

[2022] eKLR

Keywords: policy renewal / compulsory medical testing

The insured sought a declaration compelling the insurer to reinstate her education policy, which the insurer did not renew when she refused to undergo HIV-AIDS testing. She also sued for general damages for emotional and mental anguish, and argued that the insurer had violated her rights under the HIV and AIDS Prevention and Control Act.

The insurer said that the insured was not compelled to take any medical tests but instead that the requirement "was for material disclosure which is a principle that governs all insurance policies".

The claimant had been asked to pay the arrears on the policy to reinstate it, but she did not. She was then asked to undergo the medical tests. The claimant had therefore been presented with two options: pay the arears or undergo a medical test. She refused (apparently on principle) to take the tests, despite asserting that she had no problem undergoing medical testing.

The court found that the claimant was not compelled or coerced into undergoing an HIV-AIDS test. The insurer could not reinstate the policy because the claimant had not paid the arrears. The claim failed.

Resolution Insurance Co Ltd v Omondi (2023)

[2023] KEHC 2454 (KLR) Civil Appeal 133 of 2018

Keywords: utmost good faith

The insurer had undertaken to provide the insured with medical insurance up to certain limit.

The insured was admitted to hospital and diagnosed with pancreatitis and possible alcoholism. The insurer refused to settle the insured's medical bill as the diagnosis was related to alcoholism.

The court found that the insured was under a duty to act with utmost good faith and in doing so, to disclose to the insurer all material factors that a party ought to know about himself. However, it stood to reason that the insured could not disclose that which he was not asked to disclose. Insurers have special knowledge regarding what needs to be disclosed.

In this case, the insured was not asked about alcoholism, he was not tested for alcoholism, and he was not treated for alcoholism. Therefore, for alcoholism to be the basis of the rejection, the insured ought to have been asked about it in the insurance proposal form. From the evidence, the preliminary prognosis of 'possible alcoholism' was never tested and therefore remained a mere possibility.

The court accordingly held that the insurer had no reason to refuse to settle the insured's medical bill.

Motor Vehicle Accidents (MVA)

The Insurance (Motor Vehicles Third Party Risks) Act is relevant to many of the motor vehicle accident claims that involve insurers in Kenya.

Section 10 of the Act obliges an insurer to satisfy judgments against persons insured, in relation to motor vehicle accidents.

Section 10(1) states that

> "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."

This means that if a third party sues an insured in relation to a motor vehicle accident (and the relevant motor vehicle was covered by insurance), the insurer must satisfy the judgment debt against its insured, with limited exceptions. If the insurer fails to do so, the third party suing the insured can apply to court to hold the insurer liable for the debt.

Section 10(4) of the Act only allows the insurer to raise misrepresentation or non-disclosure by the insured (within three months of the proceedings against the insured being commenced) to avoid the policy. The insurer usually applies to court, for a declaratory order confirming that it is entitled to avoid the policy.

Many of the cases discussed below relate to judgment debts that an insured (or the injured party to whom an insured has been found liable) seeks to enforce against the insurer.

MVA: Avoidance of a policy

Corporate Insurance Company Limited v Rainbow Cabs & Car Hire Limited (2023)

(Civil Appeal 352 of 2012) [2023] KECA 1029 (KLR)

Keywords: motor vehicle policy / avoidance / misrepresentation / non-disclosure

The insured's motor vehicle was involved in an accident in which a passenger died. The deceased passenger's estate issued a notice of intention to sue the insurer. The insurer filed a declaratory suit against the insured, arguing that it was entitled to avoid the policy due to misrepresentation or non-disclosure.

The insurer argued that the policy only covered private use, and that the vehicle had been hired to the deceased's employer at the time of the accident. The insured did not disclose to the insurer that the vehicle would be used for hire and reward.

The court found that this non-disclosure was material and that it entitled the insurer to avoid the policy.

Jubilee Allianz General Insurance (K) Ltd (Formally the Jubilee Insurance Company of Kenya ltd) v Asachi Works Limited (2023)

(Civil Appeal E150 of 2021) [2023] KEHC 18640 (KLR) (8 June 2023)

Keywords: motor vehicle accident / declaratory order / breach of warranty / avoidance of liability

The insurer sought an order declaring the insured to have fundamentally breached the warranties of an insurance policy. The order would discharge the insurer from liability for any claim arising from the accident.

The insurer alleged that the vehicle was only insured to carry cargo. In breach of this condition, the insured had used the vehicle to transport passengers, who were injured when an accident occurred. Several claims against the defendant had already been instituted by injured passengers.

The case was undefended, and the insurer's evidence was therefore unchallenged. The court found that the warranty/ condition had been breached.

Madison Insurance Company Kenya Limited v Njiru & another (suing as the Administrator of the Estate of Dorothy Muthoni – deceased) (2022)

(Civil Appeal 23 of 2020) [2022] KEHC 11112 (KLR) (26 May 2022)

Keywords: motor vehicle accident / defence struck out / breach of policy / attempt to avoid policy

The estate of a passenger who died in an accident sued the vehicle's insurer and received judgment in its favour. The deceased estate then sought a declaratory order against the insurer, obliging it to pay the judgment award.

The lower court ruled in favour of the deceased's estate, stating that the insurer had insured the relevant vehicle.

The insurer appealed on the grounds that it was only bound to indemnify losses by third parties as per the terms of the insurance policy. The insurer argued that the insured had breached the policy and that the insurer was therefore entitled to avoid liability (the nature of the breach was not set out in this judgment). While acknowledging that it had issued a policy, this did not amount to an admission that it should settle claims arising from the policy in circumstances where it was of the view that the insured had breached the policy.

The court held that the issue of breach of policy is a triable defence. The allegation that the insurer had not been served with the necessary statutory notice was also an issue to be decided at trial. Issuing a policy and acknowledging the existence of a judgment against the insured is not an admission of liability. Therefore, the court held that the insurer's defence should not have been struck out.

The court ordered that the matter be remitted to the trial court, to be heard on its merits.

MVA: Identity of parties and joinder

Inchwara v APA Insurance Limited (2022)

(Civil Appeal 17 of 2018) [2022] KECA 885 (KLR) (27 May 2022)

Keywords: motor vehicle insurance / statutory liability / Insurance (Motor Vehicles Third Party Risks) Act s10 / identity of insurer

The applicant was injured in an accident and successfully sued the driver of the vehicle. When the driver failed to pay the judgment debt, the applicant sued the driver's insurer for payment under section 10 of the Insurance (Motor Vehicles Third Party Risks) Act.

The applicant alleged that the driver was insured by the defendant APA Insurance. The trial court found that the insurer was Pan African Insurance Company, an insurer that had sold its business to APA Insurance. The court had to decide whether APA Insurance had taken over Pan African Insurance Company's liabilities.

The insurer argued that the entity that would morph into APA Insurance only bought part of the business of Pan Africa General Insurance Limited, and so it was not shown that Pan African Insurance Company was defunct.

The court had to untangle whether there was a link between Pan African Insurance and Pan Africa General Insurance. On the evidence, the court found that there

was a link: the Memorandum of Association of Pan Africa General Insurance stated, that one of the objects of the company was the acquisition as a going concern of the general insurance business of Pan African Insurance Company. The court therefore found in favour of the applicant.

AIG Insurance Company Limited v Benard Kiprotich Kirui (2022)

(Civil Appeal No. 17 of 2019) [2022] eKLR

Keywords: motor vehicle insurance / Insurance (Motor Vehicles Third Party Risks) Act s10 / mistaken parties / service of statutory notice

The respondent was involved in a motor vehicle accident. The injured passenger of the other vehicle successful sued for 276 000 Kenyan shillings. Neither the respondent nor his insurer defended that suit. The vehicle was later sold in execution of that judgment debt.

The respondent sued the insurer for breach of contract, claiming the value of the vehicle (around 1.64 million Kenyan shillings).

The insurer alleged that it was not made aware of the accident or the civil suit against the insured. It only came to know of the matter when the insured notified it that the vehicle was to be sold at auction to pay the judgment debt. The insurer then sought to have the judgment set aside, but by that time the vehicle had already been sold. The insurer also alleged that it had been approached by a firm of advocates and had agreed to settle the claim for 136 000 Kenyan shillings. The insurer was unaware of further suits relating to the accident.

The insured said that he was also unaware of the civil suit until his car was attached to satisfy the judgment debt. He claimed that the insurer had a duty to pay the judgment debt in terms of the policy and under section 10 of the Insurance (Motor Vehicles Third Party Risks) Act.

The evidence showed that the insurer may have settled the claim with the wrong firm of advocates. The court concluded that the insurer was served with the original court papers and was aware of the civil suit. Despite having potentially compensated the wrong party, the court found that the insurer's admission to compensating a party in relation to this motor vehicle accident "was a material admission of liability".

The court held that the insurer could not deny liability in respect of this accident on the basis that it had already settled the claim "through mistaken parties". The insurer had a contractual duty to compensate the insured.

The court awarded the insured compensation for the vehicle, up to the sum insured and not the full amount he owed on the vehicle.

Martin Mwangi Nyutho (the Administrator of the Estate of The Late Benson Nyutho Mwangi) v Alkason Transporters Ltd & another; Metropolitan Cannon Insurance (Formerly Cannon Assurance (K) Limited (Third Party) (2022)

[2022] eKLR

Keywords: motor vehicle insurance / Insurance (Motor Vehicles Third Party Risks) Act s10 / judgment debt / joinder of insurer

The defendant insured was sued for negligent driving by a party injured in a motor vehicle accident. The insured attempted to join the insurer to the court proceedings, stating that the insurer would be liable under section 10 of the Insurance (Motor Vehicles Third Party Risks) Act for any judgment against him.

The insurer argued that the plaintiff's claim against the insured was based on negligence under tort law (delict), whereas the insured's claim against the insurer would be a contractual claim based on the insurance policy, and there was therefore no link between the two claims. Further, the statutory duty under section 10 only arises once judgment on both liability and quantum has been delivered.

The court agreed with the insurer, and quoted an earlier judgment that dealt with a similar matter, stating that the insurer does not need to be joined to the civil suit and:

> "All the party suing requires to do before trial is to issue a statutory notice to the insurance company to notify them that a suit will be filed against their insured ... The insurance company on behalf of its insured would be obliged to pay. If it fails to do so, the plaintiffs are to file a declaratory suit in the High Court seeking for the court to pronounce that they are owed the award."

The insurer is therefore only liable under the section when there is a judgment against the insured. If the insurer fails to pay a judgment debt, then a cause of action arises against it.

Since the final judgment had not yet been delivered against the insured, it would be premature proceeding with an action against the insurer.

Jiji v Gateway Insurance Co. Ltd (2022)

(Civil Appeal 126 of 2018) [2022] KECA 368 (KLR) (11 February 2022) (Judgment)

Keywords: motor vehicle insurance / Insurance (Motor Vehicles Third Party Risks) Act s10 and s12 / judgment debt / burden of proof / identity of insurer

The appellant was a passenger injured in a motor vehicle accident. He successfully sued the vehicle's driver and then sought to hold the insurer liable for the judgment debt under section 10 of the Insurance (Motor Vehicles Third Party Risks) Act.

The insurer alleged that it had not issued the certificate of insurance said to have been found on the vehicle at the time of the accident, and which the appellant relied on as proof that the respondent was the insurer of the vehicle at the time.

The appellant relied on the information in the police report relating to the accident and concluded that Gateway Insurance was the vehicle's insurer. However, the insurer did not participate in the main trial relating to the driver's liability, claiming that it had not insured the vehicle at the time of the accident. The court had to decide whether the appellant had discharged the onus of proof regarding whether there had been a valid policy in force at the time of the accident.

Section 12(1) of the Insurance (Motor Vehicles Third Party Risks) Act provides that the person against whom the claim is made (such as the driver or owner of the vehicle) should state whether they are insured for third party liability for motor vehicle accidents and provide details of the policy. This mechanism allows a claimant to obtain information about the insurance. The appellant did not use this mechanism, and instead relied only on the police report, even after the insurer had alleged that it was not the insurer on risk at the time.

The court noted that, had the appellant used the section 12 mechanism, he would have been better able to decide whether to pursue this claim against the insurer. Only if the vehicle's owner failed to respond or insisted that he was insured, would the respondent assume the evidential burden of proving that the copy of the certificate of insurance in the hands of the appellant was a forgery.

Section 12 is not onerous and, by not making use of it, the appellant put himself in the position of having to prove that the certificate of insurance was not a forgery.

Since the appellant did not prove that the respondent had issued a policy to the driver or owner of the vehicle, his claim failed.

Kenyan Alliance Insurance Company Limited v Ngira and Ngugi (2021)

(Civil Appeal No. 78 of 2019)

Keywords: motor vehicle accident / Insurance (Motor Vehicles Third Party Risks) Act / statutory provisions / cover for employees of the insured / interpretation

The respondents sued the insurer on behalf of the deceased estate of a passenger who had died in a motor vehicle accident. The passenger had been an employee of the insured and was a passenger in the course of his employment at the time of the accident.

In an earlier judgment, the respondents were awarded damages of around 3 million Kenyan shillings against the insured. The respondents then filed a declaratory suit against the insurer (the appellant in this case), to enforce the judgment against the insurer in terms of section 10 of the Insurance (Motor Vehicles Third Party Risks) Act. The lower court found in favour of the respondents.

The insurer appealed, arguing that section 5 of the Act states that employees of insured persons are not considered third parties for the purposes of the Act, and are therefore not covered unless the policy specifically covers employees. The policy in this case mirrored the Act by excluding liability for the insured's employees.

The respondents alleged that after they served the section 10 statutory notice on the insurer, the insurer had a duty to reject liability by filing a declaratory suit. They argued that this declaratory suit is mandatory, irrespective of the nature of the avoidance of liability.

The court considered the Act and held that the obligation to seek a declaratory order to avoid liability is only required for avoidance relating to issues beyond the express provisions of the policy – specifically, for non-disclosure or misrepresentation of material facts by the insured. In this case, liability was excluded by section 5 of the Act and by the provisions of the policy. Section 10 of the Act only applies where a judgment is obtained in respect of a liability that is required to be covered by statute (or is in fact covered by the policy, above the requirements of statute). Cover for the employee was not a statutory requirement and was not included in the policy.

The respondents argued that the insurer should have responded to its statutory notice, and since it did not, liability attached automatically. The court held that failing to respond to the statutory notice does not result in liability attaching to the insurer but may attract liability for an offence. Therefore, even though it would have been prudent for the insurer to respond with reasons for avoiding the policy, failure to do so did not result in liability attaching to the insurer.

Finally, the respondents alleged that the insurer paid the earlier judgment award in part. However, they did not provide sufficient evidence to prove that the payment came from the insurer and the insurer denied paying any part of the award. The court noted that even if it found that the insurer had paid part of the award, it doubted whether that would be reason enough to order the insurer to pay the full judgment debt in the face of numerous provisions of the law stating otherwise and that "there can be no waiver or acquiescence of statutory provision".

The insurer's appeal therefore succeeded.

Mwobobia v Invesco Insurance Co. Limited; Nkoroi (Intended Interested Party/Applicant) (2021)

(Civil Case (Application) No. 22 of 2019) [2021] eKLR

Keywords: Insurance (Motor Vehicles Third Party Risks) Act / insured application to intervene / joinder

The plaintiff obtained judgment against the applicant (for damages arising from a motor vehicle accident) and sought to enforce payment of the judgment debt by the applicant's insurer, under the Insurance (Motor Vehicles Third Party Risks) Act.

The applicant sought to intervene on the basis that only he would be able to provide sufficient evidence to prove the existence of the insurance relationship between him and the insurer. If he did not intervene and the plaintiff's claim failed, he would be liable to settle the judgment debt, and therefore he had a substantial interest in the matter.

He argued that the plaintiff had not attached anything evidencing the insurance contract between the applicant and the insurer to the pleadings.

The plaintiff objected to the application, arguing that the applicant was attempting to intervene simply to cause delays.

The court found that the plaintiff would not be prejudiced by the joinder of the applicant as an interested party, and that the joinder would assist in sustaining the plaintiff's claim. Therefore, the applicant was allowed to join the suit as an interested party.

MVA: Insurable interest

Kenya Alliance Insurance Co Ltd v Kioko (2023)

(Civil Appeal E143 of 2021) [2023] KEHC 1819 (KLR) (2 March 2023)

Keywords: motor vehicle accident / non-disclosure / illegal activities / insurable interest

The insured sued the insurer for cover under a motor vehicle insurance policy. He alleged that the vehicle was burned by a group of unknown assailants while being used to ferry sand.

The insurer alleged that at the time of the incident, the vehicle was being used to harvest sand illegally. Further, the insured had sold the vehicle and therefore had no insurable interest at the time of the incident.

On the evidence, the court found that sand harvesting had not been banned in the area until after the accident. Therefore, the vehicle was not being used for an illegal activity at the time.

The insured claimed that while he had attempted to sell the vehicle, the vehicle financing was still in his name, and he was liable to the bank for payment of the outstanding amount on the vehicle. The sale did not proceed because the bank had refused to transfer the loan to potential buyers. The court accepted that the insured had an insurable interest in the vehicle because he was liable to make payment under the financing agreement.

Regarding the value of the loss, the policy stated that the amount payable is the market value of the vehicle immediately before the loss or damage, but not more than the value as shown in the schedule. The market value is determined by annual valuation. In this case, the insured failed to conduct the annual inspection to determine the vehicle's current market value and the insurer failed to assess the damage or loss through assessors and instead rejected the claim.

Since no inspection or valuation was done, the court held that half of the insured sum of 5 million Kenyan Shillings was sufficient to compensate for the loss.

The court therefore ordered the insurer to pay the insured 2.5 million Kenyan Shillings.

MVA: Proof of contract

Monarch Insurance Company Ltd v Mbugua (2023)

(Civil Case 19 of 2017) [2023] KEHC 1304 (KLR)

Keywords: motor vehicle accident / Insurance (Motor Vehicles Third Party Risks) Act / wrong policy document provided to court

The insured's policy limited use of the insured vehicle to social and domestic purposes, and for carrying passengers in connection with the insured's business. Only the insured or his authorised driver were to drive the vehicle.

The vehicle was involved in an accident. It had got stuck in mud and while pedestrians tried to pull it out, it overturned and landed on two pedestrians. The driver was not an authorised driver and the vehicle had been loaded with sacks of potatoes belonging to the insured's client and was therefore being used as a vehicle for hire. It was also carrying fare-paying passengers at the time.

The insurer launched a declaratory suit, asking the court to confirm that the vehicle should not have been used by any unauthorised drivers, that the vehicle should not have been used for ferrying passengers, and that the use of the vehicle at the time of the accident was in breach of the policy conditions.

The insurance policy provided to the court was in respect of a period of insurance that did not include the date of the accident. However, the insurer acknowledged that the accident occurred during a period of insurance. The court however held that it could not make a finding based on the wrong policy document. The case was dismissed.

Michael Kinyua Njue v Apa Insurance Company Limited (2022)

[2022] eKLR

Keywords: motor vehicle insurance / proof of contract

The plaintiff sued the insurer, alleging that it was liable to pay 550 000 Kenyan shillings, following a motor vehicle accident in which the plaintiff's car was written off.

The insurer denied having issued an insurance policy to the plaintiff and denied all liability to the plaintiff.

In support of his claim, the plaintiff produced a certificate of insurance and pre-accident insurance vehicle inspection report but no insurance contract. The insurer had denied the existence of the contract and therefore the burden of proof was on the plaintiff to prove the contract's existence.

The court said that the certificate of insurance only proved that the plaintiff "had an insurance cover with the defendant and nothing more". In the absence of the contract, the plaintiff's claim had to fail.

Mwaniki v African Merchant Assurance Co. Ltd (2022)

(Civil Case No. E004 of 2021) [2022] eKLR

Keywords: motor vehicle insurance / Insurance (Motor Vehicles Third Party Risks) Act / existence of policy not proved

The plaintiff insured sued the insurer under section 10 of the Insurance (Motor Vehicle Third Party Risks) Act. The insurer denied having issued a policy to the plaintiff.

The plaintiff, in alleging that a policy existed, had the burden of proof but did not provide any evidence to prove that the vehicle was covered by the insurer. The policy or certificate of insurance was not produced. The policy number alone was insufficient for the court to connect cover to the defendant. The allegation that the defendant was the insurer of the plaintiff's motor vehicle was not proved, and the case was dismissed.

MVA: Statutory liability

Kenyan Alliance Insurance Company Limited v Naomi Wambui Ngira & another (Suing as the Legal Representatives and Administrators of the Estate of Nelson Machari Maina (Deceased)

Civil Appeal No. 78 of 2019 [2021] eKLR

Keywords: motor vehicle insurance / Insurance (Motor Vehicles Third Party Risks) Act / statutory liability / repudiation of liability by insurer

The respondents, representatives of the deceased estate, filed a declaratory suit against the insurer after they were awarded damages for the fatal injuries the deceased had sustained in a motor vehicle accident. The deceased had been the insured's employee.

The insurer argued that in terms of section 5(b)(i) read together with section 10(1) of the Insurance (Motor Vehicles Third Party Risks) Act, no liability attached to it as the deceased was not a third party as contemplated by the Act. These provisions of the Act exclude employees as third parties, and the insurance policy also expressly excluded liability for employees of the insured.

The court held that because the deceased was the insured's employee, his estate could not benefit from cover between the insurer and the insured. This would have the effect of conferring an unnecessary benefit on an undeserving party, while punishing the insurer for something it did not agree to. It would also be contrary to the provisions of law.

The court found that the real issue was whether there was a duty on the insurer to repudiate liability by filing a declaratory suit after receiving notice of the primary suit.

The respondent argued that if the insurer believed it was not liable after receiving the relevant statutory notice, it should have sought a declaration to that effect. They argued that such a declaration is necessary even where an insurer is entitled to avoid liability by the express provisions of an insurance policy.

The insurer argued that the requirement of repudiating liability by filing a declaratory suit did not apply because the liability in question was not covered by the policy or required to be covered under the Act. The insurer argued that the obligation to settle liabilities arising out of a judgment only arises if that judgment concerns liability that is required to be covered. Since cover did not (and was not required to) extend to employees, the requirement to obtain a declaration did not apply.

The court found that repudiation of liability is two-fold. First, by giving notice to the plaintiff in the primary suit and, second, by filing a declaratory suit. The requirement for an insurer to file a declaratory suit is intended only for liabilities that the insurer is entitled to repudiate or avoid for reasons beyond the express provisions of the policy, specifically being that there was non-disclosure of material facts or a misrepresentation of a material fact.

The court therefore found that the insurer was indeed exempted from the requirement.

Monarch Insurance Company Ltd v Musyoki; Mbusya (Interested Party)

(Civil Suit No. 7 of 2018) [2022] eKLR

Keywords: motor vehicle accident / statutory liability / Insurance (Motor Vehicles Third Party Risks) Act s10

The insurer provided motor insurance to the defendant. The defendant was involved in a motor vehicle accident in which eight people were injured. The insurer alleged that, contrary to the terms of the policy, the defendant was carrying fare-paying passengers at the time of the accident, and this entitled it to avoid liability. The insurer sought a declaration from the court to this effect.

The insurer also applied to the court in terms of section 10(4) of the Insurance (Motor Vehicles Third Party Risks) Act to stay the proceedings by the injured parties, pending determination of the insurer's right to avoid the policy.

The interested party was one of the injured parties and the claimant in the primary suit. The interested party objected to the application to stay his case.

The interested party argued that he had not sued the insurer in relation to the defendant insured, and he had not sued the defendant insured. Instead, he had sued Canon Motors, the registered owner of the motor vehicle, and had already obtained judgment against Canon Motors. As a result of that judgment, he then sued this insurer (Monarch) because it was allegedly the insurer of Canon Motor's holding company. Monarch had already entered its appearance to defend in that case, and the interested party therefore submitted that the trial should proceed.

The court considered section 10 of the Act. The court said that usually an insurer would not be liable under a policy if the use of a vehicle was not covered at the time of an accident. However, an insurer's liability does not crystallise until after judgment has been obtained against its insured. If the judgment debtor in the primary suit is not its insured, then the insurer may have a defence. However, since that was not the matter before the court, the court found no basis to stay the proceedings in the primary suit and dismissed the application.

John Njogu v Invesco Assurance Co. Ltd; Joseph Ouma Nyachoko (Interested Party) (2022)

[2022] eKLR

Keywords: motor vehicle accident / statutory liability / Insurance (Motor Vehicles Third Party Risks) Act s10

The insurer provided motor insurance to the plaintiff, who was involved in a motor vehicle accident in which a person was killed. The deceased estate successfully sued the plaintiff, who informed his insurer of the judgment, expecting the insurer to pay the judgment debt. The insurer however refused to pay.

The plaintiff alleged that the policy was valid at the time of the accident and that the insurer had paid 350 000 Kenyan shillings towards the judgment debt after continued attempts by the plaintiff to obtain payment under the policy. The plaintiff could not pay the debt, and his vehicle and other movable property was sold in execution to satisfy a part of the judgment debt.

The plaintiff therefore sought a declaratory order confirming that the insurer was obligated to pay the judgment debt. He also sought an order directing the insurer to pay the balance of the judgment debt, and to pay special damages for the anguish and economic hardship he experienced as a result of the insurer's failure to pay.

The case proceeded undefended and the plaintiff's evidence and allegations were therefore unchallenged. The court found in favour of the plaintiff and ordered the insurer to reimburse the plaintiff for his property sold in execution and to pay the judgment debt. The court noted that the obligation of an insurer to pay under section 10 of the Insurance (Motor Vehicles Third Party Risks) Act is a strict one. Since no evidence was led to justify an avoidance of the claim, the insurer remained liable.

Muthui v Directline Insurance Company Ltd & 2 others (2022)

(Civil Suit 88 of 2019) [2022] KEHC 392 (KLR) (Civ) (6 May 2022)

Keywords: motor vehicle insurance / statutory liability / Insurance (Motor Vehicles Third Party Risks) Act s10

The insurer provided motor insurance to the plaintiff. The driver of the plaintiff's motor vehicle was killed in an accident and the driver's estate successfully sued the plaintiff. The plaintiff claimed against the insurer for the judgment debt, but the insurer rejected the claim.

The insurer submitted papers denying the allegations but did not appear at the trial to defend the claim.

The plaintiff alleged that he had not received any notice cancelling or repudiating the policy and that it was in force at the relevant times. The material risk, including injury or death to passengers on board a public service vehicle, was covered. The plaintiff argued that the insurer had a duty, under s 10(1) of the Insurance (Motor Vehicles Third Party Risks) Act, to settle judgments against insureds.

The court found in favour of the plaintiff and ordered the insurer to pay the judgment debt.

Gateway Insurance Co. Ltd v Geoffrey Kariuki Gathinji (2022)

High Court Civil Appeal No.161 of 2017 [2022] eKLR

Keywords: motor vehicle accident / statutory notice

The respondent was involved in a motor vehicle accident and successfully sued the driver for negligent driving. He then sued the driver's insurer under the Insurance (Motor Vehicles Third Party Risks) Act, alleging that the insurer was liable to indemnify its insured driver.

The insurer denied liability, claiming that it was not served with the necessary statutory notice, and denied that it had insured the vehicle in question.

The trial court struck out the insurer's defence on the basis that the insurer had settled other claims arising out of the same accident, and therefore had constructive notice of the claim.

The appeal court overruled the trial court's decision. It noted that striking out a defence is an extraordinary step. A court must review the evidence in the light most favourable to a respondent before doing so.

The court stated that the insurer had placed enough evidence on record to raise genuine issues of triable fact to warrant a trial. Whether the statutory notice had been served on the insurer was not a mere technical requirement – it is a mandatory legislative requirement, a condition precedent to a successful declaratory suit under the Insurance (Motor Vehicles Third Party Risks) Act. Constructive knowledge of a suit is not sufficient. Whether the insurer had paid out other claims was also a factual issue to be proved at trial.

The court therefore held that the insurer's defence should not have been struck out, and remanded the case back to the lower court for trial.

Kiamuko & another (Suing as Administrators of the Estate of the Late Evans Kyalo Maundu - Deceased) v ICEA Lion General Insurance Co. Limited (2022)

(Civil Suit 26 of 2018) [2022] KEHC 11682 (KLR) (1 July 2022)

Keywords: motor vehicle accident / costs and expenses / settlement / interpretation

The plaintiffs were awarded judgment against the insured, in the amount of 5.5 million Kenyan shillings. 2.5 million Kenyan shillings was recovered in execution. They then sued the defendant's insurer, seeking a declaratory order that the insurer was obliged to pay the remainder of the judgment award, plus the costs incurred in pursuing the award.

The insurer denied liability but nevertheless offered to settle the claim in the amount of 3 million Kenyan shillings, which it stated was the statutory maximum. The plaintiffs rejected the offer on the basis that the 3 million offered included the plaintiffs' costs, as well as interest.

The court found in favour of the plaintiffs. It said that the insurer may only be exempted from paying costs when the offer is made in respect of its full liability. In this case, the offer did not mention costs or interest because the insurer maintained that it was not liable to pay costs and interest. The court found that the insurer did not offer full payment, but expected the plaintiff to accept the offer as full payment. The plaintiff was accordingly entitled to reject the offer.

The court held the insurer liable to pay the costs and interest, as well as the 3 million Kenyan shillings.

MVA: Stay of proceedings

Pacis Insurance Company Limited v Ichanga (2022)

(Commercial Case E004 of 2022) [2022] KEHC 16303 (KLR) (13 December 2022)

Keywords: motor vehicle accident / statutory liability / Insurance (Motor Vehicles Third Party Risks) Act s10 / stay of proceedings

The insurer provided motor insurance to the defendant. The defendant was involved in an accident and was sued by several claimants involved in the accident. The insurer was served with a statutory notice in respect of these claims.

The insurer applied to court in terms of section 10(4) of the Insurance (Motor Vehicles Third Party Risks) Act to stay the proceedings against the insured, pending determination of the insurer's right to avoid the policy on the grounds of non-disclosure, which would entitle it to avoid liability for the claims.

The insurer alleged that it was not aware of the accident as the insured had not notified it of any potential claim. The insured furthermore denied knowledge of the accident when asked. The insurer argued that the insured was therefore guilty of material non-disclosure for failing to report the accident and for failing to disclose that the driver of the vehicle was unauthorised.

The court noted that section 10(4) of the Act "is to the effect that the insurer can avoid a judgment made in favour of a third party if 'before or within three months after the commencement' of the primary suit, the insurer has obtained a declaration that he was entitled to avoid the policy".

Although the insurer was not a party to the suit between the insured and the claimants, the court noted that liability may attach to the insurer after judgment but before stay of execution orders are obtained from the court. Therefore, there was a risk of loss to the insurer.

The court held that the insurer had presented enough evidence of alleged non-disclosure and had a reasonable chance of avoiding the policy. Therefore, the court stayed the proceedings relating to the claims against the insured, pending determination of the insurer's ability to avoid the policy.

Odhiambo v Monarch Insurance Co Ltd; Senge & another (Interested Parties) (2022)

(Civil Case E002 of 2022) [2022] KEHC 15610 (KLR) (23 November 2022)

Keywords: motor vehicle insurance / statutory liability / Insurance (Motor Vehicles Third Party Risks) Act s 10 / stay of execution of judgment debt

The insurer provided motor insurance to the plaintiff. The plaintiff was involved in an accident that killed one person. That deceased estate obtained judgment against the plaintiff for roughly 1.5 million Kenyan shillings. The plaintiff claimed for payment of the judgment debt from the insurer, but the insurer rejected the claim.

The plaintiff applied to court for a stay of execution of the judgment debt, pending his suit against the insurer. The court found that while the insurer was likely liable to pay the judgment debt, a stay of execution was not warranted. The plaintiff was liable to pay the debt and could seek compensation from the insurer in due course.

Britam General Insurance Company Ltd v Rentco East Africa Limited & another; Festus Mbithi Thomas & 36 others (Interested parties) [2022]

Keywords: motor vehicle accident / stay of proceedings

The insurer requested a stay of proceedings for cases against its insured, who was involved in an accident that led to over 36 claims against the insured.

The insurer alleged that the insured breached the conditions of the insurance policy by carrying passengers at the time of the accident, which the vehicle was not insured to do. The insurer applied for a stay of the primary suits against the insured, pending determination of the insurer's liability.

The insured and the 36 interested parties opposed the application. They argued that it was not appropriate to stay the lower court proceedings because some of those matters had been heard and received judgment. The insurer is not party to those suits and would not be instantly affected by those decisions.

An order of a stay of proceedings prevents a litigant from conducting its litigation. It is a serious step and the test for granting a stay is therefore stringent.

The court was not persuaded that the insurer would be exposed to any danger of loss if the stay was not granted. The only way interested parties can enforce a judgment decree against the insurer is through a declaratory suit, and none had yet been filed against the insurer. It had not been shown that the primary suits were improper or incompetently before the court.

The insurer itself sought a declaratory order seeking to avoid liability that may attach against the insured. The court advised that the insurer should fast-track the hearing of that case, but could not subject the determination of the interested parties' claims to that case.

The stay of proceedings was denied.

Consequential loss

ICEA Lion General Insurance Company Limited v Chris Ndolo Mutuku t/a Crystal Charlotte Beach Resort [2021] eKLR

Keywords: insurance contract / consequential loss

The insured had an insurance policy that covered his properties against all risks including fire, burglary, terrorism, political violence and acts of man.

The insured's business premises were broken into, and several items stolen. The insured claimed for these items as well as loss of profits/earnings as a result of the theft, from the insurer.

The court examined the insurance contract and found that it explicitly said that compensation for consequential loss would not be entertained. Courts rarely interfere with parties' power to enter into contracts and agree to their terms themselves.

As there was an express exclusion of consequential loss, the court held that the trial court had erred in granting the insured damages for lost profits/earnings.

Payment of premium

Liberty Life Assurance Limited v Bendeus (2023)

(Civil Appeal 301 of 2019) [2023] KEHC 1201 (KLR) (Civ) (24 February 2023)

Keywords: refund of premium / misrepresentation by insurer / life policy / investment policy

The insured sued the insurer for 1.2 million Kenyan shillings, which he claimed as a refund of premiums. The insured pleaded that he had engaged with the insurer to secure a life insurance policy and that by the time he was issued with the policy document, he had already paid 1.2 million Kenyan shillings in premiums. Only when the policy was issued did he realise that he had taken out an investment policy, and not a life insurance policy.

The insurer's agent had realised, some time after the initial discussion, that the insured did not qualify for the life policy due to his age. An investment policy was therefore issued.

The insurer said that the insured was not entitled to a refund because he had surrendered the policy before the end of the first year. The insurer alleged that the insured was made aware of the type of policy that was issued.

On the evidence, the court held that the insurer had not given the insured an explanation that would enable him to understand the change in the nature of the policy, and that this would explain his signature on the investment policy. When the insured realised that it was an investment policy, he rejected it and demanded a refund.

The court held that there was a misrepresentation by the insurer's agent, entitling the insured to set aside the agreement and claim a refund of premium paid. The insurer was ordered to refund the insured.

Madison Insurance Company Limited v Mwai (2022)

(Civil Appeal 30 of 2019) [2022] KEHC 9862 (KLR) (Civ) (8 July 2022)

Keywords: motor vehicle insurance / payment of premium

The insurer provided motor insurance to the defendant. The defendant's vehicle was damaged in an accident, and he claimed for the costs of repair and for loss of use of the vehicle. The insurer rejected the claim, on the grounds that the insured had failed to pay the premium. There was disagreement regarding whether post-dated cheques issued by the defendant to the insurer had bounced, or whether they had been cashed by the insurer at all. The evidence was not clear in this regard.

Nevertheless, the insured subsequently paid the alleged outstanding amount, which the insurer demanded, after the claim was lodged.

The court had to consider the effect of non-payment of premium on the policy because the agreement did not provide for the consequences of non-payment (or late payment) of premium. The court found that this did not mean that the policy was invalid, and instead held that the effect of non-payment of premium depended on the intention of the parties as expressed in the contract.

The court found that there was no evidence that the insurer rejected the payment it demanded from the insured. The court also found that there was no evidence of a notice of cancellation of the policy having been sent to the insured, as required by the policy. Therefore, the court held that the policy was valid and ordered the insurer to pay the claim.

Performance guarantees

Machiri Limited v Mayfair Insurance Company Ltd; Jinsing Limited (Interested Party) (2023)

(Civil Case E502 of 2022) [2023] KEHC 20218 (KLR) (Commercial and Tax) (17 July 2023)

Keywords: conditional bond / construction insurance

The plaintiff was awarded a construction contract, and subcontracted with the interested party to carry out some parts of the project. The interested party procured a performance bond and an advance payment bond from the defendant, each for a sum equivalent to 10% of the contract price. The plaintiff alleged that the interested party breached the contract and called upon payment of the bonds, which the defendant refused to pay.

The defendant argued that the bonds were conditional on proving default by the interested party and were not payable on demand. Default had not been proved. The defendant's application was supported by the interested party, who contended that the plaintiff had failed to perform its obligations under the subcontract, which led the interested party to send a notice of suspension to the plaintiff. The interested party argued that suspension of the works did not imply a breach of contract, and that if the plaintiff corrected the events leading up to the suspension, the interested party was ready to resume work, subject to payment of accrued losses and expenses related to the suspension.

In this application, the plaintiff sought an order directing the defendant to deposit into an escrow account the amount of the bonds called upon by the plaintiff.

The court held that it would be premature and prejudicial to order the defendant to deposit the contested sums in an escrow account before establishing that those amounts were payable. The order the plaintiff sought is akin to an order of attachment before judgment because the plaintiff sought the entire sum claimed to be deposited in an escrow account, pending the hearing and determination of the suit.

The power to attach before judgment will not be exercised lightly. It will only be done where there is clear proof that the defendant is about to dispose of the property or remove it from the court's jurisdiction, with an intent to obstruct or delay any decree that may be passed against the defendant.

The plaintiff had not shown any special circumstances requiring protection of the funds. The plaintiff's application was therefore dismissed.

AAR Insurance Kenya Ltd v Thika Water & Sewarage Company Ltd; KCB Bank Kenya Ltd (Interested party) (2022)

(Civil Appeal No. E412 of 2021) [2022] eKLR

Keywords: performance guarantee / expiry

The applicant had a performance guarantee with the interested party in relation to its contract with the respondent. The respondent called on the guarantee, and the applicant applied to court to prevent the respondent from claiming under the guarantee. That application was dismissed.

The applicant appealed and attempted to have the appeal heard urgently because the performance guarantee was to lapse on 31 December 2021. The applicant was not able to get an urgent court date.

The applicant then applied to court to extend the timelines for the enforcement of the performance guarantee, pending the outcome of its appeal in relation to the contract with the respondent.

The interested party argued that the guarantee expired on 31 December 2021.

The court had to decide whether an order extending the timeline of the guarantee should be granted, pending determination of the appeal.

The court held that no good reason was given for an extension. The court quoted English law, explaining that the contractual obligations arising from the performance guarantee are separate from, and not dependent on, the obligations of the contract between the applicant and respondent.

The application was therefore dismissed.

Property insurance

ICEA Lion General Insurance Company Limited v Noble Merchants Shipping Limited & another

(Civil Appeal 133 of 2019) [2023] KECA 1061 (KLR) (2023)

Keywords: property insurance / quantum of loss / exclusion clause

The insured took out insurance for electrical equipment, hydraulic equipment, and other equipment relating to a reverse osmosis plant used for purifying water.

The premises and all its equipment were destroyed by fire and the insured claimed the full insured amount.

The insurer rejected liability on the grounds that the insured was unable to prove the exact description, quantity and cost prices of the destroyed items and because the cause of the loss was burning bushes, which was excluded from cover.

The cover was from December 2001 to December 2002 and the fire happened in February 2002. However, the policy document was only sent to the insured in March 2002, after the fire had occurred. This meant that the insured was unaware of the exclusion clause, and therefore the court held that the insurer could not enforce the alleged exclusion There was also insufficient evidence to determine the cause of the fire.

With regard to value, the court noted that the insurer did not verify the value of the claim, and in so doing it took a calculated risk that if it was found liable the evidence regarding the value of the loss would be that presented by the insured. The insurer undertook to insure the goods for a specific sum and quoted the premium as due consideration for the amount insured. The evidence showed that the goods were completely destroyed. Without an adjustment by a professional loss adjuster, the parties were left with the contractual amount.

The court ordered the insurer to pay the insured's claim.

Pioneer Holdings (Africa) Limited v Concord Insurance Company Limited & another (2022)

(Civil Case 817 of 1998) [2022] KEHC 305 (KLR) (Commercial and Tax) (4 April 2022)

Keywords: property insurance / damage caused by terrorist attack / exclusion / burden of proof

The insured's property was damaged due to its proximity to the United States embassy, which was the subject of an attack in 1998. The explosion aimed at the embassy was so powerful that it affected other buildings in the area.

USAID paid a grant of 22 million Kenyan shillings to the plaintiff, in recognition of the damage sustained due to the bomb blast at the embassy.

The insured claimed 117 million Kenyan shillings under the standard explosion clause of its property policy, but the insurer rejected the claim on the basis of a terrorism exclusion.

The insured presented a technical argument about the definition of "terrorism", alleging that the attack must have been "political" and aimed at the Kenyan government or its people. As this was supposedly a religiously motivated attack aimed at the US government, it did not constitute "terrorism", as excluded. The insured also alleged that because the terrorism clause provided for an exclusion of liability, it should have been specifically brought to its attention. Because this was not done, the insured was unaware of the terrorism exclusion and it could not apply.

The insured argued that in insurance contracts the burden of proof rests on the insured to demonstrate that the loss falls within the policy, and that the insurer bore a reverse onus to prove that the loss falls under the exclusion. Therefore, the insurer should prove that the explosion was caused by an act of terrorism as defined in the policy.

The court found that the damage was caused by an act of terrorism. In defining the word "terrorism", the court noted that the single word should not be viewed in isolation, but in the context of the insurance contract. Since the insurer's evidence proved that the cause of the damage was terrorism, it was for the insured to controvert this evidence, by adducing evidence to show that the explosion had another cause. The insured did not do so.

Regarding the insured's contention that it was not made aware of the exclusion, the court noted that it was the insured who produced the policy document that contained the contested clause. The insured is also a major player in the insurance industry, and would therefore be expected to be familiar with the standard policy clauses.

The court found that the insured could not rely on the policy as the basis of its claim for indemnity yet disown parts of the contract that were not favourable to it.

The exclusion was upheld and the insured's claim failed.

Donald Dinnie
Norton Rose Fulbright South Africa Inc
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Donald Dinnie
Norton Rose Fulbright South Africa Inc, Director
Tel +27 11 685 8847
donald.dinnie@nortonrosefulbright.com

Paul Ogunde
Walker Kontos, Partner
Tel +254 20 3953121
pogunde@walkerkontos.com

Gregory Karungo
Walker Kontos, Partner
Tel +254 20 3953104
gkarungo@walkerkontos.com

Angela Gecaga
Associate, Walker Kontos,
Tel +254 20 3953132
agecaga@walkerkontos.com

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