**Pioneer General Assce Soc Ltd v Mukasa**

**Division:** Court of Appeal at Kampala

**Date of judgment:** 17 April 1974

**Case Number:** 9/1974 (58/74)

**Before:** Sir William Duffus P, Law Ag V-P and Mustafa JA

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**Appeal from:** High Court of Uganda – Musoke, J

*[1] Insurance – Motor insurance – Compulsory third party insurance – Breach of condition – Insurer*

*entitled to rely on breach of condition against insured.*

*[2] Insurance – Motor insurance – Breach of condition – Breach contributed to by insurer – Effect of.*

**JUDGMENT**

The following considered judgments were read.

**Law Ag V-P:** The respondent was the owner of a motor car which, on 17 April, 1970, was involved in an accident in which a man was killed. The deceased’s widow sued the respondent and recovered Shs. 25,000/- damages and costs of Shs. 4,530/-. The car was at the material time covered by a comprehensive policy of insurance issued by the appellant company. Instead of claiming these damages and costs from the appellant company, the widow levied execution against the respondent. He in turn sued the appellant company praying for a declaration that it was liable under the policy of insurance to indemnify him in respect of the decretal amount obtained against him by the widow. The appellant company by its defence claimed to be under no such liability by reason of an alleged breach of a condition of the policy committed by the respondent. This was his failure to report the occurrence of the accident in writing and as soon as possible, as stipulated in conditions 2 and 4 of the policy, condition 10 whereof further stipulated that due observance of the terms of the policy should be conditions precedent to any liability on the part of the appellant company. The trial judge held that “as soon as possible” meant a reasonable period according to the circumstances. He did not say specifically that the report in this case was made within a reasonable time, but this finding is in my opinion implicit from the fact that he gave judgment for the respondent. He also said “In any event s. 102 of the Traffic Act 1951, which was in force when this policy was taken up, cannot be ignored,” and held that this section prohibited the appellant company from relying on non-compliance of conditions in the policy. This latter finding is the subject of one of the main grounds of appeal argued by Mr. Kateera, that while s. 102 aforesaid preserves the rights of third parties, the conditions of the policy remained effective as between the parties to the contract of insurance and were a condition precedent to liability on the part of the appellant company in a suit for indemnity brought by the respondent. S. 102 aforesaid is to this effect, so far as it is material: “Any condition in a policy of insurance providing that no liability shall arise under the policy . . . shall, as respects such liabilities as are required to be covered by a policy under section 99 of this Act, be of no effect.” The liabilities required to be covered under s. 99 are liabilities in respect of third parties. Such a third party, in a claim against an insurance company, is not affected by conditions in the policy which may relieve the company of liability towards the insured, but these conditions remain effective contractually between the company and the insured. We are not concerned here with a claim by the third party, against whom a condition that the insured must report the accident as soon as possible in writing would have been of no effect, under s. 102 aforesaid. That section is similar to s. 206 (2) of the Road Traffic Act 1960, of England. As is stated by Kahn-Freund, in dealing with this subject in *The Law of Carriage by Inland Transport*, 4th edn., at p. 550, restrictive conditions in a policy are of no effect in so far as the insurance is compulsory. Third parties are enabled to recover their damages from the insurer notwithstanding such conditions. Such conditions are not void, but in relation to third parties the insurer cannot rely on them. He can however seek to enforce them against the insured, and that is what the appellant company is seeking to do here, in a suit between the insured and the company with which the third party is not concerned.

It should be noted that it was never part of the case in the High Court, whether in pleadings or in argument, that s. 102 had the effect of nullifying contractual conditions in a policy, in a suit between the insured and the appellant company as insurer arising out of that policy. With respect to the trial judge, he should not have based his decision, to a substantial extent, on a statutory provision not pleaded or relied upon by the parties to the suit, without giving them an opportunity of being heard. Had he done so, he must have come to the conclusion that s. 102 only applied to claims by third parties enjoying the benefit of compulsory third party protection conferred by statute, and had no application to a suit between the insured and his insurer. In my opinion, with all due respect to the trial judge, s. 102 was irrelevant to the issue which he had to decide, and this part of the appeal succeeds. There now remains to be considered the second main ground of appeal, which is directed against the implicit finding in the judgment that the appellant company was not entitled to repudiate its liability to indemnify the respondent against the judgment recovered by the widow. By condition 2 in the policy, as read with condition 4, any occurrence which may give rise to a claim under the policy shall as soon as possible be given in writing to the insurer. By condition 10, the due observance of the terms of the policy are made a condition precedent to any liability by the insurer. Non-compliance with a condition precedent may be fatal to a claim for an indemnity, see *Austin v. Zurich General Accident*, [1944] 2 All E.R. 243. In *Williams v. Lancashire and Yorkshire Accident Insurance Co*. (1902), 19 T.L.R. 82, delay of two months in reporting an accident was held sufficient to entitle the insurance company to repudiate liability; that case however concerned insurance under the Workman’s Compensation Act, and the condition required “immediate” notice of the accident, and specified that time was of the essence of this condition. The facts of the case now under consideration are not in dispute, and are as follows: The accident occurred on 17 April 1970. The respondent reported it within two weeks to an Asian employee of the appellant company by telephone. He was told to collect a form at the office of the appellant company and did so a further fortnight later. The respondent was told he could complete the form at his leisure by one Mr. Umedali, described as the “top man” in the appellant company’s Kampala office at that time. The respondent is a schoolmaster, and at about that time was sent to Nairobi on a course. The respondent did not complete the form and send it to the appellant company until 22 August 1970, a little over 4 months after the date of the accident. By a letter dated 26 August 1970, the appellant company told the respondent that it was entitled to repudiate liability by reason of the delay, but did not do so in terms. Instead it said that: “. . . at its option and without admittance of any liability (it) may take such action as in its discretion deems fit to assist you but shall have recourse against you for repayment . . . of all sums for repayment of claim or any other costs incurred or arising out of the said claim.” In March 1971, the appellant company arranged for the legal representation of the respondent in the suit brought against him by the widow. She recovered nearly Shs. 30,000/- in damages and costs. She did not seek to claim this sum from the appellant company, which (we were informed) had by then closed its Kampala office. Instead she proceeded to execution against the respondent personally. After judgment was given, but before the execution proceedings, the respondent went to see Mr. Janjua who was then representing the appellant company in Kampala. Mr. Janjua told him the company would satisfy the decree if he brought the Shs. 600/- “excess” he was bound to pay on any claim under the policy, and added “the sooner you pay that sum the better”. Within a week the respondent raised Shs. 600/- and took it to Mr. Janjua, only to be told that the appellant company was repudiating liability. The question is whether, in these circumstances, the appellant company is entitled to repudiate its liability to indemnify the respondent, relying on the latter’s failure to report the accident as soon as possible in writing. In my considered opinion, it is not. On the respondent’s unchallenged and unrebutted evidence, he was told when he reported the accident by telephone that he must complete a form to be obtained at the appellant company’s office; and when he collected the form, he was told that he could complete it “at his leisure”. Quite clearly he was led to believe that there was no urgency in reporting the particulars of the accident in writing. Relying on this assurance, he took his time and did not submit the completed form for a further 3 months. He was dilatory, but had no reason at that stage to believe that his dilatoriness would be held against him. If the appellant company wanted to avail itself of the condition that the accident must be reported as soon as possible in writing, it should have so informed the respondent when he reported by telephone, or at the latest when he collected the form. It did not do so. On the contrary it misled the respondent into believing that there was no urgency. The appellant company must be taken, in my opinion, to have waived its right to repudiate liability to indemnify the respondent by reason of a breach by him of conditions 2 and 4 of the policy. I am in agreement with the trial judge’s implicit finding that the report in this case was, in all the circumstances, made within a reasonable time. I would affirm the decree appealed from, although not on the statutory ground relied on by the judge, and dismiss this appeal with costs. **Sir William Duffus P:** I agree with the judgment of the Acting Vice-President and as Mustafa, J. A. also agrees the appeal is dismissed with costs. **Mustafa JA:** I have read and agree with the judgment prepared by Law, Ag. V.-P. and I concur in the order proposed by him. *Appeal dismissed*

For the appellant:

*J Kateera* (instructed by *Hunter & Greig*, Kampala)

For the respondent:

*JBM Balikuddembe* (instructed by *Mpungu & Balikuddembe*, Kampala)