**Bweko v Kenya Orient Insurance Co. Ltd (Civil Appeal E083 of 2023) [2024] KEHC 9387 (KLR) (30 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9387 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**CIVIL APPEAL E083 OF 2023**

**DKN MAGARE, J**

**JULY 30, 2024**

**BETWEEN**

**MEMBWANA IDDI BWEKO ..... APPELLANT**

**AND**

**KENYA ORIENT INSURANCE CO. LTD ..... RESPONDENT**

## JUDGMENT

1. This appeal arises from the Judgment and Decree of J.B. Kalo, Chief Magistrate delivered on 2/3/2023 in Mombasa CMCC No 1644 of 2016.
2. The Appellant was the Plaintiff. He lodged the Memorandum of Appeal dated 11/4/2023 on the following grounds:
    a. The leaned magistrate erred in exonerating the Respondent from liability.
    b. The learned magistrate erred in failing to find that a statutory notice was duly issued and served.
    c. The learned magistrate erred in failing to consider the submissions of the Appellant.
    d. The learned magistrate erred in dismissing the Appellant's suit.

### Pleadings

3. In the Claim dated 2/9/2016, the Plaintiff sought a declaration that the Appellant is bound to indemnify the Respondent in the sum of Kshs 201,720/=.
4. The suit arose from judgment in the primary suit which was stated to have arisen from a road accident that occurred on 13/5/2015 when Respondent's insured motor vehicle registration number KAS 210X was so negligently driven that it knocked down the Appellant.

5. The Appellant consequently filed the primary suit in Mombasa CMCC No 1099 of 2015 in which Judgment was entered for the Plaintiff as against the insured defendant at Kshs 163,100/- plus costs and interest of Kshs 38,620/= totaling Kshs 210,720/-.

6. The Respondent entered appearance and filed a defence to the suit denying the averments in the plaint. The Respondent was categorical in its defence that it was not issued with a statutory notice.

**Evidence**

7. The Appellant testified as the Plaintiff, PW1. He relied on his witness statement and bundle of documents which he produced in evidence. It was his stated case on cross examination that the policy certificate indicated the policy number as 201031348TPO and was the accident motor vehicle.

8. PW2 was one PC David Mutisya who produced the police abstract filed on 29/4/2015. He testified that that accident was reported on 13/3/2015 but erroneously indicated as 13/4/2015 on the OB.

9. On the part of the Respondent, they called DW1 Said Amin, the Relationships Manager. He denied that the Respondent received a statutory notice.

10. It was her testimony that the policy was valid between 11/3/2014 and 10/3/2015 and was number 201031384.

**Submissions**

11. The Appellant submitted that the Appellant served the Respondent with a statutory notice and the learned magistrate erred in his finding that the statutory notice was not served as required under Section 10(1) of the *Insurance (Motor vehicle Third Party Risks) Act*.

12. Reliance was placed on the cases of *M/s Fidelity Shield Insurance Co Ltd v Peter Mbugua Kimotho* (2020) eKLR to canvass the argument that there was a valid insurance cover and the statutory notice was served.

13. On the part of the Respondent, it was submitted that the learned magistrate correctly interpreted the law. They submitted that the statutory notice was not issued. They relied on Section 10 (2) of Cap 405 as follows:

> " 10
>
> (2). No sum shall be payable by an insurer under the foregoing provisions of the section.
>
> (a) in respect of any judgment, unless before or within 14 days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings....."

14. Reliance was also placed inter alia on *Philip Kimani Gikonyo v Gateway Insurance Co. Ltd* (2007) eKLR to canvass the submission that notice was mandatory to alert the insurer to enable them investigate and settle or defend the claim.

**Analysis**

15. The issue that fall for this Court's determination is therefore whether the learned magistrate erred in dismissing the Appellant's suit.

16. This being a first Appeal, the court should with judicious alertness re-evaluate the evidence, and consider arguments by parties and apply the law thereto, and, make its own determination of the issues in controversy.

17. Law JJA, in the locus Classicus case of *Selle and another v Associated Motor Board Company and others* [1968]EA 123, stated as follows:-

> " .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

18. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

19. In the case of *Peters v Sunday Post Limited* [1958] EA 424, court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

20. The Appellant's case is that the lower court erred in dismissing his suit on account of failure of service of statutory notice. On the other hand, the Respondent contends that indeed statutory notice was not served as required under the law.

21. The requirements for an insurance policy are set under the law. I will reproduce in extenso the entire provisions of section 5 of the *Insurance (Motor Vehicle Third Party Risks) Act* CAP 405 which stipulates as follows: -

> 5. Requirements in respect of insurance policies
>
> In order to comply with the requirements of Section 4, the policy of insurance must be a policy which –
>
> (a) Is issued by a company which is required under the *Insurance Act*, 1984 (Cap 487) to carry on motor vehicle insurance business; and
>
> (b) Insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road:
>
> Provided that a policy in terms of this section shall not be required to cover –
>
> i) Liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or

ii) Except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arose; or

iii) Any contractual liability.

iv) Liability of any sum in excess of three million shillings, arising out of a claim by one person

22. On the other hand turning to the provisions of Section 10(1) of the *Insurance (Motor Third Party Risks) Act*, Cap 405 on the statutory notice, the same provides as follows: -

> 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.

23. Section 10(2) of the *Insurance (Motor Third Party Risks) Act*, Cap 405 provides:

> " 10
>
> (2). No sum shall be payable by an insurer under the foregoing provisions of the section.
>
> (a) in respect of any judgment, unless before or within 14 days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings....."

24. As was held in *Stephen Kiarie Chege v Insurance Regulatory Authority & another* (2009) eKLR, the import of the above provision of the law is that for liability to accrue under Section 10 of the *Insurance (Motor Vehicle Third Party Risks) Act* Cap 405, there is a 4-fold test to be met. Firstly, that the motor vehicle in question was insured by the Appellant; Secondly, that the Respondent has a judgment in his favour against the insured; Thirdly, that statutory notice was issued to the insurer within 30 days of filing the suit where judgment has been obtained and finally the Respondent was a person covered by the insurance policy.

25. In my view, the purpose of the above provisions and the *Insurance (Motor Vehicle Third Party Risks) Act* CAP 405 was also to ensure that a third party who suffered injury or loss due to acts or omission on the part of an insured motor vehicle would be assured of compensation for their injury, loss or inconvenience in circumstances where the owner or driver of the insured motor vehicle has no means to settle the claim. This view is supported by Sir Clement De Lestang, J.A. in *New Great Insurance Co. of India Ltd v Lilian Everlyne Cross & another* (1966) EA, 90 at page 104 as doth:

> " Generally speaking the Act seeks to achieve that object (of making provision against third party risks arising out of the use of motor vehicle on the roads) not by placing the

whole burden of compensating third parties injured in accidents on the insurers but by combination of two means namely:

i. by making it obligatory, on pain of punishment, for any person who uses or causes or permits any other person to use a motor vehicle on the road, to have in relation to the user of the vehicle a policy of insurance which satisfies the requirements of the Act, and

ii. restricting the right of insurers to avoid liability to third parties."

26. Lord Denning in *Escoigne Properties Ltd v I.R. Commissioners (15)* [1958] A.C at 565 stated that,

> "A statute is not named in a vacuum, but in a framework of circumstances, so as to give a remedy for a known state of affairs. To arrive at its true meaning, you should know the circumstances with reference to which the words were used, and what was the object, appearing from those circumstances, which parliament had in view."

27. It is not in dispute that the policy was a third-party insurance cover. The learned magistrate dismissed the declaratory suit on the basis that no statutory notice was served in the primary suit. In my reevaluation, indeed there were discrepancies in that the policy number indicated in the demand letter was for motor vehicle Registration No KBS 210X and the policy number was 2103184 TPO while the correct accident motor vehicle was KAS 201X and Policy No 201031384TPO.

28. I do not agree with Appellant that the learned magistrate failed to take into consideration the evidence adduced by the Appellant and the law. It was clear that the statutory notice in respect of the subject accident was not served as evidenced that it was served upon the Respondent and the insured person was not the person sued as defendant or a party in the primary suit.

29. The Appellant had the duty to show by way of evidence that the statutory notice was duly served as required under Section 10(2) of the *Insurance (Motor Vehicle Third Party Risks) Act* Cap 405, and the Defendant in the primary suit was the policy holder and insured. This is because the Policy as produced supported the Respondent's case.

30. On the proof of the allegations of breach of contract in *Raghbir Singh Chatte v National Bank of Kenya Limited* [1996] eKLR the Court of Appeal stated thus:

> "When a party in any pleading denied an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum, or any part thereof, or else set out how much he received. And so, when a matter of fact is alleged with divers circumstances, it shall not be sufficient to deny it as alleged along those circumstances, but fair and substantial answer must be given."...
>
> ...First of all a mere denial is not a sufficient defence in this type of case there must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given."

31. What amounts to proof is set out in section 107-109 of the *evidence act* as thus: -

107.

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person

32. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in *William Kabogo Gitau v George Thuo & 2 others* [2010] 1 KLR 526 as follows: -

> "In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

33. In *Palace Investment Ltd v Geoffrey Kariuki Mwenda & another* (2015) eKLR, the judges of Appeal held that:

> "Denning J. in *Miller v Minister of Pensions* (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -
>
> > "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."

34. Based on the foregoing, the Appellant failed to discharge the burden of proof placed upon him. I find no reason to interfere with the finding of the lower court.

35. Consequently, the Appeal lacks merit and is accordingly dismissed with costs of Kshs 85,000/=.

**Determination**

36. In the circumstances, I make the following orders.

a. The appeal is dismissed.

b. The Respondent shall have the costs assessed at Kshs 85,000/-.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 30TH DAY OF JULY, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of:-

No appearance for the Appellant

Mr. Kioko for the Respondent

Court Assistant – Jedidah