



**Kariuki v Xplico Insurance Compay Limited (Civil Appeal
E407 of 2023) [2024] KEHC 9653 (KLR) (30 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9653 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL APPEAL E407 OF 2023

S MBUNGI, J

JULY 30, 2024

BETWEEN

CHRISMORRIS GATHERU KARIUKI APPELLANT

AND

XPLICCO INSURANCE COMPANY LIMITED RESPONDENT

*(Appeal against the Judgement of Hon. Caroline Cheptoo Kemei(Mrs) (PM)
delivered on the 23rd April 2023 at Milimani CMC. Case No. 7985 of 2021)*

JUDGMENT

Representation:

For Appellant- Wanjohi & Wawuda Advocates

For Respondent- Mugwe & Co. Advocates

1. The Appellant, being dissatisfied with the Judgment of the Honourable Hon. Caroline Cheptoo Kemei(Mrs) (PM) delivered on the 23rd April 2023 at Milimani CMC. Case No. 7985 of 2021 Between Chrismorris Gatheru Kariuki versus Xplico Insurance Co. Limited, filed the Memorandum of Appeal dated 9th May 2023 and the Record of Appeal dated 19th July 2023 and received in court on 2nd August 2023, seeking the following orders: -
 - 1 The appeal be allowed.
 - 2 The Judgement of the Chief Magistrate Court (Nairobi)in CMCC No. E7985 of 2021 be set aside, and the Respondent be found liable to pay and do pay the decretal sum of Kshs. 1,173,162/- in Milimani Chief Magistrate's court Civil Case No. 11105 of 2018: Chrismorris Gatheru Kariuki versus Peter Ng'ang'a Ngahu and Paul Maina.
 - 3 The costs of the appeal be awarded to the Appellant.



2. The Appeal was premised on the following grounds: -
 - i. The Trial court erred in finding that the Appellant had proved his case on a balance of probabilities.
 - ii. The trial court misdirected itself on the standards of proof required to prove the existence of valid insurance policy cover issued by the Respondent and that the burden of disproving it shifted to the Respondent.
 - iii. The trial court erred in finding that the police abstract amounted to third party information.
 - iv. The trial court erred in failing to appreciate that notice of institution of the suit had been given in conformity with Section 10(2) of the Insurance (Motor Vehicle Third Party Risks) Act.
 - v. The trial court erred in delivering an incomplete judgement which lacked reasons for her decision contrary to order 21 Rule 4 of the Civil Procedure Rules 2010.

Written Submissions At Appeal

3. The court directed that the appeal be canvassed by way of written submissions. The Appellant's written submissions drawn by Wanjohi & Wawuda Advocates were dated 29th February 2024. The Respondent did not file submissions.

Background to the appeal

4. The Appellant vide a Declaratory Plaintiff dated 26th April 2021 and supported by a verifying affidavit sworn on an even date sought before the trial magistrate court the following reliefs:-
 - a. A declaration that the defendant is liable to pay and do pay the decretal sum of Kshs. 1,173,162/- in Milimani V Chief Magistrate's Court Civil Case 11105 of 2018 Chris Morris Gatheru Kariuki versus Peter Ng'ang'a Ngahu & Paul Maina.
 - b. Interest on (a)above from the date of filing this suit until payment in full.
 - c. Costs of this suit.
5. The plaint had been accompanied by a list of witnesses dated 26th April 2021, the Appellant's Witness statement dated on an even date, his list of Documents dated on an even date, and his bundle of documents (Pg. 8 – 21 of the record are all pleadings by the Appellant before the lower court).
6. The Judgement (pg.83) indicates that the Respondent did not enter appearance, and a default judgement was entered on 4th September 2022 and the case set done for formal proof.
7. On the record, the Respondent/Defendant filed a memorandum of appearance(pg.22) and a Statement of Defence dated 25th June 2021(Pg.-23-25).
8. The Appellant filed a Reply to the Respondent's Statement of Defence dated 5th July 2021(Pg.27-28), complied with Order 11, and filed their list of issues dated 5th July 2021(pg. 29-32 of Record).
9. The matter proceeded by way of viva voce evidence on 19th October 2021 with Appellant testifying as PW1(Pg. 90-92). The parties filed written submissions after the hearing. The plaintiff submissions(Pg. 33-54). The Respondent's submissions (Pg. 55-82). The judgement was delivered on 28th April 2023(Pg. 83-87). The trial magistrate dismissed the Appellant's case as follows: "In conclusion I find that the plaintiff have failed to prove that the defendant had insured motor vehicle registration number KCB 069Y at the time of the accident. It therefore follows that the court cannot compel the defendant



to satisfy the decretal sum in Milimani CMCC No. 11105 of 2018. The court finds no merit in the plaintiff's suit . the same is dismissed with costs.”

Determination

10. The principles which guide this court in an appeal from a trial court are now well settled. In *Selle And Another V Associated Motor Boat Company Ltd & Others*, [1968] EA 123, Sir Clement De Lestang, Vice President of the Court of Appeal for East Africa stated those principles as follows:-

“An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

11. Further in *David Kahuruka Gitau & Another v Nancy Ann Wathithi Gatu & Another Nyeri HCCA No. 43 of 2013*, the court opined:- ‘Is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on point of law and facts and come up with its findings and conclusions.’”

Issues for determination

12. The Appellant in his submissions identified the following issues for determination in the appeal:-
- a. Whether the Appellant had proved his case on a balance of probabilities
 - b. who should bear the costs of this Appeal
13. The court finds that having considered the pleadings in the trial court and submissions at the trial court and at appeal, the issue placed by the Appellant for determination in the appeal is whether the trial court arrived at the proper finding?

Analysis

Whether the trial court arrived at the proper finding?

14. It is not in dispute that judgement was entered dismissing the Appellant's Case in Milimani CMCC No. E7985 of 2021. In her judgement, the Trial Magistrate was of the view that there was no proof to the averment that the Respondent had insured the subject motor vehicle KCB 069Y with policy no. P/NO.XPL/00058408 apart from the information contained in the police abstract dated 18th July 2018.
15. According to the Appellant, the police abstract was sufficient to establish that the respondent had insured the motor vehicle registration number KCB 069Y. The Appellant asserted that there was no contrary evidence produced by the Respondent in court and considering that a certificate of insurance is normally in the custody of the insured and the insurer, and the entry by the police on the abstract is sufficient and where an insurer objects they can submit the correct policy to court.
16. The appellant submits that the respondent failed to produce a certificate of insurance to disprove the appellant's case and hence the contents of the police abstract remain unchallenged.



17. According to the Appellant, the Trial Magistrate erred in finding that he ought to have availed the certificate of insurance, as the respondent failed to discharge its burden of proof required under Sections 109 and 112 of the *Evidence Act*. He relied on the following decisions to buttress his case, namely Bernard Mutisya Wambua v Kenya Orient Insurance Company Limited (2020) eKLR; Esther Muthoni Munyiri v Amaco Insurance Company Limited (2020) eKLR; APA Insurance Company Limited v George Masele (2014) Eklr.
18. The appellant submits that the trial court erred in finding that the appellant had not proven his case on a balance of probability. He asserts that the respondent was statutorily bound to satisfy the judgement entered against its insured and as per section 10 (2) of the Insurance (Motor Vehicle Third Party Risks) Act, the Appellant served the Statutory Notice (C-Exh-1) which was duly stamped by the Respondent which is not contested. The appellant submits that the Respondent did not object to the statutory Notice nor allege that it was forged.
19. The Appellant submits the Respondent ought to have filed a Repudiatory suit under Section 10(4) of the Insurance (Motor Vehicle Third Party Risks) Act if it intended to avoid liability.
20. The Appellant asks the court to find the respondent is liable to satisfy the decretal sum in Milimani CMCC No. 11105 of 2018; Chrismorris Gatheru Kariuki v Peter Ng'ang'a Ngahu & Paul Maina in the primary suit and urges the court to order that the respondent to pay for the costs in the lower court and interests and the costs of the appeal.

Analysis

21. The Respondent denied in its defence to have issued an insurance cover for motor vehicle registration number KCB 069Y. The policy number as indicated in the police abstract is policy No. P/NO.XPL/00058408.
22. Section 10(1) of the Act provides as hereunder:(1) If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or canceled, 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. Based on the above provision for the insurer to be liable to satisfy the decretal sum, there must be a policy of insurance, and the judgement must have been in respect of a liability required to be covered by a policy under paragraph (b) of section 5 and the judgement must have been obtained against a person insured by the policy.
24. At trial, the appellant told the court that the abstract obtained from the police indicated that the insurer of the motor vehicle at the time of the accident was the respondent.
25. The appellant served upon the respondent a Statutory Notice dated 24th July 2018 pursuant to Section 10(1) of Cap 405 of the Laws of Kenya.
26. The demand letter before institution of the declaratory suit was dated 15th April 2021(pg. 18 -19 of the Record).



Determination

27. The appellant relied on the abstract to prove that the respondent was the insurer. The respondent filed the defence dated 25th June 2021 stating that they had not issued the said policy but did not object to production of the police abstract as an exhibit. The evidential burden shifted to the respondent to call rebuttal evidence in line with section 109 and 112 of the evidence Act Cap 80which provides.
28. There is enough case law stating that particulars/details recorded by a police officers in a police abstract in absence of any other evidence to the contrary suffices.
29. In the case of appeal case of Joel Muna Opija -Vs- East African Sea Food Ltd (2013) eKLR where the court held as follows: -
- “ the best way to prove ownership of a motor vehicle would be to produce a document from the registrar of motor vehicles showing the registered owner. However, if a police abstract is produced in court without any objection, its contents cannot be denied”
30. In the case of Bernard Mutisya Wambua- vs Kenya Orient Insurance Company Limited (2020) e KLR where the court held as follows;
- “I agree with Mabeya J, that the insurance certificate is a document usually in the possession of the insurer and insured. The evidence by the police in the police abstract that such and such was the insurance policy, giving its number and the name of the insurer is, in my view, evidence of such a nature than that it must be controverted. if objected to by the insurance company it would easily bring the correct policy to the attention of the court because it keeps copies of these.”
31. In the case of Esther Muthoni Munyiri -Vs- Amaco Insurance Company Limited (2021) eKLR Justice F Muchemi held as follows: -
- “ This court of appeal decision is binding on this court and presents very sound reasoning on proof ownership of a vehicle which is akin to the issue herein that save for the general denial that it had not insured the vehicle, the respondent did not deny the contents of the police abstract. As such, it is a general practice that the police abstract ordinarily captures the details of the insurance policy from eh certificate of insurance affixed to the motor vehicle. In case, the contents of the abstracts have not been contested by the respondent through evidence. As such, I hold the view that the police abstract was sufficient proof of evidence that the respondent was the insurer of the vehicle registration number KBD 139N at the time of the accident.”
32. In the case of Esther Muthon Munyiri -Vs- Amaco Insurance Company Limited (2021) eKLR the court held as follows with regard to certificate of insurance: -
- “ this means that the policy document and certificate of insurance in the custody of the insurer and the insured will not be easily accessible by a plaintiff in a declaratory suit. It is correct to say that in that case, only the respondent herein being privy to the insurance contract between it and the defendant in the primary suit, ought to have produced evidence in court to refute that it did not have a valid insurance policy with the said defendant. The case of Isaac Katambani Iminya vs firestone east Africa (1969) limited (2015) e KLR, which outlines the effect of failure by the respondent to adduce rebuttal evidence.”



33. In the case of APA Insurance Company Limited -vs.- George Masele (2014) e KLR where the Honourable court held as follows: -

“As to the certificate of insurance which Ms Akonga insists should have been produced, I am of the contrary view. The certificate of insurance is usually issued to the insured and not the road accident victim. It is a document in the special knowledge and possession of both the insured and the insurer. The road traffic accident victim cannot access it. The details in the police abstract as to the details of insurance are in the ordinary course of events obtained by the police from the certificate of insurance affixed to the motor vehicle or are supplied by the insured. In this regard, I am unable to agree with Ms. Akonga that the respondent should have produced the certificate of insurance for policy NO. 010/810/000005/2001/04 in order to prove who the insurer was.”

34. Therefore, from the above holdings it is clear that the trial court misdirected itself when it held that proof of existence of insurance policy was only through production of the certificate of insurance cover.

35. Having found the respondent had insured motor vehicle KCB 0691 and a judgment was entered against the respondent in the case No. CMCC 7985/2021 at Milimani Commercial Court. The respondent as the insurer under section 10(1) of the insurance (motor vehicle third party risks) act is statutory bound to satisfy the judgment in the primary suit for there is no evidence that the respondent took advantage of the defences afforded to wait under Section 10(4) of cap 405 laws of Kenya.

36. The net effect is that I find the appeal has merit and I do allow it as prayed.

37. The Appellant shall also have the cost of the appeal for the respondent had no reason as to why it did not satisfy the judgment in the primary suit.

38. The Appellant shall also have the costs of the suit in the lower court.

Right of appeal within 30 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 30TH DAY OF JULY 2024.

S. MBUNGI

JUDGE.

In The Presence Of:-

Court Assistant: Elizabeth Angon'ga

Appellant: No appearance

Respondent: No appearance

