



**Nzioka v Apa Insurance Company Ltd (Civil Appeal E007 of 2022)
[2024] KEHC 17235 (KLR) (20 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 17235 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E007 OF 2022
TM MATHEKA, J
AUGUST 20, 2024**

BETWEEN

RUTH NDUKU NZIOKA APPELLANT

AND

APA INSURANCE COMPANY LTD RESPONDENT

JUDGMENT

1. The appellant filed Makindu PMCC 325/2013 against Akamba Public Road Services Ltd & Bonface Kioko. At some point during the trial, the appellant (then the plaintiff) amended the plaint and removed Akamba Public Road Services Ltd and proceeded with the suit against Bonface Kioko.
2. In the judgment delivered by the trial magistrate in that case on 13/12/2018 the defendant was described as the “Sole registered owner/beneficial owner of the motor vehicle registration no. KBE 297V being driven by their agents, driver or servant.”
3. The plaintiff’s prayer was for judgment against the defendant for special damages, general damages for pain suffering & loss of amenities & costs of the suit plus interest.
4. Judgment was entered against the defendant - Bonface Kioko at Kshs. 762,500 by Hon. J.D Karani SRM.
5. The appellant proceeded to file Makindu PMCC 201/2019 on 17/7/2019 seeking a declaration that the defendant is liable to settle the decretal amount owing in Makindu PMCC 325/2013 plus costs & interest.
6. The ground for that prayer is that the accident subject to the suit in Makindu PMCC 325/2023 happened during the currency of the Insurance Policy issued by the defendant with respect to M/V Reg. No. KBE 297V, and that the accident that happened on 6/2/2011 involving the said motor vehicle and the deceased - was as the result of the negligence of the defendant’s insured driver.



7. The defendant filed a defence on 2/10/2019 and denied the claim - 1st that the defendant had not issued the policy referenced in the primary suit - titled - P/10/2008/1802/1036 TPO.
8. The defendant also denied that the defendant was its insured's driver/or its insured at all.
9. Hon. J.D Karani heard the suit and came to the conclusion that the defendant in Makindu PMCC 325/2013 was not the insured of the motor vehicle and the time the accident happened. That the plaintiff had failed to prove its case and the case was dismissed with costs.
10. Aggrieved, the plaintiff filed this appeal. It was canvassed by way of written submissions which I have considered.
11. The appellant has set out ground of appeal - 6 of them
 1. That the honourable magistrate erred in law and fact in failing to appreciate the purpose to which the insurance (Motor Vehicle Third Party Risks) Act, Cap 405, was enacted to cure and hence fell into error in dismissing the plaintiffs suit.
 2. That the honourable magistrate erred in law and fact in holding that judgment obtained against a driver employed by a limited liability company at the date of accident, is not enforceable against the insurance company for purposes of the provisions of Cap 405 Laws of Kenya.
 3. That the honourable magistrate erred in law and fact in considering irrelevant and extraneous matters not before her and arrived at a wrong decision yet this was only a declaratory suit before her.
 4. That the honourable magistrate erred in law and fact in failing appreciate that a party has a right to amend his pleadings at any time before judgment and more so where the defendant has in his pleadings and evidence before court admitted that they had insured motor vehicle registration KBE 297V as at the date of the accident on 6/2/2011 for purposes of Cap 405 Laws of Kenya and that they had been served with a statutory notice on 19/9/2013 before the initial suit was filed and they were aware there was judgment against the driver of the said motor vehicle for the death of Justus Wambua Nzioka.
 5. That the honourable magistrate erred in law and fact in failing to appreciate the defendants admission in court that all the buses belonging to Akamba Public Road Services Ltd were insured under one general Motor Public Number the one allocated by them to motor vehicle registration KBE 297V was ZAA810/000405/000/02 and it was wrong to hold that the plaintiffs claim was not payable, under cap 405,Laws of Kenya.
 6. That the honourable magistrate erred in law and fact in shifting the burden of proof from the defendant to the plaintiff as to the fine details of how they allocated sub- policy members in a motor pool policy when the police had already provided the main policy number to the plaintiff and it was correct.

Reasons wherefore the appellants prays for the following orders;

- a. That the judgment of the honourable magistrate J.D Karani delivered on 2/2/2022 in Makindu PMCC 201 of 2019 be and is hereby set aside.
- b. That judgment in Makindu PMCC 201 of 2019 be and is hereby entered in favour of the plaintiff as against the defendant herein as prayed in the plaint thereof. c) That the costs of this appeal and the lower court be to the appellant/plaintiff.



12. Appellant filed submissions
13. On whether or not Bonface Kioko was the insured of the defendant as per Cap 405 Law of Kenya - it is submitted that the police abstract produced as evidence shows that he was the driver of the said motor vehicle - and that the defendant did not produce evidence to show that he was not the driver of the motor vehicle; that no appeal was filed against the judgment of the subordinate court.
14. It is also submitted that the motor vehicle Reg. No. KBE 297 was insured by the respondent at the material time – that it belonged to Akamba Public Road Services Ltd – who was the insured of the respondent. That the trial court was in error in failing to appreciate that Bonface Kioko was sued as the driver of the Akamba Public Road Services Ltd - and that the company absorbed his liability.
15. The appellant cited Section 10(1) (2) of the *Insurance Act* Cap 405, Laws of Kenya, *Kayanja vs New India Assurance Company Ltd (1968) EA 295* with respect to the liability of the Insurer regarding the insured authorized driver.
16. It is further submitted that what was insured was the use of the motor vehicle and that it is not in doubt that the bus KBE 297V was insured by the respondent. That the appellant had made on oral amendment of the pleadings to include the proper policy no. ZAA810/00465/000/02.
17. It was further submitted that the plaintiff could not have known who was in the insurance policy which was in the custody of the insurer - the appellant relied on *Siaya HCCA 7/2020 Kenya Alliance Insurance Co. Ltd vs Thomas Ochieng Apopa* suing as the Administrators of the Estate of Pamela Agola Apopa.
18. For the respondent it was submitted the following issues were set out for determination
 - a. Whether the defendant in the primary suit Makindu SRMCC No. 325 of 2013 one Boniface Kioko was the respondent’s insured?
 - b. What is effect of section 10(1) of Cap 405 (Insurance Motor Vehicle (Third Party Risks) Act Laws of Kenya?
 - c. Whether the respondent was liable to pay the decretal sum as alleged in the declaratory suit Makindu CMCC No. 201 of 2019.
 - d. Who should bear the costs of the appeal.
19. It is submitted that the defendant in PMCC 325 /2013 was not the insured of the defendant –
20. It is further submitted that the appellant failed to establish the mandatory pre-condition for an insurer to be liable – the existence of a judgment obtained against any person insured by the policy. For the respondent it is cited – *Philip Kimani Gikonyo vs Gateway Insurance Company Ltd [2007] eKLR* on the rights under the policy of the permitted driver, that an insured person must demonstrate to the court that he had an existing contract of insurance with an insurance company in order to receive compensation from the insurance company. This was the holding in *AIG Insurance Co. Ltd vs Benard Kiprotich Kirui[2022] eKLR*;
21. It is further submitted that there must be an insurable interest “the pecuniary/ property interest that the insured stands to lose if the risk attaches “– see *Lucena vs Crawford (1806) 2 BOS PNR 269*at 302; that the appellant failed to establish as between the defendant in the primary suit and the respondent in this appeal a direct relationship, arising out of a legal/equitable right or interest, related to the insurance.



22. That during the trial the appellant's position was that the said Bonface Kioko was the registered owner of the motor vehicle, but at the declaratory suit, changed the narrative to say that he was the driver – that the appellant sued the wrong party and obtained judgment against the wrong party a stranger to the respondent.
23. I have from the foregoing only one issue to determine - whether the appellant established that the respondent was liable to pay/settle the decretal sum in MAKINDU PMCC325/2013 .
24. The appellant sued Bonface Kioko as the defendant . In that suit the appellant told the court that the defendant was the registered owner of the motor vehicle registration no. KBE279V and that it was driven by his driver/agent - the plaintiff also gave a policy number.
25. The judgment was entered against the said Bonface Kioko - nowhere in that suit was the Akamba Public Road Service Ltd indicted as a defendant. No judgment was entered against the said Akamba Public Road Services Ltd. If the respondent insured the said bus through Akamba Public Road Services Ltd, it was clear that Bonface Kioko was not the insured of the respondent.
26. How then could the trial court find that the respondent was liable - when their insured was not a party- and was removed from the suit by the appellant?
27. The respondent's insured did not participate in the primary suit, and no judgment was entered against it.
28. It is evident from the primary suit, and the appellant sued Bonface Kioko - not Akamba Public Road Service Ltd, It is evident that there was no evidence that Bonface Kioko was the driver/employee/ authorized driver of the respondent, insured, hence , the submission that the respondent is liable because Bonface Kioko was the authorized driver of respondent - is not tenable.
29. What emerges from this appeal , and from the suit appealed form is that the appellant is prosecuting the primary suit through these suits. The declaratory suit was not the place to bring new evidence - neither is the appeal the place to bring new evidence - evidence that ought to have been placed before the trial court.
30. The long and short of it all is that the appellant sued Bonface Kioko and judgment was entered against Bonface Kioko - the respondent's insured was not sued - and no judgment was made against the respondent's insured.
31. There is no reason to upset the judgment of the trial court and the same is upheld .
32. The appeal is dismissed with costs.

DATED SIGNED AND DELIVERED VIA CTS ON 20/8/2024.

MUMBUA T. MATHEKA

JUDGE

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

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