



Kenya Orient Insurance Company Ltd v Mbelenzi (Civil Appeal E089 of 2022) [2024] KEHC 11252 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11252 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E089 OF 2022
H NAMISI, J
SEPTEMBER 26, 2024**

BETWEEN

KENYA ORIENT INSURANCE COMPANY LTD APPELLANT

AND

BENJAMIN MUTHAMA MBELENZI RESPONDENT

(Being an Appeal from the judgement of Hon. R.W. Gitau delivered on 31 May 2022 in Mavoko CMCC No. E618 of 2021)

JUDGMENT

1. This appeal arises out of a declaratory suit filed in the Magistrate Court by the Respondent, against the Appellant, seeking the following orders:
 - i. An order of declaration that the Defendant is bound to settle the decretal amount in Mavoko CMCC No. 1464 of 2018;
 - ii. An order that the Defendant does pay the Plaintiff herein the sum of Kshs 3,154,953.50/- as stipulated in paragraph 11 hereinabove stated;
 - iii. Costs and interest of this suit until full payment;
 - iv. Any other relief and further relief this honourable court deems fit to grant
2. The Respondent's claim arose out of an accident that occurred on 8 November 2015, involving motor vehicle registration number KCA 984R which belonged to one Gillian Warigia Mwangi and insured by the Appellant herein. As a result of the accident, the Respondent's son sustained fatal bodily injuries and died. On 12 November 2019, the Respondent obtained judgement against the insured and subsequently drew a decree and certificate of costs for the sum of Kshs 2,948,975.31, which included interest as at 12 February 2020.



3. The Appellant entered appearance and filed a Statement of Defence dated 7 October 2021 in which the Appellant denied the claim against it and alleged fraud on the part of the Respondent. More specifically, the Appellant denied being served with the statutory notice as required by the provisions of the Insurance (Motor Vehicle Third Party Risks) Act and that the alleged stamps appearing on the statutory notices did not conform to the official stamps used by the Appellant in receiving documents.
4. At the hearing, the Respondent produced a bundle of documents, which included the Judgement delivered in Mavoko CMCC NO. 1464 of 2018, Plaintiff and Defence filed in the said case, Warrant of Attachment, duplicate certificate of insurance, demand letter and statutory notice. The Appellant did not call any evidence. At the close of the case, both parties filed their respective submissions.
5. In its judgement, the trial court addressed two issues: (i) whether the Defendant (Appellant herein) was the insurer of the motor vehicle registration number KCA 984R; and (ii) whether the Defendant was duty bound to satisfy the judgment in Mavoko CMCC No. 1464 of 2018. The trial court noted that by fact that the Appellant did not call any witnesses to support their case, their defence was reduced to mere unsubstantiated statements.
6. Having found that the Plaintiff (Respondent herein) had proved their case on a balance of probability, the Court then addressed the Appellant's duty to satisfy judgements under section 10 (1) of the Insurance (Motor Vehicle Third Party Risks) Act. Judgement was entered in favor of the Respondent.
7. The Appellant, being dissatisfied by the judgement, lodged an appeal on the following grounds:
 - i. The learned Magistrate erred in law and fact in holding that the Appellant was liable to satisfy the judgement delivered in CMCC No. 1464 of 2018 and ordering the Appellant to satisfy the said judgement plus cost in total disregard to the provisions of section 5 and 10 of the Insurance (Motor Vehicle Third Party Risks) Act and under the insurance policy;
 - ii. That the learned Magistrates judgement be rendered/ delivered per incuriam;
 - iii. That the learned Magistrate erred in law in making a finding of damages against the Defendant;
 - iv. That the Learned Trial Magistrate erred in over relying on the evidence of the Respondent which was not corroborated and thus misdirected himself in making a finding against the Appellant;
 - v. That the learned trial Magistrate erred in awarding Kshs 3,154,953.50 for damages that exceed three million contrary to section 5 of the Insurance (Motor Vehicle Third Party Risks) Act and under the insurance policy;
 - vi. That the learned trial Magistrate erred in law and fact when she misapplied the provisions of section 10 of the Insurance (Motor Vehicle Third Party Risks) Act in ruling that the Plaintiff had fully complied with the said provision despite failure to prove service of the statutory notice within the set timelines within the said Act;
 - vii. That the learned trial Magistrate erred in holding that the Respondent has proved its case;
 - viii. That the learned trial Magistrate erred in fact and in law by failing to appreciate the scarcity of evidence tendered by the Appellant with regard to the service of statutory notice, legality of the certificate of insurance and liability;
 - ix. That the learned trial Magistrate erred in fact and law in holding that the Respondent is entitled to the reliefs sought;



- x. That the learned trial Magistrate erred in failing to consider or properly consider the written submissions filed by counsel for the defendant/Appellant and to case precedents of senior courts before it;
 - xi. That the learned trial Magistrate erred in finding that the issues raised by the Appellant in his statement of defence especially the issue of no proof of service of the statutory notice upon the Defendant/Appellant had not been proved;
 - xii. That the learned trial magistrate erred in law and fact by awarding costs to the Respondent;
8. Directions were given to canvass the appeal by way of written submissions. The Appellant filed their submissions dated 13 October 2023, while the Respondent's submissions are dated 5th March 2024.
9. I have considered the Memorandum of Appeal and Record of Appeal. The issues for determination are:
- i. Whether there was service of the statutory notice as provided under section 10 (2) (a);
 - ii. Whether the Appellant is liable to pay any sums exceeding Kshs 3 million.

Analysis & Determination

10. This being the first appeal, it is this court's duty under Section 78 of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya, to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion, taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123.
11. Regarding the issue of service, section 10 of the Act stipulates the duty of insurer to satisfy judgement against persons insured. Section 10 (2) (a) provides that:
- No sum shall be payable by an insurer under the foregoing provisions of this section in respect of any judgement, unless before or within 30 days of the commencement of the proceedings in which the judgement was given, the insurer had notice of the bringing of the proceedings.
12. In its judgement, the trial court noted that the Respondent had adduced evidence to the effect that a statutory notice was served upon the Appellant through his counsel prior to the commencement of the suit. The court also noted that there was evidence of duly acknowledged correspondence between the Respondent's counsel and the Appellant's legal department in relation to the primary suit and a demand of payment of the decretal sum, failure to which a declaratory suit would ensue.
13. The Appellant submitted that since the primary suit (Mavoko Civil Cause No. 1464 of 2018) commenced in 2018, it is expected that the statutory notice should have been served on the Appellant either prior to the initiation of the suit or within 14 days of its commencement. The documents presented by the Respondent were the Demand Letter dated 26 February 2020 and Statutory Notice dated 16 July 2021.
14. On this issue, the Respondent submitted that the issue of serving a statutory notice upon the Appellant before and after filing the primary suit are legal technicalities of procedure which cannot remove a litigant from the seat of justice. The Respondent clung onto the provisions of Article 159(2)(d) of *The Constitution* that stipulates that justice shall be administered without undue regard to procedural



technicalities. The Respondent submitted that the Appellant is relying on a technicality, being the failure to file and serve the statutory notice on or before the institution of the primary suit.

15. From the foregoing, it is clear that the Respondent only served the notice upon the Appellant prior to the declaratory suit, and not the primary suit. Although the Appellant disputed the mode of service of the notice, the main issue herein is whether or not the failure to serve the statutory notice prior to the commencement of the primary exonerates the Appellant from liability in this claim.
16. In my considered view, the provisions of section 10(2)(a) are substantive legal provisions and not procedural requirements as argued by the Respondent. This provision serves to ensure that a third party who has suffered injury or loss due to the acts or omissions on the part of an insured motor vehicle is assured of compensation in the event that the owner or driver of the insured motor vehicle is unable to settle the claim. One cannot hide behind constitutional provisions on procedural technicalities to circumvent a substantive legal requirement.
17. In this instance, where the notice was not served prior to the commencement of the primary suit or within 14 days of the suit being filed, then the insurer is by statute absolved from any liability. The service of the notice is a legal requirement upon the Respondent, and, therefore, an obligation that cannot simply be wished away. This was well enunciated in the case of John Langa -vs- Kipkomo Terer & 2 Others; Kisumu HC Civil Appeal No 21 of 2013 where the court stated:

“The court is enjoined to not only protect *the Constitution* but all laws enacted by Parliament.”

18. In view of the foregoing, this court comes to the inevitable conclusion that the trial court erred in its interpretation of the provisions of section 10(2)(a) of the Insurance (Motor Vehicle Third Party Risks) Act. Consequently, this court makes the following orders:
 - i. The Appeal is allowed;
 - ii. The judgment delivered by Hon. R. Gitau in Mavoko CMCC No. 618 of 2021 is hereby set aside
 - iii. Bearing in mind the outcome of this appeal, each party shall bear its own costs.

DATED AND DELIVERED AT MACHAKOS THIS 26 DAY OF SEP 2024.

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

N/A for the Appellant

Masika..... for the Respondent

