



Occidental Insurance Co. Ltd v Korir (Suing on Behalf of the Late Simon Kiprono Cheruiyot – Deceased) (Civil Appeal 53 of 2022) [2024] KEHC 11249 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11249 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL 53 OF 2022
JR KARANJA, J
SEPTEMBER 26, 2024**

BETWEEN

OCCIDENTAL INSURANCE CO. LTD APPELLANT

AND

EMILY CHERTOTCH KORIR (SUING ON BEHALF OF THE LATE SIMON KIPRONO CHERUIYOT –DECEASED) RESPONDENT

JUDGMENT

1. The Appellant, Occidental Insurance Co. Ltd was the Defendant in Kericho CMCC NO 23 of 2018, in which it was sued by the Respondent, Emily Cherotich Korir, in her capacity as the personal representative of the estate of the late Simon Kiprono Cheruiyot (deceased) who passed away on the 18th March, 2015 due to fatal injuries sustained in a road traffic accident which occurred on the same day.
2. In the plaint dated the 19th January, 2017 the Respondent/Plaintiff pleaded that as a result of the accident and the demise of her deceased husband she instituted Kericho CMCC NO. 8 of 2016 against the owner and driver of motor vehicle registration No. KBL 037E Mitsubishi canter which hit the deceased and occasioned him fatal injuries. The owner of the vehicle was said to be one Professor Onyango Ogembo and that he had insured the vehicle which the Appellant insurance Company vide Policy No TP/08/6784/M/04.
3. It was also pleaded by the Respondent that the suit (i.e Kericho CMCC No. 8 of 2016) was finalized in her favour on the 27th June, 2017 with judgement being entered against the owner and driver of the ill-fated vehicle for loss and damages in the total amount of Ksh, 2,724,000/= together with costs and interest.
4. The Respondent further pleaded and contended that the Appellant, being the insurer of the vehicle and the owner of the vehicle Professor Onyango Ogembo being the Appellant's insured was bound to



make good the judgement amount on behalf of its said insured necessary notices having been issued to itself pursuant to Section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act*, (Cap 405 of the Laws of Kenya).

5. The Respondent contended that despite demand made and notice of interest to sue having been given, the Appellant ignored and/or failed to make good the Respondent's claim. The Respondent therefore prayed for Judgement against the Appellant whose defence was a denial of the claim and a contention that the alleged owner of the motor vehicle one Professor Onyango Ogembo was not its insured in respect of the material motor vehicle. Further, that there existed no policy of insurance or any insurance contract between the Appellant and the alleged insured.
6. At the trial, evidence was led by both the Appellant and the Respondent in support of their respective pleadings for and against the claim. Thereafter, the trial court rendered its judgement upholding the claim in favour of the Respondent/Plaintiff against the Appellant/Defendant.

Being dissatisfied, the Appellant proffered four (4) grounds of appeal as set out in the memorandum of appeal dated the 12th October, 2022.

7. The Appellant's complaint was basically that the impugned judgement was against the weight of the evidence in that the Trial Court disregarded the evidence on record thereby failing to appreciate the Appellant's evidence. Further, that the Trial Court determined issues which were not raised by the parties and failed to give reasons for its decision.
8. At the hearing of the appeal which was by way of written submissions, the Appellant was represented by the learned counsel Mr. P.R. Ojala, while learned counsel M/s Kirui represented the Respondent. Both counsels presented their respective submissions which were given due consideration by this court in the light of the grounds of appeal.
9. The duty of this court was to reconsider the evidence availed before the Trial Court and arrive at its way conclusions bearing in mind that the Trial Court had the advantage of seeing and hearing the witness. In that regard, this court would find that there existed no particular dispute as regards the involvement of a motor vehicle insured by the Appellant in a road accident which claimed the life of the Respondents deceased husband.
10. Indeed, it was adjudged by a competent Court of law that the said motor vehicle registration No. KBL 037E Mitsubishi Canter was on the 18th March, 2015 driven negligently, carelessly and/or carelessly such that it hit and knocked down the pedestrian deceased causing him fatal injuries. There was sufficient and undisputed evidence that the motor vehicle was at the material time insured by the Appellant vide policy No TP/08/6784/M/04. The Appellant's witness Collins Muturi Mwai (DW1) confirmed as much as well as that it was a third party insurance cover thereby falling within the scope of the provisions of the *Insurance (motor vehicle Third party Risks) Act* which is an Act of Parliament to make provision against third party risks arising out of the use of motor vehicles.
11. It's a requirement under Section 4 of the *Act* that Motor vehicles be insured against third party risks.

Thus;- " Subject to this Act, no person shall use or cause or permit Any other person to use a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person on that other person as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirement of this Act."

A third party insurance policy normally covers third parties in case of bodily injury or damage to their property.



12. Indeed, the pedestrian deceased was the third party in the applicable insurance policy and/or contract and for whom the appellant in its final submissions before the Trial Court entered a prayer for “his soul to rest in peace until the second coming of Jesus if he was a righteous person.” At this juncture we can only say “Amen”.
13. What emerged as the bone of contention between the Appellant and the Respondent was whether the material vehicle was insured by the Appellant through its lawful owner who therefore became the person insured under the existing insurance policy or contract against liabilities to third parties. Invariably, the insurance policy/contract would be between the appellant as the “insurer” and the lawful owner of the vehicle as the “insured.”
14. The contention by the Respondent was that the lawful owner of the vehicle, hence the insured, was one Professor Onyango Ogembo. A police abstract was tendered in evidence to confirm the fact. However, the Appellant disputed the fact and contended that the vehicle's ownership was vested in one Sio Onyango Alexander who was the actual insured rather than Professor Onyango Ogembo. The Appellant tendered in evidence a copy of the motor vehicle record from the National Transport and Safety Authority (NTSA) dated 10th April, 2017 which clearly indicated that the said Sio Onyango Alexander, was the lawful owner of the material motor vehicle registration No. KBL 037E since its registration on the 9th April, 2010.
15. It is axiomatic that the record from the NTSA is more authoritative than the police abstract in establishing the actual owner of the material vehicle which in this case was one Sio Onyango Alexander and not one Professor Onyango Ogembo. It would therefore follow that the material insurance policy/contract was between the appellant as the insurer and Sio Onyango Alexander as the insured. Indeed, this was clearly established and proved by the documentary evidence availed by the Appellant in the Trial Court in the form of the relevant policy document and policy renewal receipts.
16. Most unfortunately for the respondent the person she considered and treated as being the owner of the ill-fated vehicle was not the appellant's insured. Therefore, the Appellant was not under any obligation to make good the judgement which was made against Professor Onyango Ogembo who was not its insured, but a stranger.

As it were, the Respondent sued the wrong party for damages and expected to be compensated through his insurer, but it turned out that the party was not the insured.
17. This declaratory suit against the Appellant was unmerited as it was clear from the evidence that the Respondent had no case of action against the appellant on the basis of the material insurance policy and/or contract. The Appellant could not therefore be called upon to make good a judgement in terms of Section 10 (1) of the *Insurance (Motor Vehicles Third Party Risks) Act*.
18. In the circumstances, this court would find that the impugned judgement of the Trial Court was against the weight of the evidence on record in particular that of the Appellant. In that regard, the Trial Court erred in fact and law in declaring that the Appellant was liable to satisfy the judgement entered in favour of the Respondent.
19. In sum, this appeal is allowed to the extent that the impugned judgement be and is hereby set aside and substituted for a judgement dismissing the Respondent's claim with costs. Each party shall however, bear own costs of the appeal.
20. Ordered accordingly.

DATED AND DELIVERED ON 26TH DAY OF SEPTEMBER, 2024.



J.R. KARANJAH

JUDGE.

In presence of;-

Mr. Ojala for Appellant

M/s Koko for Respondent

Mr. Kibet Court Assistant.

