



**Omutanyi & another (Suing as the legal representatives of Ronald Marocha Oseko - Deceased) v APA Insurance Co Ltd (Civil Appeal E032 of 2022) [2024] KEHC 13563 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13563 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
CIVIL APPEAL E032 OF 2022  
RL KORIR, J  
OCTOBER 31, 2024**

**BETWEEN**

**HILDA ATALI Omutanyi & RICHARD OSEKO (Suing as THE LEGAL REPRESENTATIVES OF RONALD MAROCHA OSEKO - DECEASED) ..... APPELLANT**

**AND**

**APA INSURANCE CO LTD ..... RESPONDENT**

*(Being an Appeal from the Judgment of Principal Magistrate, Kiniale L. at the Principal Magistrate's Court at Bomet, Civil Suit Number 33 of 2019)*

**JUDGMENT**

1. The Appellants (then Plaintiffs) as the legal representative of the deceased Ronald Marocha Oseko, filed a declaratory suit against the Appellant (Defendant) to compel them to pay the decretal sum of Kshs 1,720,000/= as ordered by the court (Bomet Principal Magistrate's Court) in Civil Suit Number 51 of 2015.
2. Both parties called one witness each and closed their cases.
3. In its Judgment delivered on 8th March 2021, the trial court dismissed the declaratory suit.
4. Being aggrieved with the Judgment of the trial court, the Appellants filed their Memorandum of Appeal dated 19th July 2022 appealing against the whole Judgement and relied on the following grounds:-
  - I. That the learned trial Magistrate misdirected herself in law by dismissing the Appellants' suit when there was no dispute that the Defendant had issued a cover vide policy Number P/



AK800/0004998 – COMP in favour of the subject vehicle KBT 087S which was valid at the time of the claim.

- II. That the learned trial Magistrate erred both in law and fact in failing to consider the overwhelming evidence on record that the Respondent had failed to repudiate the Policy and thus could not avoid the claim.
  - III. That the learned trial Magistrate erred both in law and fact by failing to consider the Appellants' submissions and authorities in support thereof.
  - IV. That the learned trial Magistrate misapprehended the principles applicable in declaratory suits of this nature thus occasioning a miscarriage of justice.
  - V. That the learned trial Magistrate erred in law and in fact by failing to properly evaluate the evidence on record thus reaching an erroneous decision.
5. My duty as the 1st appellate court is to re-evaluate and re-examine the evidence in the trial court and come to my own findings and conclusions. See *Selle & Another vs Associated Motor Boat Co. Ltd and Others* (1968) EA 123.

#### **The Plaintiffs'/Appellants' case.**

6. Through their Amended Complaint dated 9th March 2019, the Appellants stated that the deceased (Ronald Marocha Oseko) suffered fatal injuries when he was involved in a road traffic accident on 31st August 2013 while aboard motor vehicle registration number KBT 087S. That the said motor vehicle belonged to Sunday Mososi who was insured by the APA Insurance (Respondent) vide Policy Cover Number P/AK800/0004998-COMP.
7. It was the Appellants' case that they instituted a civil suit (Bomet Principal Magistrate's Court Civil Suit Number 51 of 2015) against the registered owner of the subject motor vehicle for general and special damages for the estate of the deceased. That Judgment was entered against the owner (Sunday Mososi) on 21st December 2016 for Kshs 1,720,000/= and costs of Kshs 224,775/=.
8. The Appellants stated that they had not been paid the decretal sum and this necessitated them to file a declaratory suit against the Respondent for them to fully satisfy the decretal sum.

#### **The Defendant's/Respondent's case**

9. Through its amended Statement of Defence dated 11th April 2019, the Respondent stated that it had filed a disclaimer suit being Kisii CMCC Number 86 of 2015 – APA Insurance Co. Ltd vs Sunday Mososi & Magari Hire Purchase Ltd. That the Chief Magistrate's Court in Kisii entered Judgment in its favour and held that it was not liable to compensate or indemnify the deceased, passengers or relatives of the Appellants arising from the accident that occurred on 31st August 2013.
10. It was the Respondent's case that even if it had insured the subject motor vehicle, they were not served the requisite Notice under section 10(2) of the Insurance (Motor Vehicle Third Party Risks Act). It was its further case that it was not served the Notice of Entry of Judgment as required by the law.
11. As earlier stated, the trial court dismissed the declaratory suit.
12. On 17th October 2023, I directed that this Appeal be canvassed by way of written submissions.



### **The Appellants' submissions.**

13. Through their submissions dated 18th February 2023, the Appellants submitted that the Respondent failed to notify them that they had instituted a declaratory suit contrary to the provisions of section 10(4) of the Insurance (Motor Vehicle Third Party Risks) Act. That failure to serve them the mandatory notice precluded them from benefiting in a declaratory suit and the declaration could not be used as a defence. They relied on *Gateway Insurance Company Limited vs Moses Jaika Luvali* (2008), eKLR, *Corporate Insurance Co. Ltd vs Violet Nabwire Ouma* (2019) eKLR and *Blueshield Insurance Co. Ltd vs Raymond Buuri M'rimberia* (1998) eKLR.
14. It was the Appellant's submission that the Respondent was bound to settle the decree in the primary suit as they could not benefit from the declaratory orders as they had failed to serve the with the mandatory notice as provided for in section 10(4) of the Insurance (Motor Vehicle Third Party Risks) Act.

### **The Respondent's submissions**

15. Through their submissions dated 25th February 2023, the Respondent submitted that they filed declaratory suit repudiating the policy cover as required by the law through Kisii CMCC Number 86 of 2015. It further submitted that section 10(4) of the Insurance (Motor Vehicle Third Party Risks) Act also allows an Insurer to avoid liability if the policy was obtained by non-disclosure of a material fact or by false representation.
16. It was the Respondent's submission that during the trial, DW1 stated that they had served the Notice to the parties informing them of Kisii CMCC Number 86 of 2015 and once the Decree was issued, they successfully avoided liability from any claim arising out of the accident. That the decree was still valid and had not been vacated.
17. It was the Respondent's submission that it could not be compelled to settle the decretal amount in the primary suit as they had long obtained the Judgement in the disclaimer suit being Kisii CMCC Number 86 of 2015 which exonerated it from any liability arising out of the accident. That it would be an injustice if it were compelled to pay the decretal sum.
18. The Respondent submitted that the Appellants failed to prove in the trial court that the disclaimer suit was in breach of section 10 of the Insurance (Motor Vehicle Third Party Risks) Act.
19. It was the Respondent's submission that the Judgement in Kisii CMCC Number 86 of 2015 was final and binding and it settled the parties' rights with finality. It relied on section 44 of the *Evidence Act*, *Silas Make Otuke vs Attorney General & 3 others* (2014) eKLR and *APA Insurance Limited vs Gabriel Opondo Ogenga* (suing as the legal representative of Jane Akinyi Saida- Deceased) (2018) eKLR.
20. I have gone through and carefully considered the Record of Appeal dated 3rd August 2022, the Appellants' written submissions dated 18th February 2023 and the Respondent's written submissions dated 25th February 2023. The sole issue for my determination was whether the Appeal has merit.

### **Analysis**

21. The Respondent (APA Insurance) had insured motor vehicle registration number KBT 087S belonging to Sunday Mososi through Policy Number P/AK800/0004998-COMP. The said motor vehicle was involved in a road traffic accident on 31st August 2013 which caused fatal injuries to Ronald Marocha Oseko.



22. The Appellants who were relatives of the deceased brought a civil suit being Bomet Principal Magistrate's Court Civil Suit Number 51 of 2015 on 15th July 2015 against the registered owner of the subject vehicle, Sunday Mososi. The matter was concluded and the trial court issued a Judgement dated and delivered on 21st December 2016. Richard Oseko (PW1) produced a Decree as P.Exh 2 and it showed that the trial court had awarded them the total decretal sum of Kshs 1,893,500/= being the sum of general damages, special damages and interest. The Decree was issued on 13th February 2019.
23. When the decretal sum was not satisfied, the Appellants filed a declaratory suit being Bomet Principal Magistrate's Court Civil Suit Number 33 of 2019 (now the subject of this Appeal) which sought to compel the Respondent to settle the decretal sum as awarded in Bomet Principal Magistrate's Court Civil Suit Number 51 of 2015.
24. Judith Onyango (DW1) who was the Respondent's legal officer stated that they had filed a disclaimer suit being Kisii CMCC Number 86 of 2015 – APA Insurance Limited vs Sunday Mososi and Magari Hire Purchase Limited. The court issued a Judgment to the effect that they were not liable to pay any claims that arose from the accident that occurred on 31st August 2013. She produced the Decree as D.Exh 6 and the same shows that it was issued on 3rd May 2016. From the evidence on record, the Plaintiff was dated on 16th January 2015 and filed on 4th March 2015. The Decree (D. Exh 6) was issued on 3rd May 2016.
25. From the above analysis, it is clear that the disclaimer suit (Kisii Chief Magistrate's Court Civil Suit Number 86 of 2015) was filed in between the institution of the primary suit (Bomet Principal Magistrate's Court Civil Suit Number 51 of 2015) and the declaratory suit (Bomet Principal Magistrate's Court Civil Suit Number 33 of 2019).
26. I have looked at the exhibits produced by Judith Onyango (DW2) being the pleadings in Kisii CMCC Number 86 of 2015 as D.Exh 1-6. I have noted that the parties were the Respondent (APA Insurance) and the joint owners of the subject motor vehicle, Sunday Mososi and Magari Hire Purchase Limited. I have also noted that the joint owners failed to enter appearance and an interlocutory Judgement was entered against them.
27. For clarity of purpose, I shall reproduce the orders s contained in the Decree (D. Exh 6) issued on 3rd May 2016:-
  - i. That the Defendants herein be and are hereby declared to be in breach of fundamental terms and conditionality of the policy instrument and licensing terms and traffic laws, prohibiting carrying of excess passengers and/or use of the subject motor vehicle thus the Plaintiff is not liable to compensate and/or indemnify the deceased/passengers/relatives or the Defendants from the accident arising on the 31st day of August 2013.
  - ii. That the Defendants be and are hereby declared personally, jointly and severally liable to settle the claims arising from the accident herein and/or bear own loss from the accident arising on the 31st day of August 2013.
  - iii. That the Plaintiff be and is hereby declared entitled to full refund by the Defendant if at all the same has settled any claim arising from any suit filed by claimant out of the accident arising on the 31st day of August 2013 in the event the same is constrained under any circumstance to settle any such claim from the repudiated policy.
  - iv. Costs of this awarded to the Plaintiff.
28. The import of the above Judgement was that the Respondent was not liable to settle any claim that arose out of the accident that occurred on 31st August 2013. That further, the registered owners of



the motor vehicle registration number KBT 087S that was involved in the accident were to be held personally or jointly liable for any claims that arose out of the accident.

29. I have gone through the trial court record and there was no evidence to suggest that the Judgement in Kisii CMCC Number 86 of 2015 has been appealed or set aside. I therefore agree with the Respondent that this Judgement was valid and in force.

30. The Appellant submitted extensively on the issue of the Respondent's failure to serve them with the mandatory notice as per section 10 (4) of the Insurance (Motor Vehicle Third Party Risks) Act before instituting their disclaimer suit (Kisii CMCC Number 86 of 2015) and as such it was precluded them from enjoying the orders of escaping liability. Section 10 (4) of the Insurance (Motor Vehicle Third Party Risks) Act provides:-

No sum shall be payable by an insurer under the foregoing provisions of this section if in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto.

31. In my view, the issue of whether the Respondent served the Appellant with the requisite notice as envisaged under section 10 (4) of the Insurance (Motor Vehicle Third Party Risks) Act can only be determined in an Appeal of the disclaimer suit being Kisii CMCC Number 86 of 2015. This would allow the Appellate Court to examine the trial court file, analyse it and make a proper determination. Suffice to say, such an Appeal is not before this court. What is before this court is the Appeal on the trial court's decision to dismiss the Appellant's declaratory suit being Bomet Principal Magistrate's Court Civil Suit Number 33 of 2019.

32. The Respondent had submitted that the Judgment in the disclaimer suit produced in the declaratory suit as (D.Exh 6) under section 44 of the Evidence Act acted as conclusive proof that the dispute had been settled as to who was to settle the claims that arose from the accident. Section 44 of the Evidence Act provides:-

(1) A final judgment, order or decree of a competent court which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is admissible when the existence of any such legal character, or the title of any such person to any such thing, is admissible.

(2) Such judgment, order or decree is conclusive proof—

(a) that any legal character which it confers accrued at the time when such judgment, order or decree came into operation;



- (b) that any legal character to which it declares any such person to be entitled accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person;
- (c) that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease;
- (d) that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property.

33. From the above section of the law, it is my finding that there is a Judgment on the legal character of the Respondent as a decree holder.

34. In discussing Judgements in rem as envisaged under section 44 of the *Evidence Act*, the Court of Appeal in *National Land Commission vs Registered Trustee of the Arya Pratinidhi Sabha, Eastern Africa & another* (2019) eKLR held:-

“.....The Black’s Law Dictionary, 9th Edition defines a judgment in rem as;

“An action in rem is one in which the judgment of the Court determines the title to the property and the rights of the parties, not merely as between themselves, but also as against all persons at any time dealing with them or with the property upon which the court had adjudicated.”

To expound further, a decision in rem was discussed in *Kamunyu & Others v Attorney General & Others* (2007) 1 EA 116 as follows;

“In a suit seeking judgement in rem, that is a judgement applicable to the whole world, an individual does not sue on behalf of the whole world, but sues for judgement which is effective against the whole world. In other words, in the present case, the appellants when successful in the suit obtain judgement, which is effective against the whole world but does not confer benefits upon the whole world.”

35. Similarly, *Odunga J. (as he then was) in Abukar G Mohamed vs Independent Electoral and Boundaries Commission* (2017) eKLR held:-

“Similarly in *Japheth Nzila Muangi vs. Kenya Safari Lodges & Hotels Ltd* [2008] eKLR it was held:

“It is trite law that ordinarily a judgement binds only the parties to it. This is known as Judgement in personam. A judgement may also be conclusive not only against the parties to it but also against all the world. This is known as a judgement in rem. This is a judgement which declares, defines or otherwise determines the status of a person or of a thing i.e. the jural relation of the person or thing to the world generally.”

I am also alive to the decision in *Pattni vs. Ali & Anor* (Isle of Mann (Staff of Government Division) [2006] UKPC 51 in which reliance was sought from *Jowitt’s Dictionary of English Law* (2nd Edn.) p. 1025-6 to the effect that:

“A judgement in rem is an adjudication pronounced upon the status of some particular subject-matter by a tribunal having competent authority for that purpose. Such an adjudication being a solemn declaration from the proper and accredited quarter that the



status of the thing adjudicated upon is also declared by the adjudication...So a declaration of legitimacy is in effect a judgement in rem.”

36. This however does not preclude Judgements in rem from being challenged either by way of an appeal or a review. I concur with Muya J. and Meoli J. in *Silas Make Otuke vs Attorney General & 3 others* (2014) eKLR where they held:-

“In our view, however, the provisions of section 44 of the *Evidence Act* create a rule of evidence as to admissibility and proof existence of a judgment in rem giving effect to the conclusive character of such a judgment on the legal character or entitlement of a person as at the time of the judgment. It does not preclude such a judgment from being set aside on appeal or review under the applicable rules of the Court.”

37. From the above and as shown earlier, the Appellants were not parties in the disclaimer suit (Kisii CMCC Civil Suit Number 86 of 2015) but were bound by the Judgment in that they could not seek compensation from the Respondent. The insured who was a party could however have challenged that judgement.

38. In the final analysis, I agree with the trial court that until the Judgment in the disclaimer suit was appealed, reviewed or set aside, the said Judgment was in force and the trial court could not render a decision in which a court of similar jurisdiction (Magistrate’s Court) had already rendered Judgment upon. The trial court was also correct in finding that the Appellants’ recourse lay with the insured appealing the Judgment in the disclaimer suit or by the Appellants pursuing the registered owners of the subject motor vehicle for full settlement of the decree which they (Appellants) already hold.

39. In the end, the Appeal dated 19th July 2022 has no merit and is dismissed. Each party shall bear their own costs in the Appeal as well as in the declaratory suit as ordered by the trial court.

**JUDGEMENT DELIVERED, DATED AND SIGNED THIS 31ST DAY OF OCTOBER, 2024.**

**R. LAGAT-KORIR**

**JUDGE**

Judgement delivered in the absence of the parties and Siele (Court Assistant).

