



**Kibera v Kenyan Alliance Insurance Company; Momentum Credit Limited (Interested Party)
(Civil Appeal E014 of 2024) [2024] KEHC 16383 (KLR) (18 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16383 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E014 OF 2024
S MBUNGI, J
DECEMBER 18, 2024**

BETWEEN

FREDRICK KIMTAI KIBERA APPELLANT

AND

KENYAN ALLIANCE INSURANCE COMPANY RESPONDENT

AND

MOMENTUM CREDIT LIMITED INTERESTED PARTY

(Being an appeal from the Judgment of small Claims Court of Kenya at Kakamega by Hon. Gladys. W. Kiamah dated 26th January 2024 in SCCC no. E305 of 2023, a declaratory suit arising from Kakamega SCCC No. E210 of 2023 judgment delivered on 29th September 2023 by Hon. Caroline Cheruiyot)

JUDGMENT

1. The Appellant herein filed a declaratory suit before the Small Claims Court against the Respondent following a judgement in the subordinate court in Kakamega CMCC No. 210 of 2023. The interested party was enjoined before the small claims court at Kakamega upon the Small Claims Court's direction. The said declaratory suit arises from a civil suit where judgment was entered against the Appellant arising from an alleged accident which occurred on or about 5th March 2023.
2. As a result, the Appellant sued the Respondent hereto for a declaration against the Respondent for the satisfaction of the award made in Kakamega SCCC No. 210 of 2023 of Kshs. 1,000,000/= together with costs thereto.
3. The suit before the Small Claims Court was heard pursuant to the provisions of Section 30 of the *Small Claims Court Act* by way of production of documents and the parties therein file their written submissions. After considering the documents filed by the Appellant and the Respondents hereto



and the submissions filed by both parties, the trial Court dismissed the suit and the Respondent was awarded costs of the suit.

4. Being aggrieved by the said Judgment, the appellant filed a memorandum of appeal on the following grounds:
 - a. The learned trial magistrate erred in law and fact to evaluate the evidence tendered by both the appellant and the respondent thereby arriving at a wrong conclusion.
 - b. The learned trial magistrate erred in law and fact by not considering the fact that the appellant had indeed been issued with an insurance policy facility by the 2nd respondent on behalf of the 1st respondent thus occasioning the appellant a miscarriage of justice.
 - c. The Learned Trial Magistrate erred in law fact by not finding that indeed the interested party after issuing an Insurance Policy facility for Kshs. 49,748.39/= to the Appellant (as observed on page 4 of the judgment) failed to issue the cover sticker.
 - d. The Learned Trial Magistrate erred in law and fact by not making a finding that valuation of the motor vehicle was done prior to the payment of the premium and not thereafter.
 - e. The Learned Trial Magistrate erred in law by finding that the motor vehicle had not been covered at the time of the accident when the Appellant had paid the premium as evidenced by the mobile number of Dennis Odeng (employee appearing on the insurance sticker).
 - f. The Learned Trial Magistrate erred in law by not considering the standard of proof in such matters hence arriving at a wrong principle of Law.
5. The appellant prayed that the appeal be allowed, the judgment and decree in the small claims court be set aside, and costs of the appeal be awarded to the Appellant.
6. The court directed that the appeal be canvassed by way of written submissions.

Appellant's Case.

7. The appellant filed submissions dated 03.06.2023 and identified three key issues of determination:
 - i. Whether the plaintiff had a valid insurance policy /contract with the defendant when the accident occurred.
 - ii. Whether the section 10(2) and (4) of Insurance Policy cap. 405 was complied with by the insurer and interested party insurance brokers in the primary suit.
 - iii. Whether the respondent and the interested party followed due process in withholding/cancellation of policy cover (if it was cancelled) before the accident on 5th March, 2024 occurred.
8. On the 1st issue, the appellant submitted that there was a valid insurance policy/contract between the plaintiff and the defendant when the accident occurred on 05.03.2023 involving the plaintiff's motor vehicle number KBX 519H. He submitted that in support of this, the premium payments of Kshs. 49,748.39/- and insurance policy No. MPI/DN/POL / 183334(COMP) were produced as exhibits by the appellant in the trial court and the same was valid from 17th May, 2022 to 16th May, 2023.
9. On issue (2), the appellant submitted that he received judgment from the primary suit (SCCC E210 of 2023), and he had submitted the statutory notice to the respondent in compliance with section 10(2) of the act before the commencement of the primary suit. He submitted that despite the respondent



- being aware of the suit, the respondent only participated in the declaratory suit 8 months after it had been instituted. Further, he averred that despite being served with the statutory notice, the respondent neither responded, challenged the contents thereof nor sought a declaration in the primary suit. He referred the court to the case of *Kenindia Assurance Co. Ltd v Joseph Amudanyi* (2010) eKLR.
10. On issue (3), the appellant submitted that he indicated in the trial court that on 10.08.2022 he wrote an email to the respondent through the interested party insurance brokers enquiring about the status of the insurance cover of the suit motor vehicle. He submitted that he received a response from the interested party, that the vehicle cover was still on cover due to a pending loan between the Appellant and the interested party hence at the time of accident (5th March 2023) the cover was on and the defendant did communicate by an official letter to the insurer that the cover was cancelled so that the Appellant could go ahead and obtain from a different insurance.
 11. He averred that the respondents relied on an unsigned email by the interested party that they had informed the appellant that he needed to repair his vehicle for the annual sticker to be issued but remained mum on the issue of the payments made to them by the interested party.
 12. The appellant further submitted that the respondent did not issue notices within 14 days before the commencement of the primary suit notifying them of its intention to avoid the claim through a declaratory suit by specifying the material non-disclosure of false representation made by their insured and placed reliance on the case of *Britam General Insurance Co.(Kenya) Limited v Josephat Ondick* (2018) eKLR.
 13. The appellant averred that the suit herein is a declaratory suit, brought under the provisions of the *Insurance (Motor Vehicles Third Party Risks) Act*, and the respondent (an insurance company) ought to settle the decree for an award of damages of Kshs. 1,000,000/- entered against the appellant who at the material time was insured by the defendant in Kakamega SCCC No.210 of 2023.
 14. The appellant filed supplementary submissions dated 01.10.2024 and submitted further supplementary issues for determination as follows:
 - i. Whether service of third party notice was necessary.
 - ii. Whether there are consequences of a party failure to enter appearance.
 - iii. Whether upon payment of premium for an insurance policy makes a policy valid.
 - iv. What effect does a declaration suit have on the Respondent?
 - v. Whether the Learned Magistrate correctly captured the contents of police abstract as crucial evidence before her.
 - vi. Whether the insurance policy was properly cancelled (if it was at all cancelled)
 - vii. Whether the Appellant had a valid insurance policy with the Respondents
 15. On whether service of third party notice to the respondent was necessary, the appellant submitted positively; stating that as per the provisions of Order 1 of the *Civil Procedure Act* and Rule 15, the appellant notified the insurance company of the suit proceedings to which they were supposed to indemnify the appellant and or contribute as the court would have directed since there existed an insurance cover between the parties.
 16. The appellant submitted that as per Order 1 Rule 17 of the Civil Procedure Rules, the consequences of 3rd party who doesn't enter appearance in the suit after duly being served with notice dictates that



the party shall be deemed to admit the validity of the decree obtained against them whether obtained by consent or otherwise.

17. It was the appellant's submission that he paid the premium of Kshs. 49,748.39/- paid by the interested party to the respondent on behalf of the appellant, hence the appellant had subscribed to the insurance policy and was duly insured by the respondent for the period as of 17.05.2022 to 16.05.2023.
18. The appellant averred that it was necessary for him to make a declaratory suit against the respondent so as to compel the respondent to settle the awarded relief in SCCC No. E210 of 2023 as per the provisions of section 10 of the *Insurance Act* (Motor vehicle third party Risk)
19. Further, he submitted that the claimant in the primary suit SCCC No. E210 of 2023 provided the police abstract indicating the period of the cover, ownership of the suit vehicle, policy number stamped and signed by a police officer just like the appellant. The appellant submits the police officer stated that the windscreen of the suit vehicle was missing and hence he could not find the sticker, and the details were then provided by the appellant.
20. To add on this, the appellant submitted that despite the respondent's claim that the cover ended, it was undisputed that they never gave 21 days' notice of cancellation as required under clause 11 of the policy document.
21. Lastly, the appellant submitted that he had a valid insurance policy with the respondent. In support of this averment, he stated that he had a long standing relationship with the 3rd party by virtue of loans both normal and IPF dating back to 2021 when the interested party provided cover for the suit vehicle from 15.05.2021 to 16.05.2022 through Geminia Insurance Company. The interested party further renewed the cover thereafter and the respondents also did not dispute this fact but averred that they issued cover for three months. He further stated that the respondent could not have renewed the policy without payment of premium since that would have contravened section 156(1) of the *Insurance Act*.

Respondent's Case.

22. Vide submissions dated 29.07.2024, the respondent isolated the main issue for determination as whether the claimant had a valid insurance cover by the respondent in favor of the Claimant by the Respondent hereto.
23. The respondent submitted that the appellant did not have a valid insurance cover at the time of the accident and further the certificate of Insurance produced by the appellant in court clearly indicated that the cover expired on 16.06.2022. the respondent averred that the appellant further renewed the cover with the respondent twice, the last one having expired on 12.08.2022 thus the respondent was not liable to settle the judgment award in SCCC E210 of 2023.
24. It was the respondent's submission that the appellant failed to prove his case on a balance of probabilities as no evidence was adduced by the appellant to suggest that the respondent was on cover at the time of the accident. Moreover, the appellant did not even produce a copy of the Certificate of Insurance for the period to support his claim.
25. Also, the respondent submitted that since it was the appellant who alleged that there was a breach of statutory duty on the part of the respondent, the burden of proof fell on the appellant and in failing to do so, the suit was dismissed. The respondent's counsel cited the case of *Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another* (2005) 1 EA 334.



26. The respondent averred that the claimant testified that he had sold the suit motor vehicle to one John Oduor in December 2022 but did not produce evidence in support of the assertion that the premium to Kenya Alliance had been paid by Momentum Credit.
27. Lastly, the respondent submitted that the interested party filed an affidavit in the trial court and confirmed that they were not aware who the appellant's insurer was at the time of the accident. The third party affirmed that indeed there was an application for the annual insurance cover but the respondent refused to give the same on account that the motor vehicle was defective. This withstanding, it was their submission that the appellant could not purport that the premiums were paid by the interested party of Kshs. 49,748.39/- when the interested party confirmed that no premium was paid to the respondent.

Analysis.

28. This being a first appeal, this court is under a duty to re-evaluate and re assess the evidence and make its own conclusions. It must, however, keep in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows:

“...This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way...”

29. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of 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...”

30. I have looked at the memorandum of appeal, the submissions by both parties, the proceedings from the lower court and the trial court's judgment.
31. I have also looked at the issues of determination as submitted by the parties. I agree with the respondent. The only issue for determination is whether there was a valid insurance cover offered by the respondent to the appellant in place at the time of the accident on 05.03.2023.
32. Determination of this issue will completely resolve other issued as submitted by the parties.

Determination

33. The legal burden of proof fell on the appellant in the trial court and also in this appeal.



34. Section 107 of the *Evidence Act*, Section 109 and Section 112 of the *Evidence Act* were dealt with in the case of Anne Wambui Ndiritu -vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, in which the Court of Appeal held that:

“As a general proposition under Section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

35. Similarly, in WILLIAM KABOGO GITAU -VS- GEORGE THUO & 2 OTHERS [2010] 11 KLE 526 it was stated that:

“In ordinary civil cases a case may be determined in favor of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

36. The appellant’s case is that at the time of the accident on 05.03.2023, his vehicle had a valid insurance cover No. MPI/DN/POL / 183334(COMP) issued by the respondent (Kenya Alliance Insurance Company) who were paid the insurance premium by the interested party whom he had the insurance premium finance agreement.

37. Pursuant to that insurance premium finance agreement, the interested party advanced to him Kshs. 49,748.39/- as a loan which was paid directly to the respondent by the interested party. As per the insurance premium finance agreement, he had already paid the loan and thus he knew his motor vehicle was on full insurance cover from 17th May, 2022 to 16th May, 2023.

38. The respondent admits having issued insurance cover to the appellant through the interested party. The first one No. C25588758 commencing on 13.07.2022 and expiring on 12.08.2022. a second one No. C25294391 commencing on 17.05.2022 and expiring on 16.06.2022 and declined to issue further insurance cover for the appellant refused to make repairs to his motor vehicle number KBX 519H.

39. The appellant did produce insurance covers for the period stated by the respondent in paragraph 38 but failed to produce any insurance cover issued by the respondent covering his motor vehicle on the date of the accident.

40. Further, the appellant did not produce the policy agreement document of Policy No. MPI/DN/POL / 183334(COMP) for the court to ascertain the terms and conditions of the policy.

41. In rebuttal, the respondent produced an extract from the Insurance Regulatory Authority portal which shows that the 1st cover in favor of the Claimant lapsed on the 16th June 2022 and was later renewed and lapsed on 12th July 2022 and it was finally renewed for another one month and lapsed on 12th August 2022 which is way before the date of the Accident.

42. The portal also showed that:

- a. The Claimant's vehicle was on cover by African Marchant Assurance Company Limited between 23.12.2023 to 22.1.2023



- b. That the Claimant's cover was later renewed by the said African Merchant Assurance Company Limited between 25.01.2023 to 24.02.2023
- c. That the Claimant's Cover was later renewed through Trident Insurance Company Limited on 2 further occasions.
43. I have also looked at the insurance premium finance agreement between the appellant and the interested party. I did not see any clause restricting the interested party on where to source insurance cover on behalf of the appellant. Similarly, I have not seen any clause saying that the loan advanced to the appellant was to be paid to the respondent or was paid to the respondent. Further the interested party despite being ordered by the trial court, did not produce any evidence to show that it paid any money to the respondent as premium for the respondent to issue an insurance cover to the appellant for the disputed period and I think this is why the interested party during the trial in the lower court said it could not tell whether the appellant's motor vehicle had insurance cover or not at the time of the accident.
44. The above observations make me find that the trial court was not wrong in finding that there was no valid insurance cover issued by the respondent to cover the appellant's motor vehicle during the time of the accident thus the respondent cannot be compelled to satisfy the judgment given in SCCC No. E210 of 2023 under the provisions of section 10 of the *Insurance Act* (Motor vehicle third party Risk).
45. Therefore, this also means there being no contractual (insurance) relationship between the appellant and the respondent, the respondent had no business in taking out third party proceedings in the lower court's trial in SCCC no. E305 of 2023 against the interested party as submitted by the appellant.
46. To me, the only remedy available to the appellant on a balance of probability is to sue those he had contracted to arrange insurance cover for his motor vehicle. I note in the lower court file the appellant never sought any specific prayers against the interested party. In fact, he had not sued the interested party. It is only the court which brought in the interested party but no specific reliefs were prayed from the interested party. Therefore, as an appellate court I cannot make any specific orders against the interested party.
47. Before I pen off, it seems the appellant relied on details contained in the police abstract. A police abstract is a public document issued by a public officer so per say, the details contained therein are admissible as evidence as per section 38 of the *evidence act* but can only be taken as the gospel truth if not contested. In this case, in the trial court the police officer who testified told the court that the windscreen of the motor vehicle KBX 519H where normally insurance covers are affixed, was missing. He only relied on the words of the appellant. The respondent in rebuttal, has produced records from Insurance Regulatory Authority which have disapproved the contents of the police abstract.
48. In conclusion, I do find that the appeal has no merit. The same is dismissed with costs to the respondent. The interested party did not participate in the appeal.
49. Right of appeal 30 days explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 18TH DAY OF DECEMBER, 2024.

S.N MBUNGI

JUDGE

In the presence of :



Ms. Nafula for the respondent present online

Fredrick Kibera appellant present online

Kitonyi for the interested party present online

Court Assistant – Elizabeth Angong'a

