



REPUBLIC OF KENYA



KENYA LAW
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**Ndombi v Kenya Orient Insurance Company Ltd (Civil Appeal
E009 of 2020) [2023] KEHC 604 (KLR) (30 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 604 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E009 OF 2020**

OA SEWE, J

JANUARY 30, 2023

BETWEEN

JOB WAMALWA NDOMBI APPELLANT

AND

KENYA ORIENT INSURANCE COMPANY LTD RESPONDENT

*(Being an Appeal of the whole Judgment delivered by Hon. J. Nyariki
at Mombasa on the 6th October, 2020 in Civil Suit No. 882 of 2019)*

JUDGMENT

1. This appeal arises from the decision of the lower court in Mombasa CMCC No. 882 of 2019: Job Wamalwa Ndombi v Kenya Orient Insurance Company Limited. The appellant had sued the respondent in that suit seeking a declaratory judgment compelling the respondent to pay Kshs. 100,000/= pursuant to Section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act*, Chapter 405 of the Laws of Kenya, in addition to costs and interest. The appellant's cause of action was that, on or about the 30th December 2017 at around 5.20 a.m. while walking along Miritini road in KCC Miritini area, he was knocked by Motor Vehicle Registration No. KCN 249D, Toyota Station Wagon, and thereby sustained serious bodily injuries.
2. Consequently, the appellant sued the owner of the subject motor vehicle in Mombasa CMCC No. 773 of 2018: Job Wamalwa Ndombi v Ibrahim Ndung'u Gikonyo for compensation in tort and was awarded an all-inclusive amount of Kshs. 100,000/=. Thereupon, the appellant filed Mombasa CMCC No. 882 of 2019 pursuant to Section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act*, on the ground that the respondent insured the suit motor vehicle against such perils as befell him vide Policy No. MSA/0700/232349/217-COMP. The claim was, however, resisted by the respondent. In its Defence dated 21st June 2019, the respondent denied having issued the cover in issue and put the appellant to strict proof. It further contended in the alternative that, if at all there was in circulation



an insurance sticker or certificate indicating that it had insured Motor Vehicle Registration No. KCN 249D then it would plead non est factum as the same must have been forged.

3. Upon hearing the parties, Hon. Nyariki, RM, rendered his judgment thus:

“...I have analyzed the Plaintiff’s case and his list of documents. Among them is a Police Abstract dated 9th January, 2018 confirming the date, time and place of the accident, the name of the Plaintiff as the injured and the motor vehicle in suit as having caused the accident in question and that the same was insured by the Defendant herein under policy number 232349/2017-COMP which was to expire on the 8th October, 2018. This document was marked by the Plaintiff as MFI- 3 but was never produced as an exhibit....

...I find this lack of production of either a copy of a policy sticker or police abstract to be fatal as the Plaintiff has failed to prove liability on the part of the Defendant. The Plaintiff did not produce any document nor call any witness to produce the only document which they intended to link the Defendant with, that being the Police Abstract...”

4. Accordingly, the lower court dismissed the appellant’s suit on 6th October 2020. Being aggrieved by that decision, the appellant filed the instant appeal on 14th October 2020 on the following grounds:

- (a) That the learned magistrate erred in law and fact in dismissing the appellant’s claim.
- (b) That the learned magistrate erred in law and fact in not considering the oral evidence by the appellant adduced in court regarding the claim in question.
- (c) That the learned magistrate erred in law and fact by failing to consider the documentary evidence and the submissions presented by the appellant.
- (d) That the learned magistrate’s judgment was against the weight of the need to dispense justice with fairness and thus bad in law.

5. Consequently, the appellant prayed for orders that the appeal be allowed with costs, and that the judgment in CMCC No. 882 of 2019 delivered on 6th day of October 2020 by Hon. Nyariki, RM, be set aside and an award entered in his favour. The appellant also prayed for costs of the appeal.

6. The appeal was urged by way of written submissions, pursuant to the directions given herein on 2nd July 2021. Accordingly, Mr. Otieno for the appellant filed his written submissions on 27th September 2021. He proposed the following two issues for determination:

- (a) Whether the magistrate erred in law and fact in not considering the oral evidence by the appellant; and,
- (b) Whether the respondent was entitled to the costs awarded.

7. According to Mr. Otieno, since the Executive Officer produced the primary file, being Mombasa CMCC No. 773 of 2018, the Police Abstract was duly produced. He relied on Ibrahim Wandera v P.N. Mashru Ltd [2007] eKLR as well as Gateway Insurance Co. Ltd v Jamila Suleiman & Another [2018] eKLR to buttress his argument that, since the appellant’s evidence, including the Police Abstract, was not challenged by way of cross-examination, a finding ought to have been made in the appellant’s favour by the lower court. He pointed out that the Police Abstract proved that the respondent issued the Policy No. MSA/0700/232349/217-COMP and therefore furnished the nexus between the suit motor vehicle and the respondent. Hence, Mr. Otieno urged the Court to find that the appellant adduced sufficient evidence to prove his case on a balance of probability.



8. On behalf of the respondent, Mr. Jengo filed his written submissions on 6th October 2021. On the authority of *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi* [2014] eKLR and *Charterhouse Bank Limited (Under Statutory Management) v Frank N. Kamau* [2016] eKLR, he submitted that the evidential burden was on the appellant to prove his case on a balance of probability even if the respondent chose to remain silent. In response to the submission that the entire court file of the primary suit was produced before the lower court, Mr. Jengo urged the Court to note that the respondent was not a party to that suit; that no evidence was taken in the primary file and that no Police Abstract was produced in the primary file. He therefore submitted that it was imperative for the parties to the declaratory suit to adhere to the provisions of Section 34 of the *Evidence Act*, Chapter 80 of the Laws of Kenya if the evidence adduced in the primary suit was to be admitted in the declaratory suit; which was not done.
9. Thus, it was the submission of Mr. Jengo that, the Police Abstract was only marked for identification, and therefore the lower court cannot be faulted for holding that the appellant's failure to produce the Police Abstract was fatal as it was the only document the appellant intended to use to create a nexus between the accident motor vehicle, its owner, the driver and the appellant herein. He likewise relied on *Kenneth Nyaga Mwigie v Austin Kiguta & 2 Others* [2015] eKLR for the proposition that if a document is marked for identification and not formally produced and proved, that document "...would only be hearsay, untested and an unauthenticated account."
10. Mr. Jengo also submitted that although a statutory notice was produced before the lower court, service thereof was never proved, yet service was denied in the Defence. He relied on *Mariam Njeri Njau v Attorney General* [2016] eKLR and *Leunora Shioko Lusala v Kenya Orient Insurance Company Limited*, RMCC No. 827 of 2019, in which it was held that the appellant's suit did not lie without proof that the respondent had been served with the mandatory statutory notice. Consequently, Mr. Jengo urged for the dismissal of the appeal with costs.
11. This being a first appeal, it is the duty of the Court to re-evaluate the evidence adduced before the lower court with a view of coming to its own findings and conclusions thereon; while giving due consideration for the fact that it did not have the advantage of seeing or hearing the witnesses (see *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123 and *Mwanasokoni v Kenya Bus Services Ltd* [1985] eKLR).
12. A perusal of the record of the lower court shows that the appellant testified on 3rd December 2019 as PW1. He essentially adopted his witness statement dated 10th June 2019 as part of his evidence and produced the List and Bundle of Documents filed therewith, save for the Police Abstract. Thus, his evidence was that, on 30th December 2017 at around 5.20 a.m., he was walking to his workplace at the SGR Mombasa Terminus near Miritini when he was hit from behind by Motor Vehicle Registration No. KCN 249D, Toyota Station Wagon. He explained that he was working on the left side verge of the road when the suit motor vehicle veered off the road and knocked him. He added that, as a result of the accident, he sustained multiple injuries on his face, right arm and lower part of the right leg.
13. The appellant further testified that he later instructed his advocates on record to file Mombasa CMCC No. 773 of 2018 against the owner of Motor Vehicle Registration No. KCN 249D; and that the case proceeded and judgment was entered by consent on 30th April 2019 for Kshs. 100,000/= as damages and costs. It was also his evidence that, because the judgment debtor had refused to settle the decree, he had no option but to file a declaratory suit against the respondent vide Mombasa CMCC No. 882 of 2019.



14. The appellant called Daniel Njuguna (PW2), the Executive Officer in charge of Chief Magistrate's Civil Registry, as his witness. PW2 confirmed that CMCC No. 773 of 2018 was finalized by consent; and that judgment was entered for the appellant in the all-inclusive sum of Kshs. 100,000/= which was to be paid within 45 days from the date of adoption of the consent as an order of the court. Thus, PW2 produced the primary file as an exhibit in the declaratory suit.
15. The record of the lower court further shows that a witness statement, made by Caroline Simiyu on 26th September 2019, was adopted by consent as the defendant's evidence. The defendant thereby denied having issued the insurance cover for Motor Vehicle Registration No. KCN 249D and reiterated its stance that the same was a forgery. The defendant further denied that it was served with a statutory notice as required by the *Insurance (Motor Vehicles Third Party Risks) Act*.
16. From the foregoing summary of evidence, there is no dispute that the appellant was involved in an accident on 30th December 2017 at about 5.20 a.m. while walking to his place of work. He was knocked from behind by Motor Vehicle Registration No. KCN 249D and thereby sustained bodily injuries. There is uncontroverted proof that the appellant consequently filed Mombasa CMCC No. 773 of 2018 which was resolved by consent and the appellant awarded an all-inclusive sum of Kshs. 100,000/= . The said amount was to be paid within 45 days; and on account of the judgment-debtor's default, the appellant felt constrained to file a declaratory suit against the judgment-debtor's insurer. Hence, the lower court suit from which this appeal arises, namely, Mombasa CMCC No. 882 of 2019, was filed on 10th June 2019, but was ultimately dismissed for lack of sufficient proof on the part of the appellant.
17. Needless to stress that the appellant's suit against the respondent was predicated on the insurance cover allegedly provided by the respondent in respect of the suit motor vehicle. Thus, at paragraph 5 of the Complaint, the appellant averred that:

“The Defendant herein insured the said motor vehicle KCN 249D TOTOTA STATION WAGON vide Policy No. MSA/0700/232349/217-COMP covering such persons or class as specified in respect of any injury or death caused or arising out of the use of the said motor vehicle and the said accident was a liability covered by the said Policy within the meaning of S.5(b) of Cap 405 Laws of Kenya.”
18. On the other hand, the respondent vehemently denied the appellant's allegations and pleaded non est factum in its Defence. In addition, the respondent denied having been served with the requisite statutory notice under the *Insurance (Motor Vehicles Third Party Risks) Act*. In the premises, it was imperative for the appellant to clearly demonstrate that indeed the respondent had provided the insurance policy cover for the suit motor vehicle at the material time.
19. A careful perusal of the evidence presented before the lower court shows that although the appellant alleged that the subject motor vehicle was covered by the respondent, he did not produce either the policy document or the Certificate of Insurance before the lower court. At page 102 of the Record of Appeal, the appellant is recorded as having produced all the documents filed along with his witness statement save for the Police Abstract, which was marked for identification as the Plaintiff's MFI 3. It was expected then that the Police Abstract be formally produced in evidence by its maker or an authorized police officer in that regard. This was not done; and therefore the lower court was entitled to find, as it did, that the nexus between the subject policy and the respondent was not established.



20. In *Kenneth Nyaga Mwige vs. Austin Kiguta & 2 Others* (supra) in which the central issue on appeal was the probative value, if any, of a document marked for identification but which was neither formally produced in evidence nor marked as an exhibit. the Court of Appeal held that:

“The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held as proved or disproved. First, when the document is filed, the document though on the file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; ... Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case...a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness...we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondent’s case. The documents did not become exhibits before the trial court; they had simply been marked for identification and they have no evidential weight...”

21. Likewise, in the case of *Finmax Community Based Group & 3 others v Kericho Technical Institute* [2021] eKLR, the Court of Appeal reiterated its stance and held:

“...As part of that consent the parties were also emphatic that the accounts report would not be produced alongside the other documents but, instead they were to be “Marked for Identification” (MFI. 10).

We understand this to mean that the respondent was to call a witness to prove the accounts report before they could be admitted in evidence. Up to the point the judgment was pronounced, the accounts report had not been produced.

As way back in 1953, in the case of *Des Raj Sharma vs. Reginam* (1953) 19 EACA 310, it was recognized that the only distinction between “exhibit” and an article or a document “marked for identification” is that an “exhibit” is evidence which has been formally proved and admitted in evidence, while an exhibit “marked for identification” (MFI) is not part of the evidence before the court and cannot, therefore, be used as proof of any fact.

Until a document “marked for identification” is formally produced, it is of very little, if any, evidential value. See *Kenneth Nyaga Mwige vs. Austin Kiguta & 2 others* [2015] eKLR.

The report in question which we suspect was the genesis of the amount claimed by the respondent was not produced and appears not to be part of this record.

We come to the conclusion on this question that the respondent did not present any proof of how the figure of Kshs. 11,261,901.28. was arrived at. The learned Judge clearly erred in failing to analyze the evidence in respect of proof of the figure claimed.

Having found that the respondent did not discharge its burden of proof, we need not consider the next and final ground....”



22. It is noteworthy that, other than the Police Abstract, the appellant did not avail any other document in proof of his claim. In fact, he conceded in cross-examination thus:

“I have not produced a policy sticker to show that I was covered by Kenya Orient...The statutory notice that I produced does not show the stamp of the defendant’s acknowledgment of receipt...”

23. Faced with such evidence, the trial magistrate cannot be faulted for coming to the conclusion that the appellant had failed to prove his claim against the respondent on a balance of probability, for it is the law that whoever desires the court to give judgment in his favour must prove that the alleged facts exist. Section 107 of the *Evidence Act* is explicit that:

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

24. Likewise, Section 108 of the *Evidence Act* provides that:

The onus of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

25. Accordingly, in *Antony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank [2004] eKLR* the Court of Appeal held: -

“...we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or the Court on the basis of those pleadings pursuant to the provisions of order XIV of the Civil Procedure Rules. And the burden of proof is on the plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail...”

26. The upshot is that the appeal fails and is hereby dismissed. Granted the circumstances of the matter, it is hereby ordered that each party shall bear own costs of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 30TH DAY OF JANUARY 2023

OLGA SEWE

JUDGE

