



Indiatsi (Suing as the personal legal representative of the Estate of Micheal Simbili (Deceased) v Invesco Assurance Company Limited (Civil Case E034 of 2021) [2023] KEHC 22913 (KLR) (29 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22913 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL CASE E034 OF 2021
SM MOHOCHI, J
SEPTEMBER 29, 2023**

BETWEEN

REV VICTOR OULO INDIATSI (SUING AS THE PERSONAL LEGAL REPRESENTATIVE OF THE ESTATE OF MICHEAL SIMBILI (DECEASED) PLAINTIFF

AND

INVESCO ASSURANCE COMPANY LIMITED DEFENDANT

JUDGMENT

1. In his Complaint dated 30th November, 2021, the Plaintiff herein instituted a declaratory suit against the Defendant seeking the Defendant to be compelled to settle the decretal sum in Nakuru HCCC No 38 of 2006 with costs plus interest accruing from the decree.
2. In the primary suit by a Complaint dated 14th February, 2006 which was filed against the John Wiharo and Kenia Tours and Safari Limited, the beneficial owner and registered owner respectively, the Plaintiff sought compensation for general and special damages as well as costs and interests arising out of a road traffic accident which occurred on or about 16th August, 2003 along Bondo Kisumu road near Atigo market involving motor vehicle registration number KAB 420L Nissan Matatu as a result of which the Plaintiff sustained fatal injuries.
3. In the suit it is alleged that the Defendant herein had insured the subject motor vehicle vide a policy number INS/084/1/09100/2002/12.
4. In the primary suit, by an Amended Defence dated 4th May, 2006, the 1st Defendant denied ownership of the vehicle. The 2nd Defendant too filed a defence and denied ownership of the said vehicle and averred that he had sold the vehicle to one James Mwangi Waithaka vide a sale agreement dated 19th March 1996 and that he would enjoin the said purchaser as a defendant.



5. The primary suit proceeded before Justice Mulwa and judgment was delivered on 18th July, 2019 against the Defendants.
6. In the judgement, the Court recorded that PW1, the Plaintiff produced letters of administration obtained in Nakuru High Court Probate and Administration Cause No 368 of 2004 dated 28th July, 2004 as well records of the accident motor vehicle. He testified to not witnessing the accident but the youth group from his church including the deceased had attended a youth conference and on returning the vehicle got involved in the accident.
7. PW2 and PW3 testified that they had accompanied the youth to the conference. They witnessed the accident and testified that the vehicle was over speeding and had called out to the driver to stop over speeding. PW4 the investigating officer produced the abstract, the police file as well as the sketch plan of the accident scene. He also confirmed that the deceased was a passenger in the accident vehicle. He blamed the vehicle for the accident. He recommended the driver, the 1st Defendant to be charged but he disappeared.
8. The 1st Defendant participated in the trial through his advocates. The 2nd Defendants DW1 testified that as the Manager of the 2nd Defendant, since 1991 and had witnessed execution of the accident vehicle sale agreement. That a transfer was duly filled dated 19th March 1996 and released to the purchaser for onward transmission to the registrar of motor vehicles.
9. She also produced a letter to the registrar dated 26th March, 1996 to inform him of the transfer of ownership but could verify on whether the letter was ever received as she did not have any evidence to confirm the registrar had ever received the letter. She also confirmed that the transfer form was never executed by the purchaser; 2nd Defendant did not enjoin the purchaser to the suit despite requesting its advocates.
10. The judgment was entered in favour of the Plaintiff. The Defendants failed to satisfy the terms of the judgment delivered. The Plaintiff thereafter instituted the instant suit as a mode of execution against the Defendant. The Defendant did not enter appearance.
11. The instant suit proceeded to formal proof on 3rd March, 2023 and the Court directed the Plaintiff to file written submission. Plaintiff filed submissions dated 20th April, 2024.
12. It was the Plaintiff's submission that in the primary suit, PW4 produced a police abstract as evidence that the motor vehicle KAB 420L was insured by the defendant and thus liable to satisfy the decree issued. In his submissions the Plaintiff has also pointed out that the Defendant was served with the Plaintiff and all supporting documents as well as a statutory notice and the defendant was aware of the existence of the primary suit as well as judgment
13. I have considered the facts and the nature of the case and the arguments brought forth in the Plaintiff's submissions. The Plaintiff has a judgment and a decree issued by a Court of competent jurisdiction. The Plaintiff filed a declaratory suit under Section 10 (1) of the [*Insurance \(Motor Vehicle Third Party Risks\) Act*](#) to enforce the said judgment.

The Law

14. Section 10 (1) of the Act provides:

“If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then



notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.”

15. According to the above, a successful Plaintiff is duty bound in seeking to enforce a decree against an insurer to prove that firstly there was an accident, secondly that there was a suit that resulted in the decree and thirdly there is a decree that is yet to be settled.
16. Having established all that, the Plaintiff has to also demonstrate and satisfy the Court that prior to filing a declaratory suit, the insurer was aware of the suit, and the insurer was served with a notice.

Analysis & Determination

17. So therefore in my opinion the main issues for deliberation by this Court are;
 - i. Whether the Defendant is bound to satisfy the decree.
 - ii. Who shall bear costs of the suit
18. As regards to whether the Defendant can be held liable it is important to take cognizant of the fact that from the proceedings:-I note that the firm of Kariuki Mwangi & Company Advocates served demand letter to the Defendants in the primary suit dated 11th August, 2004. The Defendant herein vide a claim memorandum on a “without prejudice” basis dated 20th October, 2004 sought to know the basis on why the Plaintiff blamed “its client”.
19. A Statutory Notice dated 14th February, 2006 was served upon the Defendant but it refused to acknowledge refused to sign.
20. The Defendant was served with summons to enter appearance dated 3rd December, 2021 and was received by the Defendant on 16th December, 2021. The Defendant was also served with the first formal proof notice dated 24th November, 2022 which was received on 30th November, 2022 the second one dated 13th February, 2023 which was also received on 14th February, 2023. The Defendant had sufficient notice.
21. Having established that the Defendant was served with the notices and as per Section 12 (1a) of the Act the insurer has an obligation to respond to a statutory notice. It states as follows: -

“The insurer shall, upon being served with the statutory notice and documents, admit or deny liability for the claim or judgment by a notice in writing to the person or persons presenting the claim or judgment.”
22. There was no response or Court appearance from the Defendant herein. In *Ogada Odongo v Phoenix of E.A. Insurance Co. Ltd* Kisumu HCC 132/2003, it was held:
 - (1) “By an insurer issuing a policy of insurance, it automatically assures the rights of third parties. It simply means, the rights/obligation of the insured automatically transferred to the insured unless it is proved otherwise.
 - (2) By covering third parties, rights, the insurance was in essence performing a statutory duty imposed by an Act of Parliament.”



23. In *Kenya Alliance Insurance Co. Ltd v Thomas Ochieng Apopa (suing as Administrator of the Estate of Pamela Agola Apopa) deceased* [2020] eKLR.

“The Respondent cannot be left to hold a barren decree from a lawful judgment”.

24. Further on the evidence of the police abstract which was produced by the police who conducted investigations of the accident, it was clear that there existed an insurance policy with the Defendant.

25. In *APA Insurance Co. Ltd v George Masele* [2014] eKLR (Mabeya J), held that:

“a police abstract was good enough, as evidence that there had been a policy of insurance in force, and that it was unreasonable to expect the injured victim to produce a certificate of insurance, given that he was not privy to the contract between the insured and the insurer, and that the details, as captured in the police abstract, are from the certificate of insurance affixed to a motor vehicle or supplied by the insured.”

26. Based on the facts of the case and the above legal provisions, I am satisfied that the Plaintiff has proved his case and the Defendant has an obligation to settle the decree.

27. It is trite that costs follow the event, unless otherwise ordered by the Court. Section 27 of the *Civil Procedure Act* states:

“--- the costs of and incidental to all suits shall be in the discretion of the Court or Judge, and the Court shall have full power to determine by whom--- such costs shall be paid --- provided that the costs of any action, cause or other matter or issue shall follow the event unless the Court or judge shall for good reason otherwise order.”

28. In High Court Election Petition No 6 of 2013 *Party of Independent Candidate of Kenya and another v Mutula Kilonzo & others*. It was stated that the Principle underlying the award of costs is twofold:-

1. The award of costs is a matter of discretion of the Court that ought to be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at.
2. The general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.

29. The Defendants in the primary suit failed to honour obligations placed on by law. The Plaintiff has spent money and time to pursue fulfilment of the decree by filing the instant declaratory suit which the Defendant at all times knew about the case and knew it had a statutory obligation to the Plaintiff to settle the decree or give tangible reason with evidence why it should not settle the decretal amount. Having found that the Defendant is liable to settle the decree, I ward costs as well as interest to the Plaintiff.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 29th DAY OF SEPTEMBER, 2023

MOHOCHI S.M.

JUDGE OF THE HIGH COURT

