



REPUBLIC OF KENYA



KENYA LAW
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**Kenya Orient Insurance Company Limited v Grace (Civil Appeal
E036 of 2022) [2023] KEHC 24672 (KLR) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24672 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E036 OF 2022
GMA DULU, J
OCTOBER 31, 2023**

BETWEEN

KENYA ORIENT INSURANCE COMPANY LIMITED APPELLANT

AND

MERCYLINE GRACE RESPONDENT

*(From the judgment in Civil Case No. 30 of 2020 delivered by
Hon. C. K. Kithinji (PM) at Voi Law Courts on 31st August 2022)*

JUDGMENT

1. In a judgment delivered on 31st August 2022 the trial Magistrate's found in favour of the plaintiff Mercyline Grace, and concluded as follows:-
 - “23. On the basis of the foregoing judgment is entered for the plaintiff against the defendant as prayed in the plaint as follows:-
 - a. The defendant does satisfy the judgment/decretal sum in Civil Suit No. 154A of 2018 at Voi Law Courts amounting to Kshs. 902,000/=. The judgment continues to accrue interest as ordered in the primary suit.
 - b. The plaintiff shall have the costs of this suit.”
2. Dissatisfied with the above judgment and findings of the trial court, the appellant Kenya Orient Insurance Company Limited (who was the defendant at the trial) has come to this court on appeal through counsel Jengo Associates relying on an amended Memorandum of Appeal on the following grounds: –



1. The learned trial Magistrate erred in law and in fact in holding that the plaintiff had proved his case on a balance of probability.
 2. The learned trial Magistrate erred in law and in fact in failing to appreciate an elementary but fundamental principle of law that parties are bound by their pleadings.
 3. The learned trial Magistrate erred in law and in fact in using a motor vehicle insurance certificate for motor vehicle KBY 527K to prove that the appellant had insured motor vehicle registration number KBY 527E.
 4. The learned trial Magistrate erred in law and fact in failing to appreciate that unless all the requirements under Section 5(b) and 10(2) of the Insurance Motor Vehicles Third Party Risks Act are met an insurer cannot be liable.
 5. The learned trial Magistrate erred in law and fact in failing to appreciate that there was no evidence placed before it to show that the appellant had insured motor vehicle number KBY 527E on 28th March 2022.
 6. The learned trial Magistrate erred in law and in fact in acting ex cathedra holding without evidence, pleadings nor submissions that the appellant exhibit 1 was fraudulent.
 7. The learned trial Magistrate did not comprehend the appellant's defence on the issue of fraud wherein the evidential burden of proof would only have shifted to the appellant if the respondent had proved the existence for certificate of insurance for motor vehicle KBY 527E at the time of accident.
 8. The learned trial Magistrate erred in law and in fact in holding that the police officer who testified was the investigating officer and in holding that his oral evidence could amend the contents of the certificate of insurance produced by the respondent.
 9. The trial Magistrate erred in law and in fact in holding that the certificate of insurance and the police abstract produced by the respondent referred to the same motor vehicle.
 10. The learned Magistrate misapprehended and misapplied the provisions of Section 10(4) (A) of the Insurance (Motor Vehicle Third Party Risks) Act Chapter 405 Laws of Kenya.
3. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Jengo Associates Advocates for the appellants, and the submissions filed by Njoroge Mwangi & Company Advocates for the respondents, as well as the reply to respondent's submissions filed by Jengo & Associates for the appellant. I must acknowledge that both sides cited decided court cases.
 4. This being a first appeal, I am duty bound to reconsider the evidence on record and that I am not bound to go by the findings of the trial court – see Section 78(1) of the *Civil Procedure Act* (Cap.21), and the case of Fidelity Commercial Bank Ltd =Versus= Kenya Grange Vehicle Industries Ltd (2017) eKLR.
 5. I also have to bear in mind that the burden was on the respondent, who was plaintiff, to prove the case against the appellant (who was defendant), and this being a civil case the standard of proof was on the balance of probabilities – see Section 107 of the *Evidence Act* (Cap.80), and the English case of Miller =Versus= Minister of Pensions (1947) 2 ALL ER 372 wherein Denning J. stated as follows:-

“If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability is equal it is not.”



6. In the trial, the major issue was whether the insurance certificate relied upon was not a genuine certificate or a forgery or fraud as pleaded by the appellant in their defence.
7. At the trial, the respondent testified as PW1 and adopted her witness statement. She stated that on 28th March 2018 she was a passenger on KBY 527E on Mwatate road when an accident occurred, and that she filed Voi SMCC No. 154(A) of 2018 and was awarded damages, and that the insurer of the motor vehicle were Kenya Orient Insurance Company Limited and produced documents. The respondent thereafter sought leave to file a further list of documents as the production of the judgment in the primary case was objected to, and the appellant also sought leave to put in the policy documents, none of which requests was objected to, and the court granted such leave.
8. On 10th March 2021, the respondent testified again and produced supplementary list of documents including decreed set of costs, letter on certified copy of the primary case judgment and a receipt for the certified copy. She testified that she was riding on a motor cycle KMDW 062T with one Lawrence Kighombe Mkoji, and that both filed cases in court, with hers being civil case number 154A of 2018, in which both obtained judgment.
9. In cross-examination, she stated that the certificate of insurance was number 16671081 which she got from the police station. She stated also that she was not able to explain the difference in the motor vehicle registration numbers on the insurance sticker or certificate.
10. PW2 was Lawrence Kighombe Mkoji, who testified that he was travelling with the respondent on the day of accident, and that they filed separate cases in court. He stated that he was paid after suing the same insurance company. In cross-examination he stated that the information on the identity of the insurer of the motor vehicle was from the police. He agreed that the true and primary document for the claim was the certificate of insurance.
11. PW3 was Cpl. Juba Mwarabu of Voi Police Station, who testified that the accident occurred on 28th March 2018 between motor vehicle KBY 527E driven by Alexander Thomas, and motor cycle KBDW 062T ridden by Thomas Kigombe carrying Mercy Grace, and that the motor vehicle driver was to blame, and that the motor vehicle was insured by Kenya Orient effective 13th March 2018 expiring on 12th March 2019, and that certificated number was C16671081 Policy KTD/07001/24/320/2018(TPO).
12. In cross examination, he stated that he was the investigating officer. He said that the number KBY 527K was an error in the entry.
13. In their defence, the appellant called DW1 Amin Said a Relationship Manager in Mombasa. He stated that the police abstract was in respect of motor vehicle KBY 527E, which they did not know to have been involved in an accident. He also testified to motor vehicle number KBY 527K and insurance certificate No. C16671081 Policy No. KTD/070024/320/2018, and complained that the insurance policy number was not included in the pleadings, statutory notice and demand letter. He stated that they did not insure KBY 527E.
14. In cross-examination, he stated that the notice of intention to sue was received, but he did not know if it was responded to. He insisted that they claim forgery of certificate of insurance for KBY 527K, and said that the respondent the maker of the document.
15. In re-examination, he stated that though they settled the claim in the same accident, they now wanted to mitigate the fraud.



16. Having re-considered the evidence, the grounds of appeal, and submissions, I note that the appellant has stated that parties are bound by their pleadings. I have perused the plaint herein, which refers to vehicle KBY 527E and Voi SPMCC No. 154(A) of 2018. No insurance certificate number or police abstract number was highlighted therein.
17. The appellant's defence was dated 18th March 2020. The defendant denied issuance of insurance cover for motor vehicle KBY 527E and alleged forgery of insurance sticker and lists particulars of fraud. There is no mention of the number of insurance certificate or sticker or police abstract. There is also no mention of motor vehicle number KBY 527K.
18. In the reply to defence dated 28th May 2020, the respondent put the appellant to strict proof of the allegations of denial and fraud in the defence.
19. Though the appellant made strong argument from the trial stage herein, to this appeal about forgery, I see no evidence tendered of forgery. The police officer who testified herein stated clearly that if there was a variance in the official insurance documents, and the entries in the police records, including the police abstract form, with regard to the registration number of the motor vehicle, then it was a mistake. We all know that mistakes can be made, and in law a mistaken entry of the identity of an item, unless there is a criminal intention of falsifying something does not amount to forgery.
20. I note that the copy of insurance sticker relied upon herein reads KBY 527K, but the police abstract is for KBY 527E. All the correspondences and other documents exchanged relate to KBY 527E. The same documents were used in the primary case filed in 2018.
21. I note also that the appellant asked for leave which was so granted to produce policy document or insurance sticker, but they did not do so. They however relied on a Motor Private Policy Schedule which indicates that between 10th November 2016 and 9th November 2017 they insured motor vehicle KBY 527E and the insured was Mr. Mbinga John. For them now to state under ground 5 of appeal that they did not insure vehicle KBY 527E on 28th March 2022, while the accident occurred in 2018, sounds mischievous.
22. From the fact and circumstances of this case, and bearing in mind that the standard of proof was on balance of probabilities, and the appellants were duly informed about insuring motor vehicle KBY 527E at the time of the alleged accident in 2018, it was incumbent upon them to challenge the allegation in the earlier case SPMCC No. 154A of 2018 at Voi by declining liability, or appealed against the decision in that particular case. All notices were sent to them at that time, and they did not disclaim liability.
23. The presence appeal, arising from that other primary and substantive case, cannot be used as a basis for challenging facts or findings which were not contested in the previous or primary case, by parties who were aware of the facts and allegations in the primary case and could participate in those proceedings either directly or indirectly. The appellants are such parties and this reasoning applies to them.
24. Consequently, I find the allegation of fraud and denial by the appellant herein to have been raised too late in the day and in the wrong forum or case, and is for dismissal. On that account, the appeal will fail.
25. To conclude, I find no merits in the appeal, which is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED THIS 31ST DAY OF OCTOBER 2023 AT VOI VIRTUALLY IN OPEN COURT. RIGHT OF APPEAL EXPLAINED.

GEORGE DULU

JUDGE



In the presence of:-

Alfred – Court Assistant

Mr. Salim holding brief for Mr. Jengo for appellant

Mr. Kazungu for respondent

