



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CIVIL CASE NO. E004 OF 2021**

**JOHN MUTHEE MWANIKI .....PLAINTIFF**

**VERSUS**

**AFRICAN MERCHANT ASSURANCE CO. LTD....DEFENDANT**

**JUDGMENT**

1. In his plaint dated 10.05.2021, the plaintiff herein instituted a declaratory suit against the defendant, *Africa Merchant Assurance Company Limited*, seeking to have the defendant compelled to settle the decretal sum in Runyenjes Civil Suit Numbers 19 of 2018 and 65 of 2017 plus any accruing interest from the decree.

2. In the primary suit which was filed against John Muthee Mwaniki (“the insured”, the plaintiff sought general and special damages arising out of a road traffic accident which occurred on or about 14.07.2017 along Embu - Meru Road involving the motor vehicle registration number KAJ 987H (“the subject motor vehicle”) belonging to the insured, as a result of which the plaintiff sustained severe injuries. It is alleged in this suit that, the defendant herein had insured the subject motor vehicle vide a Policy of Insurance Number AML/080/1/000120/2011 which was in force from 23.11.2016 to 22.09.2017.

3. It is his case that while the insurance cover was still in force, his aforesaid motor vehicle was involved in an accident along Embu – Meru Road at Runyenjes Town on 14.07.2017.

4. After hearing of both matters, the court in the primary suits delivered its judgments and issued decrees against the plaintiff for the payment of damages and costs against him for payment of Kshs. 835,835 in Civil Suit Numbers 65 of 2017 and 19 of 2018 respectively making a total of Kshs. 1,338,694.00.

5. Upon the defendant’s failure to settle the aforementioned decretal sum, the plaintiff has now filed the instant suit under Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act, Cap. 405 Laws of Kenya.

6. Going by the record, the defendant upon being served with summons entered appearance and filed a statement of defence but the matter proceeded ex parte as the defendant did not attend court on the day of the hearing.

7. At the hearing, the plaintiff chose to rely on his signed witness statement and his list of documents filed on 23.05.2021 which he produced as P. Exhibits.

8. Upon close of the plaintiff’s case, the plaintiff filed written submissions wherein he reiterated that he had insured his motor vehicle KAJ 987H vide policy number AML/080/1/000120/2011 which policy was issued by *the defendant and upon occurrence of an accident on 14.07.2017 involving the aforesaid motor vehicle, he was sued in Civil Suit Numbers 65 of 2017 and 19 of 2018 wherein judgment was entered against for a total of Kshs. 1,338,694.00 and pursuant to the warrants issued in those two cases, the auctioneers have already threatened to attach his property.*

9. The plaintiff thus filed the declaratory suit herein seeking to compel the defendant to satisfy the decretal sum. In the statement of defence, the defendant denied ever issuing any policy to the plaintiff and so liability was denied.

10. I have considered the evidence adduced by the plaintiff and I find that the main issues for determination are:

i. Whether motor vehicle registration No. KAJ 987H was insured by the defendant; and if so,

ii. Whether the defendant should satisfy the decretal sums claimed.

11. On whether the motor vehicle registration No. *KAJ 987H* was insured by the defendant, the plaintiff in his evidence told the trial court that the said motor vehicle was insured by the defendant and that the insurance cover was still valid when the motor vehicle was involved in an accident along Embu – Meru Road. It was his statement that as a result of the accident, he was sued *vides Runyenjes Civil Suit Numbers 19 of 2018 and 65 of 2017*.

12. It is trite that the duty of the Insurance Company (insurers to satisfy or settle decrees against their insured is a statutory duty which stems from Sections 10(1) and (2) of the Insurance Act.

**10. Duty of insurer to satisfy judgments against persons insured**

**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.**

13. Section 5 of the Act which is of relevance to the subject at hand stipulates as follows:

**“In order to comply with the requirements of section 4, the policy of insurance must be a policy which—**

**a. is issued by a company which is required under the Insurance Act, 1984 (Cap. 487) to carry on motor vehicle insurance business; and**

**b. insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road:**

**Provided that a policy in terms of this section shall not be required to cover—**

**i. ....**

**ii. ....**

**iii. ....**

**iv. liability of any sum in excess of three million shillings, arising out of a claim by one person.”**

14. The defendant denied ever insuring the motor vehicle in question or issuing policy number AML/080/1/000120/2011 and further that even if such a policy was issued, the same was not in force and/or extend cover at all material times to the suit. The defendant further denied knowledge of any judgment entered against the plaintiff in any suit or receiving any demand letter or statutory notice.

15. It is a principle of law that whoever lays a claim before the court against another has the burden to prove it. Sections 107 and 108 of the Evidence Act provide as follows:

**107 “(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.**

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

16. I rely on the case of *Muriungi Kanoru Jeremiah v Stephen Ungu M’warabua [2015] eKLR* where the court held as follows with regard to the burden of proof:

**“....As I have already stated, in law, the burden of proving the claim was the appellant’s including the allegation that the respondent did not pay the sum claimed as agreed; i.e. into the account provided.....The trial magistrate was absolutely correct in so holding and did not shift any legal burden to the appellant.....The appellant was obliged in law to prove that allegation; after the legal adage that he who asserts or alleges must prove.... In the circumstances of this case, the respondent bore no burden of proof whatsoever in relation to the debt claimed. By way of speaking, the shifting of burden of proof would have arisen had the trial court magistrate held that the respondent bore burden to prove that he deposited the sum of Kshs. 98,200/= the debt being claimed herein.”**

17. I also refer to *The Halsbury’s Laws of England, 4<sup>th</sup> Edition, Volume 17*, at paras 13 and 14: describes it thus:

**“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”**

**[16] The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?”**

18. This Court notes that the plaintiff did not tender any evidence before the court to prove that his motor vehicle was insured by the defendant. His cause of action is based on the contract he had with the defendant in the form of an insurance policy. No such policy was produced before the court as an exhibit or at the very least some form of proof even by way of a certificate of insurance, yet, he was the insured. The police abstract which he produced does not show who the insurer of the motor vehicle were, save for the policy number which the court is not able to connect with the defendant.

19. As it is now, the contention by the plaintiff that the defendant was the insurer of his motor vehicle remains on allegation which was not proven by way of evidence.

20. In view of the foregoing, the court finds that the plaintiff did not proof his case on a balance of probability and the same is hereby dismissed.

21. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 26<sup>TH</sup> DAY OF JANUARY, 2022**

**L. NJUGUNA**

**JUDGE**

.....for the Plaintiff

.....for the Defendant