REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CIVIL APPEAL NO. 17 OF 2019

(Being an Appeal from the judgment of Hon. B. Omwansa, Principal Magistrate at Sotik, delivered on 25th July 2019 in Sotik PMCC No. 80 of 2018)

AIG INSURANCE COMPANY LIMITED.....APPELLANT

VERSUS

BENARD KIPROTICH KIRUI .....RESPONDENT

JUDGMENT

1. This Appeal has been brought through a Memorandum of Appeal dated 14th August 2019 in which the Appellant has raised 15 grounds of appeal as follows: -

i) That the learned trial magistrate erred in law and fact allowing the Respondent's claim which was not proved on the balance of probability required by law.

ii) That the learned magistrate erred in law and fact in failing to dismiss the Respondent's suit with costs.

iii) That the learned trial magistrate erred in law and fact in failing to make a finding that the Appellant had already paid the full claim amount of Kshs. 136,400/= to the firm of M/s D. Okech & Co. Advocates on 25/08/2017 as earlier agreed on 22/08/2017 by consent.

iv) That the learned trial magistrate erred in law and fact in failing to appreciate and understand the provisions of section 8 of the Traffic Act, Cap 405 Laws of Kenya.

v) That the learned trial magistrate erred in law and fact in giving a contradictory judgment.

vi) That the learned trial magistrate erred in law and fact in failing to explain how he arrived at a sum of Kshs. 1,918,306/= as an amount payable to the Respondent by the Appellant.

vii) That the learned trial magistrate erred in law and fact by disregarding the Appellant's evidence tendered in court by DW1 (Margaret Mucheru) and the Appellant's submissions.

viii) That the learned trial magistrate erred in law and fact in awarding the Respondent interest on the sum claimed in paragraph 12 of the Plaint as the rate of 8.27% p.a. without any basis and/or legal justification.

ix) That the learned trial magistrate erred in law and fact in over relying on the Respondent's evidence and submissions.

x) That the learned trial magistrate erred in law and fact by disregarding his own findings in favour of the Respondent who was neither in possession of the said motor vehicle nor enjoying its day running proceedings when awarding the Respondent prayers a, b and c of the Plaint dated 29.5.2018 instead of dismissing the suit.

xi) That the learned trial magistrate erred in law and fact in failing to appreciate the fact that the Respondent had sold motor vehicle Reg. No. KBX 556S to one Benard Kiplang'at Kirui on 26.2.2015 at a sum of Kshs. 1,264,790/= and therefore the said motor vehicle was not his at the time of the attachment.

xii) That the learned trial magistrate erred in law and fact in failing to make a finding that the Respondent had failed to notify the Appellant of the existence of Civil Suit Sotik PMCC No. 247 of 2015.

xiii) That the learned trial magistrate erred in law and fact in failing to make a finding that this being a case of contract, there were no particulars of breach of contract pleaded and proved in court against the Appellant.

xiv) That the learned trial magistrate erred in law and fact in totally ignoring the contents of the sale agreement dated 26.2.2015.

xv) That the learned trial magistrate's decision albeit a discretionary, one was plainly wrong.

2. The Appellant prayed as follows:

a) That the Appeal be allowed in its entirety.

b) That the Order awarding the Respondent prayers a, b and c of the Plaint dated 29th May 2018 be set aside.

c) The Respondent's suit in the subordinate court be dismissed with costs.

d) The Respondent to pay the costs of this particular Appeal and the lower court costs of the suit.

Background

3. This case emanated from an accident claim involving motor vehicle Reg. No. KBX 556S and a motorcycle registration No. KMCT 763N which occurred on **24th March 2014**, in which the motorcycle's passenger by the name Nelson Ochieng Oiso was injured. The Respondent was the registered owner of motor vehicle at the time of the accident. The said passenger instituted a civil suit vide **SPMCC 247 of 2015** at Sotik Magistrate's Court seeking compensation. Neither the Respondent nor his Insurer defended the suit. Judgment was thus entered in favour of the Plaintiff on 12th April 2014 by Hon. N. Barasa in the sum of Kshs. 180,000/= together with costs and interest. Later, the motor vehicle was attached by Ongumwe Auctioneers based on a proclamation letter which indicated that the decretal amount was Kshs. 276,234/=. The vehicle was sold on 23rd March 2018.

4. The Respondent then instituted a claim against his Insurer, the Appellant herein for breach of contractual terms. He claimed specific interest and penalty interest at a rate of 8.27% p.a. and Kshs. 1,642,072/= being the purchase price of the motor vehicle at mortgage value and the loss incurred in refusing to pay the injured passenger the claim amount of Kshs. 267,234/=.

5. Judgment was entered in favour of the Respondent in the trial court in the sum of Kshs. 1,918,306/= together with interest at the rate of 8.27% p.a. This forms the basis of the suit and the present appeal.

Appellant's Case

6. The Appellant in this matter alleged that it was never made aware of the civil suit in Sotik PMCC No. 247 of 2015 and that the Respondent who had been served with Summons to enter Appearance failed to notify and forward the same to the Appellant. Secondly, they claimed that they only came to know about the suit when their Insured, the Respondent, had notified them of the intended attachment of the suit motor vehicle. It was their claim that by this time, though they had instructed their counsel to peruse the court file, enter appearance and seek to set aside the judgment, the same was dismissed by the court because by that time, the vehicle had already been disposed off through sale by auction.

7. In a different twist, the Appellant told the trial court that they had previously been approached by the firm of D. Oketch and Company Advocates and they had agreed on an out-of-court settlement in respect of the same accident, which they paid Kshs. 136,400/= as settlement costs. That they were therefore unaware of any further pending suits in respect of the same accident. Lastly, the Appellant stated that the Respondent had already sold the suit vehicle to a third party by the name Benard Kiplangat Kirui and therefore by the time of the sale, the suit vehicle did not belong to him. Thus, he had no reasons to seek compensation from the Appellants.

Respondent's Case

8. The Respondent's case was that their motor vehicle Registration Number KBX 556S had been involved in an accident with a motor cycle Registration No. KMTC 763N which gave rise to a third party claim from the passenger, one Nelson Ochieng Oiso. It was their case that they were never notified of the intended suit by the third party's advocates – G.M. Maengwe & Company Advocates and so he only got to know about the judgment when he was notified by the auctioneers of the intended attachment of the suit motor vehicle. Unfortunately, before he could obtain an order to set aside the summary judgment, the vehicle was sold by auction. It was his case that the Insurer/Appellant had a duty to pay off any liabilities which arose from the insured vehicle by virtue of the requirements of Insurance (Motor Vehicles 3rd Party Risks) Act and the Insurance contract. He therefore sought compensation from the court for general damages for the loss of his car and loss of user including interests and costs.

9. The Appeal was canvassed by written submissions.

Appellant's Submissions

10. The Appellant submitted on six issues. The first issue was whether the Appellant had already settled the decretal sum. It was their submission that the appellate Court should make a finding that they had already settled the decretal sum of Kshs. 136,400/= through the firm of D. Okech and that the finding by the trial court demanding that they pay Kshs. 1,918,306/= be set aside.

11. On the second issue of ownership of the suit motor vehicle, they submitted that the Respondent had already sold it off to a third party. Therefore, at the time of attachment, the Respondent had no insurable interest in the said motor vehicle to warrant indemnification by the Appellant. To this, they relied on ***Kenya Orient Insurance Limited vs. Kelvin Macharia Karanja (2017) eKLR.*** They submitted that the Respondent never informed the insurer that he had sold off the vehicle and also failed to disclose to the court material facts in respect of his claim. That the Respondent had breached the principle of good faith in the insurance contract by claiming compensation when he knew he had already sold off the suit vehicle.

12. Thirdly, the Appellant submitted that the award made by the trial magistrate as the value of the attached vehicle was unfounded. That the Respondent would if at all, only be entitled to be compensated based on the insured interest which according to them would not have been more than Kshs. 1,200,000/= if depreciation was factored in. On the same breath, the Appellant submitted that the trial court erred in awarding Kshs. 1,918,306/= to the Respondent yet this was categorized as special damage that required to be specifically and strictly proven and the Respondent did not do so. Further, that the amount awarded was without basis.

13. On the issue of interest, the Appellant submitted that the trial court did not provide any justification for using 8.27% p.a. as the applicable interest for the principal sum. It was their view that a rate of 6% was sufficient as per sections 26(2) of the Civil Procedure Act. They placed their reliance the case of ***B.O.G. Tambach Teachers Training College vs. Mary Kipchumba (2018) eKLR***.

14. The Appellant also submitted that the Respondent did not specifically plead the manner in which the Appellant breached its contractual terms. The Appellant stated that they were never informed of the primary suit and as such they could not be faulted for not acting.

15. Lastly, on the issue of the statutory notice, the Appellant submitted that they were never served with the same as per section 10(2) (a) of the Insurance (Motor Vehicles Third Party Risks) Act, thereby making the Respondent's case for indemnity fatal. That there was no proof of service of summons for the suit PMCC 247 OF 2015 and the statutory notice and that the Respondent admitted to failing to forward the summons to enter appearance to the Appellant. That the court ought to have barred the Respondent from seeking to mitigate the losses that arose from his failure to defend the suit and failure to inform his insurer on time. They relied on ***Peter Kinyari vs. William Matendechere & Another (2019) eKLR*** and ***Imara Steel Mills Ltd vs. Heritage Insurance Company Kenya Limited & 38 Others eKLR***. They urged the court to allow the appeal, set aside the judgment of the lower court and to award them costs.

Respondent's submissions

16. The Respondent also submitted on six issues. Firstly, on the ownership of the suit vehicle, he submitted that he was the registered owner of the motor vehicle which he jointly owned with NIC Bank; that at the time of the accident, the presumption of ownership could be deduced since he was the one paying the insurance premiums. He relied on ***section 8 of the Traffic Act No. 18 of 2018*** and the case of ***Muhambi Koja vs. Said Mbwana Abdi, Civil Appeal No. 30 of 2014, Joel Muga Opiyo vs. East Africa Sea Foods Limited, Civil Appeal 309 of 2010*** and ***Thuranira Karauri vs. Agnes Ncheche Civil Appeal 192 of 1996 UR.*** As for the supposed sale as alleged by the Appellant, he submitted that he merely got into an arrangement with Bernard Kiplangat Kirui as a result of the financial difficulties he was undergoing to enable him repay the loan to his financier, but the same was not an actual sale. It was his submission that Benard Kiplangat was to use the vehicle and the installments were to be remitted to the financier, which was the basis for the log book remaining in the name of NIC Bank and the Respondent as registered owners.

17. On the second issue whether there was a contract between the parties, the Respondent submitted that he had entered into an insurance contract with the Appellant under Policy Number COMP-012056221 (C10688/71) with a valid certificate of insurance (PEX2) set to expire on 2nd March 2015. On this, they relied on the case of ***M/S Fidelity Shield Insurance Company Limited vs. Peter Mbugua Kimotho (2020) eKLR*** in which the court quoted the case of ***Dr. James Ng'ang'a Mungai vs. United Insurance Company Limited No. 1860 of 2000***.

18. Thirdly, on the issue of whether the Appellant had already indemnified the Respondent, he submitted that the Appellants' claim that they had already compensated the claimant through the firm of D. Okech upon being served with a demand letter was not proven. That the said demand letter was never attached and the said firm was also a stranger to the claim in respect of the said accident since G.M. Maengwe & Company Advocates were always on record for the claimant in the original suit. The Respondent claimed that his vehicle was attached after the Appellant blatantly refused to settle the decretal sum in Civil Suit 247 of 2015.

19. Fourthly, in submitting on service of statutory notice, the Respondent maintained that the Appellant was served with the Statutory Notice dated 2nd November 2014 which was duly received through registered post. They referred to section 10 of the Insurance (Motor Vehicles Third Party Risks) Act, the case of ***M/S Fidelity Shield Insurance Company Limited vs. Peter Mbugua Kimotho (2020) eKLR*** and ***Pan African Company Limited vs. Grace Washo (2007) eKLR***.

20. On whether the Appellant ought to indemnify the Respondent as ordered by the trial court, the Respondent submitted that he acquired the vehicle through financing and the total cost together with mortgage charges was Kshs. 1,949,144/=. The Appellant was therefore bound to satisfy the judgment of the trial court. To this, he relied on the case of ***M/S Fidelity Shield Insurance Company Limited vs. Peter Mbugua Kimotho (supra), Madison Insurance Company Kenya Limited vs. Justus Ongera (2004) eKLR*** and ***Cannon Assurance Limited vs. Peter Mulei Sammy (2019) eKLR***.

21. Lastly, on costs, the Respondent relied on section 27 of the Civil Procedure Act. It was their submission that costs followed the suit and interest was a discretionary decision by the court but must not exceed 14% as per section 27(2) of the Civil Procedure Act. Therefore the appellate court should be reluctant to interfere. In addition, he submitted that the Appellant should bear the costs just as it did in the lower court with respect to the party to party costs. He cited the cases of ***Cecilia Karuru Ngayu vs. Barclays Bank of Kenya & Another (2016) eKLR***, ***Farah Awad Gullet vs. CMC Motors Group Limited (2018) eKLR*** and ***Southern Star Sacco Limited vs. Venancio Ntwiga (2021) eKLR***.

Issues for determination.

22. Having perused the Record of Appeal, the trial file and the respective submissions of the parties, the following are pertinent issues for determination:

i) Whether the Respondent was the rightful owner of the suit motor vehicle and therefore entitled to compensation.

ii) Whether the parties were aware of the existence of the original suit (Civil Suit No. 247 of 2015) that led to the present Appeal.

iii) Whether the trial court misdirected itself in making the said award as compensation for the Respondent's loss.

iv) Who bears the costs of the suit?

23. The Court of Appeal held in the case of **Mark Oiruri Mose vs. R. (2013) eKLR** that:-

"This Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that."

Thus, this Court is required to review and analyze the entire Record and evidence presented before the lower courts in respect of the present appeal and draw its own conclusion, bearing in mind that the benefit of hearing firsthand evidence from the witnesses themselves is lacking.

i) <u>Whether the Respondent was the rightful owner of the suit motor vehicle and therefore entitled to compensation.</u>

24. Ownership of a motor vehicle is proven in accordance with **section 8 of the Traffic Act**. This section provides:-

"The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle."

25. In the present case, the Respondent claimed that he was at all times the rightful owner of the suit vehicle. In support of this, he produced PEXH1 a copy of the chattels mortgage agreement dated 27th February 2014 which indicated that he purchased the vehicle through financing by NIC Bank. It is the Appellant's contention that the Respondent was never the registered owner of the suit vehicle.

26. The **Evidence Act, Cap 80** is clear on the aspect of the burden of proof. In this case, it lies squarely on the Respondent because the whole suit is pegged on his right as the legal owner of the suit vehicle which he must prove. Sections 107 and 108 of the Evidence Act provide as follows:-

Section 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.

Section 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."

27. I note from the trial file that the Respondent never produced the log book of the suit vehicle. However, from the records of the bank and the insurance sticker, it can be deduced that at the time of purchase and when the accident occurred on 24th March 2014, he was the legal owner of the suit vehicle, jointly with the bank. These facts are not in contention from either of the parties. What is in dispute is whether the Respondent was still the legal owner of the vehicle at the time of the attachment in execution of the decree from the trial court.

28. I have perused the trial file and therein noted an agreement for sale in respect of the suit vehicle between the Respondent and Benard Kiplang'at Kirui dated 26th February 2015 and produced as PEX6. The Agreement indicates that the purchase price is Kshs. 1,264,790/= with the deposit being Kshs. 315,000/= that was paid to the Respondent. According to the Agreement, the balance of Kshs. 949,790/= was to be paid directly to NIC Bank from 11th March 2015, and every succeeding month, to offset the outstanding loan balances. This informs the claim by the Appellant that the suit vehicle had already passed onto a third party.

29. In the Court of Appeal, Tunoi, O'Kubasu' Deverell JJ.A held in **Securicor Kenya Ltd vs. Kyumba Holdings Civil Appeal No. 73 of 2002** that:-

*"Our holding finds support in the decision in **OSAPIL VS. KADDY [2000] 1 EALA 187** in which it was held by the Court of Appeal of Uganda that a registration card or logbook was only prima facie evidence of title to a motor vehicle and the person whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise. The appellant had, indeed, proved otherwise."*

30. The same Court in the case of **Joel Muga Opinja vs. East Africa Sea Food Ltd [2013] eKLR** restated this position as follows:-

"We agree that the best way to prove ownership would be to produce to the Court a document from Registrar of Motor Vehicles showing who the registered owner is but when the abstract is not challenged and is produced in Court without any objection, the contents cannot later be denied."

31. From the foregoing, the presumption of ownership arising out of the production of a title document is the best evidence *prima facie* to demonstrate one's ownership rights. However, this presumption is not absolute and may be rebutted based on the facts of a case and the evidence produced. In this case, the Respondent testified that the log book had been retained by the bank, even though he had completed his loan as he was yet to pay for the log book processing fees. He maintained that at the time of the attachment of the vehicle, the vehicle was still legally his.

32. The Respondent further explained away the existence of a sale agreement between himself and one Bernard Kiplangat Kirui as aimed at getting finances to pay off his chattel mortgage with the bank.

33. In the Court of Appeal case **Civil Appeal 192 of 2007 Ignatius Makau Mutisya vs. Reuben Musyoki Muli [2015] eKLR**, it was stated as follows:-

"All this goes to show that the presumption that the person registered as owner of a motor vehicle in the log book is the actual owner is rebuttable. Where there exists other compelling evidence to prove otherwise, then the Court can make a finding of ownership that is different from that contained in the log book. Each case must however be considered on its own peculiar facts. As observed by this Court in the case of ***Francis Nzioka Ngao vs. Silas Thiani Nkunga, Civil Appeal No. 92 of 1998,***

'Whether the property in a chattel being sold has or has not been passed to the buyer is a question of fact to be determined on the facts of each individual case."

34. It is clear that the Respondent purchased the suit motor vehicle through financing by NIC Bank, that the said vehicle was involved in an accident and that even though he jointly owned the motor vehicle with the bank, it was eventually paid for in full by the purchaser Bernard Kiplangat Kirui who had control and custody at the time of attachment and sale. The legal ownership by the Respondent was still subsisting at the time of the accident.

35. This appeal however arises from an accident claim that occurred at the time when the Respondent was the legal owner of the suit vehicle. Thus, this Court must make a determination on the insurable interest that existed from the insurance contract between the Appellant and the Respondent at the time of the accident. This is an issue to which I shall return later.

ii) Whether the parties were aware of the existence of the original suit (Civil Suit No.247 of 2015) that led to the present appeal.

36. From the trial proceedings I note that the firm of G.M. Maengwe & Company Advocates filed a statutory notice dated 2nd November 2014 that was addressed to AIG Insurance Company Limited, the Appellant herein. There is also a Summons to enter Appearance dated 3rd November 2015 served upon the Respondent. There is no proof of service either by an affidavit or a certificate of posting.

37. From the trial Record, the Respondent during cross-examination testified that he was told that the demand notice and summons were sent to the Insurer. He also stated that he informed the Appellant of Civil Suit 247 of 2015 but they did not take any action. I find this odd because he had originally stated that the claimant's advocates never informed him of the suit and that the address used on the Summons to enter Appearance did not belong to him yet on this other hand he stated that he forwarded the Summons to the Appellant and they failed to act. Lastly, he also stated in examination in chief that G.M. Maengwe Advocates for the claimant had sent a letter to him on 3rd November 2015. Therefore the issue about the Respondent not knowing about the civil suit against him does is not truthful as I have established that the advocates for the claimant did inform him. Therefore, his reasons for failing to enter appearance or defend the suit remain a mystery.

38. There is on record a demand notice issued at the beginning of the suit, dated 2nd November 2014 by G.M. Maengwe Advocates. The address indicated as belonging to the Appellant was neither denied nor rebutted as an erroneous address. Whether the statutory demand was in fact served upon the Appellant is a question of fact. The address indicated on the statutory demand is P. O. Box 49460 - 00100, Nairobi served upon the Claims Manager of AIG Insurance Company Limited.

39. The provision on Service of Summons is provided for under **Order 5, Rules 6 and 7 of the Civil Procedure Rules**. The said rules are explicit that service of summons shall be made by delivering or tendering the duplicate of the said document that is intended to be served upon the other party. Rule 3 in particular envisages service on a corporation that:

Service on a corporation.

3) Subject to any other written law, where the suit is against a corporation the summons may be served —

a) on the secretary, director or other principal officer of the corporation; or

b) if the process server is unable to find any of the officers of the corporation mentioned in rule 3 (a) —

i) by leaving it at the registered office of the corporation;

ii) by sending it by prepaid registered post or by a licensed courier service provider approved by the court to the

registered postal address of the corporation; or

iii) if there is no registered office and no registered postal address of the corporation, by leaving it at the place where the corporation carries on business; or

iv) by sending it by registered post to the last known postal address of the corporation."

40. In this case, since the address remained uncontroverted and the Appellant did not adduce any evidence to the contrary indicating that they did not receive the said demand notice, I am satisfied that the notice was duly served upon them. In the proceedings, the Appellant's legal officer confirmed during cross examination that the Statutory Notice from G.M. Maengwe was received by AIG although the date indicated for receipt was 2nd June 2018, after the car had been attached and sold. There is no certificate of posting that was filed on Record together with an affidavit in the present suit and the Appellant claims that they were served way later. The burden lies on the Appellant to prove that they were served way after the loss. In my view it is questionable that a letter dated 2nd November 2014 could have been posted and received 4 years later as alleged by the Appellant's legal officer.

41. The Court of Appeal in the case **Dickson Daniel Karaba vs. John Ngata Kariuki & 2 Others [2010] eKLR** stated as follows:

"*Presumption as to service – There is a presumption of service as stated in the process server's report, and the burden lies on the party questioning it to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service.*

Also, in **Karatina Garments Limited vs. Nyanarua [1976] KLR 94**, the Court stated-

"*Where one party to proceedings denies having been served with a relevant document, it is proper for the Court to look into the matter; if the Court is faced with conflicting affidavits as to the alleged service of process, it is proper that the deponents should be examined on oath in order to establish the truth."*

42. On the same note, in the case of **Elizabeth Wambui Njuguna vs. Housing Finance Co. Kenya Ltd, Nairobi HCCC No. 293 of 2006**, Kasango J. held as follows;-

"*The Plaintiff ought to have brought evidence to show that the letter sent by the Defendants was not received by her and this could have been confirmed by the post master general."*

43. It is probable that the Appellant was actually served. What is unclear is the exact date of postage that would be evidenced by an Affidavit of service and Certificate of posting or at the very least, a Post Office receipt confirming postage. It is common practice that when a document is posted, it is deemed to be delivered after two days. In this case, the Appellant accepts that they received the notice but the same was received 4 years after the date indicated on the letter. I find this curious owing to the fact that the Appellant originally stated that they knew nothing about the civil suit until judgment was delivered and the suit vehicle attached.

44. The Appellant's conduct in respect of the manner in which the accident claim was handled was wanting. Firstly, she said that the Respondent filled a claim form, though unsigned, while on the other hand, the Respondent stated that he never filled any claim form. Secondly, in the testimony of the Legal Officer, she made reference to motor vehicle registration **No. KBX 566S** while the suit vehicle in this Appeal is **KBX 556S**. Later on however in re-examination, she stated that the same was a typographical error. A similar error is again noted on the email correspondence in which the suit vehicle is now listed as **KBX 565S**.

45. Thirdly, she made reference to a demand notice from the firm of D. Okech Advocates and failed to adduce this in court for scrutiny. The discharge voucher confirming the said settlement is also unsigned by the said firm of D. Okech Advocates albeit there are emails confirming that a former employee did settle the claim through an agent but the file cannot be traced. The only evidence available concerning the engagements with the firm are e-mail correspondences. I also noted from those email correspondences that they refer to an accident which occurred on **24th July 2014** while the Legal Officer in her testimony said that the accident whose claim was settled occurred on **24th May 2014**. The accident that brought this suit occurred on **24th March 2014.**

46. With all the above inconsistencies, I am not convinced that a typographical error could have occurred in respect of the dates and the registration all at the same time. These discrepancies create doubt as to whether the Legal Officer representing the Appellant knew at all the details pertaining to the case before the trial court at the time, no wonder they were misled in compensating a different party. She confirmed during cross examination that the amount paid to D. Okech Advocates was in respect of a different vehicle and not the suit vehicle. This was a demonstration that there was lack of keenness on their part in ensuring that they paid settlement costs for the correct claim.

47. It is my conclusion that the Appellant was well aware of the accident and the civil suit but having realized that they made an error in settling with a different party, they are now seeking to absolve themselves of any liability. I note that at all material times, the firm of G.M. Maengwe was on record for the claimant and their notices were served in 2014, the same year when the accident occurred while D. Okech came into the picture with their supposed demand notice in 2017. In the absence of the supposed demand notice received from D. Okech, I conclude that the Appellant engaged with a party not related to the suit in question.

48. It is trite that he who alleges must prove. Since this demand notice was of paramount importance to proving that the Appellant paid the rightful claimant in respect of the primary claim when it engaged with D. Okech for an out of court settlement, they ought to have adduced it

as primary evidence before court. It is my view also that they ought to have been diligent enough to engage with their insured the moment they received summons from a different firm in order to ascertain the party who sought compensation and their rightful advocate seeing as the Insured had already been served and was aware of the civil suit instituted by G.M. Maengwe Advocates. On the flip side, their admission to have compensated was material admission of liability.

iii) <u>Whether the trial court misdirected itself in making the award as compensation for the respondent's loss.</u>

49. According to the Plaint, the Respondent's first and main prayer was that he ought to have been compensated by the Appellant for the loss of his vehicle through the auction sale. The trial magistrate concluded that the Appellant owed the Respondent a duty to settle his claims and in failing to do so, the latter suffered a loss which could be compensated for as prayed. The trial magistrate therefore awarded the Respondent Kshs. 1,918,306/= which comprised of the cost of the car at mortgage value during the time of the sale together with the amount stipulated in the judgment decree from the civil suit.

50. In order to receive compensation from an insurance company, an insured person must demonstrate to the court that he indeed had an existing contract (Insurance policy) with the insurance company. Secondly, such a person must demonstrate that they had an insurable interest in the particular thing that they seek compensation for. The concept of insurable interest was defined in the case of **Lucena vs. Crawford (1806) 2 BOS PNR 269 at 302** where Lawrence J. stated that an insurable interest is essentially the pecuniary or proprietary interest that the insured stands to lose if the risk attaches. Similarly, in **Anctol vs. Manufacture Life Insurance Company (1899) AC 604**, it was defined as:-

> "*That basic requirement of an insurance contract unless waived, that it generally means that the party to the insurance contract who is the insured or policy holder must have a particular relationship with the subject matter with the insurance whether that be 'a life or property or a liability' to which he might be exposed. Every insurance contract requires an insurable interest to support it, otherwise it is invalid."*

51. Simply put, an insurable interest has the connotation of a pecuniary interest or proprietary interest (see **Halford vs. Kymer (1930) 10 B.C. 724.)** Courts have outlined the following as determinants of an insurance interest:

a) A direct relationship between the insured and the subject matter.

b) The relationship must have arisen out of a legal or equitable right or interest in the subject matter.

c) The interest bears any loss or liability arising in the event the loss or risk attaches.

d) The insured's right or interest in the subject matter must be capable of pecuniary estimation or quantification.

52. In the circumstances of this case, I am clear that the Respondent had an insurable interest at the time of the accident. This interest would lapse at the end of the insurance contract being 2nd March 2015. It is clear that an accident occurred during the pendency of the Insurance contract and during the subsistence of the legal ownership of the vehicle by the Respondent.

53. In line with the above, the Appellant in this case admitted before court that they had already settled the claim in respect of their insured through an out of court settlement. They produced DEX 4 and DEX 5 (a-c) being the email correspondence for the settlement sum and the approval and remittance of the settlement amount being Kshs. 136,400/=. From their own evidence, it is apparent that the Appellant had accepted liability for the claim brought against their insured, albeit, they paid the same to a non-existent law firm. The insurable interest being undisputed at the time of the accident and a valid insurance contract in place means that they were under a duty to compensate the Respondent in accordance with the insurance contract. They were willing to settle the claim from the onset. They are estopped from denying liability in respect of this same accident on the basis that they already settled the claim through mistaken parties. They were under a legal contractual duty to compensate their insured, the Respondent herein.

54. I now consider the award made by the trial court and whether it was appropriate under the insurance contract. The purpose of an insurance contract and the subsequent compensation is not meant to give an insured person unnecessary benefit or a profit of sorts from his loss. This was aptly cautioned by the Court of Appeal in the case of **Madison Insurance Company Ltd vs. Solomon Kinara t/a Kisii Physiotherapy Clinic [2004] eKLR**. It is solely meant to operate on **the principle of indemnity**.

55. Indemnity according to Black's Law Dictionary 10th Edition is defined as:-

> "*To reimburse (another) for a loss suffered because of third parties or one's own act or default."*

This means that whatever losses may be incurred, an indemnifier's work is to make good such a loss so as to restore the person in his or her original position.

56. The Supreme Court of India defined this concept as the basis of an insurance contract in the case of **United India Insurance Company vs. Kantika Colour Lab and others Civil Appeal No. 6337 of 2001** as follows:-

> "*Contracts of Insurance are generally in the nature of contracts of indemnity. Except in the case of contracts of Life Insurance, personal accident and sickness or contracts of contingency insurance, all other contracts of insurance entitle the assured for the reimbursement of actual loss that is proved to have been suffered by him. The happening of the event against which insurance cover has been taken does not by itself entitle the assured to claim the amount stipulated in the policy. <u>It is only upon proof of the actual</u>*

loss, that the assured can claim reimbursement of the loss to the extent it is established, not exceeding the amount stipulated in the contract of Insurance which signifies the outer limit of the insurance company's liability. The amount mentioned in the policy does not signify that the insurance company guarantees payment of the said amount regardless of the actual loss suffered by the insured. The law on the subject in this country is no different from that prevalent in England; which has been summed up in Halsbury's Laws of England – 4th Edition." [Underlining mine for emphasis].

57. Therefore, indemnity seeks to make good an insured person's position as if that loss had not occurred. It should not bring unnecessary gain to the party seeking compensation. In this case, the Respondent asked the trial court to make a finding that he ought to have been compensated for the mortgage value. From the NIC Bank statements attached in the Record of Appeal at page 27, the amount financed by the bank to enable the Respondent purchase the car was Kshs. 840,000/=. This is also evidenced by the Chattels Mortgage Instrument (PEX1) at page 175 of the Record of Appeal. The said loan amount was to be repaid in 48 monthly installments with an interest of Kshs. 11,520/= monthly. The monthly installments were Kshs. 30,282/= and the full loan repayment amount would be Kshs. 1,227,072/= to be completed on 11th March 2018.

58. At the time of the accident, the Respondent had made some monthly repayments as evidenced by the Mpesa statement PEX4 on page 185 of the Record of Appeal. I also note that the said Chattels Mortgage instrument indicated at page 178 of the Record of Appeal that the cost of the car was Kshs. 1,250,000/= and that the Respondent had paid Kshs. 410,000/= as deposit. In the Policy schedule at page 245, I noted that the Respondent paid Kshs. 54,283/= as premium for a sum insured of Kshs. 1,200,000/=.

59. The Appellant contended that the trial court ought to have awarded the Respondent the value of the suit vehicle at the time of sale. It is my view that the trial court should have only awarded the Respondent the sum insured at the time of the accident, being Kshs. 1,200,000/=. There is no evidence from the Respondent to demonstrate that he had insured the full loan amount. I am unable to make a finding in his favour for compensation for the entire loan amount.

60. In the persuasive case of **Crisp v. Security Nat'l Ins. Co, 369 S.W. 2d 326 (1963);** the court stated that:-

"Indemnity is the basis and foundation of insurance coverage not to exceed the amount of the policy, the objective being that the insured should neither reap economic gain nor incur a loss is adequately insured.….The measure of damage that should be applied in case of destruction of this kind of property is the actual worth of value of the articles to the owner for use in the condition in which they were at the time of the fire excluding any fanciful or sentimental considerations"

61. Following the above, the only compensation the Respondent would be entitled to would be that insurable interest for which he paid premiums. It is my conclusion that the trial magistrate erred in making the said award as it exceeded the insurable interest under the insurance contract.

iv) What interest is applicable and who bears the costs of the suit?

62. The Civil Procedure Act under sections 26(2) and 27(2) provide on the issue of interest as follows:

26. Interests

1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.

2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.

*27. **Costs***

1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: 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.

2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such. [Act No. 19 of 1985, Sch.]

63. The award of interest is discretionary as seen from section 26 above. However, the Chief Justice from time to time fixes the ceiling of the court rate interest under section 26 of the Civil Procedure Act. The interest rate affixed by the Chief Justice through **Practice note no. 1 of 1982** dated **Tue, March 16th 1982** remains 12% unless there was a valid reason for ordering a higher or lower rate of interest. I therefore find the rate of 8.27% awarded by the trial magistrate to be lawful and reasonable and I shall not disturb it.

64. In the final analysis, the Appeal partly succeeds to the extent that the award is varied as follows: -

i) Judgment is entered in the sum of Kshs. 1,200,000/= being the insurable interest at the time of the accident in favour of the Respondent.

ii) The Appellant shall pay interest at the rate of 8.27% on (i) above from the date of the judgment in the trial court until payment in full.

iii) Costs of this suit in the trial court shall be borne by the Appellant while each party shall bear their costs in this appeal.

65. Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 31STDAY OF MARCH,2022

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R. LAGAT-KORIR

JUDGE

Judgment delivered virtually in the absence of Mr. Omwenga for the Appellants and in the presence of Mr. Kiprotich holding brief Mr. Kemboi for the Respondents and Kiprotich (Court Assistant).

The Judgment emailed to the parties at the following address: