



**Real Insurance Company Limited v Ndambuki (Civil Appeal
6 of 2019) [2022] KEHC 228 (KLR) (24 March 2022) (Judgment)**

Neutral citation: [2022] KEHC 228 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 6 OF 2019
MW MUIGAI, J
MARCH 24, 2022**

BETWEEN

REAL INSURANCE COMPANY LIMITED APPELLANT

AND

TITUS ITUMO NDAMBUKI RESPONDENT

(Being an appeal from the judgment and decree by Hon. I. Kabuya (S.R.M.) in Chief Magistrate's Court at Machakos in Civil suit No. 361 of 2017 delivered on 13th December, 2018)

JUDGMENT

BACKGROUND:

1. The Plaintiff filed in Court on 28th June, 2017 a Plaint dated 24th June, 2017 and deposited; on 1st August 2012, the Plaintiff was lawfully travelling as a passenger in motor tri –cycle KTWA 100 C along Machakos – Wote Road. When he was near Machakos Level 5 Hospital, the 2nd Defendant drove motor vehicle registration number KBK 541E negligently, that it rammed into the rear of the motor tri-cycle KTWA 100C and violently pushed it off the road into a drainage as a result the Plaintiff sustained severe injuries.
2. That the Plaintiff filed Civil Suit No. 866 of 2012 at Chief Magistrate's Court at Machakos where on 5/12/2013. Judgment was entered in favour of the Plaintiff against the Defendant's Insured for Kshs.173,330/-. The costs of the suit were subsequently assessed at Kshs.79,890/- and interest to date at Kshs.183,200/- making the sum due and payable by the defendant to the Plaintiff at Kshs.436,420.
3. The defendant was informed of the said judgment through a letter dated 6/12/2013 and was requested to settle the sum of Kshs.436,420 but the defendant declined to pay the same. The Plaintiff prays for judgment against the defendants for:



- (a) A declaration that the Defendant is bound to honour and/or satisfy the judgment in the said CMCC No. 866 of 2012 (Machakos).
- (b) An order compelling the defendant to pay the sum of kshs.436,420/- plus interest therein at Court rates from the date of filing till full payment.
- (c) Costs of this suit;
- (d) Any other or further relief as this honourable Court may deem fit and just to grant

DEFENSE

- 4. The Defendant filed his statement of defence dated 19th July, 2017 filed in Court on 25th July, 2017, and denied that it was the insurer of the motor vehicle reg. KBK 541E at the time of the accident i.e on 1/08/2012; that the correct insurance cover for the said motor vehicle under policy number MRU/MPRV/VOL/2052744 was for the period 06/08/2012 to 11/03/2013 hence it was a stranger in this civil suit.
- 5. The defendant sought to rely on the pleadings, proceedings and judgment in Machakos CMCC 127 of 2015 which was a similar suit arising from the same accident where the court dismissed the suit against the defendant.

JUDGMENT OF THE TRIAL COURT

- 6. The Trial Court in its judgment delivered on 13th December, 2018 found that the Defendant was statutorily bound to settle the decretal sum in Machakos CMCC No. 866 of 2012 and entered judgment for the Plaintiff against the defendant for Kshs.436,420/- with interest thereon at court rates from the date of the primary suit CMCC 866 of 2012, judgment to the date of this judgment of CMCC 361 of 2017.

APPEAL

- 7. Aggrieved by the Trial Court judgment the Appellant herein filed his Memorandum of Appeal dated 14th January, 2019 and filed in Court on 31st January, 2019 based on the following grounds:-
 - (a) That the Trial Magistrate erred in both law and fact when she made a declaration that the Appellant is statutorily bound to settle the decretal sum in Machakos CMCC No. 866 and awarded Kshs.436,420/- as general damages in favour of the Respondent against the Appellant.
 - (b) That the Trial Magistrate erred both in law and fact in declaring that the Appellant is liable to pay the claim under CAP 405 Insurance (Motor Vehicle Third Party Risks) Act contrary to the evidence and submissions on record that motor vehicle registration number KBK 541 E was not insured by the Appellant at the material time.
 - (c) That the Trial magistrate erred both in law and fact by failing to properly find that Section 10 (1) and Section 10(2) of Cap 405 does not apply to the Appellant in the circumstances as it was not repudiating the policy nor under a statutory obligation to repudiate a non-existent policy.
 - (d) That the Trial Magistrate failed to properly scrutinize Section 10 (1) and Section 10(2) of Cap 405 and appreciate and apply the full meaning and import in relation to insurance contracts and further that an insurance company is only bound to pay a claim where there is a cover and a policy in existence between the insurance company and the Defendant in the primary suit.
 - (e) That the Trial Magistrate erred both in law and fact by failing to appreciate the full import of Section 10 (1) and Section 10(2) of Cap 405 Insurance (Motor vehicle third party Risks)



Act with regard to declaratory suits to enforce and or decline responsibility under an insurance contract.

- (f) That the Trial magistrate erred both in law and fact in failing to take into account the submissions of the Appellant's Counsel whilst making the award.
 - (g) That the learned Trial Magistrate erred both in law and fact by failing to uphold the doctrine of precedent and appreciate and be guided by the laws of natural justice and appreciate and be guided by case law of similar facts.
 - (h) That the learned Trial Magistrate erred both in law and fact in making a declaration against the Appellant while failing to apply the doctrine of Stare Decisis which was applicable in the circumstances as a court of competent jurisdiction had already pronounced itself on another matter arising from the same accident being *Machakos Civil Case Number 127 of 2015 Abdullah Mbiti Mumo –vs- Real Insurance Company Limited*.
 - (i) That the declaration and subsequent award on general damages was against the weight of the evidence before the Court and was without any consideration to the submissions of both counsel whilst making the award.
8. He sought for the following orders:
- (a) The Judgment be set aside.
 - (b) The declaration that the Appellant is liable to pay for the general damages and costs in Machakos Civil Suit Number 866 of 2012 be set aside.
 - (c) The appeal be allowed with costs.

APPELLANT SUBMISSIONS:

9. The Appellant submitted that they had not issued any policy to the Respondent as at 1/08/2012 and therefore there being no policy in existence there was none to repudiate as Section 10 of CAP 405 was not applicable to the Appellant. Reference was made to the provision of Cap 405 Insurance (Motor Vehicle Third Party Risks) Act;
10. That the Respondent failed to discharge his duty to prove his case on a balance of probabilities since the claim was wholly reliant on Section 10 of Cap 405 Laws of Kenya it was therefore imperative that the Respondent was to demonstrate by way of adducing evidence that the Appellants' were indeed the insurers of motor vehicle KBK 541 E on 1st August, 2012 and that the Appellants on their part denied that they were the insurers of the said motor vehicle and tendered evidence in support of the same by producing a copy of policy which was only valid during the period of 6th August, 2012 to 13th March, 2013.
11. The Appellant further submitted that the moment they denied being insurers of the said motor vehicle and produced evidence to that effect then the burden of proving that the Appellant were not liable under Section 10 of Cap 405 had been discharged. Reference was made under section 107 of the evidence Act which states that:-
- Section 107
- (i) 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 exists.



- (ii) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
12. The Appellant referred to the Court of Appeal case of *Mbutbia Macharia –vs- Annab Mutua & Anor* [2017] eKLR while discussing the burden of proof stated thus:-
- “ [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 court of trial, depending on the evidenced adduced. As the weight to evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence/ in this case, the incidence of both the legal and evidential burden was with the Appellant.”
13. It was therefore imperative that the Respondent demonstrates by way of evidence that the Appellants were indeed insurers of motor vehicle Reg KBK 541E as at 1st August 2012. F
14. The Appellant further submitted that the Trial Court failed to apply the doctrine of stare decisis given that a court of competent jurisdiction had already pronounced itself on another matter arising from the same accident.

RESPONDENT SUBMISSIONS

15. The Respondent submitted that the Trial Court found that a Statutory notice had been served upon the Appellant which did nothing to repudiate the Policy if it for sure felt that it had not insured the accident motor vehicle as at the time of the accident; that the Appellant did not come forward and defend the primary suit so as to protect its interests; that the Respondent was not expected to produce the certificate of insurance himself since such a document was not issued to him but to the owner of the motor vehicle; and that the Trial court further found that the Appellant could not explain how police officers obtained the insurance details by the Appellant.
16. The Respondent relied on the case of *Gitobu Imanyara & 2 Others vs AG* (2016) eKLR quoted in *Jackson Kaio Kivuva vs Penina Wanjiru Muchene* (2019) eKLR to buttress the point;
- “ An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such appeal are well settled. Briefly put, they are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has either seen nor heard the witness and should make due allowance in that respect.”
17. The Respondent relied on the case of *APA Insurance Co Ltd vs George* (2014) eKLR on the import of a Certificate of Insurance;
- The Certificate of Insurance is usually issued to the insured and not the road accident victim. It is a document in the special knowledge and possession of both the insured and insurer. The details in the Police Abstract on the insurance are in the ordinary course of business obtained by the Police from the Certificate of Insurance offered to the motor vehicle or supplied by the Insurer.

DETERMINATION



18. This being a first Appellate Court, its role is well captured in the case of *Selle vs. Associated Motor Boat Co [1986] EA 123* as follows:-

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal from the trial court by the high court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect in particular the court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

19. The Court considered pleadings submissions and evidence on record; the issues for determination are;

- (a) Did the Trial Court err in declaration that the Appellant is statutorily bound to settle the decretal sum in Machakos CMCC No. 866 and awarded Kshs.436,420/- as general damages in favor of the Respondent against the Appellant?
- (b) Did the Trial Court fail to appreciate the full import of Section 10 (1) and Section 10(2) of Cap 405 Insurance (Motor vehicle third party Risks) Act with regard to declaratory suits to enforce and or decline responsibility under an insurance contract?
- (c) The Trial Court failed to apply the doctrine of Stare Decisis which was applicable in the circumstances as a court of competent jurisdiction had already pronounced itself on another matter arising from the same accident being Machakos Civil Case Number 127 of 2015 Abdullah Mbithi Mumo –vs- Real Insurance Company Limited.

20. The Plaintiff filed Civil Suit No. 866 of 2012 Interlocutory Judgment was entered in favour of the Plaintiff against the Defendant’s Insured;

Nthukah Moses 1st Defendant & Moses Mugambi Kegoro 2nd defendant respectively. The matter proceeded for formal proof where PW1 testified that while on board Reg KTW 100C Tuk Tuk the 2nd Defendant drove motor vehicle registration number KBK 541E negligently, that it rammmed into the rear of the KTW 100C and the Plaintiff sustained injuries. The Plaintiff produced the Police Abstract PEX 4 and informed the Trial Court that the 2nd Defendant Moses Mugambi Kegoro was charged for careless driving and fined Ksh 3,000/-. The Defendants did not enter appearance and/or file defense and liability was entered against the Defendants jointly and severally at 100%.

21. The Trial Court assessed the special and general damages and on 5/12/2013, judgment was entered for Kshs.173,330/-. The costs of the suit were subsequently assessed at Kshs.79,890/- and interest to date at Kshs.183,200/- making the sum due and payable by the defendant to the Plaintiff at Kshs.436,420/- in the declaratory judgment of 13/12/2018.

22. The Plaintiff before filing the declaratory suit the subject of the instant Appeal served the Defendant/Appellant with notice of intention to file declaratory suit on 6/12/2013.

23. The Defendant did not deny the demand letter, statutory notice and notice of intention to sue and file a declaratory suit to be filed by the Plaintiff/Respondent.

24. The Plaintiff/Respondent filed Civil Suit 361 of 2017 against the Defendant/Appellant. The plaintiff testified and relied on his Witness Statement of 24/6/2017. The plaintiff produced Police Abstract PEX



- 5 for motor vehicle Reg KBK 541E insured as per Policy no MRU/MPR/POL/205744/COMP that commenced from 29/5/2012-18/3/2013.
25. The Defendant /Appellant denied that it was the insurer of the motor vehicle reg. KBK 541E at the time of the accident i.e on 1/08/2012; that the correct insurance cover for the said motor vehicle under policy number MRU/MPRV/VOL/2052744 was for the period 06/08/2012 to 11/03/2013 hence it was a stranger in this civil suit.
 26. On the one hand, the Appellant relied on the case of *Geminia Insurance Company Limited vs John Mukele Musili & 2 Others* where Hon.L.Njagi J held that since the Plaintiff did not issue Certificate of Insurance in question there was no contract of insurance at the time of the accident and was not bound to settle the claim arising out of the accident in question.
 27. On other hand, the Respondent took the view that the Certificate of Insurance on the Defendant's motor vehicle Reg KBK 541E at the time of the accident indicated the insurance cover commenced from 29/5/2012-18/3/2013. The Police Abstract produced as PEX 5 was filled by the Scene Visiting/ Investigation Officer Senior Sergeant Oseko of Machakos Police Station.
 28. The Plaintiff/Respondent relied on the case of *Cooperative Insurance Co Ltd vs John Kabui Njiri High Court Civil Appeal 119 of 2003* Hon A. Makhandia J observed; the Policy of insurance was not tendered in evidence. As it is therefore [the Court] had no benefit of its content. It may have contained provisions contrary to what the Appellant was stating. After all it was a comprehensive cover.
 29. This Court outlined the chronology of events to aid resolution of the dispute as there are parallel compelling arguments by each party to fortify its position. Section 107-112 of *Evidence Act* encompasses the cardinal rule of Evidence that he who alleges must prove.
 30. The Plaintiff/Respondent proved that he was injured in a road accident where Defendants' the motor vehicle Reg KBK 541E was found liable for the accident as per the judgment in Civil Suit No. 866 of 2012. During these proceedings the plaintiff produced the Police Abstract PEX4 filled as per OB 13 of 1/8/2012 on 5/9/2012, that confirmed motor vehicle Reg KBK 541E insured as per Policy no MRU/MPR/POL/205744/COMP that commenced from 29/5/2012-18/3/2013.
 31. The Plaintiff was/is not privy to the Contract of Insurance between the Appellant and Defendants/ Insureds save for the fact that at the time of the accident the Defendants vehicle had the Certificate of Insurance as indicated above. The Plaintiff produced the copy of Certificate of Insurance No 8885085 Policy Holder as per Policy for Reg KBK 541E.
 32. The Policy of Insurance is a contract of Insurance between the Insurer and Insured. The Plaintiff discharged his burden of proof that motor vehicle Reg KBK 541E was insured at the time the accident that gave rise to his injuries occurred.
 33. The Defendant reiterated its position that it had /did not insure the Defendants for the period of 29/5/2012-18/3/2013 but from 6/8/2013.
 34. The Defendant/appellant submitted that the Plaintiff did not produce the Certificate of Insurance neither did he invite the Police Officer who authored the Police Abstract to explain where he got the information from. On the other hand, the Defendant /Appellant produced the Certificate of Insurance that indicates the cover was to commence on 6/8/2012.
 35. This Court considered Section 112 of the Evidence Act that provides;
Proof of special knowledge in civil proceedings



- In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him
36. In the instant matter, the plaintiff did not know any of the parties before the occurrence of the accident that gave rise to his claim for compensation for injuries sustained from the said accident.
 37. The Plaintiff sued the Defendants' owners or in possession of the impugned motor vehicle Reg KBK 541E and the 2nd Defendant was charged and convicted of careless driving. Judgment was entered in favor of the Plaintiff against the Defendants in Civil Suit No. 866 of 2012. The Police Abstract filled by Scene Visiting Officer confirmed the insurance vide the Policy Number and Certificate of Insurance which was produced in Civil Suit No. 866 of 2012 contrary to the Defendant's claim that the Certificate of Insurance was not produced by the Plaintiff. The Plaintiff was not legally required to avail the Scene Visiting /Investigation Officer as he had no issue to raise with regard to the Police Abstract as filled.
 38. Apart from details obtained during/after the accident, since the Plaintiff was not privy to the Insurance arrangement between the Appellant and Insureds, it is contrary to Section 112 of Evidence Act to demand /require from the Plaintiff, details or evidence or documents that he was not privy to, made aware of, availed to or involved. The Plaintiff cannot produce or prove what is not in his possession, knowledge or involvement. As long as the Plaintiff presented evidence of Defendants insured by the Appellant through production of Police Abstract and copy of Certificate of Insurance, prima facie the Defendants motor vehicle was insured by the Appellant.
 39. With regard to Appellant's claim that they insured the Defendants motor vehicle from 6/8/2013 and not from 1/8/2013 and through DW1Antony Kariuki as per his statement of 24/11/2015, the Court finds that the burden of proof shifts to the appellant to prove either it was not insurer of the Defendants motor vehicle apart from alleging so. Whereas the Defendant cast aspersions to the Police Abstract and details thereof, at no point during the proceedings of Civil Suit 361 of 2017, did the Defendant/appellant request for the Scene Visiting Officer /Investigation Officer to be summoned by the Trial Court and subjected to cross examination to test veracity of contents of the Police Abstract as in the case of Dominic Githae vs Susan Kanyi HCCA 130 of 2008 MHC Hon. A Makhandia J posited where contents of P3 Forms and Police Records were questioned;

.....Ordinarily the Police abstract speaks for itself..... the appellant questioned the validity of Police Records. However, I believe P.C. Onesmus Mutuku offered a perfect explanation.....
 40. Secondly, the Policy of Insurance that details terms of Insurance between the Insurer and Insured was not produced as evidence to ascertain the period of Insurance and terms of Insurance of motor vehicle Reg KBK 541E.
 41. Thirdly, if the Certificate of Insurance No 8885085 Policy Holder as per Policy for Reg KBK 541E was/ is a forgery or fraud, no evidence was adduced to confirm that the Appellant pursued the matter with Law Enforcement Agencies and/or Courts of Law against the Defendants namely; Nthukah Moses 1st Defendant & Moses Mugambi Kegoro 2nd defendant.
 42. From the above evaluation of the evidence on record and taking into account that this Court did not see and hear the witnesses, the emerging position is that the Plaintiff/ Respondent discharged its burden of proof and established the legal claim against the Appellant.
 43. On the issue of whether Trial Court failed to appreciate the full import of Section 10 (1) and Section 10(2) of Cap 405 *Insurance (Motor vehicle third party Risks) Act* the Court referred to;



Section 10 of Insurance Motor Vehicle 3rd Party Risk Act provides for the duty of insurer to satisfy judgments against persons insured as follows;

- (1) 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.

44. The Appellant submitted that it had not issued any policy to the Respondent as at 1/8/2012 when the accident occurred. The Appellant sought that the Plaintiff/Respondent proves that the Defendants were insured as at 1/8/2012, as considered above, this would be an uphill task for the Plaintiff / Respondent as it was /is not privy to the contract of insurance between parties. The Appellant ought to have produced the Policy of Insurance at the Trial Court's proceedings, to confirm terms and period of insurance if at all. The onus of proving whether the policy of insurance was effected lies with the appellant in the absence of which Section 10 of the Act is applicable.
45. On whether the Trial Court failed to apply the doctrine of Stare Decisis in Machakos Civil Case Number 127 of 2015 Abdullah Mbithi Mumo –vs- Real Insurance Company Limited, the Court observes as follows;
 - a) Each case, matter is heard and determined on its special and specific circumstances.
 - b) The Trial Court's in Civil Case 361 of 2017 & Civil Case 127 of 2015 are both Senior Resident Magistrates; Courts of equal, similar concurrent and competent jurisdiction. Their decisions are not binding to each other's Court but persuasive.
 - c) Stare decisis is binding precedent on the Lower Court by the Higher Court in the hierarchy of Courts in cases of similar facts and or issues.
 - d) In Machakos Civil Case Number 127 of 2015 Abdullah Mbithi Mumo –vs- Real Insurance Company Limited, the Trial Court observed at Pg 2 of the Judgment as follows;
From the Plaintiff's cross examination evidence, he clearly admitted to the fact that he did not have any insurance policy at the time of the subject accident.....
 - e) In the instant case, the Plaintiff filed declaratory suit following judgment and decree in CMCC 866 of 2012 following the fact that the Defendants' vehicle was insured as shown by the Police Abstract and the Certificate of Insurance showed the insurance was from 29/5/2012-18/3/2013. Clearly, there are different sets of facts, one judgment arose out of an admission and in this case there was no admission.
46. For these reasons the Trial Court was not bound to apply the decision of Machakos Civil Case Number 127 of 2015 Abdullah Mbithi Mumo –vs- Real Insurance Company Limited.

DISPOSITION

1. The appeal against the Judgment of 13/12/2018 in Civil Case 361 of 2017 is dismissed and the costs be borne by the Appellant in favor of the Respondent.



DELIVERED SIGNED DATED IN OPEN COURT ON 24TH MARCH 2022 (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

MR. MULI/MUUMBI .FOR APPELLANT

MR. MUSILI H/B KAVILA FOR RESPONDENT

GEOFFREY COURT ASSISTANT

Mr. Muli: We pray for 30 days stay of execution. So as to preserve the amount deposited in an interest earning account.

COURT: Stay of execution for 30 days granted.

M.W. MUIGAI

JUDGE

