



**Aluvaga v Africa Merchant Assurance Co. Limited (Civil Appeal  
2 of 2019) [2022] KEHC 10649 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 10649 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
CIVIL APPEAL 2 OF 2019  
SN MUTUKU, J  
APRIL 28, 2022**

**BETWEEN**

**LEE DEMESI ALUVAGA ..... APPELLANT**

**AND**

**AFRICA MERCHANT ASSURANCE CO. LIMITED ..... RESPONDENT**

*(Being an appeal from the judgement/decree of Hon. Mr.  
Mbungi given on 21/12/2019 in Ngong CMCC No. 114 of 2017)*

**JUDGMENT**

**Introduction**

1. The Appellant herein was involved in a road traffic accident on 17<sup>th</sup> August 2012 at the intersection of North Airport Road in Nairobi as a result of which he sustained fractures on the pubic bone, fracture to the left iliac bone, fracture to the skull and extensive head wound. He sued one Josphat Nyakundi, the driver of the Motor Vehicle Registration No. KAP 931J, while Lawrence Obwoye was the registered owner of that vehicle as 1<sup>st</sup> and 2<sup>nd</sup> defendants in Milimani CMCC No. 3894 of 2013. He successfully prosecuted the suit and was awarded Kshs 1,626,079.93 as shown in the decree and certificate of costs dated 10<sup>th</sup> April 2017.
2. These proceedings in Milimani CMCC 3894 gave rise to a statutory cause of action for a declaration under the Insurance (Motor Vehicles Third Party Risks) Act (Cap. 405 Laws of Kenya) that the defendant is liable to satisfy the primary decree in Nairobi CMCC No. 3894 of 2013 under Section 10 of the said Act.



3. The Appellant was however unsuccessful in that claim. The learned magistrate and his claim was dismissed by the trial court on 21<sup>st</sup> December 2018. The trial court stated as follows in dismissing that claim:

“In a nutshell I do find that the contents entered in the police abstract not strict proof of the correctness of the details entered therein. I do find that on a balance of probability the plaintiff has not proved his case against the defendant. I do dismiss the case.”

4. That dismissal aggrieved the Appellant and as a result, he preferred this appeal.

### **Memorandum of Appeal**

5. The Appellant has raised the following grounds of appeal in his memorandum of appeal dated 14<sup>th</sup> January 2019:

- i. The Learned Magistrate erred in dismissing the plaintiff's/appellant's suit as not proved.
- ii. The Learned Magistrate erred in his appreciation and application of the provisions of the Insurance (Motor Vehicles Third Party Risk) Act Chapter 405 of Laws of Kenya.
- iii. The Learned Magistrate erred in his appreciation and application of the case law cited by the parties.
- iv. The Learned Magistrate failed to appreciate and therefore to find and hold that plaintiff's evidence was not controverted.
- v. The Learned Magistrate misunderstood the burden and standard of proof.
- vi. The Learned Magistrate misunderstood the evidence materially.

6. The Appellant seeks orders to set aside the entire decision of the lower court and to have it substituted with a judgment for the appellant against the respondent as prayed in the plaint and costs of the appeal.

### **Submissions**

7. The appeal was canvassed by way of written submissions.

8. In his submissions dated 5<sup>th</sup> July, 2021, the Appellant has faulted the trial court for dismissing the case as not proved and for misunderstanding the evidence and the law. He submitted that his six grounds of appeal are mainly on points of law.

9. He submitted that section 10 of the Insurance (Motor Vehicles Third Party Risk) Act makes it mandatory for an insurer to satisfy all judgement sums and costs for its insureds; that section 10(2) gives the exceptions when an insurer may not be liable, namely that:

- i. Where there is stay of execution of the judgment/decree.
- ii. Where the policy has been cancelled and the certificate of insurance has been surrendered.
- iii. Where no notice of institution of the suit giving rise to the judgment sought to be enforced was served either before institution of the suit or within 14 days after it was filed.
- iv. Where the insurer has obtained a decree entitling it to avoid liability under the policy.

10. He submitted that the four exceptions are the only instances when an insurer can avoid liability under a policy and that the trial court was referred to the relevant authorities on that issue but the learned



- magistrate did not consider those authorities despite the fact that the authorities were binding on the court. He submitted that none of the four exceptions were pleaded in this case and not evidence was adduced by the defence to bring the Respondent within those exceptions.
11. It was submitted that the Appellant relied on police abstract and its contents as proof of insurance; that the Appellant called a police officer who confirmed the contents of the police abstract and the policy number, which policy had been issued by the Respondent as shown on the Certificate of insurance displayed on the vehicle's windshield. It was submitted that the Respondent did not offer any evidence controverting that direct oral evidence supported by a document which was produced without objection. They listed various cases supporting the fact that contents of a police abstract have been held to be sufficient proof of their contents until the contrary is proved.
  12. It was submitted that the Court of Appeal decisions of *Securicor Kenya Ltd -v- Kyumba Holdings Limited* Civil Appeal No. 73 of 2002 and *Joel Muga Opija -vs- East Africa Sea Food Ltd* (2013) eKLR both settled the place of the contents of police abstract where there is no other contradictory evidence. It was submitted that it was erroneous for the trial court to hold that the Appellant should have produced either the policy document or the certificate of insurance, which was observed by the court in the case of *Edwin Ogada Odongo -vs- Phoenix of East Africa Assurance Co. Ltd* to be impossible for a road accident victim to access such documents which are in the possession of the insurer and the insured since they are parties to the contract of insurance.
  13. The Respondents filed their submissions dated 15<sup>th</sup> October, 2021. The Respondent has raised two issues for determination:
    - a) whether the Respondent had insured motor vehicle registration KAP 931J on or about 17<sup>th</sup> August, 2012.
    - b) whether the judgement in Nairobi CMCC 3894 of 2013 was entered against an insured of the Respondent.
  14. In addressing the first issue the Respondent has submitted that the pronouncement of statutory law and the proceedings in the declaratory suit make it crystal clear that the Appellant failed to lead necessary and substantial evidence in support of his allegations; that the Appellant is erroneously seeking to shift the burden of proof that he bore on the Respondent through this appeal when the Respondent unequivocally refuted the substance of the Appellant's allegations; that the cardinal principle of law is that he who alleges must prove as per section 107 and 109 of the *Evidence Act* and that the Appellant did not make any effort to obtain the certificate of insurance of the concerned motor vehicle to verify who the insurer was in light of the Respondent's unequivocal denial that it had insured the motor vehicle.
  15. It was submitted that the Appellant relied on police abstract without bringing the investigating officer to claim the Respondent had insured the motor vehicle. The Respondent cited *Richard Makau Ngumbi & another -vs- Cannon Assurance Company limited* (2016) eKLR and *Kenya Orient Insurance Co. Ltd -vs- Farida Hemed* [2015] eKLR.
  16. It was their argument that the Appellant testified that besides reading the contents of the police abstract he did not make any attempt to find out who had insured motor vehicle KAP 931J. That neither him nor his advocates contacted the defendant in Nairobi CMCC 3894 of 2013 to get information on the insurance company.
  17. On the second issue it was submitted that there could be no liability against the Respondent if judgment in Nairobi CMCC 3894 of 2013 was not entered against an insured of the Respondent or an agent of the Respondent's insured.



## Determination

18. This is a first appeal and this court understands its mandate as stipulated in the court of appeal in *Kiruga vs Kiruga & Another* [1988] KLR 348, observed that: -

“An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand.”
19. The law under the *evidence Act* section 107 and 108 states that he who alleges must prove. The burden of proof being one on a balance of probabilities. In this case the Appellant filed a declaratory suit in Ngong CMCC 114 of 2017 against the Respondent seeking for a declaratory judgment that the Respondent be bound to satisfy the judgement entered in Nairobi CMCC 3894 of 2013. It was the case for the Appellant that the Respondent had a valid insurance policy No. AM1/085/1/008351/2010 which covered motor vehicle registration number KAP 931J and that the registered owner was Lawrence Obwoye as at the date of the accident on or about 17<sup>th</sup> August, 2012. It is his case that the police abstract showed the details of the insurance policy and the duration of the said policy.
20. The Respondent on the other hand, opposed the claim and filed a statement of defence denying effecting a policy of insurance covering the motor vehicle herein. They also denied having knowledge of the primary suit No. 3894 of 2013. They also denied that statutory notice pursuant to section 10(2) (a) was served upon them by the Appellant. The Respondent in their defence also denied paragraph 7 of the Plaint of entry of judgement on 19<sup>th</sup> January, 2017 for Kshs. 1,626,079.93. The Respondents did not call any witness to support its case.
21. I have read the lower court record. It shows that on 9<sup>th</sup> August 2018, the case was heard. One PC No. 84867 Rachel Mutokoi testified and produced OB Abstract dated 17<sup>th</sup> August 2012. The entry confirmed an accident occurred on that date involving the Motor Vehicle in question and the Appellant. The OB entry showed that Motor Vehicle KAP 931J was insured by the Respondent in this Appeal under Policy No. AM1/085/1/00831/2010. This officer told the trial court that at the time of that accident the insurance cover was valid and that the details were in the insurance sticker displayed on the motor vehicle.
22. This officer was clear, on cross-examination, that she did not see the insurance sticker but was in court to produce the information contained in the OB Abstract. On re-examination, she told the court that the information contained in the OB were from the insurance sticker found on the motor vehicle.
23. The Appellant also testified. During cross-examination, the concern of counsel for the Respondent was whether the Appellant has the insurance sticker. This was aimed at establishing whether the Respondent was the insurer of the motor vehicle in question.
24. I have considered the law under Cap. 405. Section 10 (1) of this Act is clear that the insurer has a duty under the law to satisfy judgments against persons insured unless the insurer can claim exemption under Section 10 (2) of that Act. I have not found anywhere in the proceedings before the trial court where the Respondent has pleaded those exceptions.
25. I have noted that the Respondent holds the view that the Appellant did not obtain a Certificate of Insurance of the motor vehicle in his quest to verify who the insurer of Motor Vehicle No. KAP 931J



was. This particular issue was discussed by the court in *APA Insurance Co. Ltd vs George Masele* [2014] eKLR, where the court stated that:

“As to the Certificate of Insurance which Ms Akonga insists should have been produced, I am of the contrary view. 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 the insurer. The road traffic accident victim cannot access it. The details in the Police Abstract as to the details of insurance are in the ordinary course of events obtained by the police from the Certificate of Insurance affixed to the motor vehicle or are supplied by the insured. In this regard, I am unable to agree with Ms. Akonga that the Respondent should have produced the Certificate of Insurance for Policy No. 010/810/000005/2001/04 in order to prove who the insurer was.

26. The law of evidence in Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:

“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.”

27. This is the legal burden of proof. However, Section 109 of the same Act deals with the evidentiary burden of proof and states as follows:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

28. This position of the law was affirmed in the case of *Maria Ciabaitaru M’airanyi & Others v. Blue Shield Insurance Company Limited* Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognises that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

29. This position of the law brings me to the conclusion that it was upon the Respondent to adduce evidence in rebuttal that he was not the insured of the motor vehicle in question. The OB Abstract was produced in both the CMCC No. 3894 of 2013 and Civil Suit No. 114 of 2017. In both cases there was no objection to its production.

30. As stated in the Court of Appeal decision of *Joel Muna Opija vs East African Sea Food Ltd* [2013] eKLR:

“The best way to prove ownership of a motor vehicle would be to produce a document from the registrar of motor vehicles showing the registered owner. However, if a police abstract is produced in court without any objection, its contents cannot be denied.”

31. My view on this matter is that the Respondent did not deny the contents of the police abstract neither did they call any witness to rebut those claims. In my view therefore the police abstract was sufficient proof of evidence that the Respondent was the insurer of motor vehicle KAP 931J and therefore, the Appellant has satisfied the court that, on a balance of probabilities, the Respondent is liable to satisfy



the judgment and decree against its insured. I therefore make a finding that the Respondent was the insured of motor vehicle KAP 931J; that the Policy was valid on or about 17<sup>th</sup> August 2012 when the accident subject of these proceedings occurred and that the judgment in CMCC No. 3894 of 2013 was entered against the insured of the Respondent.

32. I also find that the statutory notice was duly served on the Respondent and stamped using the respondent's official stamp and signed.
33. The Respondent has not provided any evidence to show that it falls under the exemptions under Section 10 (2) of the Act nor did it rebut the evidence of the Appellant contained in the Police Abstract.
34. I fault the trial magistrate for failure to consider the legal issues presented before that court. I agree with the Appellant in his grounds of appeal contained in the Memorandum of Appeal. For that reason this appeal must succeed. It is hereby allowed with the effect that the entire judgment of the lower court delivered on 21<sup>st</sup> December 2018 is hereby set aside. In its place, this court enters judgment against the Respondent in favour of the Appellant in the following terms as prayed in the Plaint dated 19<sup>th</sup> May, 2017:
  - i. That a declaration is hereby made that the Respondent is bound to fully pay the decretal sum, costs and interest in Nairobi CMCC No. 3894 of 2013;
  - ii. That judgment is hereby entered for the Appellant against the Respondent in the sum of KShs 1,626,079.93 with interest from 17<sup>th</sup> March 2016 to date.
  - iii. Costs of this suit in the lower court and of this appeal be paid to the Appellant by the Respondent.
35. Orders shall issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 28<sup>TH</sup> DAY OF APRIL 2022.**

**S. N. MUTUKU**

**JUDGE**

