



REPUBLIC OF KENYA



**Njiru v African Merchant Assurance Company Limited (Civil Suit  
131 of 2014) [2022] KEHC 11539 (KLR) (Civ) (29 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 11539 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL SUIT 131 OF 2014  
DO CHEPKWONY, J**

**JULY 29, 2022**

**BETWEEN**

**BONIFACE MUGENDI NJIRU ..... PLAINTIFF**

**AND**

**AFRICAN MERCHANT ASSUARANCE COMPANY LIMITED .... DEFENDANT**

**JUDGMENT**

1. The Plaintiff initiated this suit by way of a Plaint dated May 5, 2014 seeking for judgment against the defendant for the following prayers;
  - a. A declaration that the defendant is bound to honour and/or satisfy the said Judgment in Civil Suit No 555 of 2007 under section 10(10 of Cap 405)
  - b. Interest;
  - c. Costs;
  - d. Any other relief that this honourable court may deem fit to grant.

**Summary of Plaintiff's Case**

2. The Plaintiff avers that on or about August 6, 2005, while he Plaintiff was lawfully driving vehicle Registration No KAN 968S, along Nairobi-Mombasa road at Manjewa area-Mariakani, a Vehicle Chassis No KZN9072037, a Toyota Prado driven by the Defendant's insured's driver/agent servant was so negligently driven that it collided with his vehicle. As a consequence, thereof, he sustained serious injuries.
3. On May 8, 2007, the Plaintiff through his advocate M/s Lucy Njiru & Company Advocates sent to the defendant a Statutory Notice pursuant to Section 10(2) of the [Insurance \(Motor Vehicle Third Party](#)



Risks Act) Cap 405. Later, on or about July 27, 2007, the Plaintiff filed a suit being Nairobi HCCC No 555 of 2007 against the defendant's insured, Mr Ochieng T/A Tohel Agencies owner of Vehicle Chassis No KZN-9072037.

4. The defendant's insured was served with summons to enter appearance and Judgment in default was entered on March 10, 2008. The matter proceeded for assessment of general damages on February 3, 2011 and on March 22, 2011 the court entered Judgment for the Plaintiff in the sum of Kshs 1,331,768/=. By the said Judgment, the Plaintiff is entitled to Kshs 1,331,768/= with costs and interests.

#### **Defendant's Statement of Defence**

5. The defendant entered appearance *vide* a memorandum of appearance dated June 27, 2014 and filed a defence dated July 22, 2014.
6. The defendant denies that it was the insurer of Motor Vehicle Chassis No KZN 130-9072037 *vide* Policy No AMZ/070/1/ 05885/05/08 and Certificate No C 363512 as alleged in paragraph 2 of the Plaintiff.
7. The defendant further denies knowledge of an accident that is alleged to have occurred on August 6, 2005, involving Motor Vehicle Registration No.KAN 968S and Motor Vehicle Chassis No KZN-9072037.
8. The defendant states that it has no knowledge of any proceedings having been commenced against a Mr Ochieng T/a Tohel Agencies as alleged in the Plaintiff and contends that the said person is unknown to it.
9. The defendant denies that its insured was served with summons to enter appearance as alleged.
10. The defendant denies having effected a Policy No AMZ/070/ 1/05885/05/08 covering Motor Vehicle KZN 130-9072037 as alleged and it has no records of such motor vehicle or policy number, hence any Judgment obtained as alleged was not obtained against its insured and the defendant is not bound to satisfy the same.
11. Finally, the defendant prays that the Plaintiff's suit be dismissed with costs.
12. The Plaintiff filed a reply to defence dated August 7, 2014 on even date.

#### **Amended Plaintiff dated 1<sup>st</sup> February, 2016**

13. The Plaintiff amended his Plaintiff *vide* an amended Plaintiff dated February 1, 2016 as follows;

2A. The defendant is a limited liability company duly incorporated in Kenya in accordance with the companies Act (Cap 486) Laws of Kenya having it registered offices in Nairobi and is an authorized insurer within the meaning of the Insurance (Third Party Motor Vehicles Risks) cap 405 Laws of Kenya and was at the material times the insurer of motor vehicle Cassis number KZN 130-9072035 *vide* policy AM2/070/1/0588/05/08 Certificate No C36355312 Commencing August 5, 2005 expiring August 18, 2005 insured by Tohel Agencies Ltd.

3A. On or about August 6, 2005, while the Plaintiff was lawfully driving vehicle registration number KAN 968S along Nairobi-Mombasa road at Manjewa Area –Mariakani, a vehicle chassis No KZN 130 9072035, a Toyota Prado driven by the defendant's insured's driver/ agent servant was so negligently driven that it collided with the Plaintiff's vehicle. As a consequence, thereof, the Plaintiff sustained serious injuries.



5A. On or about July 27, 2007, the Plaintiff through his advocates Lucy Njiru & Company Advocates filed a suit being Nairobi HCCC 555 of 2007 against the defendant's insured Mr Ochieng T/a Tohel Agencies owner of vehicle Chassis No KZN 130-9072035.

8A. The defendant had effected a policy cover No.AM2/070/1/05885/05/08 covering the insured motor vehicle KZN 130-9072035 against any such liability as is required by a policy under section 4(1) of the *Insurance (Motor vehicle Third party Risks) Act* (Cap 405) Laws of Kenya and the Plaintiff states that the said accident was a liability covered by the terms of the policy and that Judgment in respect of the said liability has been obtained against the defendant's insured and therefore the defendant is required under section 10 (1) of (Cap 405) to pay the Plaintiff the sum payable in respect of the liability including costs and interests.

14. The Plaintiff also filed a reply to the amended defence dated March 2, 2016, reiterating the contents of the amended Plaintiff on March 21, 2016.
15. The defendant filed an amended defence dated on February 24, 2016 denying the contents of Paragraphs 2A, 3A, 5A and 8A of the amended defence on February 25, 2016.
16. The matter came up for hearing on March 9, 2022, the Plaintiff testified as PW1 (Boniface Mugendi Njiru). He adopted his witness statement dated May 15, 2014 during examination in chief. He also produced as exhibits the list of documents dated May 16, 2016. He further stated that he had not been paid and would like to be paid by the Insurance. He was given a Judgment against the defendant insured as per the amended plaintiff and was seeking for a declaration.
17. On being cross examined by counsel for the Defendant, he confirmed that he had served Mr Ochieng and Tohel Agencies as the defendants. The Plaintiff confirmed that before filing the suit their advocate filed a Statutory Notice as required by law. He further stated that the Insured is Charter Investments as per the Statutory Notice. He also confirmed that the Charter Investments was not the defendant in the primary suit. The Plaintiff confirmed that he obtained Judgment against Charter Investments. He did not produce a Judgment against Charter Investment. He confirmed that the Judgment he had is not against Charter Investment as per the statutory notice and therefore African Merchant Assurance Company Limited satisfy the same.
18. During re-examination, the Plaintiff stated that Chartar Investment is another Company to Tohel Investment Agencies. The Defendant covered Charter Investment through Tohel Agencies. He further stated that the registration numbers and Chassis numbers of the vehicles involved in the accident are indicated in the statutory notice.
19. The Plaintiff closed his case and so did the defendant without calling any witness.
20. On March 9, 2022, this court issued directions, regarding filing of written submissions. The Plaintiff filed his submissions dated March 23, 2022, while the Defendant's written submissions are dated May 4, 2022.

### **Plaintiff's Written Submissions**

21. The Plaintiff submitted that he filed a declaratory suit by an amended Plaintiff dated February 1, 2016 praying for *inter alia*: - "A declaration that the Defendant is bound to honour and/or satisfy Judgment in Civil Suit Nairobi HCCC No.555 of 2007 under section 10(i) of Cap (405)."
22. For the plaintiff, it was submitted that the defendant entered appearance on June 27, 2014 and amended defence on February 24, 2016. The defendant denied knowledge of the accident under the



Policy No AMZ/070/1/ 05885/05/08 and further denied knowledge of its insured (defendant) and generally denied the vehicle insurance policy and certificate.

23. The plaintiff also submitted that section 10(1) of Cap 405 states;
- “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.”
24. The Plaintiff further submitted that prior to filing suit, the Plaintiff’s advocate served a statutory notice to the defendant on May 8, 2007 as evidenced in “Exhibit 3” and the primary suit was filed on July 27, 2007. The Plaintiff proceeded to submit that for this to be successful in a declaratory suit, the following must be proved;-
- i. A statutory notice under Cap 405 Laws of Kenya was served 14 days prior to filing of the suit or 14 days after filing of the suit.
  - ii. The Plaintiff has a judgment in his/her favour.
25. It was contended that section 10(4) makes it mandatory that in order for the insurer to obtain a declaration to avoid policy he must commence on action before suit is filed or within 3 months after commencement of the proceedings in which Judgment was given and obtain a declaration that he is entitled to avoid the policy.
26. Finally, the plaintiff submitted that there is no declaration for avoidance of the policy and the defendant is thus bound to honour.

### **Defendant’s Written Submissions**

27. The defendant submitted that on March 9, 2022, the Plaintiff called one witness and in his testimony he stated that he was driving Motor Vehicle Registration No KAN 968S along Nairobi-Mombasa road when he was involved in an accident at Manjewa area, as a result of which he sustained injuries.
28. The Plaintiff produced various documents during the hearing namely, a decree issued on April 23, 2013, a demand letter, statutory notice, letter from APA insurance and a letter from IRA. On cross-examination, he confirmed that the statutory notice issued to the defendant was in respect of the insured namely Chartar Investment while they had sued Tohel Agencies and Amon Njemo.
29. The witness also confirmed that he did not produce the Plaintiff or even the original court file in HCCC No 555 of 2007. The witness further confirmed that there is no Judgment obtained against Chartar Investments and that Chartar Investments was not sued or named as defendant in the primary suit.
30. It was submitted on behalf of the defendant that through its statement of defence denied that it had insured Motor Vehicle Chassis No KZN130-9072037 at the stated time of the accident or at any time.
31. The defendant went further to submit that no policy document or certificate of insurance was tendered by the Plaintiff to prove his case. All that was tendered is a letter from APA insurance with a police abstract attached. The defendant submitted that the Police Abstract produced is not conclusive proof that the Defendant insured the said motor vehicle.



32. It was the defendant's submissions that in the absence of a policy or certificate of insurance showing the Defendant had insured Motor Vehicle Chassis No KZN130-9072037 the plaintiff's claim has no feet to stand on.
33. The plaintiff cannot purport to enforce a Judgment obtained against other persons as if it was against the defendant's insured. A Judgment not obtained against an insurer's insured, such as this case, cannot be enforced against the insurer.
34. In the end, the defendant asked this court to dismiss this suit with costs to the defendant.

### **Analysis and Determination**

35. I have given due consideration to the pleadings and the submissions filed by parties as well as the cited provisions of the law and the authorities relied on. I am of the view that the only issue arising for determination by this Honourable court is whether the defendant is liable to satisfy the decree issued in the primary suit.
36. The Plaintiff instituted this suit in a bid to seek to have the defendant an Insurance Company, satisfy a decree he obtained in Nairobi HCCC No 555 of 2007. It is therefore a declaratory suit, brought under the provisions of the *Insurance (Motor Vehicles Third Party Risks) Act*. The Plaintiff was awarded a sum of Kshs 1,331,768/= plus costs taxed at Kshs 165,552/= against Ochieng T/a Tohel Agencies who at the material time was his insured defendant. According to the defendant's defence the contents of the Plaintiff were denied and in particular the Statutory Notice issued to the defendant was in respect to the insured. It denies that it is under an obligation to meet the amount due to the Plaintiff in the primary suit.
37. The Plaintiff has placed reliance on the provisions of Section 10(1) of the *Insurance (Motor Vehicles Third Party Risks) Act* cap 405, which imposes a duty on an Insurer to satisfy decrees and provides as follows;

“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.

Provided that the sum payable under a Judgment for a liability pursuant to this section shall not exceed the maximum percentage of the sum specified in section 5 (b) prescribed in respect thereof in the Schedule.”

38. Having considered the pleadings before me, I confirm that the Plaintiff has produced several documents such as decree, certificate of costs, a letter from Association of Kenya Insurers dated October 26, 2016 and a letter from APA insurance dated October 28, 2016 in support of his claim against the defendant.
39. In his defence and submissions, the defendant has denied that it was the insurer of Motor Vehicle Chassis No KZN 130-9072037 and Certificate No C 363512. However, upon perusal of the documents provided by the Plaintiff and more so the letters from the Association of Kenya Insurers, it is indicated that Motor Insurance Certificate No C3635312 was allocated to African Merchant



Company on July 26, 2005 and the letter produced by the Plaintiff from APA Insurance dated October 28, 2016 motor vehicle with Chassis Number KZN130-9072037 insured by the defendant was to blame.

40. From the documents provided by the Plaintiff, it is evident that the defendant had insured the motor vehicle with Chassis No KZN130-9072037.

41. Being guided by the provisions of section 10(1) of the *Insurance (Motor Vehicles Third Party Risks) Act* Cap 405, and the decision by Gikonyo J in the case of *Joseph Mwangi Gitundu v Gateway Insurance Co Ltd*, where he expressed himself as follows with respect to the liability of insurers to meet third party claims against its insured:

“...under Section 10(1) of Cap 405 Laws of Kenya, the insurer has a statutory obligation to 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.”

42. The submissions by the defendant regarding the statutory notice are unfounded as from the initial list of documents filed by the Plaintiff, there are attached copies of decree, notice of entry of judgment and a statutory notice addressed to the defendant dated May 4, 2007 and duly stamped.

43. The defendant is therefore bound under law as aforementioned to settle such decree and it is therefore my finding the plaintiff is entitled to enjoy the fruits of his judgment delivered in the primary suit.

44. The upshot of the foregoing is that, the plaintiff's case is merited and the prayers in the amended Plaintiff dated February 1, 2022 are hereby allowed. I therefore enter Judgment for the Plaintiff as against the defendant as follows:-

- a) A declaration that under section 10 (1) of the *Insurance (Motor Vehicles Third Party Risks) Act* Cap 405, do issue.
- b) The defendant is liable to pay to the Plaintiff a sum of Kshs 1,331,768/= being payment of the decree issued in favour of the Plaintiff in HCC No 555 of 2007.
- c) The amount shall attract interest at court rates from today's date until payment in full.
- d) The Plaintiff is awarded costs of the suit.

It is hereby so ordered.

RULING DELIVERED DATED AND SIGNED THIS 29<sup>TH</sup> DAY OF JULY, 2022.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/s Njiru counsel for Plaintiff

Mr. Kirori holding brief for Mr. Kinyanjui for Defendant

