Cannon Assurance Limited v Jagogo & another (Suing as Representatives of the Estate of Nicholas Osemba Okwako) (Civil Appeal E036 of 2020) [2022] KEHC 14762 (KLR) (Civ) (27 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14762 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E036 OF 2020

CW MEOLI, J

OCTOBER 27, 2022

BETWEEN

CANNON ASSURANCE LIMITED ..... APPELLANT

AND

CALEB OKWAKO JAGOGO & RISPA KANGA (SUING AS REPRESENTATIVES OF THE ESTATE OF NICHOLAS OSEMBA OKWAKO) ..... RESPONDENT

(Being an appeal from the judgment of Mburu, (Mr.) SPM delivered on 17th July 2020 in Nairobi Milimani CMCC No. 8304 of 2018)

JUDGMENT

1. This appeal emanates from the judgment delivered on 17.07.2020 in Nairobi Milimani CMCC No. 8304 of 2018. The declaratory suit was commenced by Caleb Okwako Jagogo and Rispa Kanga the Plaintiffs in the lower court (hereafter the Respondents) against Cannon Assurance Limited the Defendant in the lower court (hereafter the Appellant). It was averred that at all material times the Appellant was the insurer of the user of motor vehicle registration No. KBB 051G (hereafter the suit motor vehicle) under Policy of Insurance No. 03/06/38713/10/TPO and Certificate No. B4786914. That as a result of a fatal accident involving Nicholas Osemba Okwako (hereafter the deceased) and the suit motor vehicle, the Respondents instituted Nairobi Milimani CMCC No. 2945 of 2013 (hereafter the primary suit) where judgment was entered on for the Respondents against the Appellant's insured on 17.06.2017. It was further averred that the Appellant had been duly served with the requisite statutory notice prior to the filing of the primary suit and hence the Appellant was bound to satisfy the decree in the primary suit pursuant to the provisions of Section 10 of Cap. 405 Cap 405.

2. The Appellant filed a statement of defence on 13.11.2018 denying the key averments in the plaint, and averred in the alternative, that if an accident occurred involving the deceased as alleged (which it denied) and or that the Respondents had obtained any judgment as against the Appellant in the primary suit, then the Appellant was not under any contractual and or statutory obligation to satisfy the resultant decree as the deceased was not a person covered under the subject policy and or entitled to the compensation claimed. The suit proceeded to full hearing during which both parties adduced evidence in support of their respective cases. The trial court eventually gave judgment in the Respondents' favour against the Appellant in the form of a declaration that the Appellant was bound to satisfy the decretal sum in the primary suit in the sum of Kshs. 1,510,996.88/-.

3. Aggrieved with the outcome, the Appellant preferred this appeal which is based on the following grounds: -

> " 1. The learned magistrate erred in law in wrongly shifting the burden of proof to the Appellant.
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> 2. That the learned trial magistrate erred in law and fact in failing to consider the submissions by the Appellant together with the authorities relied on by the Appellant.
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> 3. That the learned trial magistrate failed to appreciate that the defence raised by the Appellant was viable and the suit ought to have been dismissed.
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> 4. That the learned magistrate erred in law and fact in disregarding crucial evidence in arriving at his decision based on only partial evidence." (sic)

4. The appeal was canvassed by way of written submissions. Counsel for the Appellant condensed his grounds of appeal into two key issues. Submitting on whether judgment in the primary suit was against the Appellant's insured, while calling to aid the provisions of Section 10(1) of Cap. 405 (hereafter Cap 405) , the decisions in Kenindia Assurance Company Limited v Otiende [1991] KLR 39 and Phillip Kimani Gikonyo v Gateway Insurance Company Limited [2007] eKLR that the Appellant's insured was not a party in the primary suit and therefore judgment obtained therefrom could not be enforced against the Appellant. It was additionally contended that the Respondents did not demonstrate that the policy of insurance had been issued to the defendants in the primary suit against whom judgment was obtained by the Respondents. Counsel asserted that the serial numbers of the policy and certificate cited by the Respondents in the primary suit were also disputed . That on account of the foregoing the judgment obtained in the primary suit was neither against the insured person nor the insured driver at the material time and the Respondents' suit ought to fail.

5. Concerning whether the Respondents had fulfilled the requirement for service of the statutory notice pursuant to Section 10(2)(a) of Cap 405, counsel cited Susan Oluoch Nyambane v Blue Shield Insurance Co. Ltd [2012] eKLR to submit that the Respondents failed to demonstrate that service of the statutory notice, particularly with the correct policy number, was effected upon the Appellant, a fact disputed at the trial by the Appellant. Counsel urged the court to find that no valid statutory notice was served on the Appellant. In concluding, counsel cited the provisions of Section 107 of the *Evidence Act* and the decision in Cannon Assurance v Isaiah Kubondo Milimani HCCA No. 517 of 2015 to argue that the Respondents failed to discharge their burden of proof and did not create a nexus between the judgment-debtors in the primary suit with the Appellant. The court was thus urged to allow the appeal with costs.

6. The Respondent naturally defended the trial court's decision. Counsel anchored his submissions on the decision in Kajiado HCCA No. 7 of 2019, Gerald Njuguna Mwaura v Africa Merchant Insurance Co. Ltd on the principles to be observed by an appellate court on a first appeal. Submitting seriatim on the grounds of appeal, he relied on Section 112 of the *Evidence Act*, the decisions in Kisumu HCCC No. 132 of 2000, Edwin Ogonda Odongo v Phoenix of E.A Insurance Co. Ltd and APA Insurance Co. Ltd v George Masele [2014] eKLR to dismiss the Appellant's first ground of appeal that the court did shifted the burden of proof upon the Respondents. He pointed out in that regard that the Appellant and or its insured were the custodians of the policy document, and pertinent facts thereof within their special knowledge, hence their obligation to prove the same. It was further submitted that there is no legal requirement for the policy document be produced by a claimant and that the Respondents were only required to serve a notice before the suit against the Appellant.

7. Besides, Section 10(2)(a) did not require that the statutory notice must state the policy number and, in any event, any form of notice including a demand letter suffices. And the Appellant having admitted through its witness to have insured the suit motor vehicle, the trial court was justified in its finding of liability. The case of Martin Onyango v Invesco Assurance Co. Ltd [2015] eKLR was cited to bolster the foregoing submissions.

8. Regarding the second and third grounds of appeal counsel for the Respondents submitted based on Anyanzwa v Gasperis (1981) KLR 10 that a driver who was not driving for the owner but for a hirer is an insured or authorized driver and the insurer is liable. Similarly, the driver sued in the primary suit being an authorized agent of the insured by dint of Section 2 of was an insured person and the Appellant's denials in that regard were unsustainable. Further while citing the decision in Esther Mokeria Nyambane v Xplico Insurance Co. Ltd [2020] eKLR counsel argued that the Respondents having demonstrated service of the statutory notice on the Appellant by registered post, the onus was on the Appellant to controvert the fact. In closing, the Respondents' counsel defended the trial court's rejection of the Appellant's bid to escape liability on the basis of an error involving misstatement of the serial numbers in the policy and certificate of insurance which error was corrected by amendment of pleadings. The court was thus urged to dismiss the appeal with costs.

9. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in Selle –Vs- Associated Motor Boat Co. [1968] EA 123 in the following terms: -

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.
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> 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 an 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 neither seen nor heard the witnesses and should make due allowance in this respect.
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> In particular this 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."

10. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See Ephantus Mwangi & Another vs Duncan Mwangi Wambugu (1982 – 1988) 1 KAR 278. Upon review of the memorandum of appeal and submissions by the respective parties before this court, it is the court's view that the appeal turns primarily on the one particular issue namely; whether trial court misdirected itself in holding that Appellant was duty bound to satisfy the decree issued in Nairobi Milimani CMCC No. 2945 of 2013.

11. Pertinent to the determination of issues are the pleadings, which form the basis of the parties' respective cases before the trial court. Hence a review thereof is apposite before dealing with evidentiary matters. In Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91, the Court of Appeal stated in this regard that: -

> "We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail." (Emphasis added).

12. The Respondents by their amended plaint averred at paragraph 3, 4, 5, 6 & 8 that:

> "3. At all material times the Defendant was the insurer of the user of motor vehicle registration number KBB 051G under policy of insurance number 03/06/38713/10/TPO and certificate of insurance No. B486914.
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> 4. On or about 4/2/2011 and whilst the said policy was in force the deceased sustained fatal injuries in an accident involving herself the said vehicle and then Plaintiffs sued the Defendant's insured in Nairobi CMCC No. 2945 of 2013 as his legal representative.
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> 5. Judgment was entered on 16/6/2017 for the Plaintiffs against the Defendant's insured for Shs. 1,303.391/= plus costs and interests which came to Shs. 1,510,996.88/= per decree and certificate of costs issues on 20/9/2017.
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> 6. The Defendant had statutory notice of the previous proceedings as is required under the provisions of Cap. 405 under which the policy was issued.
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> 7. .....
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> 8. The Plaintiffs pray for a declaration that the Defendant is bound to satisfy the decree in Nairobi CMCC No. 2945 of 2013 under Section 10 of the said Act (Cap 405)." (sic)

13. The Appellant filed an amended statement of defence denying the key averments in the amended plaint meanwhile contended that the Respondents failed to comply with provisions of Cap. 405 by stating at paragraphs 3, 7 and 8 that: -

> " 3. The Defendant denies the contents of paragraph 2 of the Plaint. In particular the Defendant denies that it was the insurer of motor vehicle registration number KBB 051G under the policy number 03/06/38713/TPO and further denies issuing certificate of insurance No. B4786314. The Plaintiffs are put to specific proof thereof.
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> 4. .....
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> 5. .....
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> 6. .....
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> 7. In the alternative and without prejudice to the foregoing, the Defendant states that if at all an accident occurred involving the deceased as alleged (which is denied), or that the Plaintiff obtained any judgment as against the Defendants in the Nairobi CMCC Number 2945 of 2013 then the Defendant is not under any contractual and/or statutory obligation to satisfy any decree in possession of the Plaintiffs arising out of the alleged accident as the deceased was not a person covered under the subject policy and or entitled to compensation within the ambit of Cap. 405 Chapter 405 Laws of Kenya.
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> 8. The Defendant denies that it was ever served with any notice of institution of suit pursuant to the provisions of Section 10(2) of Cap. 405 Chapter 405 Laws of Kenya and specifically in respect of the motor vehicle registration number KBB 051G or in respect of the policy described as 03/06/038713/10/TPO." (sic)

14. The court having reviewed the pleadings and the evidence notes that some key facts were not in dispute. First, it was not disputed that during the material period the Appellant was the insurer of the motor vehicle KBB 051G (the suit motor vehicle) in favour of its insured Francis Karanja Maina, albeit under a policy and certificate whose details are disputed. Secondly, it was not in dispute that judgment had been obtained in the primary suit against Thomas Mugo and Stephen Ngathiko sued in their capacity as owner/driver and registered owner of the suit motor vehicle, respectively. The Appellant's chief complaint before the trial court and on this appeal is that the Respondents' judgment in the primary suit was not against its insured and therefore the deceased was not a person covered under the subject policy and or entitled to compensation for purposes of Cap. 405; that the statutory notice was never served upon the Appellant; and ultimately that the Appellant is not obligated to satisfy the decree in the primary suit. These are the issues in dispute.

15. The trial court after restating and examining the said evidence by the respective parties had in its judgment stated that:

> " 12. In our case, it is now clear that the subject motor vehicle was under cover issued by the Defendant herein. The cover was for the period 06/04/2010 to 05/04/2011. The subject accident happened on 4/2/2011 within the period of cover. It is expected that the defendant herein is the custodian of the policy document. The same was never produced in court. Had the policy document

been produced, the same would have provided the court with more details regarding the said cover. The defendant withheld this crucial document from the court and sought to dwell on the error made by the police in capturing the policy number and the certificate of insurance number.

13. The Plaintiffs have sufficiently proved both in the primary suit and in this suit that Nicholas Osemba Okwaro dies as a result of an accident caused by the motor vehicle registration number KBB 051G which was insured by the defendant at the time of the accident. The authorized driver of the said motor vehicle at the time of the accident was Stephen Ngathiko as the records. The said driver was sued in the primary suit and judgment was entered against him. There is no evidence tabled before the court to show that the said driver did not have authority to drive the said motor vehicle at the time of the accident. Most importantly, the defendant was served with a statutory notice through registered mail to its registered postal address but did not respond. In my view, the defendant is simply trying to take advantage of the error made by the police in recording the policy number and the certificate of insurance number in order to avoid liability.

14. It is clear beyond per adventure that the defendant's insured motor vehicle registration number KBB 051G caused a fatal accident during the period of cover. The family of the deceased is entitled to compensation. The Defendant has not proved to the court that any of the terms of the policy had been violated by the insured as to entitle the defendant to avoid liability under the policy. The defendant cannot be allowed to take advantage of an error made by the police in capturing the insurance policy details to deny plaintiffs their much deserved compensation.

15. The standard of proof in civil cases is in a balance of probabilities. In this case, I am satisfied that the Plaintiffs have discharged this burden. Consequently, judgment is hereby entered in favour of the Plaintiffs as against the Defendant as prayed in the Plaint. The Plaintiffs shall also have the costs of the suit." (sic).

16. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. The duty of proving the averments contained in the plaint lay squarely on the Respondents whereas those in the statement of defence lay with the Appellant. In Karugi & Another v Kabiya & 3 Others (1987) KLR 347 the Court of Appeal stated that:

> " [T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...--. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim." (Emphasis added)

17. At the hearing PC Patrick Yogo testified as PW1 in connection with the report to police concerning motor vehicle KBB 051G Mitsubishi Canter having been involved in a fatal road traffic accident with the deceased. That according to the report as recorded in the Occurrence Book (O. B) produced as P. Exh.1, one Thomas Mugo was the driver of the suit motor vehicle, and the insurance particulars of the said motor vehicle were captured in the (O.B) as Certificate No. B 4786914 of Policy No. 03/06/39/713/10/TPO issued by Cannon Assurance (K) Limited commencing on 06.04.2010 and expiring on 05.04.2011. He asserted that the insurance information with respect to the suit motor vehicle was extracted from the Certificate of insurance on the suit motor vehicle.

18. PW1 further produced a copy of the police abstract as P.Exh.2. On cross-examination he stated the name of the motor vehicle owner was not captured in the (O.B) and reiterated the details of the policy serial number as captured. PW1 was further re-called to give evidence and upon being shown the original certificate of insurance (later tendered as exhibit by the Appellant) acknowledged that the number thereon was 478614 while the policy number read 03/08/39713/10/TPO. He admitted that the latter detail differed from the (O.B) entry in respect of one digit and owned that he was the person who made the said entry in the (O.B). On further re-examination he reiterated and confirmed the digits on the certificate number.

19. Caleb Okwako Jagogo testified as PW2. Adopting his witness statement, he reiterated his judgment in the primary suit and further stated that his counsel effected service of the statutory notice through registered post on 28.04.2011 by registered mail as evidenced by a certificate of postage. He produced the advocate's forwarding letter as P. Exh.4a, registration slip as P. Exh.4b), statutory notice as P. Exh.4c, demand letter as P. Exh.4d, Grant of letters administration as P. Exh.5, decree in the primary suit as P. Exh.6. He also produced the letter forwarding the decree to the Appellant as P. Exh.7a and certificate of postage as P. Exh.7b. Correspondence between his counsel and the Association of Kenyan Insurers (AKI) concerning insurance certificate no. B478614 was produced as P.Exh.8a, P.Exh.8b and P.Exh.8c.

20. The Appellant called one witness Wincate Macharia (DW1), a legal assistant working with the Appellant who adopted her witness statement as her evidence -in -chief and contended that policy no. 03/08/38713/10/TPO and related certificate of insurance no. B4786914 (D. Exh.2) were issued to their insured one Francis Karanja Maina and that he was not a party in the primary suit. That the policy proposal form (D. Exh.1) was completed by their insured. She denied ever receiving the statutory notice (P. Exh.4). She said the latter bore a different policy number from the policy effected in favour of their insured in respect of the suit vehicle. That the policy no. 03/06/38713/10/TPO as pleaded by the Respondents was not issued by the Appellant and that neither Thomas Mugo nor Stephen Ngathiko sued in the primary suit were the Appellant's insured.

21. Under cross-examination she confirmed the Appellant's postal address to be P. O Box 30216-00100 as indicated in statutory notice (P. Exh.4), that the subject notice was in respect of the suit motor vehicle and that the insurance policy was in force at the time the accident occurred. She admitted that she could not tell the identity of the driver of the suit vehicle at the time of the accident, that the policy permitted the insured to engage a driver for the suit motor vehicle and that she could not tell what, if any arrangement existed between the Appellant's insured and the two defendants in the primary suit. Additionally, that the Appellant had not obtained a declaration to avoid liability for the accident as provided under Section 10 of Cap. 405.

22. In my considered view, this appeal turns on the three disputed issues revolving around section 10 of Cap.405, as identified earlier in this judgment, and which can be restated as follows. Whether the defendants in the primary suit were the Appellant's insured within the meaning of the policy of insurance admittedly in place at the material time in respect of the suit motor vehicle, whether the

Respondents served the statutory notice on the Appellant, and ultimately, whether the Appellant was statutorily obligated to satisfy the decree in the primary suit.

23. The onus was on the Respondents to establish the Appellant's statutory obligation pursuant to Section 10 (1) as read with 10(2) of Cap 405. See Jiji v Gateway Insurance Co. Ltd (Civil Appeal 126 of 2018) [2022] KECA 368 (KLR). The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act* which are to the following effect:

> " 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.
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> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person. 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.... 109. 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."

24. Section 10(1) & (2) of the Insurance (Motor Vehicle Third party Risks) Act provides that: -

> "(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.
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> (1A) .....
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> (1B) .....
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> (2) No sum shall be payable by an insurer under the foregoing provisions of this section—
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> (a) in respect of any judgment, unless before or within thirty days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings; or
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> (b) in respect of any judgment, so long as execution thereon is stayed pending an appeal; or
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> (c) in connexion with any liability if, before the happening of the event which was the cause of the death or bodily injury giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provision contained therein, and either—

(i) before the happening of the event the certificate was surrendered to the insurer, or the person to whom the certificate was issued made a statutory declaration stating that the certificate had been lost or destroyed; or

(ii) after the happening of the event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer, or the person to whom the certificate was issued made such a statutory declaration as aforesaid; or

(iii) either before or after the happening of the event, but within a period of twenty-eight days from the taking effect of the cancellation of the policy, the insurer has notified the Registrar of Motor Vehicles and the Commissioner of Police in writing of the failure to surrender the certificate."

25. It is mandatory under Section 4 as read with 5(b) of Cap. 405 that insurance in respect of third-party risks be effected for vehicles used on roads in the event of the death of, or bodily injury to, any person caused by or arising out of the use of such vehicle on a road.

26. I propose start with the second issue as relates to service of the statutory notice. From the pleadings of the Appellant, it appeared that the dispute was not so much about the service of the notice, but the particulars of the policy in respect of which the notice was issued. During the trial, the Respondents tendered evidence of postage by registered mail of the notice to the Appellant's admitted postal address and asserted that the mail was not returned. On her part DW1 appeared to deny receipt of any notice and further pointed out that the Respondent's notice quoted policy no. 03/06/38713/10/TPO instead of 03/08/38713/10/TPO and hence the notice did not satisfy the statutory requirements.

27. I think this is a good place to lay to rest the specious posture adopted by the Appellant on the question of the particulars of the insurance policy and certificate of insurance. Granted, the particulars of these documents as contained in the Respondent's evidence differed with the details in the Appellant's material. The trial magistrate dealt with the errors and properly dismissed them on several accounts including the fact that the errors did not affect the admitted key fact that the Appellant had insured the suit motor vehicle in the material period. I agree with the position taken by the trial court. The error regarding the certificate of insurance involved the omission in the police abstract of the digit "9" (thus, B478614 instead of B4786914 as admitted by PW1 though the abstract has evidence of attempted crude alteration to correct the error) and the capture of the policy number as no. 03/06/38713/10/TPO instead of 03/08/38713/10/TPO. These errors subsequently made their way into the statutory notice and correspondence by the Respondent's advocate with AKI and the initial plaint in the declaratory suit.

28. While Cap. 405 does not prescribe the precise format and contents of a notice issued under section 10(2) , and while it is expected that the details of the claim communicated in the statutory notice ought to give adequate information of the claim for purposes of the insurer's inquiries and other necessary action, there is nothing in the section to support the position taken by the Appellant that a statutory notice that cites an erroneous policy or certificate particulars amounts to an incompetent or invalid

notice. In my view, the statutory notice in this case included some of the most important details, namely, the name of the claimant, the claim, identity of the victim and date and place of the accident and more importantly, the motor vehicle involved.

29. As correctly asserted by the Respondent's counsel, the insurers and their insured are the custodians of the policy documents and to which a claimant ordinarily has no access. The claimant must therefore rely on the details obtained from the police O.B and extract in this regard and in the normal course of things, errors may occur as police transpose particulars of the certificate and of the policy from the certificate on the accident vehicle onto their O.B. Of course, some errors may be of such a nature or magnitude as to create doubt on the authenticity of the entry and on the related occurrence, but such is not the case here. The material in the statutory notice in this case was adequate and to succeed in their further disavowal, the Appellants ought to have controverted the Respondents' oral and documentary evidence that they were served with the notice. On their part, the Appellants merely denied receipt of the notice through DW1.

30. In that regard, although section 10(2) (a) of Cap 405 does not require service of the statutory notice by post, the court is persuaded by the Respondent's invocation of the provisions of section 3(5) of the Interpretation General Provisions Act in asserting due service. The provision states that:

> " Where any written law authorizes or requires a document to be served by post, whether the expression "serve" or "give" or "send" or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing to the last known postal address of the person to be served, prepaying and posting, by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of the post".

31. Equally, the court is prepared to take judicial notice of the fact that concerning a letter dispatched by registered post, the proof of dispatch is the certificate of postage to the correct address, in this case to the Appellant's postal address, namely P.O Box 30216-00100 Nairobi which DW1 confirmed to belong to the Appellant. The Appellant by their amended defence and evidence at the trial appeared to oscillate between an outright denial of service and what amounts to a qualified denial of service based on the incorrect particulars of the insurance policy and certificate cited in the notice. Neither denial can stand scrutiny. The Respondents' evidence that the statutory notice was served in 2011 prior to the institution of the primary suit instituted in 2013 was not controverted. Consequently, the trial court 's finding on the issue cannot be faulted.

32. Moving now to the first issue, the decree originating from the primary suit was as against Thomas Mugo and Stephen Ngathiko described at paragraph 3 in the copy of the plaint in the primary suit (found among the Respondents' initial list of documents dated 10th August 2018 and filed on 18th September 2018) as owner and/ or driver and registered owner, respectively, of the suit motor vehicle. Thomas Mugo, was the driver of the accident vehicle at the material time, according to the police abstract produced by PW1. It appears from the learned trial magistrate's judgment that the court mistakenly reversed the descriptions and capacities of the two defendants before her, thus erroneously asserting Stephen Ngathiko to have been the driver of the suit vehicle at the time of the accident.

33. Be that as it may, the Court found the two defendants liable, dismissing the Appellant's point of contention that as per the proposal form (D. Exh.1) their insured was Francis Karanja Maina. That fact was not controverted at all and I do not see how the facts in the case of Anyanzwa v Gasperis (1981) KLR 10 as cited by the Respondent applied to the specific circumstances of this matter, there being no evidence that the accident vehicle was in the possession of a hirer's driver at the time of the accident. However, DW1 admitted that under section 2 of the policy issued to Francis Maina Karanja he and

his authorized driver were insured persons. Although there was no dispute that at the material time the Appellant had insured the accident vehicle, under section 10(1) of Cap 405, for the Respondents to succeed in the declaratory suit, they needed to create an appropriate nexus between Francis Maina Karanja and the parties sued in the primary suit. See Kenindia Assurance Company Ltd. v Otiende.

34. The trial court relied on the undisputed involvement of the suit vehicle and the driver named in the police abstract in the accident to conclude, in the absence of evidence to the contrary that the driver of the suit vehicle at the time of the accident, mistakenly referred to in the judgment as Stephen Ngathiko was an authorized driver. Indeed, DW1 had stated during cross-examination that she could not tell the identity of the vehicle driver at the time of the accident, or what arrangements existed between the Appellant's insured Francis Maina Karanja and the two defendants in the primary suit concerning the vehicle, and further confirming that the Appellant had not received any complaints from their insured regarding the (unlawful or unauthorized) use of the vehicle.

35. Thus, in my view, the facts of the case raised a rebuttable presumption that the undisputed vehicle driver Thomas Mugo was an authorized driver. In Karisa & Anor v Solanki & Anor [1969] EA 318 the Court of Appeal for East Africa while considering an almost similar situation stated that:

> " The third point is whether the car owner is responsible for the negligence of the car driver. The law on this matter is concisely and clearly set out in the judgment of Sir Clement De Lestang, V-P; in Selle v Associated Motor Boat Co. Ltd [1968] E.A at p. 128, where he said:-
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> "Where, however, a person delegates a task or duty to another, not a servant, or employs another, not a servant, to do something for his benefit or the joint benefit of himself and the other, whether the other person be called agent or independent contractor, the employer will be liable for the negligence of that other in the performance of the task, duty or act as the case may be".
>
> .... Where it is proved that a car has caused damage by negligence then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible (see Barnard v Sully (1931), 47 T.L.R. 577). This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by evidence that the car was lent to the driver by the owner, as there the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver... The inference could, of course, be rebutted by credible evidence to the contrary, but at no stage was any evidence given as to the circumstances in which the car was lent to the driver. Thus, the presumption to which I have already referred that the owner of a car is liable for the negligence of the driver has not been rebutted..."
>
> See also the decision of the Court of Appeal in Robert Njoka v Alice Wambura Njagi & 3 Others (2013) eKLR reiterating the above dicta.

36. Implicit in the presumption above is the inference that the person who caused damage through negligent driving is an authorized driver, hence the owner's vicarious liability. Similarly, in this case the evidence presented before the trial court raised the presumption that Thomas Mugo was an authorized driver of the insured James Maina Karanja, the admitted principal insured under the policy. The Appellant did not call their insured to shed light on the circumstances in which their insured's vehicle passed into the possession of Thomas Mugo, DW1 accepting that she was not privy to such information. Significantly too, the Appellant despite being duly served with the statutory notice together with their insured did not file a declaratory suit in terms of section 10(4) of Cap. 405 to avoid the policy.

37. In this instance, it is the court's further view that the inference is not disturbed by the fact that Stephen Ngathiko had been sued in the primary suit as the registered owner of the accident vehicle; in law, it is possible for two or more types of ownership to co-exist contemporaneously in respect of the same motor vehicle. Hence it may not be unusual that a vehicle registered to one party is also in the beneficial/equitable or possessory ownership of another party. See Jared Magwaro Bundi & Another –Vs- Primarosa Flowers Limited (2018) eKLR. Clearly Francis Maina Karanja must have owned, or at least possessed some significant legal interest in the vehicle hence the act of effecting the insurance policy concerning it. Had he testified, the insured would have shed light on this and other relevant matters. Thus, the presumption that the driver of the accident vehicle was so doing with Francis Maina Karanja's authority was not rebutted and therefore the driver was an insured person in terms of the policy. Judgment against the said driver in the primary suit therefore qualified under section 10(1) of Cap 405 as a judgment against an insured person under the policy. The finding of the trial court on the first issue was therefore well founded.

38. The foregoing findings resolve the third issue. Consequent to which it is apparent that, the Appellant was properly found to be under statutory obligation to satisfy the decree in the primary suit. The appeal is without merit and is hereby dismissed with costs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 27TH DAY OF OCTOBER, 2022.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: Mr. Bwire

For the Respondent: Mr. Kaburu

C/A: Carol