



Madison Insurance Company Kenya Ltd v Mwendwa (Suing as the legal representative of the Estate of Yvonne Musangi Nzembei - Deceased) (Civil Appeal E049 of 2021) [2022] KEHC 16095 (KLR) (28 November 2022) (Judgment)

Neutral citation: [2022] KEHC 16095 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL APPEAL E049 OF 2021
RK LIMO, J
NOVEMBER 28, 2022**

BETWEEN

MADISON INSURANCE COMPANY KENYA LTD APPELLANT

AND

PAUL NZEMBEI MWENDWA RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF YVONNE
MUSANGI NZEMBEI - DECEASED**

(Being an appeal from the judgement and decree of the Chief Magistrate's Court at Mwingi delivered on the 24th June, 2021 by the Hon. Mr. I. G. Ruhu (Resident Magistrate) in Mwingi PMCC No. 37 of 2020, a declaratory suit arising from the judgement in Mwingi SPMCC No. 32 of 2017)

JUDGMENT

1. This is an appeal that arose from the judgement of Hon I.G Ruhu-Resident Magistrate Mwingi in Mwingi Senior Principal Magistrate civil case No 32 of 2017.
2. In that suit, the appellant had been sued by the respondent through a declaratory suit that it was contractually bound to make good a judgement passed in Mwingi Principal Magistrate Court civil case No 32 of 2017 by virtue of being the insurer/underwriter of motor vehicle registration number Kxx xxxS when it got involved in an accident on June 3, 2019 along Mwingi-Thika Road and caused fatal injuries to Yvonne Musangi Nzembei (deceased). In the original suit Mwingi Principal Magistrate Court civil case No 32 of 2017, Paul Nzembei Mwendwa, the respondent herein, suing as legal representative of the estate of the late Yvonne Musangi Nzembei (deceased) was awarded a total of Kshs 3,413,350 in damages under various heads plus costs and interests.



3. The appellant denied being insurers of the motor vehicle registration No Kxx xxxS stating that when the accident occurred, the ownership had changed hands from Antony Macharia Kinuthia who was their insured to Josphat Juma Okoth and that the date of sale was on September 2, 2016 while the accident, the subject of the claim occurred on September 3, 2016 a day after the sale.
4. At the trial, the respondent testified that the deceased Yvonne Musangi Nzembei was his daughter and that she died from an accident that occurred on September 3, 2016 along Thika-Mwingi Highway at Kwa Muthusi area, involving motor vehicle registration No Kxx xxxS.
5. According to him the motor vehicle was insured by the appellant under policy No CHK 1xxx0/2015 with certificate No Axxxx9 commencing on September 7, 2015 and expiring on September 7, 2016.
6. He further testified that the police abstract indicated that the motor vehicle was owned by one Josephat Okoth.
7. The appellant through Antony Macharia Kinuthia (DW1) testified that he was the registered owner of the accident motor vehicle. He tendered sale agreement (D Ex 1) indicative of sale agreement between him and Josephat Juma Okoth dated September 2, 2016. The subject of sale agreement is indicated as Kxx xxxS. He testified that he had sold the said motor vehicle to Josephat Okoth by the time the accident occurred on September 3, 2016.

He testified that at the time of the sale, he did not have the logbook as it was with the bank.

8. Charles Gathu (DW2) a legal officer with the appellant testified and gave a report from rapid insurance investigators as D Ex 2. According to him, the insurance cover issued to insured expired upon sale of the said motor vehicle. He told the trial court that the new owner ought to have taken a new insurance cover.
9. The trial court evaluated the evidence tendered and found that there was no evidence tendered that showed that Antony Macharia Kinuthia was the owner of the subject motor vehicle and had sold the motor vehicle to Josphat Okoth. The trial court found that the statement of Josephat Okoth was unsigned and Unaitas the alleged registered co-owner was not involved in the sale of the subject motor vehicle. The appellant was found liable to satisfy the decree passed in Mwingi Senior Principal Magistrate Court civil case No 32 of 2017.
10. Aggrieved it filed this appeal raising the following grounds namely: -
 - i. That the learned trial magistrate erred in law and fact by declaring that the appellant was liable to satisfy the decree in Mwingi Senior Principal Magistrate Court civil case No 32 of 2017.
 - ii. That the learned trial magistrate erred by not appreciating that insurable interest is not transferable.
 - iii. That the trial magistrate erred by shifting the burden of proof to the appellant.
 - iv. That the learned magistrate erred in law and fact by failing to note that ownership of motor vehicle Kxx xxxS had changed ownership.
 - v. That the trial magistrate erred by failing to note that the owner of the subject motor vehicle (Josephat Okoth) was a stranger to the appellant.
 - vi. That the learned trial magistrate failed to consider its written submissions.
 - vii. That the trial magistrate failed to address the following issues: -



- a. Whether motor vehicle registration number Kxx xxxS was insured by the appellant at the time of the accident.
 - b. Who had insurable interest on the motor vehicle registration No Kxx xxxS at the time of the accident.
 - c. Whether insurable interest is transferable.
 - d. What was the connection between the plaintiff and the defendant in the primary suit and the appellant herein?
- viii. That the trial magistrate misdirected himself on all points of law and fact.
 - ix. That the trial magistrate failed to consider authorities and the law cited.
11. The appellant in its written submissions through counsel contends that it was a stranger in the primary suit, Mwingi Senior Principal Magistrate civil case No 32 of 2017 and it could not therefore be called to satisfy the decree thereat as there was no insurance contract to that effect. The appellant submits that its obligation was to its insured Antony Macharia Kinuthia the policy holder in insurance cover issued in respect to motor vehicle registration No Kxx xxxS.
 12. The appellant points out that evidence was read at the trial that Antony Macharia Kinuthia had sold the said motor vehicle to Josphat Okoth. It submits that the insurance interests could not be transferred and the fact that the insured did not notify the appellant of the disposal of the motor vehicle in its view is a mere technicality. The appellant has urged this court not to hyper the technical hitch but strive to do substantial justice as stipulated under article 159 of the Constitution of Kenya 2010. It relies on Pius Orieno Owuor v Republic [2016] eKLR to buttress its contention.
 13. The appellant faults the trial court for shifting the burden of proof to it after it presented 2 witnesses to support its case. It submits that the burden is always in the plaintiff and has relied on the case of Eastern Produce (K) Ltd. (Chemom Tea Estate) v Boniface Ashoya [2018] eKLR where the court held that the plaintiff always carries the burden of proving its case on a balance of probabilities.
 14. The parties in this appeal were restricted to not more than 5 pages in written submissions and both knew that any party going beyond 5 pages will only have the first pages considered. The appellant went beyond 5 pages and did 10 pages without leave of this court.
 15. The respondent has opposed this appeal through written submissions by Counsel M/s Musyoka Muigai and Co Advocate dated October 3, 2022.
 16. The respondent has urged that this court being the first appellate do exercise caution in reviewing the evidence tendered at the trial because the trial court had the advantage seeing witness testify unlike this court.
 17. The respondent submits that the appellant pleaded in its defence that ownership of motor vehicle changed prior to the accident and that it was incumbent upon it to prove the allegations. He supports the finding of the trial court that found that DW1 had taken out insurance cover. He contends that the trial court did not find or mention anywhere in its judgement that insurable interests was transferable but instead found that the evidence that the ownership of the motor vehicle had changed hands a day before the accident was questionable.



18. He faults the appellant of over hyping the burden of proof stipulated under section 109 of the *Evidence Act*. He cites the provisions of section 112 of the *Evidence Act* in response pointing that the provision states;

“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.”
19. He submits that the details of the policy holder of insurance cover of the accident motor vehicle was information within the knowledge of the appellant and that the burden of proof by dint of section 112 of *Evidence Act* was upon it. He contends that there was nothing easier than tendering a policy document showing that it's the owner of the motor vehicle was not is policy holder.
20. The respondent contends that the evidence tendered by the appellant to repudiate liability felt short of requirements of section 35 (4) of the *Evidence Act* because the documents of change of ownership were unsigned.
21. He submits that the trial court did not shift the burden to the appellant adding that the trial court only considered the evidence and submission adduced by the appellant.
22. On cross appeal, the respondent faults the trial court for varying the date on which interests were to accrue from the principal sum in the primary suit and that by reviewing the interests payable the trial court sat on appeal on its judgement in the primary suit. The respondent urges this court to correct that error at this stage.
23. This court has considered this appeal and the response made including the cross appeal by the respondent.
24. This appeal arose from Mwingi PMCC No 37 of 2020. That declaratory suit is intertwined with the primary suit being Mwingi Senior Principal Magistrate Court civil case No 32 of 2017. The primary suit was between the respondent as the plaintiff and Josphat Okoth as the defendant and registered owner of motor vehicle registration No Kxx xxxS (hereafter to be referred to as the subject accident vehicle) for ease of reference).
25. The issues in this appeal has to have some contextual reference to the primary suit because the declaratory suit (Mwingi SPMCC No 37 of 2020) is a product of the primary suit Mwingi PMCC No 32 of 2017). The issues for determination in this appeal can be summarized as follows: -
 - i. Whether the appellant is liable or obligated to satisfy the decree in the primary suit (Mwingi Senior Principal Magistrate Court civil case No 32 of 2017).
 - ii. Whether the trial court shifted the burden of proof to the appellant.
 - iii. Whether the trial court could vary interests accruing from the decree in Mwingi Senior Principal Magistrate Court civil case No 37 of 2020.

Whether the Appellant was obligated to satisfy the decree

26. The provisions of section 10 of *Insurance (Motor Vehicles Third Party Risks)* cap 405 Laws of Kenya. Provides that an insurer has a duty to satisfy a judgement passed against persons injured so long as the judgement sum does not exceed 3 million.
27. The obligation placed on the insurer is subject to insurer cover issued by the insurer to its insured. An insurer under the law cannot be compelled to underwrite a loss occasioned to an insured unless there is a contractual relationship between the underwriter and insured. It is



true as submitted by the respondent herein that the party with or expected to be in possession of policy documents is the insurer.

28. In their appeal however, the owner of the subject accident motor vehicle is listed as Josphat Okoth. The appellant contends that the said Josphat Okoth was a stranger to it as it had not issued insurance cover to him with respect to subject accident motor vehicle.
29. The trial court faulted the appellant for not proving the issue of ownership of the subject accident motor vehicle finding that agreement of sale was insufficient because Josphat Okoth did not turn up in court to testify to confirm ownership of the subject accident motor vehicle.
30. This court finds that the above finding by the trial court was erroneous because of the following reasons: -
 - i In the first place, in the primary suit, the said Josphat Okoth was named as the defendant. The police abstract tendered in evidence captured him as the owner. The big question is was he the insured.
31. It is true that a logbook is a *prima facie* evidence of proof and there is a presumption of fact that the name appearing on the logbook is the owner of the motor vehicle of course that presumption is rebuttable by facts showing the contrary. That is why a police abstract is in given circumstances taken as proof of ownership.
32. The trial court failed to address its mind to the evidence tendered in the primary suit in regard to the ownership of the subject accident motor vehicle and hence the holder of an insurance of the insurance policy in question.
 - ii The trial court did not find out if the appellant participated in the primary suit in defending the suit on behalf of the insured as its obligated in its contractual relationship, with the insured. So if the appellant never participated at the trial in the primary suit, the trial court should have made a finding whether the appellant failed in its duty or not and/or whether it had a duty to defend in the first place.
 - ii The appellant during the trial in the declaratory suit called Antony Macharia Kinuthia (DW1) who testified that he was the previous owner of the subject accident motor vehicle and had disposed-off the motor vehicle to Josphat Okoth at the material time of the accident.
33. The trial court found that the document showing that Josphat Okoth as the owner was unsigned but the trial court addressed it mind only on the statement of the hired investigator, rapid investigations services nut not on the agreement of sale tendered as D Exh1. That evidence in my view, corroborated the information contained in the police abstract tendered in the primary suit. The trial court should have addressed its mind on whether, Josphat Okoth was insured and whether on the evidence of ownership, whether the insurable interest of Antony Macharia Kinuthia (DW1) was transferrable to Josphat Okoth upon sale of the subject motor vehicle.
34. An insurable interest is not transferable as a legal principle. That position is not disputed in this appeal. Having disposed the motor vehicle to Josphat Okoth, Antony Macharia (the appellant's insured) ceased to have further insurable interest on the subject motor vehicle. His interest on the motor vehicle passed upon being paid consideration of the motor vehicle. The ownership and possession passed over to the new owner Josphat Okoth. That fact is gleaned from the evidence tendered in both the primary suit and the declaratory suit.



35. The trial fell into error to find that the appellant was contractually liable to satisfy the decree in the primary suit when there was no evidence on privity of contract between it and Josphat Okoth.

In the absence of contractual obligation on the part of the appellant it was unfair and unlawful to hold it liable. I however, agree with the trial court observation regarding the manner in which the appellant presented its case. While I agree that it could have done better, in my view, the evidence presented met the threshold in providing sufficient response to the declaratory suit.

36. There was an apparent omission by Antony Macharia to notify the appellant of the sale of the subject accident motor vehicle but the appellant cannot be faulted for that omission and it is no fair to hold them accountable. It is also true that the accident occurred so close after the date of transfer which in my view might have been purely coincidental. The trial court appears to have placed premium on the coincidence when it found red flag on the failure by UNAITAS to have been involved in the sale when it was alleged it was a co-owner. In my considered view, there were no red flags in the transaction between the previous owner and Josphat Okoth because the police abstract corroborated the sale agreement tendered by DW1.

This court finds that in light of the evidence tendered, there was no evidence that the appellant had a contractual duty and statutory obligation to satisfy the decree in the primary suit.

Whether the trial court shifted the burden of proof.

37. The legal burden of proof is always on whoever alleges. The section 107 of *Evidence Act* states;

“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”.

38. The respondent in his pleading in the declaratory suit under paragraph 4 averred as follows: -

“At all material times to this suit, the defendant(appellant) was an insurer within the meaning of *Insurance (Motor Vehicle Third Party Risks) Act*, cap 405 Laws of Kenya who had issued Insurance Co in respect of motor vehicle registrarion No Kxx xxxS to cover among others third party risks.”

39. In its defence, the appellant denied that it had issued an insurance cover at the material time pointing out that it’s insured was one Antony Macharia Kinuthia.

40. The burden of proof in my view in the face of defence filed was on the respondent to prove that in fact the appellant had issued cover to Josphat Okoth the judgement debtor in Mwingi SPMCC No 32 of 2017. It was erroneous for the court to hold that the appellant and Antony Macharia had failed to prove the question of ownership of the subject accident motor vehicle because of what the trial court found to be “shortcomings” and “red flags” which in the end failed to prove ownership of the said motor vehicle. That in essence was shifting the burden of proof. It was the respondent who wanted the trial court to belief on the position asserted that the appellant had issued insurance cover. He had the initial evidential burden of proof. That burden was not discharged to enable the trial court find that the appellant failed in its bid to disprove evidence placed before the trial court.

41. The trial court in my view failed to direct its mind on who the insured or the owner of the motor vehicle was.



I have perused through the documents in the subordinate court and find that the respondent's counsel did a notice to the appellant dated June 14, 2019 asking it to satisfy a decree in the primary suit. The judgement in the primary suit was entered on June 13, 2018 and the question posed is why did the respondent delay in informing the appellant about the claim. The appellant was entitled to be notified of the intention to institute the primary suit and when the judgement was delivered especially if it did not participate in the proceedings. There is no evidence in that regard and it is not easy to know whether there is any fault on either party. But this court finds that the evidential burden of proving the claim at the trial court fell on the respondent and it was improper to hold that the appellant did not prove ownership of the motor vehicle at the material time.

Cross appeal

- 42 This court has considered the issue raised by the respondent on cross appeal. The issue is in regard to when the interests of the principal amount was to accrue or start accruing. There is no dispute going by the decree in the primary suit that the principal amount was to attract interests at 12% per annum beginning from June 13, 2018. In its judgement in the declaratory suit, the trial court stated that the interests were accrued from June 24, 2021 which I agree with the respondent was erroneous. The trial court did not have the jurisdiction to vary the dates when the interests were to accrue. The judgement in the primary suit is clear on when the interests were to accrue.
- 43 My findings, however, is rendered academic since I have found out above that, the entire judgment was erroneous. My findings on cross appeal therefore, have no legs upon which it can be enforced as against the appellant herein.
- 44 In sum this court finds merit in this appeal. The same is allowed the judgement of the lower court is set aside and in its place this court finds that the declaratory suit was not proved as against the appellant and is therefore dismissed with costs to the appellant who will also get costs of this appeal.

DATED, SIGNED AND DELIVERED AT KITUI THIS 28TH DAY OF NOVEMBER, 2022.

HON. JUSTICE R. K. LIMO

JUDGE

