REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CIVIL APPEAL NO. 7 OF 2020

KENYA ALLIANCE INSURANCE CO. LTD.....APPELLANT

VERSUS

THOMAS OCHIENG APOPA

(suing as Administrator of the Estate of Pamela Agola Apopa) deceased.....RESPONDENT

(Being an appeal arising from the Judgment and decree in Siaya PM Civil Suit No. 40 of 2018

dated 27th February 2020 before Hon. J. Ong'ondo, Principal Magistrate)

JUDGMENT

1. This appeal was filed on 19/3/2020. It arises from the judgment of Hon. James Ong'ondo, Principal Magistrate in **Siaya PM Civil Suit No. 40 of 2018**, delivered on 27th February 2020. The Appellant herein Kenya Alliance Insurance Company Limited was the Defendant in the lower court whereas the Respondent Thomas Ochieng Apopa **suing as Administrator of the Estate of Pamela Agola Apopa) deceased** was the Plaintiff in a claim filed on 31/5/2018 wherein the Respondent filed a Plaint dated 17th May 2018 seeking for Declaratory Orders compelling the Appellant herein to satisfy the decree pursuant to the judgment and decree delivered in **Ukwala SRM Civil Suit No. 3 of 2014** on 1st July 2015 between **Thomas Ochieng Apopa suing as Administrator of the Estate of Pamela Agola Apopa) deceased and Jacinta Wairimu**, wherein the court awarded the Plaintiff (now Respondent, Kshs. 396,500/= general damages, interest of Kshs 126,880 and costs of Kshs 88,410 all totaling Kshs 611,790 following a fatal road accident which occurred on 20.4.2013 wherein the Respondent's mother was fatally injured, along Busia-Kisumu Road involving motor vehicle Reg. No. KBS 306C Mitsubishi Lorry/Track belonging to Jecinta Wairimu and the Respondent herein.

2. In the said suit, the Respondent claimed that the said lorry was insured by the appellant herein vide Policy **No. KS 1/MC/0461 3TPOCOMM 26-11-2012 Expiring 25-11-2013.**

3. The Respondent having obtained a decree for Kshs 611,790 inclusive of costs and interest against the insured **Jecinta Wairimu SRM CC in Ukwala 3/2014**, he now filed a declaratory suit against the Defendant insured (Appellant herein) pleading that the appellant was bound by law to indemnify their insured, the original defendant, against any claims in line with Cap 405 Laws of Kenya.

4. He also pleaded that he served relevant notices under Section 10(2a) of Cap 405 Laws of Kenya and that despite demand and Notice to the appellant to settle the claim as awarded in the Ukwala SRM's court, the appellant had neglected, failed and refused to settle.

5. He prayed for a declaration compelling the appellant to settle the decretal sum, costs of the suit and interest.

6. The appellant herein entered an appearance and filed defence on 27/2/2019 after leave of court was granted out of time following entry of judgment for failure to file defence. The Appellant denied all the claims by the Respondent. It denied that it ever insured motor vehicle KBS 306C as at 20th April 2013, 9th October 2013 or at all; that motor vehicle in issue never belonged to Jecinta Wairimu. It also denied Policy No. KS/11/MC0466131TPO; occurrence of the accident on 20/4/2013 involving the aforesaid motor vehicle, or that judgment was ever entered in the Respondent's favour in Ukwala SRM CC No. 3/2014 or that he was awarded the sums of money subject of the declaratory suit.

7. The Appellant also denied that statutory Notice pursuant to Section 10(2)(a) of the Insurance (Motor Vehicles Third Party Risks) Act was served upon it. In other words, the appellant denied liability in *toto* and all other averments against it in the plaint.

8. It also contended that the Respondent lacked *locus standi* to bring suit to enforce the purported right of indemnification.

9. The Appellant contended that the Respondent was not a person insured under any Insurance Policy issued by the Defendant and therefore the Respondent had no legal right to seek declaratory orders against the Defendant/Appellant compelling it to satisfy any judgment obtained against Jecinta Wairimu.

10. It also deemed receiving any demand or Notice of intention to sue from the Respondent and put him to strict proof thereof.

11. The Respondent filed a Reply to defence dated 25th April 2019 reiterating the contents of his claim.

12. The trial magistrate in the declaratory suit found for the respondent and held that the appellant was obligated to settle the judgment and decree in favour of the respondent in the primary suit.

13. Aggrieved by the said judgment and decree, the appellant herein filed this appeal setting out the following grounds of appeal:

> ***1. The learned trial magistrate erred in law and fact in finding that the appellant was obligated to satisfy the decretal sum obtained by the Respondent in the primary suit even though the appellant produced in evidence an Insurance policy document that showed that at the material time, its insured, in respect of the motor vehicle Registration Number KBS 306, was Francis Kang'ethe and not Jecinta Wairimu, against whom judgment in the primary suit was obtained.***
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> ***2. The learned magistrate erred in law and fact in failing to find that even though the appellant was the insurer of motor vehicle Registration Number KBS 306C, it's insured, Francis Kang'ethe, was never sued in the primary suit and that an unknown party, Jecinta Wairimu, had been sued and judgement entered against her.***
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> ***3. The learned magistrate erred in law and fact in dismissing the insurance policy document produced as evidence by the appellant to demonstrate that the person in respect of whom motor vehicle Registration KBS 306 was insured at the material time was Francis Kang'ethe and not Jecinta Wairimu yet the said policy document was not controverted, impugned discredited, challenged, discounted or its production objected to at the trial.***
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> ***4. The Learned magistrate erred in law and fact in misapprehending and misapplying the contents of Section 10 of the Insurance (Motor Vehicles Third Party Risk) Act which only obligates an insurer to indemnify judgments obtained against its insured.***
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> ***5. The learned magistrate erred in law and fact in incorrectly imputing the existence of and insurance policy between Jecinta Wairimu and the appellant whereas none existed.***
>
> ***6. The learned magistrate erred in law and fact in imputing the existence of privity of contrary between the appellant and Jecinta Wairimu, against whom judgment was entered in the primary suit;***
>
> ***7. The learned magistrate erred in law and fact in ignoring the submissions made by the Appellant***.

14. The appellant prayed that this appeal be allowed, the judgment of the trial court be set aside and the respondent's suit be dismissed with costs.

15. This being a first appellate court, and as required under section 78 of the Civil Procedure Act, this court must reassess and re-valuate the evidence adduced before the trial court and arrive at its own independent conclusion bearing in mind the fact that it neither heard nor saw the witnesses as they testified. See ***Sielle* –vs- Associated Motor Boat Co. Ltd & Others [1968] EA 123).**

16. Revisiting the evidence adduced before the trial court as required by Section 78 of the Civil Procedure Act, this being a first appellate court, the Respondent Thomas Ochieng Apopa testified as PW1 on 27/6/2019 and stated he was a resident of Ukwala and doing clerical work. He adopted his witness statement recorded on 21.5.2019 as his evidence in chief and testified that he was seeking for declaratory order against the appellant herein to settle decree in **Ukwala SRM CC No. 3 of 2014** wherein he was awarded damages following a fatal road accident involving his late mother Pamela A. Apopa involving motor vehicle KBS 306C Mitsubishi Lorry Truck on 20/4/2013, which truck belonged to the defendant in the original [primary] suit who was Jecinta Wairimu. He also produced copy of records of the subject motor vehicle showing the owner thereof to be Jecinta Wairimu, as PEx3. He testified that the said motor vehicle was insured by the appellant herein. The Respondent also produced as exhibit 3a copy of **Certificate of Insurance No. KS 11/MC/40 6013 TPO Comm**: **26/11/2012 Exp: 25/11/2013** showing that at the material time of the accident, the Appellant herein had insured the said Lorry KBS 306C Mitsubishi Lorry Truck.

17. His evidence was that the original suit proceeded by way of formal proof and the trial court delivered judgment on 1st July 2015 awarding him Kshs 396,500 general damages and interest of Kshs 126,880 and costs were assessed at Kshs 88,410 all totaling Kshs 611,790. He produced decree in Ukwala SRM CC 3/2014 as PEx 4, Police abstract for the accident which was reported at Busia Police Station as PEx6 and a copy of records t as PExhibit 5, limited grant as exhibit 1 and a demand letter which he called statutory Notice dated 14/10/2013 as exhibit 2.

18. In cross examination, the Respondent reiterated that he obtained judgment against Jecinta Wairimu the registered owner of the accident motor vehicle and that the sticker showed the appellant as the insurer He maintained that he sued the right person

19. The Respondent was then granted leave to file copy of records showing the registered owner of the accident motor vehicle as at 20.4.2013 which he did file with no objection from the appellant's counsel Mr. Osino.

20. In its defence, the Appellant called one witness Anthony Kariuki, its Head of Legal and Technical Services and an advocate. He relied on his witness statement dated 6/3/2019 and a list of documents which were produced as Defence Exhibits No. 1.

21. DW1 testified that he was aware that the Respondent herein obtained judgment in the primary suit against Jecinta Wairimu but he stated that the Appellant had no contract of insurance with Jecinta Wairimu.

22. According to DW1, the appellant had insured Motor Vehicle Registration No. KBS 306C Mitsubishi Truck, in respect of Francis Kangethe the policy holder. He produced the policy schedule as DExhibit 1 and stated that the policy ran from 26/11/2012 to 25/11/2013.

23. DW1 stated that from the search conducted on 9/10/2013, the owner of the motor vehicle is indicated as Jecinta Wairimu and that the accident is alleged to have occurred on 20/4/2013. He stated that Francis Kang'ethe's was thee policy holder for policy number MCV/**BS/BOL/030036.** He could not tell where the police got the policy number.

24. He maintained that they did not know Jecinta Wairimu who was a stranger to the appellant and he also vehemently denied that the appellant was served with any statutory Notice. He denied that Jacinta Wairimu to whom demand letter was addressed was their insured but admitted that the letter was copied to Kenya Alliance and that it had a date stamp. He stated that they received notice of suit in Ukwala after judgment was delivered and notice served on them on 23/8/2018. He stated that their insured Francis Kangethe had not notified the insurance company of any accident and that from police abstract the owner of MV GK 640M was charged in court for being blameworthy. Further, that even if they had received it, it does not meet the requirements of a statutory Notice as it does not enumerate the injuries which are the basis under Section 10 of the Insurance [Motor Vehicle Third Party Risks] Act.

25. He denied that the Appellant was aware of the accident in issue and insisted that their insured was never sued and that there is no judgment against their policy holder otherwise they would have satisfied the claim long time ago.

26. He stated that the demand letter was addressed to Jecinta Wairimu and copied to the Defendant/ Appellant herein and that it had a date stamp of the defendant. He denied knowing if Jecinta had decree as they did not know her. Further, that he did not know where police got Certificate of insurance.

27. On being referred to copy of records on ownership of the subject Motor vehicle, DW1 stated that the previous owner was Jacinta Wairimu but that as at 30/7/2019, the registered owner was **Somar Mobile Ltd.**

28. The Appellant closed its case and the Respondent was granted leave to file cpy of records before written submissions.

29. In his written submissions in the lower court dated 17/12/2019, the Respondent reiterated his claim as pleaded and testified on and urged the trial court to grant the prayers sought. He relied on ***Peter Gichiri Njuguna Vs Jubilee Insurance Co. Ltd. Nakuru HC CC 57/2013*** where the Defendant insurance company was compelled to settle decree of a primary suit.

30. On the part of the Appellant, its counsel filed written lengthy submissions dated 20/11/2019 reiterating its pleadings and evidence adduced by DW1 Mr. Anthony Kariuki.

31. It was submitted that the Respondent had not discharged the burden of proof as stipulated in Sections 107 and 108 of the Evidence Act in that there was no proof that judgment in the primary suit was obtained against the Appellant's insured; or that the appellant was the insured of the accident motor vehicle as at the date of accident and that in this case, the insured was Francis Kang'ethe and not Jecinta Wairimu. Counsel for the Appellant further submitted that there was no proof of proper service of a statutory Notice upon the Appellant as stipulated in Section 10(2)(a) of Cap 405 Laws of Kenya.

32. On the applicable law, counsel for the appellant relied on Section 10(1) & (2) of Cap 405 laws of Kenya and submitted that the duty of the insurers is to satisfy judgments ***against persons insured*** and contended that in the suit beforehand, the appellant was not bound to settle the decree in Ukwala SRM CC 3/2019. He relied on ***Kenindia Assurance Co. Ltd Vs James Otiende [1987]2 KAR 162 and Kasereka Vs Gateway Insurance Co. Ltd (20030 2 EA 502 as well as Philip Kimani Gikonyo Vs Gateway Insurance Co. Ltd HCCA 746/2002 Nairobi*** where the court alluded to the provisions of Section 10 of Cap 405 Laws of Kenya emphasizing that the Insurance Company can only settle decree against its insured.

33. On the issue of alleged non-service of statutory Notice the appellant's counsel submitted that the Respondent did not prove service of the same on the appellant and that he only produced a demand Notice addressed to Jacinta Wairimu and wanted to pass it off as statutory Notice, which demand letter did not meet the threshold of a statutory Notice as one could not tell whether the claim related to material damage or personal injury claim.

34. It was contended that the said letter was not addressed to their insured though copied to the Appellant. Counsel urged the trial court to dismiss the declaratory suit with costs.

35. In his judgment delivered on 27/2/2020 which judgment is impugned herein, the trial Magistrate Hon. Ong'ondo, Principal Magistrate found for the Respondent and dismissed the alleged Insurance policy document produced by the appellant in respect of Francis Kang'ethe. The learned trial magistrate also found that the demand Notice which was duly received by the appellant by stamping on it amounted to a demand and served as a statutory Notice under Section 10(2) of Cap 405. He issued a declaration to the effect that the appellant is bound to satisfy decree in the primary suit at Ukwala in Ukwala SRM CC 3/2014 together with interest and costs of the suit.

36. It is that judgment which the appellant is aggrieved by and which is the basis of this appeal.

37. In support of the appeal herein, the appellant through its Counsel Eboso and Company Advocates urged this court to allow this appeal with costs, set aside the judgment of the trial court which allowed the Respondent's and suit and substitute it with an order dismissing the said suit with costs to the appellant.

38. The submissions mirrored the grounds of appeal and the written submissions filed in the lower court. The respondent also filed written submissions opposing the appeal.

39. I have considered the said written submissions for and against this appeal in the section below in details in order to avoid repetition.

DETERMINATION

40. Having considered the seven grounds of Appeal reproduced above, the evidence and submissions presented by both parties before the trial court and the written submissions canvassing this appeal and supporting statutory and case law, in my humble view, the issues for determination in this appeal No. 7 of 2020 which is similar to Appeal No 6 of 2020 are: -

> ***(1) whether the trial magistrate erred in law and fact in finding that the appellant was obligated to settle decree in Ukwala SRM CC 3/2014.***

41. The appellant in its ground 1 of the Memorandum of appeal and in its written submissions faulted the trial magistrate for making a finding that the appellant was obligated to settle decree which was issued in the Ukwala SRM CC 3/2014 (the primary suit) despite the fact that the appellant was not the insurer of the Defendant/respondent registered owner of MV KBS 306C at the time of the material accident, and despite the appellant having produced in evidence a policy document showing that during the said period, the insured was Francis Kangethe, who was not a party to the primary suit, and not Jecinta Wairimu, who was sued and judgment entered against her.

42. In the same vein, the Appellant argued that the finding by the trial magistrate offends the provisions of Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act Cap 405 Laws of Kenya which is clear that the Insurance company is only obligated to indemnify or settle decree in favour of a decree holder where the judgment debtor /Defendant is the insured of that Insurance Company. Several decisions were relied on in support of these propositions.

43. On the part of the Respondent, he submitted in contention that he had proved his claim by production of an insurance sticker (Certificate of Insurance for the subject Motor vehicle for the period covering the date of accident and copy of the records showing that the insured owner was Jecinta Wairimu, which documents were not challenged to be fraudulently obtained hence the appellant was said to have merely denied the claim.

44. The Respondent further supported the trial magistrate's finding that the purported insurance policy in respect of Francis Kang'ethe for Motor vehicle registration No. KBS 306C was an afterthought and made up purposely for the defence of the case in issue, as the document was not signed by Francis Kang'ethe and that if at all the said alleged Francis Kang'ethe existed, then he should have been called to identify his document or called the unidentified General Manager who allegedly signed the document. Further, the Respondent questioned why the appellant did not exhibit a duplicate certificate of Insurance of the policy allegedly held by Francis Kang'ethe hence the Motor vehicle registration No. KBS 306C had a valid insurance policy from the Defendant insurer and the insured being Jecinta Wairimu.

45. As correctly submitted and asserted by the Appellant's counsel, the onus lies on the Plaintiff in a claim of this nature to prove that the judgment was obtained against the appellant's insured or its authorized driver, for the appellant (insurance company to be obligated in a declaratory suit, to settle judgment or decree of a primary suit.

46. In the instant case, the Respondent/Plaintiff obtained judgment against one Jecinta Wairimu who was the defendant in the primary suit. The Respondent argues that he sued the insured owner of the motor vehicle KBS 306C which was insured by the appellant at the material time and that he proved that Jecinta Wairimu was the owner and insured thereof. He dismisses the Appellant's policy document which claims that the insured was Francis Kang'ethe.

47. The question that I must resolve is who was the insured of motor vehicle Registration number KBS 306C Mitsubishi Lorry Truck as at the time of the material accident?

48. The duty of the Insurance Company (insurers to satisfy or settle decrees against their insured is a statutory duty which stems from Sections 10(1) and (2) of the Insurance Act Cap 405 Laws of Kenya.

49. This section provides:

> ***"10(1)(f) after a police of insurance has been effected, judgement 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 policy) <u>is obtained against any person insured by the policy</u>, 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 provision of this section, pay to the person 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 some payable in respect of interest on that sum by virtue of any enactment relating to interest on judgment."***

50. The above provision has been subject of many decisions including those cited by the Appellant's counsel on the body of his written submissions and which I take cognizance of in this judgment.

51. In the instant case, it is not a disputed fact that the Respondent sued Jecinta Wairimu who, according to copy of records and police

abstract produced by the Respondent in the lower court (primary suit), was the insured of the motor vehicle KBS 306C Mitsubishi lorry truck. A certificate of Insurance produced as an exhibit by the Respondent show that the Insurer was the appellant herein and the policy number is given as **KS/11/MC0466131TPO.**

52. On the other hand, the Appellant in the declaratory suit produced a policy document showing that the insured for the same period was Francis Kang'ethe. Based on this latter position, the appellant declined and continues to decline and resist settling the judgment which was against Jecinta Wairimu and not Francis Kang'ethe because according to the appellant, they had no privity of contract with Jecinta Wairimu.

53. The other undisputed fact is that the appellant was the insurer of the motor vehicle KBS 306C during the time in issue, but the Respondent produced a policy Number KS/11/MC0466131TPO 'printed on the Certificate of Insurance in favour of Jecinta Wairimu whereas the appellant produced what it calls a policy document containing different policy number showing that its insured was Francis Kang'ethe.

54. My commencement point is that he who alleges must prove. The Respondent alleged that the appellant was the insured of motor vehicle KBS 306C Mitsubishi Truck. He produced a police Abstract with Police Reference No. N/AR3/2013 dated 8/10/2013 issued by Base Commander, Busia Traffic Base. The abstract shows that an accident occurred on 20.4.2013 at 12.00 noon along Busia-Kisumu road at Suo River involving Motor vehicle Registration No. KBS 306C and GK A 640M Ambulance Land cruiser. The accident was reported at Busia Police Station. The police abstract is duly signed and stamped by the OCS Busia Police Station.

55. The other persons who were involved in that accident are named as Thomas Ochieng Apopa, Philip Juma Owino, Job Ochieng and Pamela A. Apopa (now deceased). They all sustained very serious injuries ranging between grievous harm and maim (for Job Ochieng).

56. A driver by the name Zadock Munala was charged with the offence of careless driving contrary to Section 49(1) of the Traffic Act and driving a defective motor vehicle, vide court case No. 556/2013 and the results of investigations and prosecution are shown that, *"Accused discharged under Section 202 of the Criminal Procedure Code* on 24/9/2013 by Hon. C. Agutu, R.M, Busia.

57. The said police abstract which was produced as an exhibit has details of the insurance Certificate No. 6004338 Policy No. K5/11/MC/046131TPO commencing on 26/11/2012 Expiring 25/11/2013 for Motor Vehicle KBS 306C and the insurer is Kenya Alliance Insurance Co. Ltd. The accident was obviously reported to Busia Police Station who investigated and even charged one of the drivers Zadock Munala who was believed to have been careless. The insurance sticker No. 6004338 was produced in evidence as PEx3 and on the body thereof, there is handwritten information:

> ***"Reg. owner Jecinta Wairimu -0724916361***
>
> ***C/O Box 433***
>
> ***Kakamega"***

58. The Respondent also produced as PEx2 copy of records showing that at that time of the accident, the said Motor vehicle was registered in the name of Wairimu Jecinta vide Log Book Number 5485078F. Her address is given as Box 2643-50100 Kakamega. The copy of Records was duly paid for vide Exhibit No. 6 the receipt from Kenya Revenue Authority.

59. I have also perused the further document which is copy of records for the same Motor vehicle as at 30/7/2019 when the declaratory suit was being heard. It shows that first owner to be **Jecinta Wairimu Gichure,** Mobile No. 0727790627 ID/No 27192063 whereas the current owner [as at 30/7/2019] was **Somar Mobile Limited,** Certificate of Incorporation No. C149136.

60. I have perused the Appellant's exhibit which is Motor Vehicle Commercial Own Goods Insurance for Motor vehicle KBS 306C. It is a document with a covering letter on the first cover page, being a letter addressed to Mr. Francis Kang'ethe and thanking him for choosing the appellant as his insurers and informing him that, that was the policy document which is evidence that they have a contract. There is a signature below that covering letter, stated to be for General Manager whose name is not given. The letter enclosing the said 'policy document' is also not dated but it quotes policy No. MCV/BS/POL/050036 and the schedule on the second page which is page 3 shows the agency through which the 'policy' was obtained to be **Blue Shod Insurance Company P.O. Box 1805 Kakamega**. Curiously, the alleged insured's [Francis Kang'ethe] address is also given as **P.O. Box 1805, Kakamega,** similar to that of the Insurance Agency that brokered the Policy Document. The said insurance 'Policy'commences Monday, November 26, 2012 to Monday, November 25th, 2013 being the inception date and Renewal dates respectively. The 'cover' as per the page 4 is for Third Party.

61. The said 'policy document' which is supposed to be evidence of the contract between Francis Kang'ethe and the appellant herein is not signed by either the insurance company's representative or the purported insured Francis Kang'the. Only an undated covering letter forwarding the 'policy document' is signed by an unnamed General Manager. I reiterate that neither the letter forwarding the 'policy document' nor the attached 'Policy document' is /are dated, or signed by any policy holder. There is also no signature of any of the parties to the 'policy document' on the said document. Only the forwarding letter is signed by an office holder whose name is not given.

62. The question is whether this court should believe the evidence adduced by the Respondent showing not only legal ownership of the accident Motor vehicle KBS 306C Mitsubishi Lorry Truck, but also the Certificate of Insurance showing the insurance policy number and the validity period for the said insurance; or believe the evidence by the Appellant, of a 'policy document' which is neither dated nor signed by any party to it although it was meant to constitute a contract of insurance between Francis Kangéthe and the appellant herein in respect of motor vehicle KBS 306C covering the same period as the Certificate of Insurance produced by the Respondent

63. According to the appellant's counsel, the said 'policy document was not challenged when produced in evidence. However, the trial

magistrate discredited the said document and rejected it. It should be noted that production of a document as an exhibit is not a guarantee that document's credibility or probative value.

64. In addition, this court takes judicial notice of the fact that whenever one buys or owns a motor vehicle other than a government owned motor vehicle and a tractor used solely for agricultural purposes and puts it on a public road, whether he is the registered (legal owner) or a beneficial owner thereof, they must insure that motor vehicle, whether it is meant to do private business, commercial business or public service business. This is the requirement of the law under section 4 of the Insurance [Motor Vehicles Third Party Risks] Act, Cap 405 Laws of Kenya. The section provides:

"4. Motor vehicles to be insured against third party risks

> ***(1) Subject to this Act, no person shall use, or cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Act.***
>
> ***(2) Any person who contravenes subsection (1) shall be guilty of an offence and be liable to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding two years or to both, and such person upon a first conviction for such offence may, and upon a second or subsequent conviction for any such offence shall, unless the court for special reason thinks fit to order otherwise, be disqualified from holding or obtaining a driving licence or provisional licence under the Traffic Act (Cap. 403) for a period of twelve months from the date of such conviction or for such longer period as the court may think fit.***
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> ***(3) This section shall not apply to any motor vehicle owned by the Government, or to a motor tractor or other motor vehicle used solely or mainly for agricultural purposes, if the use of such motor tractor or other motor vehicle on a road consists only of moving it by road from one part of the land of the owner thereof to another part of the land of such owner.***

65. A Certificate of Insurance issued by licensed insurance company is prima facie evidence that the subject motor vehicle is duly insured and the law requires that such Certificate of Insurance must be displayed at a place and in a manner prescribed on the subject motor vehicle so that the law enforcement officers can easily see it on inspection of the vehicle while it is on the road, to ensure that it is insured. This is the mandatory requirement under section 9 of Cap 405 Laws of Kenya which states:

> "9. ***Display, etc., of certificates of insurance***
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> ***(1) Any person driving a motor vehicle on a road or owning a motor vehicle so driven, in respect of which a policy of insurance is required to be in force under this Act, shall carry and display or cause to be carried and displayed on the vehicle a certificate of insurance in the prescribed form, place and manner.***
>
> ***(2) If, in any case, owing to the presence of a motor vehicle on a road an accident occurs whereby injury is caused to any person, and a certificate of insurance required under this Act is not inspected by a police officer at or near the site of the accident, the driver or the owner of that vehicle shall as soon as reasonably possible, and in any case within twenty-four hours of the occurrence of the accident, show or cause to be shown at a police station or to a police officer the certificate of insurance in force in respect of that vehicle either on the vehicle or, if the vehicle cannot reasonably be produced, detached from the vehicle.***
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> ***(3) Any person who fails to display a certificate of insurance in accordance with subsection (1) or to comply with the requirements of subsection (2) shall be guilty of an offence.***
>
> ***(4) The owner of a motor vehicle shall, within seven days after having***

received an oral or a written request to that effect, give such information as he

may be required to give by a police officer for the purpose of determining whether

the vehicle was or was not being driven in contravention of section 4, and if the

owner fails to do so he shall be guilty of an offence.

66. With section 9 of Cap 405 in place, drivers of motor vehicles in my humble view are not required to carry with them policy or insurance contract documents while on the road. Policy documents are contractual documents between the insurance company and the person insuring the motor vehicle. The end product of the policy document is the Certificate of Insurance which is required to be displayed on the motor vehicle so insured and in the manner provided for in section 9 above. A Certificate of Insurance is a small clear and precise document disclosing the policy number, the insurance company/insurer and the period covered by the insurance, or the insurable period. The duplicate [counterpart] Certificate contains the name of the insured.

67. Furthermore, where an accident occurs, as was in the instant case where from the police abstract produced as an exhibit, those affected sustained such serious injuries, such accident must be reported to the police and once the police are informed, the first thing that the Police must do is inspect the accident motor vehicle and look for the insurance sticker to see whether it is displayed and that it is valid and whether the driver had a valid driving licence. Where such crucial documents are missing, or are invalid (expired), the police are obligated by law to charge the driver[s] and even owner [s]of the motor vehicle for flouting mandatory laws and or Rules or regulations.

68. DW1 Anthony Kariuki the appellant's legal officer testified that he did not know where the police got the policy number KS/11/MO 104613/TPO but he conceded that it was for Motor vehicle registration number KBS 306C Mitsubishi Lorry Truck. He also conceded that the Certificate of Insurance normally does not show the name of the owner and or the insured. He did not claim that the Certificate of Insurance produced by the Respondent and on which the said policy number was clearly printed was a fraud. Furthermore, if such document was a fraud, nothing would have prevented the Appellant Insurance Company from investigating and coming up with the results thereof and therefore disowning it by avoiding the policy issued to Jecinta Wairimu, as required under section 10(4) of Cap 405.

69. The Defendant/now appellant did not produce before the trial court any Certificate of Insurance to allow the motor vehicle KBS 306C to be on the road for the period the 'policy document' claims he was the insured and which period the accident material to these proceedings occurred.

70. Neither did the appellant call Mr. Francis Kang'ethe as their witness to corroborate the testimony of DWI that the said Mr. Kang'ethe was indeed the insured of Motor vehicle Registration number KBS 306C and to challenge the genuineness or validity of the insurance sticker (Certificate of Insurance) produced by the Respondent.

71. Although DW1 claimed in his testimony that he did not know where the police got the policy number produced by the Respondent from, it is clear that the policy number was to be found on the Certificate of Insurance which is normally [and as required by section 9 of the Act above], displayed on the insured motor vehicle and this is common knowledge. Furthermore, from the police abstract report produced in evidence by the respondent, the police had already concluded their investigations into the material accident, charged one of the drivers with traffic offences and the results of the court proceedings indicated on the said police abstract. In my humble view, the only inference that this court makes is that when the police issued the Respondent with a police abstract, they had done their investigations and concluded them and so they supplied the Respondent with information which came into their possession in the ordinary cause of their public duties.

72. That being the case, the appellant's failure to produce a Certificate of Insurance to counter that which the Respondent produced and their failure to call Mr. Francis Kang'ethe to corroborate the evidence of DW1 was fatal to the appellant's defence and left the trial court with no option but to believe and correctly so, believed the evidence of the Respondent on the legal ownership and the person who insured the Motor vehicle KBS 306C during the accident period to be none other than Jecinta Wairimu, and the insurer thereof being the appellant herein Kenya Alliance Insurance Company Limited.

73. In my humble view, the respondent discharged the burden of proving his case on ownership, the insured and the insurer of Motor vehicle KBS 306C Mitsubishi Lorry Truck on a balance of probabilities. He was in the circumstances of the case not expected to prove his case beyond reasonable doubt by going to look for policy documents in possession of the owner and insured or insurer, when, in his possession, was a conclusive investigation report by the police, summarized in the form of a police abstract showing who the insured of the accident motor vehicle was.

74. Since the defence case for the appellant was wholly anchored on the "policy document" which I have found was not dated and or signed by the parties, and therefore a sham document, Francis Kang'ethe was a crucial witness to support the defence case and to displace the evidence adduced by the Respondent.

75. In the same vein, production of a signed certificate of insurance in the name of Francis Kang'ethe would have given the trial magistrate an opportunity to weigh the evidence and the Respondent an opportunity to cross examine the witness on how one insurance company could have issued an Insurance Certificate to one vehicle and a 'policy document' to another, covering the same vehicle and the same validity period.

76. I reiterate that the Appellant herein never pleaded any fraud and never claimed that the certificate of insurance produced by the Respondent was a fraud or that the information given by the police in the police abstract was incorrect or unauthentic. Since no such evidence was called to displace the prima facie evidence by the Respondent, that he had a valid insurance sticker in respect of the accident motor vehicle insured in the name of Jecinta Wairimu, I find and hold that the defence by the appellant was a mere denial and that the 'policy document' produced by its witness, not being dated or signed by the parties, thereto, was a sham and a document introduced by the

insurance company with the sole intention of defeating the mature claim by the Respondent and to escape liability, its insured Jecinta Wairimu, having failed to defend the primary suit.

77. In ***Bukenya vs Uganda [1972] EA 549***, the Court of Appeal for Eastern Africa held that failure to call critical witnesses (and by extension crucial documents) by the prosecution (or in the instant case, by a party alleging or who would have been expected to produce them because such evidence or witness was at their disposal), entitles the court to make an adverse inference against the prosecution (in this case, by a party who would have benefitted from the production of such evidence or called such witness to establish their case).

78. The failure the appellant to produce the duplicate insurance sticker (certificate) if at all it existed in favour of Francis Kang'ethe and the failure to call Francis Kang'ethe as a witnesses for the defence (appellant) weakened the defence (appellant's defence to the extent that the evidence adduced did not displace the Respondent's evidence) which proved his case on a balance of probabilities.

79. Furthermore, the Respondent having produced copy of records showing legal ownership of Motor vehicle KBS 306C Mitsubishi Lorry Truck, supported by the Certificate of Insurance both in the name of Jecinta Wairimu, the contrary evidence to displace that evidence by the Respondent could even have been by way of at least a sale agreement showing that the vehicle had as at the time of being insured and therefore time of the material accident, now moved from legal ownership of Jecinta Wairimu to beneficial ownership of Francis Kang'ethe who had now insured it before formal transfer.

80. To the contrary, as at the time of hearing the declaratory suit, Jecinta Wairimu who was the first registered owner had now transferred the legal ownership of the subject motor vehicle to **Somar Mobile Limited,** as at 30/7/2019. From the copy of records produced as an exhibit as at the said date, the vehicle was fairly new. It was first registered in Kenya on 2/6/2012 before it was insured and being involved in an accident. Jecinta Wairimu was the first Kenyan owner.

81. Therefore, albeit the appellant claims that the insurance can only settle decree against its insured, and that in this case their insured was Francis Kang'ethe, I find no credible evidence supporting the assertions that Francis Kang'ethe was the insured and or owner as at the time of the material accident. The only credible evidence which is believable is that Jecinta Wairimu who was the defendant/judgment debtor in the primary suit at Ukwala Law Courts was the insured and legal owner as at the time of the material accident.

82. It is my firm finding and holding that the insured as at the time of accident was Jecinta Wairimu who was also the legal owner of the insured Motor vehicle KBS 306C Mitsubishi Lorry Truck and that the insurer thereof was the appellant herein hence it was the appellant who was obligated to settle decree in favour of the Respondent in the primary suit at Ukwala SRM's Court CC No.3 of 2014. Accordingly, the trial magistrate in the declaratory suit did not err when he so found and held that the appellant herein being the insurer of the accident motor vehicle as at the time of accident was obligated to settle decree in the primary suit.

83. I observe that in the **Kenindia Assurance Company Limited v. James Otiende (1989) 2 KAR 162 and Kasereka v. Gateway Insurance Company Limited (2003) 2 EA 502 cases** cited by the appellant's counsel, there were claims that the insurance company could not settle the claim because judgment was against the insured's driver not the insured and further, the claim was by employees against the insurance company, which is distinguishable from this case with its own unique circumstances. Nonetheless, the court dismissed those allegations.

84. In the **PHILIP KIMANI GIKONYO v GATEWAY INSURANCE COMPANY LIMITED [2007] eKLR** Case, Visram J[as he then was] stated:

> ***"Now, it is important to note that in the Kenindia case the claimant was an employee of the insured, not a third party, and therefore was an exception to the categories of the people required to be covered under Section 5 of the Act. The issue before that Court was one of "jurisdiction", that is, whether the High Court in the first place had jurisdiction to entertain a claim by an "employee" against the insurance company. And, of course, applying Section 5(b) (i), the Court held that there was indeed no Judgment against the insured capable of enforcement. That, indeed, is a very different situation from the facts in the case before this Court.***
>
> ***Here, the Appellant (Plaintiff in the Lower Court) was a third party in respect of whom it was mandatory to take out third party insurance covering the risk of death or bodily injury.***
>
> ***Section 5(b) of the Act states as follows:***
>
> ***"5. In order to comply with the requirements of section 4, the policy of insurance must be a policy which -***
>
> ***(b) insure such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road".***
>
> ***Clearly, Section 5(b) makes it mandatory for motor vehicle owners and/or operators to obtain third party cover for death or bodily injury to all persons, except for those categories of people specifically excluded such as employees or passengers. Therefore, the Appellant before this Court was one such person. Now, the next issue is whether there had to be Judgment against the insured in addition to a Judgment against his authorized driver. Let us go back to Section 10(1) of the Act. The critical words of that Section are:***
>
> ***"If…… judgment is obtained against any person insured by the policy ….the insurer shall ….. pay to the persons entitled to the benefit of the judgment ……."***

85. This court is inclined to agree with the holding in the persuasive decision in ***Martin Onyango Vs Invesco Insurance Company Ltd [2015] eKLR*** where the court held that information in the police abstract is sufficient proof of the insurer because police are charged with the responsibility of Investigating accidents and gather relevant information and evidence which they use to found a charge against the offending driver or owner thereof or for closure of an accident case even where it is self- involved or where there is no fault attributable to anyone.

86. My other view is that the trial court in the primary suit having found that the Respondent, on the strength of the evidence tendered to support his claim, which claim was prosecuted exparte, had proved his case on a balance of probabilities, and if the appellant herein wished to challenge that primary evidence since a declaratory suit is not an appeal, it should have applied to set aside judgment and decree in the primary suit at Ukwala in SRM CC No. 3/2014. This is because matters of fact such as ownership of Motor vehicle KBS 306C and the insured or insurer were settled therein when the primary court accepted the evidence as presented by the respondent, which evidence was never challenged. In **Morgan Mwita Vs Cooperative Insurance Co. Ltd HCC 105/97, the High Court citing Windsor Vs Chalcraft [1938]1 KB 279 as applied in Kavindu Vs Mbaya** stated and I concur:

> ***"There has been an attempt to deny some of those facts while admitting others in the defence filed. But 1 ask myself whether the Insurers are at liberty to question the facts before the Lower Court at this stage when they had the opportunity to do so in that court. For I find, on authority, that if the Insurers were so minded, they could have applied to the Lower Court to set aside the judgement and decree entered, and would then have challenged the suit on merits. It was so stated in Windsor V Chalcraft [19381 1KB 279 which Muli J (as he then was) applied in Kavindu V. Mbaya. Per Mackinnon L.J.***
>
> ***"It seems to me that by virtue of the Provisions of the Road Traffic Act , . . the Underwriters, the strangers to the litigation, have an interest in the action with a consequent right to set aside the judgment which is greater than that arising by reason of the liability imposed on them and the nominal defendant. They have an interest by reason of the liability imposed on them by statute to make good to the plaintiff the amount of the judgement and for that reason it seems to me that they, of all people, are the sort, of strangers interested in judgment as being injuriously affected by it who have aright within the principle laid down by BowenL.J to intervene and ask to have the judgement by default set aside."[emphasis added]***
>
> ***The insurers here cannot be said to have been unaware of the suit in the Lower Court. The facts show otherwise. It is presumed that they were aware of their rights to intervene in that suit if they felt it was injurious to them. They have not and no one else has. The judgement obtained in that suit is therefore presumed to be a regular and enforceable judgement. It seems to me therefore that matters of fact finalised in that Lower Court which are sought to be challenged in this court cannot be properly so challenged. [emphasis added]***

87. In the **Windsor V Chalcraft Case (supra**), the court held that:

> ***"In as much as the underwriters, although not parties to the action, were liable under the Road Traffic Acts….. to pay the amount of the judgment to the plaintiff and under the policy to pay it to the defendant, they are the persons aggrieved by the judgment, and as such they were entitled to an order setting aside the judgment and giving them leave to enter an appearance in the action in the name of defendants or in their own name and to deliver a defence." [emphasis added]***

88. Applying the above principles to this case, albeit the appellant claims that the defendant in the primary suit was not their insured, I find that the best place to articulate such argument would have been in the primary suit, since the motor vehicle subject of the accident and suit was nonetheless, insured by the appellant as at the time of the accident.

89. The appellant could have pleaded misjoinder and applied to set aside the judgment which was as a result of a non-disputed accident and motor vehicle which was insured by the appellant.

90. In addition, the appellant had the option of complying with Section 10(4) of Cap 405 which entitles it to avoid the policy by filing suit and obtaining a declaration to that effect. The procedure under the subsection is quite elaborate such that if the defendant decree holder was not the appellant's insured as alleged, the fact that the accident Motor vehicle was insured by the appellant at the time of the accident, entitled it to apply to avoid the policy, giving reasons and placing before the court relevant material for consideration on their merit.

91. The police abstract produced as an exhibit shows the motor vehicle involved in the accident, owner thereof, insurance and insured. A police Abstract is a public record as kept by the National Police Service at Busia Police Station vide an Occurrence Book number shown on the face thereof cited herein.

92. This document was never challenged in terms of the information contained therein. It should also be observed that a certificate of insurance is usually issued to the insured and not the police or to the Road traffic victim - see ***APA Insurance Co. Ltd Vs George [2014] eKLR***. All these facts were never challenged by the appellant. In this case, the victim respondent obtained a copy of police abstract from the police who were investigating the accident. The details in the police abstract as to the insurance are the ordinary cause of the events obtained from the Certificate of Insurance affixed on the accident motor vehicle or supplied to the police by the insured or their driver in the cause of their investigations and as required by law. There was no contrary evidence.

93. For the above many reasons, I am persuaded and satisfied that the evidence on record established on a balance of probabilities that the certificate of insurance and police abstract and copy of records produced by the Respondent proved that Jecinta Wairimu was the owner and insured of the accident Motor vehicle KBS 306C whose insurer was the Appellant herein. I find no fault with the trial magistrate's precise findings.

94. Accordingly, the grounds of appeal challenging the finding by the trial magistrate that the owner and the insurer of the accident Motor vehicle was Jecinta Wairimu and not Francis Kang'ethe are all found to be devoid of any substance and are hereby dismissed.

2.) The second issue that falls for determination is whether the Respondent served the Appellant with a statutory notice before or after institution of suit and if not, what are the consequences of non-service of a statutory Notice on the insurer?

95. The Appellant faulted the judgment of the trial court for failure to find that no statutory Notice was served upon the Appellant and that the trial court erred in passing off a demand Notice as a statutory Notice.

96. On the part of the Respondent, he contended that the appellant was served with a demand Notice before the primary suit was instituted and that they duly acknowledge it prior to the institution of suit and that the appellant avoided mentioning such acknowledgement of the demand Notice which the trial court found was sufficient enough to constitute the statutory Notice of Institution of suit.

97. Section 10(2) of the Insurance (Motor Third Party Risks Act, Cap 405 provides:

"10(2). No sum shall be payable by an insurer under the foregoing provisions of the section.

(a) in respect of any judgment, unless before or within 14 days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings….."

98. The above statutory provision is clear that before the insurance company can pay or be obligated to pay the judgment sum decreed in the primary suit, the insurance company must have had Notice of the bringing or institution of the proceedings or suit, before such suit was filed or 14 days after such suit was filed.

99. There is however, no limit as to what time the Notice should be given before commencement or institution of the suit. It follows that what is of essence is that there must be evidence that the insurance company had such Notice of the intended proceedings any time before the suit was instituted.

100. That being the case, once Notice of the intended suit is given prior to the institution of suit, it is superfluous and unnecessary for the plaintiff claimant to issue or serve another Notice within 14 days after institution of the suit.

101. The language of the statute is clear. It uses the **words 'or,'** giving the intended claimant or claimant the option of electing either to serve Notice before commencement of suit or 14 days after commencement of the suit. Thus, Notice issued one way or the other is sufficient and valid.

102. In the instant case, the Respondent produced in evidence a demand letter issued to Jecinta Wairimu the owner and insurer of the accident motor vehicle KBS 306C. The said Notice which is dated 14/10/2013 is also copied to the appellant herein. In the said copy of demand letter, the Respondent's advocate provided full particulars of the Policy Number K5/11/MC/046131 TPO. Reference was made to the accident of 20.4.2013 and the 4 claimants including the Respondent herein.

103. On the face (just beside the address for the Respondent which was never disputed, is a stamp "Received" on 17/10/2013 by the appellant insurance company in the legal department.

104. DW1 testified that they never received any statutory Notice of institution of suit. He never denied receiving the demand Notice stated above. The appellant's advocate submitted, quite passionately, that the demand Notice issued does not meet the threshold under Section 10(2) of the Insurance (Motor vehicles Third Party Risk) Act because there are no particulars of injuries or damage given and that therefore the same cannot be passed off as a statutory Notice of institution or intention to institute suit.

105. Concerning the argument by the appellant's counsel that failure to serve a statutory Notice properly so-called that meets the threshold of Section 10(2) of the Act was fatal to the Respondent's case, I have read the authority cited and the demand Notice dated 17/10/2013. In the **PHILIP KIMANI GIKONYO v GATEWAY INSURANCE COMPANY LIMITED [2007] eKLR case**, the lower court had rejected the demand letter because it was not actual Notice contemplated in Section 10(2) of the Act. On appeal, the High court found this finding by the trial magistrate to be clearly wrong. The court observed and I concur that it does not matter what form a statutory Notice should take since the main purpose of a Notice is to alert the insurer of a potential claim.

106. The court stated:

"So, what form should a notice take? It simply does not matter. A notice is a notice. The main purpose of a notice is to alert the insurer of a potential claim, a potential liability, so that the insurer can take steps to protect its interest by defending the action, investigating the same, attempting to settle the same and doing anything it wants to in order to protect its rights and interests. The notice need not be in any particular format, and with due respect to the Lower Court, there is nothing like an "actual" notice, or a "not-so-actual" notice. Any notice, howsoever given, as long as it sufficiently outlines the happening of an event giving rise to a claim under the insurance policy, is good notice under the Act. So, here in this case, was such a notice given? In my view, most definitely it was. It is not in dispute that the insurer was served with a copy of the demand letter dated 25th March, 1985..."

107. In this instant case, there is overwhelming evidence that the demand Notice, whatever its form, was received by the appellant before institution of suit. The case of **Gateway Insurance Co. Ltd Vs Paul Kamau Waithaka** cited by the appellant's counsel on what a statutory Notice is under Section 10(2) of Cap 405 and the Section itself are Pre 2010 provisions/decisions which have been overtaken by Article 159(2)(d) of the Constitution which calls upon courts and tribunals in their exercise of judicial authority to be guided by the principles, among others: 2(a) that justice shall be administered without undue regard or procedural technicalities. It therefore follows that No suit should be dismissed for want of mere form and in the instant case, the form of Notice which the appellant is urging this court to disregard is a

the demand Notice for admission of liability following the accident in which the Respondent and others were injured and one of his relatives subsequently lost his life.

108. Under Section 7 of the Transitional and consequential provisions of the Constitution made pursuant to Article 262 of the Constitution, **ALL** Laws in force immediately before the effective date continue in force and shall be construed with the alternations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

109. In the event of any conflict between the existing law whether statutory or case law or Judge made law, the provisions of the Constitution prevail to the extent of the conflict. Similarly, therefore, where the Statute enacted prior or before 27th August 2010 prescribes a particular format for a Notice of institution of suit which goes against the spirit and letter of Article 159(2)(d) of the Constitution, that law must not prevail over the constitutional provisions.

110. The form of Notice of institution of suit in this case, which Notice is in the form of a demand letter and duly served upon and received by the appellant by stamping on the same with a date stamp was sufficient Notice of the Respondent's intention to institute suit against the appellant's insured and owner of the accident motor vehicle KBS 306C. The appellant does not claim that the date stamp appended on the copy served on the appellant's legal department was a forgery.

111. The demand Notice duly received by the appellant sufficiently made the appellant aware that the Respondent had the intention of instituting court proceedings against the owner and insured of the vehicle which the appellant had insured.

112. The appellant was adequately informed of the accident's occurrence involving a motor vehicle that they had insured and even if they claim that the legal owner and defendant judgment debtor in the primary suit was not their insured, nothing prevented them from responding to the demand letter and dismissing the claimant's assertions or seeking to set aside the exparte judgment in the primary suit and even and seeking to stay the declaratory suit.

113. The Respondent even went further and notified the appellant of his intention to institute declaratory suit to compel the appellant to settle decree in the primary suit vide Notice dated 13/2/2017 copied to Jecinta Wairimu.

114. Way before 2010, in ***Shah Vs Mbogo [1967] EA 116*** where the Insurance Company sought to set aside judgment on the ground that no adequate Notice of the proceedings in which the judgment was obtained had been given to the company, albeit in that case there had been correspondence between the Plaintiff's advocate and the company's office, Harris J held that the company was well aware of the Plaintiff's claim, that the Notice was adequate to meet the requirements of Section 10(2)(a) of the Insurance (Motor Vehicles Third Party Risk) Act and that it had been effectively served. On appeal, the decision of the trial judge, was upheld.

115. I am persuaded that the demand Notice dated 14/10/2013 has sufficient particulars to give Notice to the appellant of what the Respondent intended to claim from the appellant's insured Jecinta Wairimu.

116. In my humble view, the appellants showed complete indifference and contempt of Respondent's suit and rights in that even after being notified of entry of judgment in the primary suit, to settle the decree therein, they were never moved. Instead, they waited until the declaratory suit was filed is when they popped up with a document called 'policy document' which I find, was created with the intention of denying the Respondent the fruits of his lawful judgment. That document has no credibility or probative value or at all, on the face of it and I have said so much about the so called 'policy' or 'contract document.'

117. In **Ogada Odongo Vs Phoenix of E.A. Insurance Co. Ltd Kisumu HCC 132/2003**, it was held:

> ***(1) "By an insurer issuing a policy of insurance, it automatically assures the rights of third parties. It simply means, the rights/obligation of the insured automatically transferred to the insured unless it is proved otherwise.***
>
> ***(2) By covering third parties, rights, the insurance was in essence performing a statutory duty imposed by an Act of Parliament."***

118. In the instant case, it clearly emerges that the appellant was by all means trying to avoid settling the Respondent's legitimate claim and decree obtained from a court of law. The Respondent cannot be left to hold a barren decree from a lawful judgment.

119. Therefore, based on my above analysis, I am satisfied that the appellant had sufficient Notice of institution of suit against its insured judgment debtor in the primary suit and in the declaratory suit and that they had sufficient time to investigate claims by the Respondent that the judgment debtor was the then insured at the time of the accident and even intervene in the suit or seek to have the judgment vacated or policy avoided. Having failed to do any of the above, I find the ground of appeal touching on non-failure to serve a statutory Notice as stipulated in Section 10(2) of the Act devoid of any merit and the same is hereby dismissed.

(3) on allegations that the trial magistrate erred in law and fact in failing to consider submissions filed by the appellant.

120. My finding is that submissions are not evidence and cannot be substitute of pleadings or evidence adduced before a trial court. Before the trial court, the parties are expected to adduce credible evidence to establish/prove their respective assertions or contentions and the court is expected to analyze that evidence and arrive at a conclusion. Submissions however well-choreographed cannot take the place of evidence in a trial court, unlike before an appellate court where submissions take the place of arguments for or against the respective grounds of appeal.

121. Odunga J citing a plethora of case law in **East Africa Portland Cement, CFC Stanbic Limited & another v Peter Ividah Muliro [2019] eKLR** emphasized this point and stated quite elaborately:

"Submissions, with due respect, do not amount to evidence unless expressly adopted as such. Consequently, in legal proceedings, evidence ought not to be introduced by way of submissions. As was held by Mwera, J (as he then was) in Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007:

"Submissions simply concretise and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided."

The same Judge in Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993 expressed himself as follows:

"Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."

Similarly, in Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749, the Court held that:

"As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystalise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

As stated by the Court of Appeal in Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR:

"Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

The Court of Appeal in Avenue Car Hire & Another vs. Slipha Wanjiru Muthegu Civil Appeal No. 302 of 1997 held that no judgement can be based on written submissions and that such a judgement is a nullity since written submissions is not a mode of receiving evidence set out under Order 17 Rule 2 of the Civil Procedure Rules [now Order 18 rule 2 of the Civil Procedure Rules]. The same Court in Muchami Mugeni vs. Elizabeth Wanjugu Mungara & Another Civil Appeal No. 141 of 1998 found the practice of making awards on the basis of the submissions rather than the evidence deplorable."

122. In the instant case, I find no prejudice was occasioned by the appellant by the trial court's alleged failure to consider written submissions on record as he properly informed himself of the issues for determination and determined those issues as he did.

123. Accordingly, the ground of appeal is found to be devoid of substance. It is hereby dismissed.

(4) what orders should this court make.

124. Having found all the grounds of appeal lacking in merit, as summarized in the three issues herein framed, I proceed and dismiss this appeal. I uphold the judgment and decree of the trial court in the declaratory suit as awarded with costs and interest.

125. The Respondent shall have costs of this appeal.

126. Orders accordingly.

Dated, signed and Delivered in open court at Siaya this 15th Day of September, 2020

R.E. ABURILI

JUDGE

In the presence of:

Mr. Osino Advocate for the appellant virtually via Microsoft teams

Mr. Thomas Apopa present physically in court

CA: Brenda