



Arachi v Assurance; Njenga (Interested Party) (Commercial Case E007 of 2024) [2025] KEHC 2635 (KLR) (6 March 2025) (Judgment)

Neutral citation: [2025] KEHC 2635 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
COMMERCIAL CASE E007 OF 2024
FN MUCHEMI, J
MARCH 6, 2025**

BETWEEN

MARTIN MUTUMA ARACHI PLAINTIFF

AND

DIRECTLINE ASSURANCE DEFENDANT

AND

ADRINE WANJIRU NJENGA INTERESTED PARTY

JUDGMENT

Brief Facts

1. The Plaintiff instituted this suit herein vide a plaint dated 27th August 2024 seeking for orders against the defendant for:-
 - a. A declaration that the defendant be liable to and should settle any judgment arising out of any claim resulting from the accident that occurred on or about 19th June 2021 involving motor vehicle registration number KCQ 648F.
 - b. A declaration that the defendant is liable to and should settle the judgment issued against the plaintiff in Thika SCCC E496 of 2024 – Adrine Wanjiru Njenga vs Martin Mutuma Arachi.
 - c. A mandatory injunction does issue compelling the defendant to pay the decretal amount in Thika SCCC E496 of 2024 – Adrine Wanjiru Njenga vs Martin Arachi to the interested party.
 - d. An order of permanent injunction against the interested party or any party claiming under him preventing him/them from enforcing the judgment in Thika SCCC E496 of 2024 – Adrine Wanjiru Njenga vs Martin Mutuma Arachi as against the plaintiff.



2. It is the plaintiff's case that he was the owner of motor vehicle registration number KCT 056C for which he procured an insurance cover under policy 00104137 TPO with the defendant. The said cover covered losses brought about by third party risks as provided by law.
3. On 19th June 2021 the plaintiff's motor vehicle was involved in an accident along Thika – Garissa Road within Kiambu County with motor vehicle registration number KCQ 648F driven by the interested party's driver one Joakim Gatchi. Subsequently, the interested party filed a suit being Thika SCCC E496 of 2024 – Adrine Wanjiru Njenga vs Martin Mutuma Arachi.
4. The plaintiff avers that he informed the defendant of the existence of the suit through a letter dated 27th June 2024 which was received and acknowledged by the defendant. The plaintiff further avers that the defendant through its agents and or employees assured him that it would defend the suit and requested for payment of an overcharge of Kshs. 30,000/- which the plaintiff paid to the defendant on 3rd July 2024.
5. The plaintiff states that the defendant never entered appearance to defend the suit and consequently a judgment in default was entered against him for Kshs. 290,146.08/- plus costs and interests of the suit. The plaintiff adds that he sought to have the defendant settle the judgment but to no avail.
6. The plaintiff states that the interested party has extracted a decree of the said judgment and has instructed Pyramid Auctioneers to auction his moveable property in settlement of the judgment plus other appurtenant costs.
7. The plaintiff argues that it is manifestly unjust, unlawful, negligent and in breach of the insurance contract as between him and the defendant for the defendant to fail to settle the judgment amount and thus risk having him lose his valuable assets to auctioneers.
8. The defendant did not enter appearance or file a statement of defence.
9. Directions were issued that parties put in written submissions and the record shows that only the plaintiff complied by filing submissions on 2nd February 2025.

The Plaintiff's Submissions

10. The plaintiff relies on Section 10(1) of the Insurance (Motor Vehicle Third Party Risk) Act and submits that an insurer has an obligation to satisfy judgments obtained against its insured in relation to such class of persons as the policy applies.
11. The plaintiff refers to the case of Kenindia Assurance Co. Ltd vs James Otiende (1989) 2 KAR 162 and submits that judgment has already been obtained in the trial court which is an essential precondition to the insurer's liability under Section 10(1) of the Act. Furthermore, the defendant has not appealed or set aside the same. The plaintiff argues that the issue of liability had already been determined by the primary suit and therefore the defendant's liability is not in question.
12. The plaintiff submits that the defendant insured his vehicle vide policy number 00104137 TPO as evidenced in the police abstract and letter dated 1/7/2021. The plaintiff argues that no evidence has been produced in contradiction of the aforementioned fact. Additionally, the plaintiff submits that he produced the defendant's Notification of Incident form dated 29th June 2021 which further corroborates the fact that the defendant was the insurer.
13. Pursuant to Section 10(2) of the Insurance (Motor Vehicle Third Party Risks) Act, the plaintiff argues that the defendant was made aware of the proceedings in the subordinate court. The plaintiff produced a letter dated 27th June 2024 which attached a copy of the pleadings and a mention notice which letter



was acknowledged by the defendant by affixing its official stamp on the received page. the plaintiff argues that the letter dated 27th June 2024 constituted sufficient notice of the primary suit and therefore the defendant was sufficiently alerted of the potential liability and failed to take any necessary steps to protect his interests.

14. The plaintiff refers to Section 10(2) of the Act and submits that the defendant is liable to settle the judgment and decree in Thika SCCC E496 of 2024 as the plaintiff has demonstrated that the suit motor vehicle was insured by the defendant, he notified the defendant of the proceedings in the subordinate court and the defendant failed to enter appearance to defend its interests. Furthermore, the defendant did not cancel the policy.
15. The plaintiff prays that the court issues an order for the release of Kshs. 290,146/- deposited in court as a condition for stay of execution of the judgment to the plaintiff.

Issue for determination

16. The main issue for determination is whether the plaintiff proved his claim against the defendant on a balance of probabilities.

The Law Whether the plaintiff proved his claim against the defendant on a balance of probabilities

17. It is a principle of law that whoever lays a claim before the court against another has the burden to prove it. Sections 107 and 108 of the [Evidence Act](#) provide as follows:-

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

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.

18. The burden of proof was discussed in the case of Muriungi Kanoru Jeremiah vs Stephen Ungu M'mwarabua [2015] eKLR where the court held as follows:-

As I have already stated, in law, the burden of proving the claim was the appellant's including the allegation that the respondent did not pay the sum claimed as agreed; i.e. into the account as provided....The trial magistrate was absolutely correct in so holding and did not shift any legal burden to the appellant...The appellant was obliged in law to prove that allegation; after the legal adage that he who asserts or alleges must prove.....In the circumstances of this case, the respondent bore no burden of proof whatsoever in relation to the debt claimed. By way of speaking, the shifting of burden of proof would have arisen had the trial court magistrate held that the respondent bore burden to prove that he deposited the sum of Kshs. 98,200/- the debt being claimed herein.

19. Similarly in the Halsbury's Laws of England, 4th edition, Volume 17 at paras 13 and 14:-

The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he had failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle



him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.

The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence.

20. In the instant case, the plaintiff's suit is a declaratory one against the defendant seeking for a declaration that the defendant is bound to satisfy the judgment against him, its insured in the primary suit being Thika SCCC E496 of 2024. The plaintiff argues that he had a valid insurance policy 00104137 TPO. To corroborate his claim, the plaintiff has produced a copy of the police abstract and letter dated 27th June 2024. Mabeya J in *APA Insurance Co. Ltd vs George Masele* [2014] eKLR stated as follows on whether a police abstract is conclusive proof of evidence on the insurance contract:-

As to the certificate of insurance which Ms. Akonga insists should have been produced, I am of the contrary view. The Certificate of Insurance is usually issued to the insured and not the road accident victim. It is a document in the special knowledge and possession of both the insured and the insurer. The road traffic accident victim cannot access it. The details in the police abstract as to the details of insurance are in the ordinary cause of events obtained by the police from the Certificate of Insurance affixed to the motor vehicle or are supplied by the insured....”

21. Notably, the plaintiff did not produce a certificate of insurance to corroborate his claim. This is a document normally in possession of both the plaintiff as the insured and the defendant, the insurer. The said document is issued to the insured following payment of the premium. The plaintiff herein produced the police abstract. The defendant did not have a chance of contesting the production of the police abstract instead of the policy as it never entered appearance or filed a statement of defence.
22. The Court of Appeal in the case of *Joel Muna Opija vs East African Sea Food Ltd* [2013] eKLR held that:-

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

23. Following the reasoning of the Court of Appeal in the aforementioned case, the police abstract which was not objected to is admissible in evidence. As such, since the police abstract ordinarily captures the details of the insurance from the Certificate of Insurance normally affixed to the motor vehicle, and its contents have not been contested it is my considered view that the police abstract was proof of evidence on the existence of the insurance contract. On perusal of the police abstract, it outlines the insurance information giving the certificate number as A11002853, policy number 00104137 TPO with the insurance commencing on 3/6/2021 and expiring on 3/7/2021. The date of the accident is 19th June 2021, thus the plaintiff was covered on the material date. The plaintiff also produced a letter dated 27th June 2024 informing the defendant about the suit instituted against him. The defendant received the letter on 1st July 2024 by affixing their official stamp on the document. The plaintiff thereafter wrote to the defendant on 21st August 2024 informing them that default judgment had been entered



against him and attached the warrants of attachment as well as the proclamation notice. The defendant received the letter on 21st August 2024 and affixed its official stamp on the document. It is evident that the defendant was notified about the suit in the trial court and the judgment entered.

24. Thus, the defendant is statutorily bound to satisfy the judgment in the primary suit vide Section 10(1) and (2) of the *Insurance (Motor Vehicles Third Party Risks) Act*. Section 10(1) of the Act provides:-

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 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.

25. The plaintiff adduced evidence that he had a valid insurance cover with the defendant at the material date when the accident occurred. He then notified the defendant of the primary suit and of the delivery of the judgment. Thus, the plaintiff has proved his case on a balance of probabilities against the defendant. The defendant having failed to enter appearance or file a statement of defence can be taken as having opted not to institute any of the available statutory defences under Section 10(2) of the Act which provides:-

- (2) No sum shall be payable by an insurer under the foregoing provisions of this section—
- (a) in respect of any judgment, unless before or within fourteen days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings;
 - or
 - (b) in respect of any judgment, so long as execution thereon is stayed pending an appeal; or
 - (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 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.”

26. Further, Section 10(4) of the *Insurance (Motor Vehicles Third Party Risks) Act* provides:-

No sum shall be payable by an insurer under the foregoing provisions of this section if in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or if, he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto.

27. The Court of Appeal was clear under what circumstances an insurer can avoid liability. In *BlueShield Insurance Co. Ltd v Raymond Buuri M’rimberia* (supra), the Court of Appeal dealt with the issue of a declaratory suit under section 10(1) of the Act and stated;

“Although the appellant did not plead in its defence in the enforcement suit, that it had already sued the insured in H.C.C.C. No.2976 of 1986 for a declaration that it was entitled to avoid the policy and that the said suit was still pending, Mrs. Kiarie did say that in her replying affidavit hereinabove mentioned. Can that allegation in itself be a friable issue? We think not: Under s.10(4) the liability of the insurer to satisfy the judgment under s.10(1) is excluded only if, not only that the insurer had commenced an action within the time scale prescribed thereunder, but also that it has obtained a declaration that it is entitled to avoid its liability under the insurance policy.

No declaration has been so far obtained although the declaratory suit was filed some 12 years ago by the appellant. Mrs. Kiarie’s vague explanation for this delay “although the suit has been fixed for hearing a few times it has never taken off” smacks of gross lack of diligence on the part of the appellant in prosecuting the declaratory suit. Moreover, there is no evidence that a mandatory notice as envisaged by the proviso to s.10(4) had been ever given. The effect of that omission is that even if the appellant has obtained the said declaration which it has not so far, it may still not be entitled to the benefit of that declaration as against the respondent.”

28. Thus from the above provisions, an insurer is exempted from satisfying the decree obtained against an insured if the insurer is able to come within the exceptions provided for under Section 10 of the Act. The defendant did not file any defence or participate in the proceedings and as such he plaintiffs suit shall stand provided that proof has been satisfied. The defendant was served with the Statutory Notice under Section 10(2) of the *Insurance (Motor Vehicles Third Party Risks) Act* but failed to institute any declaratory suit under Section 10(4) of the Act for declaratory orders that it was entitled to avoid liability in the primary suit. Consequently, I find that the plaintiff has proved his case on a balance of probabilities.



29. Judgment is hereby entered in favour of the plaintiff in respect of prayers (a), (b), (c), and (e) of the plaint.
30. The costs of the suit to the plaintiff to be met by the 1st defendant.
31. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 6TH DAY OF MARCH 2025.

F. MUCHEMI

JUDGE

