



REPUBLIC OF KENYA



KENYA LAW
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**Intra Africa Assurance Co Ltd v Were (Civil Appeal E009 of 2023)
[2025] KEHC 4337 (KLR) (20 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 4337 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDAMA RAVINE
CIVIL APPEAL E009 OF 2023
RB NGETICH, J
MARCH 20, 2025**

BETWEEN

INTRA AFRICA ASSURANCE CO LTD APPELLANT

AND

ELIZABETH ESTHER WERE RESPONDENT

*(Being An Appeal From The Ruling of The Hon. Richard Koech Delivered
On 14Th September,2023 In Eldama Ravine CMCC No. E020 of 2023)*

JUDGMENT

1. The Appellant filed application dated 21st April 2023 seeking to strike out the respondent's declaratory suit filed against it which was dismissed by the trial court. Being aggrieved by the trial court's determination, appeals to this Honourable court against the whole of the ruling and/or decision on the following grounds: -
 - i. That the Learned Magistrate erred in law and in fact in failing to consider the Defendant's application dated 21st April,2023 seeking to strike off the declaratory suit against it on account that policy number 20/NK/NICK/COMP/PC/E0052 was never issued by the Defendant to one George Kahura Mirangi.
 - ii. The Learned Magistrate erred in law and in fact in misapprehending and misapplying the contents of Section 10 of the Insurance (Motor Vehicle Third Party Risk) Act which only obligates an Insurer to indemnify judgements obtained against its insured.
 - iii. The Learned Magistrate erred in law and in fact in failing to hold that in the absence of the policy of Insurance or certificate of Insurance being presented before the court by the Respondent, the identity of the insured therein, which was disputed, was unclear and was not proved and ought to have awaited the production of evidence at full trial.



- iv. The Learned Magistrate erred in law and in fact in misapprehending the laws and principles governing an application for striking out pleadings thereby rendering a wrong decision.
2. The Appellant prays that: -
 - a. The appeal be allowed and an order do issue setting aside the whole of the subordinate court's decision and/or ruling made on the 14th September, 2023.
 - b. That this Honourable court do issue an order striking out the suit as against the Appellant thus terminating any claim by the Respondent.
 - c. Costs of the Appeal be awarded to the Appellant.
3. The appeal proceeded by way of written submissions.

Respondent's Submissions

4. The Respondent submitted that they are opposed to the grounds as cited in the Memorandum of Appeal and supports the ruling of the trial court as it was sound and based on the proper laws and ought to be sustained by this honourable court.
5. On ground one of the memorandum of appeal, they submit that the policy number 20K/NICK/COMP/PC/E0052 as per the police Abstract was issued for motor vehicle KCA 784T on 15th October 2020 valid upto 3rd June 2021 by the appellant as reflected in the police Abstract (the accident was on 18th October 2020).
6. That in addition the Applicant produced a claim form in their application at the declaratory suit to prove that indeed an accident occurred on the material date and the same was reported to them but did not take any action until judgement was entered in favour of the respondent. It is clearly noted in the principle of "Equity does not aid the indolent" that the action by the Appellant was deliberate and meant to subvert justice.
7. They submit that they were served with a Notice of Institution of suit and deliberately concealed the identity of their insured thus subverting the cause of justice. They submit that the police abstract was silent on the names of the owner or the driver thus the respondent sued the registered owner who was served but failed to enter appearance.
8. They further submit that the Appellant failed and/or avoided to mention who the insured was and/or is thus leaving the court to speculate. That it is trite law that the policy document and/or a copy of the insurance certificate is usually in the custody of the Appellant and/or insured and cannot shift this burden to the Respondent to produce as this is a contractual document between parties who are bound by it.
9. Further that there was no insurance policy document nor certificate of the policy that was adduced as proof of their claim on who their insured is and/or was. They rely on the decision of justice Chitembwe in Nairobi Civil Appeal No. 118 of 2018 held inter alia in emphasis of Section 10 of Cap 405:

“The law requires the insurer to satisfy the claim of the 3rd party as long as the damage can be attributed to the accident vehicle. Even if the insured has not been made party to the suit, the insurer is under an obligation to compensate the injured 3rd party even if the insurer is in a position to repudiate the claim.”



10. They submit that the insurer cannot escape liability when the policy is valid and covers the risk which was attached, that is the accident involving the 3rd party. The insurer has to satisfy the claim then deal with the insured. It is the 3rd party who is protected by the law.
11. That in number 12 of the Appellant's submissions the Appellant is giving evidence during submissions, the name stated there of "Amid Diriye Amin" does not appear in the police Abstract nor in their statement of defence as filed in the declaratory suit and in addition, there was no affidavit sworn or statement by the said person to confirm ownership nor any policy document produced to show his relationship with the appellant.
12. They submit that the Appellant was obligated to bring this information upon being served with the Notice of institution of suit, but deliberately avoided as the insured was to blame for the accident as per the police Abstract.
13. They further submit that the declaratory suit as filed is proper and the insurance policy issued was in force during the occurrence of the accident. The Respondent sued the registered owner as required by law and no contrary evidence has been adduced to prove otherwise.
14. They urge this honourable court to uphold the decision of the learned magistrate and dismiss this Appeal with costs to the Respondent.

Analysis And Determination

15. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence adduced before the trial court and make its own conclusions. It must, however, bear in mind that the trial court unlike the appellate court had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
16. I have considered the memorandum of Appeal, the record of appeal and the rival submissions filed by the parties herein and what I consider to be in issue for determination is whether the trial magistrate erred in dismissing the Appellant's application dated 21st April, 2023.
17. In the application dated 21st April, 2023, the applicant sought an order to have the Plaintiff's suit struck out with costs on the grounds that the judgement debtor in civil suit No. 31 of 2022 was not the insured as per policy No. 20/NK/NICK/COMP/PC/E0052 which was the subject matter of the suit and that the declaration suit against the Applicant/Appellant does not present a reasonable cause of action and the suit ought to be struck out.
18. The issue for determination in this appeal is therefore whether the defendant in Eldama Ravine civil suit no. 31 of 2022 was the registered owner of the motor vehicle and whether the Appellant herein had insured motor vehicle Registration No. KCA 784T.
19. The Respondent in proving the registered owner and the insurance policy number placed reliance on the police abstract to prove that the suit motor vehicle had been insured by the Respondent hence a triable issue. According to the Respondent, the police abstract shows that the Appellant was the insurer of the suit motor vehicle.



20. The purpose of a police abstract was well captured in the case of Peter Kanithi Kimunya v Aden Guyo Haro [2014] eKLR where court held that:-

“ A police abstract is not proof of occurrence of an accident but of the fact that following an accident, the occurrence thereof was ‘reported’ at a particular police station.”

21. From the above, the purpose of a police abstract is to prove that the accident was reported and not proof of occurrence. The Appellant denied in its defence to have issued an insurance cover vide policy No. 20/NK/NICK/COMP/PC/E0052 for motor vehicle registration number KCA 784T. The policy number is indicated in the police abstract.

22. Section 10(1) of the Act provides as hereunder:-

“(1) If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.”

23. Based on the above provision, for the insurer to be liable satisfy the decretal sum, there must be a policy of insurance, the judgement must have been in respect of a liability required to be covered by a policy under paragraph (b) of section 5 and the judgement must have been obtained against a person insured by the policy.

24. Order 2 Rule 15 of the Civil Procedure Code which deals with striking out of pleadings and provides as follows;

“Rule 15. (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

- a. It discloses no reasonable cause of action or defence in law; or
- b. It is scandalous, frivolous or vexatious; or
- c. It may prejudice, embarrass or delay the fair trial of the action; or
- d. It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be

25. In the case of Blue Shield Insurance Company Ltd vs Joseph Mboya Oguttu [2009] eKLR the court of appeal restated the principles as follows:-

“The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan JA (as he then was) in his judgment in the case of DT Dobie and Company (Kenya) Ltd v Muchina [1982] KLR 1 discussed the issue at length and although what was before him was an application under Order 6 Rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause



of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:-

The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case.'

26. Further, in the case of Olympic Escort International Co Ltd & 2 Others –vs- Parminder Singh Sandhu & Another [2009] eKLR, the Court of Appeal held that for an issue to be triable, it has to be bona fide issue. The court stated as follows:-

'It is trite that, a triable issue is not necessarily one that the defendant would ultimately succeed on. It need only be bona fide.'

27. Upon considering the pleadings and submissions herein, I find that there was triable issue and the trial magistrate did not err in dismissing application seeking to strike out the declaratory suit. I proceed to uphold the ruling of the Senior Principal Magistrate's Court at Eldama Ravine delivered on 14th September, 2023 in Eldama Ravine Principal Magistrate's Court Civil Suit No. E20 of 2023.

28. Final Orders: -

1. This appeal is hereby dismissed.
2. Costs to the Respondent.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 20TH DAY OF MARCH 2025.

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RACHEL NGETICH

JUDGE

In the presence of:

- Mr. Odhiambo for Appellant.
- Ms. Chepkemboi for Respondent.
- CA, Karanja.

