



REPUBLIC OF KENYA



**KENYA LAW**  
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**Chege & another v Africa Merchant Assurance Co. Ltd (Civil Appeal E171 of 2024) [2025] KEHC 12687 (KLR) (9 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12687 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL E171 OF 2024  
FN MUCHEMI, J  
SEPTEMBER 9, 2025**

**BETWEEN**

**WILLIAM NGUGI CHEGE ..... 1<sup>ST</sup> APPELLANT**

**DAVID KAMAU CHEGE ..... 2<sup>ND</sup> APPELLANT**

**AND**

**AFRICA MERCHANT ASSURANCE CO. LTD ..... RESPONDENT**

*(Being an Appeal from the Judgment and Decree of Hon. W. Ngumi (SPM) delivered on 24th June 2024 in Gatundu CMCC No. E004 of 2023)*

**JUDGMENT**

**Brief facts**

1. This appeal arises from the judgment of Gatundu Senior Principal Magistrate in CMCC No. E004 of 2023 whereas the court below dismissed the appellants' case on the ground that they had not proved it on the balance of probabilities.
2. Dissatisfied with the court's decision, the appellants lodged this appeal citing 5 grounds summarized as follows:-
  - a. The learned trial magistrate erred in law and in fact by finding that the appellants had not proved their case in disregard of the sum of evidence adduced at the hearing.
  - b. The learned trial magistrate erred in law and in fact by finding that the appellants had not produced a copy of the log book as proof of ownership while a police abstract had been tendered to that effect.



- c. The learned trial magistrate erred in law and in fact in finding that the appellants had not proved that they had taken a policy with the respondent while a copy of insurance certificate had been tendered in evidence.
3. Directions were issued that parties put in written submissions and the record shows that the appellants complied by filing submissions on 8<sup>th</sup> April 2025 while the respondent failed to do so.

### **Appellants' Submissions**

4. The appellants submit that the suit arose from a road traffic accident which occurred on 11<sup>th</sup> December 2016 when their motor vehicle registration number KAP 514E knocked down a pedestrian. The said accident occurred during the pendency of a third party insurance cover provided by the respondent and despite being made aware of the said incident, the respondent did not appoint an advocate to represent them and protect their interests in the primary suit and neither did it honour the resultant judgment from the primary suit being Gatundu SPMCC No. 205 of 2019.
5. Following the respondent's failure to settle the judgment sum, the appellants submit that they filed a declaratory suit to compel the respondent to settle the decree which was dismissed. The appellants rely on the case of Kisumu Civil Appeal No. 309 of 2010 *Joel Muga Opija v East African Seafoods Ltd* and submit that they produced a police abstract in evidence which showed that the owner of motor vehicle registration number KAP 514E was the 1<sup>st</sup> appellant. The said abstract was neither challenged nor objected to during the hearing. Further, the issue of ownership never arose during trial.
6. The appellants submit that they proved that the respondent was the insurer of their motor vehicle by producing a duplicate copy of the certificate of insurance, policy number AM1/070/1/047679/2016 and validity of the cover from 26/7/2016 to 25/7/2017. To support their contentions, the appellants rely on the cases of *Kenya Alliance Insurance Co. Ltd v Thomas Ochieng Apopa (Suing as administrator of the Estate of Pamela Agola Apopa)* [2020] eKLR and *Ngiri v Africa Merchant Assurance Co. Ltd* (Civil Appeal 66 of 2018) [2022] KEHC 21 (KLR) (13 January 2022) (Judgment).
7. Pursuant to Section 10(1) of the *Insurance (Motor Vehicle's Third Party Risks) Act*, the appellants submit that judgment had been entered against them and they notified the respondent vide letter dated 4<sup>th</sup> January 2023. The respondent has to date made no effort to settle the judgment. Furthermore, the respondent had notice of the institution of the primary suit as it was served with a Statutory Notice dated 3<sup>rd</sup> April 2019 pursuant to Section 10(2)(a) of the *Act*.
8. Relying on Section 112 of the *Evidence Act* and on the cases of *Netah Njoki Kamau & Another v Eliud Mburu Mwaniki* [2021] eKLR; *Ngugi v Muriithi & Another (Suing as the personal representatives of the Estate of Job Mukwima Njoroge)* (Civil Appeal E001 of 2021) [2023] KEHC 3009 and *Kenya Alliance Insurance Co. Ltd v Thomas Ochieng Apopa (Suing as the administrator of the estate of Pamela Agola Apopa)* [2020] eKLR, the appellants submit that they tendered evidence during the hearing and the respondent did not tender any direct evidence but instead relied on written submissions.

### **Issue for Determination**

9. The main issue for determination is whether the appellants proved their claim against the respondent on a balance of probabilities.



## The Law

10. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another v Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

11. In *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR the Court of Appeal stated that:-

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

12. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-
- a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
  - b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
  - c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

### **Whether the appellants proved their claim against the respondent to the standards required in civil cases.**

13. 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:-

107.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2). When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.



14. The burden of proof was discussed in the case of *Muriungi Kanoru Jeremiah v 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.

15. Similarly in the *Halsbury's Laws of England*, 4<sup>th</sup> 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.

16. In the instant case, the appellants filed a declaratory suit against the respondent in the trial court seeking a declaration that the respondent is bound to satisfy the judgment against them, their insured in the primary suit being Gatundu SPMCC No. 205 of 2019. The appellants argue that the 1<sup>st</sup> appellant had a valid insurance policy AM1/070/1/047879/2016 and certificate of insurance no. C14188777 in respect of his motor vehicle registration number KAP 514E from the respondent. To corroborate their claim, the appellants produced a police abstract.

17. Mabeja J in *APA Insurance Co. Ltd v 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 course of events obtained by the police from the Certificate of Insurance affixed to the motor vehicle or are supplied by the insured....”

18. The appellant relied on the case of *Kenya Insurance Co. Ltd v Thomas Ochieng Apopa* where the court held that a valid insurance sticker in the name of the owner was sufficient to prove ownership since it



was not contested in evidence by the opposite party. A police abstract had also been produced in that case. This case is distinguishable from the case before me in this case, no certificate of insurance was produced. It is further noted that although the 1<sup>st</sup> appellant testified that he was paying premiums to the respondent did not produce any proof of payments to the insurance company. Additionally, the appellants did not produce a copy of the log book to show that indeed he was the registered owner of the suit motor vehicle particularly at the time of the accident.

19. Although the respondent did not call any witnesses, the burden of proof was upon the appellants to show that the 1<sup>st</sup> appellant was the registered owner of the suit motor vehicle and that at the time of the accident, he had a valid cover from the respondent. Evidently, the appellants have failed in that respect. It was only a copy of the police abstract that was produced which in this regard cannot ascertain whether the 1<sup>st</sup> appellant was the registered owner of the suit motor vehicle at the time of the accident, whether the appellants were paying their premiums to the respondent or whether the appellants had a valid cover at the time of the accident.
20. It is trite that whether the opposite party decides not to tender any evidence or not, the burden of proof does not shift. The appellants had a burden to prove that the vehicle was registered in the name of the 1<sup>st</sup> appellant. In my considered view, the magistrate did not error in her finding that the appellants failed to prove their case to the standards required in civil cases.
21. I therefore, find no merit in this appeal and I hereby dismiss it with no order as to costs based on the facts and circumstances herein.
22. It is hereby so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 9<sup>TH</sup> DAY OF SEPTEMBER 2025.**

**F. MUCHEMI**

**JUDGE**

