Opiyo v Sanlam General Insurance Company Ltd (Civil Appeal E126 of 2024) [2025] KEHC 12629 (KLR) (17 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12629 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E126 OF 2024

A MABEYA, J

SEPTEMBER 17, 2025

BETWEEN

RAYMOND AYIEKO OPIYO ..... APPELLANT

AND

SANLAM GENERAL INSURANCE COMPANY LTD ..... RESPONDENT

(Being an appeal from the judgment and decree of Hon. M. Nyigei PM delivered on the 4/7/2024 in Kisumu CMCC No. E256 of 2024, Raymond Ayieko Opiyo v Sanlam General Insurance Company Ltd)

JUDGMENT

1. The appellant filed a declaratory suit against the respondent vide his amended plaint dated 30/9/2022 for judgement delivered in his favour of Kshs. 5,793,170.50 in Kisumu CMCC 429/2019.

2. The respondent entered appearance and filed an amended statement of defence dated 13/10/2022 in which they denied the appellant's claim on liability and further denied being served with any demand or notices.

3. The matter proceeded to trial and by a judgment delivered on 4/6/2024, the trial court dismissed the Appellant's case on account that there was no evidence presented by the Appellant on service of the Statutory Notice upon the Respondent.

4. Being dissatisfied with the said Judgment/decree, the appellants lodged this appeal vide the Memorandum of Appeal dated 20/06/2024 and raised seven (7) grounds of appeal as follows: -

    a. That the learned trial magistrate erred in holding that the Appellant did not serve the statutory notice despite evidence before court showing that the Respondent was served by Nation courier services on the 20/9/2019, a fact which was never controverted, discredited and/or challenged by the Respondent.

b. That the learned trial magistrate erred in fact and in law by shifting the standard of proof in this civil case from proof on a balance of probabilities to proof beyond reasonable doubt.

c. That the learned trial magistrate erred in fact and in law by failing to distinguish between the rules of civil procedure governing service of summons to enter appearance and that provided for under Insurance (Motor Vehicles Third Party Risk) Act which provides that the Appellant was only to issue a notice to which the Appellant has so far proven by annexing a receipt from Nation courier.

d. That the learned trial magistrate erred in fact and in law by relying on the wrong authority in dismissing the Appellant's suit.

e. That the learned trial magistrate erred in law and in fact in failing to consider the evidence adduced before her and the circumstances of the case and therefore dismissing the Appellant's suit as not proved on a balance of probabilities.

f. That the learned trial magistrate erred in fact and in law in holding that the Respondent was not liable to satisfy the decree obtained in Kisumu CMCC No. 429 of 2019 even though the Appellant produced in evidence a Police Abstract and Insurance sticker that showed that at the material time the Respondent Number KBH 764L, yet the said document were never controverted and/or their production challenged at trial.

g. That the learned trial magistrate erred in law and in fact in failing to consider the Appellant's submissions and instead focusing on the Respondent''s submissions and therefore arriving at a wrong conclusion.

5. The appeal was disposed of by written submissions. As at the time of writing this judgement only the Respondent''s submission were on record. The Respondent submitted that the waybill produced by the appellant was not evidence of service of the statutory notice upon it but rather of delivery of the same to the courier.

6. That in the face of the defence by the Respondent that no notice was given, the onus was on the Appellant to show, through a certificate of delivery or other confirmation of delivery of the alleged notice.

7. That the Appellant made no effort to prove that the copy of the certificate of insurance was a copy of a certificate issued by the Respondent and further that the Appellant failed to produce any police abstract that showed details of the accident alleging liability on the Respondent''s part as an insurer of the accident vehicle.

8. That in any case, if the Respondent was liable to satisfy the decree in Kisumu CMCC 429 of 2019, the only sum that would be payable by it would only be Kshs. 3,000,000 in accordance with Section 5 (2) (B) (iv) of the Insurance (Motor Vehicle Third Party Risks) Act.

9. This being a first appeal, the Court is duty bound to evaluate the evidence before the trial court afresh and come to its own independent findings and conclusions. See Selles & Anor vs. Associated Motor Boat Co Ltd & Others [1968] EA 123.

10. The appellant's case before the trial court was that the Respondent being the Insurer of motor vehicle registration Number KBH 764L, it was liable to settle the decretal sum of Kshs. 5.793,173.50. That he served the requisite demand and statutory notices upon the respondent via courier specifically at the Nation Courier Offices.

11. The Respondent on its part denied being the Insurers of motor vehicle registration Number KBH 764L or ever receiving the demand or notice alleged to have been served by the Appellant

12. In support of his case, the Appellant testified as PW1 and admitted in cross-examination that the waybill he sought reliance on did not show who received it but only that it was received by one Javan on behalf of the Courier service.

13. PW2, No. 86557 PC Joshua Otieno produced a copy of certificate of insurance that showed that the Respondent was the insurer of the subject motor vehicle. He testified that he relied on a letter from the Association of Kenya Insurance that confirmed that indeed the Respondent had insured the suit motor vehicle.

14. The Respondent relied on the testimony Mercy Kaima who denied that the Respondent received any notice. She further asserted that the Respondent had no insurable interest over the suit motor vehicle alleging that the particulars of the policy as set out in the evidence of PW2 are likely to have been gained by an unscrupulous person.

15. I have considered the record and submissions before me. The subject matter of the suit before the trial court was a declaratory suit, brought under the provisions of the *Insurance (Motor Vehicles Third Party Risks) Act*, seeking to have the Respondent, an insurance company settle the decree. The decree was for an award of damages of Kshs 5,793,173.50 entered against the Respondent's insured by the appellant herein.

16. The Court considers that Section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act* provides for the duty of an insurer to settle a decretal amount as follows: -

> "
>
> " 10. Duty of insurer to satisfy judgments against persons insured
>
> (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.
>
> Provided that the sum payable under a judgment for a liability pursuant to this section shall not exceed the maximum percentage of the sum specified in Section 5 (b) prescribed in respect thereof in the Schedule."

17. Regarding the issue of service, section 10 of the Act stipulates the duty of insurer to satisfy judgement against persons insured. Section 10 (2) (a) provides that:

> " No sum shall be payable by an insurer under the foregoing provisions of this section in respect of any judgement, unless before or within 30 days of the commencement of the

proceedings in which the judgement was given, the insurer had notice of the bringing of the proceedings."

18. The import of the above provision of the law is that for liability to accrue under section 10 of the Insurance (Motor Vehicle Third Party Risks) Act CAP 405, there is a 4-fold test to be met.

19. Firstly, that the motor vehicle in question was insured by the appellant; Secondly, that the respondent has a judgement in his favour against the insured; Thirdly, that statutory notice was issued to the insurer either at least 14 days before the filing of the suit wherein judgement has been obtained or within 30 days of filing the suit where judgement has been obtained and finally the respondent was a person covered by the insurance policy. See Roseline Violet Akinyi v Celestine Opiyo Wangwau (2020) eKLR and Stephen Kiarie Chege v Insurance Regulatory Authority & Another (2009) eKLR.

20. The Respondent seemed not to have challenged the other 3 requirements before the trial court but took issue with the lack of notice.

21. Section 107(1) of the *Evidence Act* provides 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."

22. And section 108 of that Act provides that: -

> " 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."

23. It is trite that in civil case, the burden of proof is on a balance of probabilities. See the case of Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another [2015] Eklr

24. From the foregoing it was incumbent upon the Appellant to prove its case against the Respondent before the trial court.

25. In support of his case that indeed notice was served on the Respondent, the Appellant testified that he served the requisite demand and statutory notices upon the respondent via courier specifically at the Nation Courier Offices however in cross-examination the Appellant admitted that the waybill he sought reliance on did not show who received it but only that it was received by one Javan on behalf of the Courier service. The Appellant did not adduce any evidence to show that the said Notice was actually received by the Respondent.

26. Accordingly, it is evident that the Appellant failed to serve the requisite notices as required by law contrary to the averments in his Memorandum of Appeal. the provisions of section 10(2)(a) are substantive legal provisions and not procedural requirements as argued by the Respondent. This provision serves to ensure that a third party who has suffered injury or loss due to the acts or omissions on the part of an insured motor vehicle is assured of compensation in the event that the owner or driver of the insured motor vehicle is unable to settle the claim.

27. In this instance, where the notice was not served prior to the commencement of the primary suit or within 14 days of the suit being filed, then the insurer is by statute absolved from any liability. The service of the notice is a legal requirement upon the Respondent, and, therefore, an obligation that cannot simply be wished away.

28. Contrary to the Appellant's pleadings in his Memorandum of Appeal, it is clear from the impugned judgement of the trial court that the trial magistrate considered the Appellant's case and found it wanting.

29. In the last paragraph of the judgement, the trial court notes that the Appellant failed to prove his case on a balance of probabilities for the court to impute liability on the Respondent.

30. In view of the foregoing, I uphold the trial court's decision to dismiss the Appellant's case and proceed to find that this appeal lacks merit. I dismiss it with costs to the Respondent.

    It is so decreed.

DATED AND DELIVERED AT KISUMU THIS 17TH DAY OF SEPTEMBER, 2025.

A. MABEYA, FCI Arb

JUDGE