



REPUBLIC OF KENYA



**Kenya Orient Insurance Limited v ES (Minor through his father and next friend CW)
(Civil Appeal 84 of 2023) [2024] KEHC 2218 (KLR) (4 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2218 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 84 OF 2023
DAS MAJANJA, J
MARCH 4, 2024**

BETWEEN

KENYA ORIENT INSURANCE LIMITED APPELLANT

AND

**ES (MINOR THROUGH HIS FATHER AND NEXT FRIEND
CW) RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. M. Nabibya, PM dated 9th
March 2023 at the Magistrates Court at Mombasa in Civil Case No. 1414 of 2017)*

JUDGMENT

1. Before the court for determination is an appeal filed by the Appellant against the judgment of the Subordinate Court dated 09.03.2023 that allowed the Respondent's declaratory suit filed under the *Insurance (Third Party Motor Vehicle Risks) Act* (Chapter 405 of the Laws of Kenya) against the Appellant for Kshs. 229,160.00 with interest of 14% per annum from 16.12.2016 until payment in full, costs and interest.
2. The subject giving rise to the suit was a judgment in Civil Case No.535 of 2014; Esther Shikuku (Minor suing thro' her father & next friend Charles Waliamura) v Purity Githinji wherein judgment was entered for the Respondent against the Appellant's insured for Kshs. 229,160.00 inclusive of costs. The Respondent stated that the Appellant, as the insurer was bound to settle the decretal sum under the provisions of the *Insurance (Third Party Motor Vehicle Risks) Act* as she had issued the Respondent with the requisite statutory notice of the intention to file suit. However, the Respondent stated that the Appellant failed to make good the claim despite the notice.
3. In its defence, the Appellant urged the court to dismiss the suit. It contended that it only issued an insurance cover to the insured for the period covering 17.07.2012 to 16.07.2013. It alleged that the insurance sticker purportedly issued to its insured was fraudulent or a forgery as it never issued an



insurance sticker to the insured as at 29.11.2013 when the subject accident happened. The Appellant also denied that it was served with the statutory notice as alleged and that even if the notice was served, it would have no effect as the Appellant had not insured the subject motor vehicle KBN XXXXR at the time of the accident and that there was no judgment against the Appellant's insured.

4. At the hearing before the Subordinate court, the Respondent's next friend Anna Anya Simiyu (PW 1) testified and PC Joshua Nuchesia (PW 2), a police officer stationed at Central Police Station was also called as a witness. The Appellant called its relationship manager – Nairobi, Hamisi Said (DW 1).
5. After analyzing the evidence presented, the Subordinate Court found that there was a valid judgment in place that was in favour of the Respondent and that the Appellant was served with the original notice before commencement of the suit as admitted by DW 1. It was satisfied that from the evidence, the insurance policy expired on 18.10.2013 which was after the accident took place on 29.09.2013. The Subordinate Court dismissed the Appellant's allegations of forgery on the ground that they were not proved. That the Appellant equally failed to provide contrary evidence that the subject insurance policy was not for the Appellant's insured or that such a policy never existed. The Subordinate Court was further satisfied that although PW 2 was not the Investigating Officer, his evidence was admissible and convincing that indeed, the subject motor vehicle was insured by the Appellant. Based on these reasons, the trial court allowed the Respondents' claim thus precipitating this appeal.
6. As a first appeal, I am aware that this court has duty to re-evaluate and re-assess the evidence before the subordinate court and at the same time, keep in mind the fact that the trial court interacted first hand with the parties (see *Selle v Associated Motor Boat Co.* [1968] EA 123).
7. The thrust of the Appellant's appeal is that the Subordinate Court erred in finding that the Respondent had proved her case on a balance of probability and in particular that she proved service of the statutory notice under section 5 and 10 of the *Insurance (Motor Vehicle Third Party Risks) Act*. It states that the Subordinate Court failed to appreciate that parties are bound by their pleadings and made a decision based on extraneous matters.
8. This appeal revolves around the duty of an insurer to satisfy judgments against persons insured under the *Insurance (Motor Vehicle Third Party Risks) Act*. Section 10(1) of the *Act* states as follows:

10(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.

9. Gikonyo J., in *Joseph Mwangi Gitundu v Gateway Insurance Co Ltd ML HCCC No. 224 of 2007* [2015] eKLR expounded on this statutory duty of insurers to satisfy judgments by stating as follows:

The obligation is statutory and a strict one; it cannot be shifted or abrogated by a term in the contract of insurance or in the manner proposed by the Defendant, lest the noble intention of the *Act* to guarantee compensation of third parties who suffer injuries arising from by use of the insured motor vehicle on the road should be lost. Similarly, if the statutory obligation placed by law on the insurer was to be shifted to the insured as proposed by the



Defendant, the purpose for taking out an insurance policy and the compulsion by the Act for such insurance cover to be taken out on vehicles to be used on the roads to cover third party risks under Cap 405 Laws of Kenya will also be defeated. The only legal way liability and obligation to pay third party claims may be avoided, is by strictly following the prescriptions provided for under section 10 of Cap 405. In this case, the insurer's liability and obligation to pay the judgment entered against the insured is not in dispute. Whereas, a contract of insurance is one of indemnity, in so far as claims by third parties are concerned, the insurance has a statutory obligation to pay the judgment of the third parties unless the liability thereof has been avoided in accordance with the law and specifically section 10 of Cap 405.'

10. Section 10(2) of the Act provides for instances where an insurer can avoid the statutory obligation to pay the judgment and section 10(2)(a) therein states that:

(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;

11. In as much as the Appellant averred in its pleadings that it never received the statutory notice above notifying it of the proceedings before the Subordinate Court, DW 1 cracked during cross-examination and admitted that the Appellant was aware of the matter before the Subordinate Court. He admitted that the demand letter dated 09.01.2017 and Notice Letter dated 01.02.2017 from the Respondent was sent to the insured and the Appellant and were received by the Appellant through its correct postal and email addresses. DW 1 also admitted that the insurance policy details indicated in the police abstract indicated that the insured had a policy with the Appellant for the period between 19.09.2013 and 18.10.2013 and that it is possible that the Appellant had renewed and actually issued another cover to the insured.

12. On the allegations of forgery and fraud, it is noted that these allegations are serious and it is trite law that they must be proved to a standard higher than the balance of probabilities (see Ndolo v Ndolo (2008) 1 KLR (G & F) 742). A perusal of the record leads me to conclude and agree with the Subordinate Court that the Appellant failed to prove that the insured had forged the insurance cover he had at the time of the accident.

13. Since the Respondent proved that there was a judgment in her favour, that a valid insurance policy issued by the Appellant was in force at the time of the accident and that the Appellant had proper notice of the proceedings in respect of the judgment against the insured, the Appellant could not avoid satisfying the judgment. Based on the evidence and the law, I hold that the Subordinate Court came to the correct conclusion in allowing the suit.

14. The Appellant's appeal lacks merit. It is dismissed with costs to the Appellant. The costs are assessed at Kshs. 40,000.00.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE



DATED AND DELIVERED AT MOMBASA THIS 4TH DAY OF MARCH 2024.

OLGA SEWE

JUDGE

