



**Nyakundi v CIC General Insurance Co. Limited (Civil Appeal  
E048 of 2023) [2024] KEHC 6527 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6527 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CIVIL APPEAL E048 OF 2023**

**WA OKWANY, J**

**MAY 23, 2024**

**BETWEEN**

**AGNES KERUBO NYAKUNDI ..... APPELLANT**

**AND**

**CIC GENERAL INSURANCE CO. LIMITED ..... RESPONDENT**

*(Being an Appeal from the Judgment in the Chief Magistrate's  
Court at Nyamira, CMCC No. E070 of 2023 delivered by Hon.  
C.W. Waswa, Senior Resident Magistrate on 7th September 2023.)*

**JUDGMENT**

1. The Appellant herein filed a declaratory suit before the trial court seeking a declaration that the Defendant/Respondent was liable to pay Kshs. 444,149/= with interest at court rates, being the judgment amount awarded to her in the primary suit.
2. The Appellant's case before the trial court was that she was, on 3<sup>rd</sup> December 2017, a lawful pedestrian walking along Kericho-Nyamira road when a motor vehicle registration No. KAW 031A knocked and injured her severely. She instituted a claim for compensation in Nyamira CMCC No. 4 of 2018 (the Primary Suit) against the Respondent's insured, Davis Saisi and Njeru Rugendo Alex. She also served a Notice of Institution of Suit dated 17<sup>th</sup> January 2018 on the Respondent herein, CIC Insurance, which Notice was acknowledged on 19<sup>th</sup> January 2018. Judgement in the primary suit was entered in the Appellant's favour as follows: -

General Damages – Kshs. 307,250/=

Interests at Court rates – Kshs. 10,754/=

Costs – Kshs. 126,125/=

Total – Kshs. 444,149



3. The Appellant then filed a declaratory suit against the Respondent in Nyamira CMCC No. E070 of 2023 seeking the payment of the decretal sum.
4. The Respondents filed their Statement of Defence in which they vehemently denied the Appellant's claim and averred that the Defendants in the primary suit were strangers to them as the Policy Number that the Appellant referred to belonged to a different person one Wilson Kereri Mokandu.
5. In a judgment delivered on 7<sup>th</sup> September 2023, the trial court found that the Plaintiff did not prove her case on a balance of probabilities and dismissed the suit with costs to the Defendant (Respondent).

### **The Appeal**

6. Dissatisfied with the trial court's decision, the Appellant instituted the present Appeal and listed the following grounds of appeal in the Memorandum of appeal: -
  1. That the Learned Trial Magistrate misapprehended the meaning of Section 10 (1) of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405.
  2. That the Learned Trial Magistrate erred both in law and fact in seeking to rely upon technicalities in dismissing the Appellant's suit despite there being overwhelming evidence in terms of documentation that the Respondent was the insurer of the subject motor vehicle that caused the accident.
  3. That the Learned Trial Magistrate exhibited open bias against the Appellant by selectively applying the law in support of the arguments by the Respondents in isolation of the arguments presented by the Appellant.
  4. That the Learned Trial Magistrate erred both in law and fact in seeking to rely upon technicalities in dismissing the Appellant's suit despite there being overwhelming evidence in terms of documentation that the Respondent was the insurer of the subject motor vehicle that caused the accident.
  5. That the Learned Trial Magistrate erred both in law and fact by failing to analyse all the evidence on record and hence arrived at a wrong conclusion.
  6. That the Learned Trial Magistrate erred both in law and fact in failing to take into account that the purported policy documents sought to have been relied upon by the Respondent did not have any particulars of the subject motor vehicle.
  7. That the Learned Trial Magistrate erred both in law and fact in making a finding that the issue of ownership of the Policy Number 009/070/1/181899/2017/07 was relevant in a declaratory suit where a valid policy of insurance was in existence.
  8. That the Learned Trial Magistrate erred both in law and in fact in failing to consider the Appellant's submissions and authorities tendered at the lower court in arriving at his finding.
  9. That the judgment delivered by the Learned Trial Magistrate was against the weight of evidence on record, erroneous and unfair.
  7. The Appellant seeks orders to set aside the judgment of the trial court and a finding that she had proved her case as stated in the Plaint.
  8. The Appeal was canvassed by way of written submissions which I have considered.



## **The Appellant's Submissions**

9. The Appellant submitted that the Police Abstract provided proof that; the Respondent had issued a valid insurance cover in respect of the subject motor vehicle, that the accident occurred during the period of the cover and that they were obligated to satisfy judgments against their insured under Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act CAP 405 (the Act). It was submitted that the trial court dismissed the declaratory suit on mere technicalities and that the fact that the Respondent did not deny having insured the vehicle in the primary suit nor provide evidence controverting the Appellant's claim in the primary suit meant that they were obligated to pay. For this argument, the Appellant cited *Gerald Njuguna Mwaura v. Africa Merchant Assurance Company Limited (2020) eKLR* where it was held that an insurer could not deny liability for a claim in a declaratory suit and *Real Insurance Co. Ltd and Another vs. Mokaya (2023) eKLR* where the case of *Cannon Assurance Co. Ltd vs. Peter Mulei Sammy (2020) eKLR* was quoted.
10. It was submitted that the Respondent was mandated to cover any risks associated with the motor vehicle it had insured regardless of the name under which the cover was issued. Reference was made to the cases of *M/S Fidelity Shield Insurance Co. Ltd vs. Peter Mbugua Kimotho (2020) eKLR* quoting the case of *Ogada Odongo vs Phoenix of East Africa, Kisumu HCCC No. 132 of 2003* and *Real Insurance Co. Ltd and Another* quoting *African Merchant Assurance Co. Ltd vs. Jane Atieno (2014) eKLR* where it was held that an insurance policy assumed the rights of third parties and that it was not repudiated just because a registered motor vehicle owner was different from the person who took out the policy.

## **The Respondent's Submissions**

11. The Respondent submitted that the Appellant did not produce any certificate of insurance or policy document to prove that it indeed insured the defendants in the primary suit. The Respondent submitted that it was not served with the Notice of Institution of Suit as it was not stamped. It urged the Court to uphold the trial court's findings that the Appellant did not discharge her burden of proof.

## **Analysis and Determination**

12. The Court of Appeal for Eastern Africa explained the duty of a first appellate court in *Pandya vs. Republic (1957) EA 336* thus: -

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.”

13. The main issue for my determination is whether the Respondent should satisfy the judgment delivered in the primary suit.



14. A perusal of the trial court's record shows that the Appellant served the Respondent with a Notice of Institution of Suit dated 17<sup>th</sup> January 2018. The said Notice was received and stamped by the Respondent on 19<sup>th</sup> January 2018. I find that the Respondent was duly served with the Notice of Institution of Suit. The record also reveals that the Respondent thereafter engaged an advocate to represent the two defendants in the primary suit where a joint Statement of Defence dated 1<sup>st</sup> March 2018 was filed.
15. I have further perused the contents of the joint Statement of Defence and noted that the advocates on Record for the Defendants are the same advocates on record for the Respondents in the present suit. It is instructive to note that the reference number recorded in the Joint Statement of Defence in the primary suit was CIC/AC/011/ 18(K) while the reference cited by the Respondent in the present suit is CIC/AC/202/ 2023 (K). My analysis of this evidence is that the Respondent herein instructed an advocate to represent it and the Defendants in the two suits. This confirms my earlier finding that the Respondent was duly served the Statutory Notice.
16. On the issue of proof of ownership of the suit motor vehicle, it is trite that the ownership of a motor vehicle can be established through the production of an official search from the registrar of motor vehicles. This proof is however rebuttable if evidence is produced to show that the motor vehicle exchanged hands but has not been formally transferred to the new owner.
17. It was not clear to this Court who the actual owner of the motor vehicle KAW 031A was since a copy of motor vehicle records from NTSA was not filed. Be that as it may, the Police Abstract (P.Exh6) dated 7<sup>th</sup> December 2017 indicates that the motor vehicle was owned by one David Saisi, the first Defendant in the primary suit and records the Respondent CIC Insurance Co. Ltd as the Insurer. It further records the Policy Number as 009/070/1/181899/2017/07 (TPO). In my view, this was sufficient evidence to bring a claim against the defendants and their insurer, the Respondent in this case.
18. The Respondent's main contention was that their records show that the said Policy Number belonged to one Wilson Kereri Mokandu and that the defendants in the primary suit were strangers to them. The Respondent declined to satisfy the decree in the primary suit on the basis that the said Defendants therein were not insured under the said policy number.
19. Plainly put, the Respondent deny knowledge of the Defendants in the primary suit. I however find that the Respondent did not expressly deny having insured the motor vehicle that caused the accident in question.
20. I have carefully examined the Insurance Policy Scheduled (D.Exh1) produced by DW1, Moses Kavisi, and I note that it refers to the same policy number as the one quoted by the Appellant in her Notice of Institution of Suit. The details on the Policy however refer to one Wilson Kereri as the insured. I further note that the Policy document does not give the details of the insured motor vehicle under the Policy Number. There was also no schedule attached to the Policy for my reference. In my humble view, these details are vital in aiding the Respondents to prove that the referenced Policy Number was neither in respect of the Defendants nor of the motor vehicle that caused the accident. In other words, the Respondent did not rebut the fact that they were the Insurers of KAW 031A as already established by the Appellant through the Police Abstract.
21. I have further considered the fact that the Respondents instructed Counsel to act for the Defendants in the primary suit upon receiving the Statutory Notice served upon them by dint of Section 10 of the Act. To my mind, this means that they acknowledged that the Policy Number stated in the Statutory Notice existed in their system and it was for this reason that they provided legal counsel to the Defendants.



22. It is my finding that the insurance contract under Policy No. 009/070/1/181899/2017/07 (TPO) was in respect of motor vehicle No. KAW 031A. I find that the mere fact that the policy holder recorded in the Respondent's system may have been different from the registered owner of the vehicle in question did not vitiate the duties of the Insurer under the insurance contract. I am guided by the decision in *African Merchant Assurance Co. Limited vs. Jane Atieno* [2014] eKLR where she held thus: -

“The preamble of the Act shows that the objective of the Act is to make provisions against third party risks out of the use of motor vehicles. That preamble as read together with Section 4(1) of the Act indicates that the overriding objective of the Act is to protect third parties against the risks that may arise as a result of the use of a motor vehicle. The emphasis, therefore, as the name of the Act suggests, is a protection of third parties who may suffer risks as a result of the use of a motor vehicle on the road ..... In my view it would defeat the aforesaid purpose and objective of the Insurance (Motor Vehicle Third Party Risks) Act if the Appellant were allowed to escape liability simply on the basis that the person sued was not the policy holder. The insurance policy was issued to cover risks caused by the vehicle and the Respondent did not suffer such risk. She is therefore entitled to compensation by the Appellant..... The insurance policy is not repudiated just because the registered owner is different from the person who took up the policy.” (Emphasis added).

23. I further find that due diligence required that once the Respondent received the statutory Notice, they ought to have verified the details of the Insured, the vehicle and the policy number from their system before instructing counsel to appear on behalf of the Defendants in the primary suit. I find guidance in *Halsbury's Laws of England* in Vol. 16 (2) at paragraphs 1076 and 1079 which states as follows on the doctrine of estoppel: -

“1076. Common law estoppel by representation arises where a person has by words or conduct made to another a clear and unequivocal representation of fact, either with knowledge of its falsehood or with the intention that it should be acted upon, or has conducted himself that another would, as a reasonable person, understand that a certain representation of fact was intended to be acted upon, and the other person has acted upon such representation and thereby altered his position. In such circumstances an estoppel arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise than he represented it to be. It seems that, in contrast to the position where promissory estoppel or proprietary estoppel arises, there is no additional requirement of unconscionability.....

1079. In order for a common law estoppel by representation to arise, the person to whom the representation is made must have changed his position in some way to his detriment. In doing so, he must have relied on the representation, although that need not have been the sole cause of his change of position.”

24. Similarly, in *Serah Njeri Warobi vs. John Kimani Njoroge* [2013] eKLR, the court held as follows: -

“The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person.”

25. My finding is that the Respondents assumed full responsibility for the outcome of the suit in *Nyamira CMCC No. 4 of 2018* when they instructed counsel to defend their insured. They cannot now go back on their conduct and state that they discovered that the Defendants were strangers to the said policy



number. It would be a travesty of justice if this court were to overlook the fact that the Respondents did not deny the existence of the policy number and did not also deny that they had insured the said vehicle. By their own conduct of issuing a valid insurance policy and by instructing counsel when this accident claim arose, the Respondent bound itself to the duties of an insurer under Cap 405 and cannot renege on them.

26. I find that the Appellant discharged her burden of proof on a balance of probabilities to justify her claim for a declaratory judgment. I therefore find that the Appeal is merited and I hereby allow it as prayed. The judgement of the trial court is hereby set aside. In its place, I enter a declaratory judgment in favour of the Appellant for the judgment debt in the primary suit in the sum of Kshs. 444,149/= with interests at court rates. The Appellant is also awarded costs of the suit in the trial court and the costs of this appeal.
27. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 23<sup>RD</sup> DAY OF MAY 2024.**

**W. A. OKWANY**

**JUDGE**

