



**Madison Insurance Co. Ltd v Mwangi (Civil Appeal E008 of 2022)
[2024] KEHC 6816 (KLR) (4 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6816 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E008 OF 2022
DKN MAGARE, J
JUNE 4, 2024**

BETWEEN

MADISON INSURANCE CO. LTD APPELLANT

AND

HANNAH WAMBUI MWANGI RESPONDENT

(Being an appeal from the Judgment and Decree of the Principal Magistrate's Court at Karatina delivered on 1st February, 2022 by Hon. V.S. Kosgei in Karatina PMCC No. 89 of 2018)

JUDGMENT

1. This is an appeal from the judgment of Hon. V.S. Kosgei in Karatina PMCC No. 89 of 2018 given on 1/2/2022. The Appellant was the Respondent in the lower court.
2. The appellant filed 4 grounds of appeal as follows:
 - a. That the learned trial magistrate erred in law and in fact in finding the Appellant liable on a fraudulent contract to which it was not a party.
 - b. That the learned trial magistrate erred in law and in fact by finding that the Respondent had discharged her burden of proof on a balance of probabilities.
 - c. That the learned trial magistrate erred in law and in fact by considering unreliable and unverifiable documents as evidence and relying on them as primary evidence and disregarding the Appellant's evidence of fraud and illegality.
 - d. The learned trial magistrate erred in law and in fact by failing to consider and sufficiently appreciate the Appellant's written submissions and the binding precedents therein.
3. The Respondent filed suit stating that she was insured under HQS/708/037860/2012 for motor cycle KMCQ 089B owned by Kiongo Mwaniki. On 11/8/2013 there was an accident involving motor



vehicle Registration No. KAL 489X and KMCQ 089B. The Respondent is said to have suffered injuries.

4. The Respondent filed suit and was awarded Kshs.122,500/= with costs of 37,010. They then sought a declaration that the Appellant is unable to settle the same. The abstract annexed thereto showed the Appellant having insurance cover from 20/6/2013 to 9/6/2014. The date of accident is said to be 11/8/2013.
5. The defendant denied having issued the insurance and stated that they were strangers and were unaware of the case.
6. A reply to defence was filed. In their documents, they indicated that certificate No. 2667896 was insured to Xplico. They stated that the company was in the name of Alamdar Trading Co. Ltd.
7. The Respondent testified that he had sued and produced exhibits to support his case. Corporal Bett Japhet produced a Police abstract. The motor vehicle involved Jonh Karigu Munene and Dickson Mwangi Mbogo. They stated that they received instruction from the owner of the motor vehicle. On cross-examination he stated that he cannot confirm whether or not they are genuine.
8. The Appellant's witness, Moses Mwareri, a legal supervisor, testified that the AKI confirmed that the insurance sticker was issued to Xplico insurance. They stated that the certificate was not genuine. He stated that the investigation revealed that the Appellant were not the insurers. He stated that the information was from the owner of the Motor cycle.
9. PW2 stated that the insurance was issued to Xplico and not the Appellant. The same was issued in 2016 to Xplico. The accident at hand occurred in 2013. The police evidence on cross examination, he stated he cannot confirm.

Analysis

10. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
11. In the case of Mbogo and Another v Shah [1968] EA 93 where the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
12. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another v Associated Motor Board Company and Others [1968]EA 123, where the law looks in their usual gusto, held by as follows;-

“ .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”



13. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as in the lower court as parties cannot read into those documents matters extrinsic to them.
14. In the case of *Peters v Sunday Post Limited* [1958] EA 424, court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”
15. The court stated that the defendant never took steps to avoid liability. Section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act* provides as doth:
 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.
 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; or
 - b. in respect of any judgment, so long as execution thereon is stayed pending an appeal; or
 - c. in connexion with any liability if, before the happening of the event which was the cause of the death or bodily injury giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provision contained therein, and either—
 - i. before the happening of the event the certificate was surrendered to the insurer, or the person to whom the certificate was issued made a statutory declaration stating that the certificate had been lost or destroyed; or
 - ii. after the happening of the event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer, or the person to whom the certificate was issued made such a statutory declaration as aforesaid; or
 - iii. either before or after the happening of the event, but within a period of twenty-eight days from the taking effect of the cancellation of the policy, the insurer has notified the Registrar of Motor Vehicles and the Commissioner of Police in writing of the failure to surrender the certificate.
 - (3) It shall be the duty of a person who makes a statutory declaration, as provided in subparagraphs (i) and (ii) of paragraph (c) of subsection (2), to cause such statutory declaration to be delivered to the insurer.



- (4) No sum shall be payable by an insurer under the foregoing provisions of this section if in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it: Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto.

16. The said section deals with circumstances where a party is an insurer who wishes to avoid liability. It does not apply to non-insurers who have no liability to avoid.

17. Section 12 provides as follows: -

- (1) Any person against whom a claim is made in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 shall, on demand by or on behalf of the person making the claim, state whether or not he was insured in respect of that liability by any policy having effect for the purposes of this Act or would have been so insured if the insurer had not avoided or cancelled the policy and, if he was or would have been so insured, give such particulars with respect to that policy as were specified in the certificate of insurance issued in respect thereof under section 7.
- (2) If, without reasonable excuse, any person fails to comply with the provisions of this section, or willfully makes any false statement in reply to any such demand as aforesaid, he shall be guilty of an offence.

18. Insurance required under section 4 of Cap 405, is provided under section 5 of the same Act. It provides as follows: -

In order to comply with the requirements of section 4, the policy of insurance must be a policy which

- (a) is issued by a company which is required under the *Insurance Act*, 1984 (Cap. 487) to carry on motor vehicle insurance business; and
- (b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road: Provided that a policy in terms of this section shall not be required to cover-
- (i) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or
- (ii) except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or



alighting from the vehicle at the time of the occurrence of the event out of which the claims arose; or

- (iii) any contractual liability; (iv) liability of any sum in excess of three million shillings, arising out of a claim by one person.

19. The court relied wrongly on the case of *APA Insurance Co. Ltd v George Majele* [2014]. It is true that a victim does not have access. However, a victim company equally does not have access to insurance it did not issue. Though Order 2 Rule 4(1) provides as follows:-

“A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—

(a) which he alleges makes any claim or defence of the opposite party not maintainable;

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading.

(2) Without prejudice to subrule (1), a defendant to an action for the recovery of land

shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.

20. However, in this case, the Appellant was not blaming the plaintiff of fraud. They were simply saying non est factum. They were saying that the sticker given to the owner was fictitious. Lord Denning MR in *Gallie v Lee & Another* [1969] 1 All ER 1062 while discussing the aforementioned consequences held:

“If the deed was not his deed at all, (non est factum) he is not bound by his signature any more than he is bound by a forgery. The document is a nullity just as if a rogue had forged his signature. No one can claim title under it, not even an innocent purchaser who bought on the faith of it, nor an innocent lender who lent his money on the faith of it. No matter that this innocent person acted in the utmost good faith, without notice of anything wrong, yet he takes nothing by the document.”

21. A forged policy sticker is null and void. There is nothing that can be built on it. In *Macfoy v United Africa Co. Ltd* [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

The police officer, whose department issued police abstract could not defend it. The association of Kenya insurers who issued the sticker gave us to whom it was issued. The



abstract is not sacrosanct. It can and was wrong. The Court of Appeal in Joel Muga Opija v East African Sea Food Limited [2013] eKLR, posited as doth: -

“We find of persuasive value the view held by Ali Aroni J. when she considered a similar issue of ownership in the case of Collins Ochieng Ondiek vs Walter Ochieng Ogunde – [HC Civil Appeal No. 67 of 2008,] (UR). She distinguished Thurania’s case from the case that was before her as follows:-

“The Court of Appeal overruled this Court and found the High Court decision in Collins Ochieng Ondiek versus Walter Ochieng Ogunde Civil Appeal No. 67 of 2008 persuasive on this point. The Court quoted Ali Aroni, J. in that case in which she held:

“In as much as the abstract form is not conclusive evidence of ownership of a motor vehicle, the court notes that the defence did not take the issue of ownership seriously.” The court held the evidence by a police abstract that defendant was the owner of the accident vehicle was “not seriously rebutted by the respondent who in the end never offered any evidence to challenge or even to counter that evidence.”

In allowing the appeal, the court concluded that:

“We agree that the best way to prove ownership would be to produce to the court a document from the registrar of motor vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in court without any objection, its contents cannot later be denied.

”I would have been prepared to find that the police abstract which the police produced was sufficient proof of ownership of the vehicle in light of the foregoing decisions but even without the respondent’s rebuttal the appellant’s testimony together with that of her witness were not only inconsistent in themselves but were also contrary to the particulars in the abstract. The person who was sued was not the same person identified in the abstract as the owner of the vehicle. A certificate of official search from the registrar of motor vehicles would perhaps have shed some light on this question.

22. In this case, the abstract was challenged. The evidence, from the Appellant was that the insurers could not be the Appellant. The issuer of the certificate of insurance, that is AKI stated that the certificate was issued to another insurer.
23. I hold that the court misdirected itself in finding oral evidence to override cogent defence evidence. In Fidelity & Commercial Bank Ltd v Kenya Grange Vehicle Industries Ltd [2017]eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth:-

“Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed...”



Burden of Proof

24. The burden of proof is on whoever alleges. This is in line with the provisions of sections 107-109 of the *evidence Act*, which provide that: -

“(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.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

25. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in *William Kabogo Gitau v George Thuo & 2 Others* [2010] 1 KLR 526 as follows:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

26. In *Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another* [2015] eKLR, the judges of Appeal held that:

“Denning J. in *Miller v Minister of Pensions* [1947] 2 ALL ER 372 discussing the burden of proof had this to say; -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.”

27. From the totality of the evidence, the Appellant was not the insurer of the suit motor vehicle. The court herein placed a burden on the Appellant higher than the preponderance of probabilities. Consequently, I am satisfied that the Appellant went out of their way to displace allegation in the plaint. In the circumstances, the appeal is merited.



28. Section 27 of the *Civil Procedure Act* provides as follows in regard to costs: -

- “(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
- (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.”

29. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh *Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012*; [2014] eKLR, as follows: -

- “(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.”

30. Costs follow the event. The event in this case is the decision on the Appeal. However, the Respondent was not to blame for the predicament he finds himself.

Determination

31. In the circumstances I make the following orders:

- a. The appeal is merited. The judgment given on 1/12/2022 is set aside. In lieu thereof I dismiss the Respondent’s suit in Karatina PMCC 89 of 2018.
- b. Each party shall bear its costs both in this court and the court below.

DATED, SIGNED AND DELIVERED AT NYERI ON THIS 4TH DAY OF JUNE, 2024.

KIZITO MAGARE



JUDGE

In the presence of:-

Miss. Murimi for the Appellant

No appearance for the Respondent

Court Assistant- Jedidah

