



Superstar Parcel Services Limited v Xplico Insurance Co. Limited; Mutemi (Suing as the Personal Representative of the Estate of Emmanuel Mutinda Mutemi - Deceased) (Interested Party) (Civil Suit E007 of 2022) [2024] KEHC 7504 (KLR) (13 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7504 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E007 OF 2022
OA SEWE, J
JUNE 13, 2024**

BETWEEN

SUPERSTAR PARCEL SERVICES LIMITED APPLICANT

AND

XPLICO INSURANCE CO. LIMITED RESPONDENT

AND

MWENDA MUTEMI (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF EMMANUEL MUTINDA MUTEMI - DECEASED) INTERESTED PARTY

JUDGMENT

- (1) The plaintiff, Superstar Parcels Limited, is a limited liability company incorporated in Kenya under the *Companies Act*, 2015. It filed this suit on 18th February 2022 against its insurer, Xplico Insurance Co. Limited and enjoined the interested party, Mwenda Mutemi, as the personal representative of the estate of Emmanuel Mutinda Mutemi (deceased). The plaintiff averred that, by a Policy of Insurance No. 080/000075/14/05/020 TPO, the defendant in consideration of premiums paid, agreed to absolve, indemnify and or hold indemnified the plaintiff from any actions, proceedings, procedures, processes, liability, claims damages costs and expenses in relation to or arising out of the use of Motor Vehicle Registration No. KBK 051L.
- (2) The plaintiff further averred that, on or about the 4th November 2014, while the said motor vehicle was being driven by its authorized driver, Chaka Shehi, it knocked down Emmanuel Mutinda Mutemi (the deceased) thereby occasioning him fatal injuries. That as a result of that accident the interested party sued it for compensation in damages in Mombasa SRMCC No. 2116 of 2017: Mwenda Mutemi



- (suing as personal representative of the Estate of Emmanuel Mutinda Mutemi) v Superstar Parcels & Chaka Shehi. The plaintiff in the lower court suit is the interested party herein.
- (3) The plaintiff averred that the lower court suit was heard and determined by way of a judgment delivered on 13th September 2019 in favour of the interested party in the sum of Kshs. 2,317,000/=. It further averred that the judgment was brought to the attention of the defendant herein as its insurer, but that the defendant refused, declined and/or neglected to pay the interested party. Upon execution being initiated against it, the plaintiff opted to file this suit for declaratory orders against the defendant.
- (4) The plaintiff contended that the said execution against it directly by the interested party is not only unlawful, but also renders the provisions of the *Insurance (Motor Vehicles Third Party Risks) Act* ineffectual. The plaintiff further asserted that the refusal by the defendant to settle the entire decretal sum arising out of the judgment in the lower court suit amounts to a breach of the law, contract and/or insurance policy. Accordingly, the plaintiff prayed for the following reliefs against the defendant:
- (a) A declaration that the Policy of Insurance No. 080/000075/14/05/020 TPO issued by the defendant was valid at the date of the accident the subject of this suit.
 - (b) A declaration that the defendant is liable to indemnify and/or hold the plaintiff indemnified and make good to the interested party the entire decretal sum in Mombasa SRMCC No. 2116 of 2017: Mwenda Mutemi (suing as personal representative of the Estate of Emmanuel Mutinda Mutemi) v Superstar Parcels & Chaka Shehi.
 - (c) An order directing the defendant to pay and or make good the entire decretal sum awarded to the interested party against the plaintiff in Mombasa SRMCC No. 2116 of 2017: Mwenda Mutemi (suing as personal representative of the Estate of Emmanuel Mutinda Mutemi) v Superstar Parcels & Chaka Shehi as well as any/all amounts consequent thereto.
 - (d) Costs and interest.
- (5) The defendant opposed the claim vide a Statement of Defence dated 29th March 2022. The defendant denied that it was the insurer of Motor Vehicle Registration No. KAQ 578V and averred that it is a stranger to the contents of PARA graph 6 of the Plaintiff in which the occurrence of the subject accident was pleaded. The defendant further denied any knowledge of Mombasa SRMCC No. 2116 of 2017: Mwenda Mutemi (suing as personal representative of the Estate of Emmanuel Mutinda Mutemi) v Superstar Parcels & Chaka Shehi or the parties thereto. It was therefore categorical that it is under no obligation to settle any claim in respect of a decree involving a stranger.
- (6) In the alternative, the defendant averred that, if indeed there was an insurance policy in place involving the plaintiff then it is not liable because the plaintiff failed to report the accident to it as legally expected and also failed to pay excess, which is a condition precedent. In effect, the defendant posited that the plaintiff is precluded from indemnity for breach of the insurance policy and hence the underlying contract.
- (7) Although the defendant was duly served with a Hearing Notice, it failed to attend court on 18th April 2024 when the matter came up for hearing. Accordingly, hearing proceeded ex parte in terms of Order 12 Rule 2 of the Civil Procedure Rules. On hand for the hearing were the plaintiff and the interested party.
- (8) In support of the plaintiff's case, Ayub Suleiman Omar (PW1), a director of the plaintiff testified on 8th April 2024 and adopted his witness statement dated 17th February 2022. He also produced the plaintiff's List and Bundle of Documents in support of his testimony. The documents were collectively marked as the Plaintiff's Exhibit No. 1.



- (9) In his testimony, PW1 essentially reiterated the facts as pleaded in the Plaint, namely that by a policy of insurance No. 080/000075/14/05/020 TPO, the defendant agreed to indemnify the plaintiff from liability in relation to the use of Motor Vehicle Registration No. KBK 051L Nissan Diesel in consideration of the premium then paid by the plaintiff. PW1 further testified that on or about 4th November 2014, the deceased was riding Motor Cycle Registration No. KMDJ 100L when the plaintiff's Motor Vehicle Registration No. KBK 051L, driven by its authorized driver, Chaka Shehi, hit him, thereby occasioning him fatal injuries.
10. PW1 further testified that the accident occurred during the currency of the insurance policy, and that the defendant was duly notified of the accident both by the plaintiff and the interested party by way of a letter dated 2nd March 2015. He produced a copy of the letter as part of the Plaintiff's Bundle of Documents and is appearing as No. 5 in the said List and Bundle of Documents.
- (11) Further to the foregoing, PW1 testified that the plaintiff was sued by the interested party on behalf of the estate of the deceased in Mombasa SRMCC No. 2116 of 2017; and that judgment was passed on 13th September 2019 in that suit in favour of the interested party against the plaintiff for Kshs. 2,317,000/= . PW1 produced a copy of the Judgment as document number 7 in the Plaintiff's List and Bundle of Documents. He added that, again, the defendant, as the insurer of the plaintiff, was notified of the Judgment by the plaintiff but refused, neglected or declined to settle the same.
- (12) It was the testimony of PW1 that, it was that refusal to pay that caused the interested party to embark on execution of the lower court's judgment and decree against the plaintiff by way of Proclamation of Attachment. A copy of the Proclamation was produced by PW1 as document No.8 in the plaintiff's List and Bundle of Documents. The plaintiff's contention was that the likely consequence of failure by the defendant to take responsibility is that the plaintiff will suffer great prejudice and loss, considering that it paid premiums for the subject Policy of Insurance. PW1 concluded his evidence by stating that he knows the interested party and acknowledges that he is entitled to payment as decreed by the lower court. He added that it was for the benefit of the interested party that this suit was filed.
- (13) The interested party, Mwenda Mutemi, testified as IPW1. He explained that the deceased, Emmanuel Mutinda Mutemi, was his younger brother. He confirmed that the deceased died in a road accident involving a motor vehicle belonging to the plaintiff. He likewise adopted his witness statement dated 9th August 2023 and produced as the Interested Party's Exhibits 1-7 the documents filed therewith. His plea was for the Court to make such orders as would enable them realize the fruits of the judgment of the lower court.
- (14) Although the plaintiff filed a list of 6 issues for determination in its List of Issues dated 30th February 2024, the same were compressed to only two in the plaintiff's closing submissions, namely:
- (a) Whether there was a valid Policy of Insurance in respect of Motor Vehicle Registration No. KBK 051L at the time of the subject accident.
 - (b) Whether the defendant is liable to satisfy the judgment in favour of the interested party against the plaintiff.
- (15) On whether there was a valid Policy of Insurance in respect of Motor Vehicle Registration No. KBK 051L at the time of the accident, the plaintiff placed reliance on the Certificate of Insurance and the documents in proof of payment of premiums produced by PW1 as documents No. 3 and 4 in the Plaintiff's List and Bundle of Documents marked the Plaintiff's Exhibit 1. The plaintiff also urged the Court to take into account the Police Abstract produced by the interested party as the Interested



Party's Exhibit No. 1 as sufficient proof that the subject motor vehicle was insured by the defendant for the period between 15th May 2014 and 14th May 2015.

- (16) The plaintiff also relied on *Kenya Alliance Insurance Co. Limited v Thomas Ochieng Apopa* (suing as administrator of the Estate of Pamela Agola Apopa, deceased) [2020] eKLR to support the proposition that a Certificate of Insurance is prima facie evidence that the subject motor vehicle is duly insured. The plaintiff pointed out that although in its Statement of Defence the defendant denied liability, it is significant that it made reference to Motor Vehicle Registration No. KAQ 578V as opposed to Motor Vehicle Registration No. KBK 051L. The plaintiff therefore asserted that the defendant has failed to discharge the burden of proof in connection with Motor Vehicle KBK 051L.
- (17) On whether the defendant is liable to satisfy the judgment in favour of the interested party, the plaintiff placed reliance on Section 10 of the *Insurance Act* (Motor Vehicles Third Party Risks) Act and the case of *Isaack Wakoli v Xplico Insurance Company* [2021] eKLR for the proposition that an insurer is under mandatory statutory liability first to pay the full judgment sum to the person entitled to the benefit of the judgment and thereafter recover the sum so paid to the third party under the contract with the insured. The plaintiff underscored their submission that the purpose of the *Insurance (Motor Vehicles Third Party Risks) Act* is to ensure that a third party who is injured gets compensated for his suffering, loss or inconvenience. Counsel relied on *Britam General Insurance Co. (Kenya) Limited v Josephat Ondiek* [2018] eKLR, *Charles Makenzi Wambua v Africa Merchant Assurance Co. Ltd & another* [2014] eKLR, *Joseph Mwangi Gitundi v Gateway Insurance Co. Ltd* [2015] eKLR and *Muthui v Directline Insurance Company Ltd & 2 Others (Civil Suit 88 of 2019)* [2022] KEHC 392 (KLR) (Civ) (6 May 2022) (Judgment), among other authorities to buttress her arguments.
- (18) On his part, the interested party proposed the following issues for determination vide his written submissions dated 24th May 2024:
- (a) Who between the plaintiff and the defendant should settle the outstanding decretal sum?
 - (b) Whether the interested party is entitled to settlement of the decretal sum.
- (19) Ms. Kayatta, counsel for the interested party submitted that credible evidence has been adduced to prove that the defendant was duly served with the requisite demand as required under the *Insurance (Motor Vehicles Third Party Risks) Act*. She accordingly urged the Court to find that both the plaintiff and the defendant are liable to the interested party and therefore the interested party is at liberty to execute the decree directly against the plaintiff. Reliance was placed on High Court Civil Case No. 25 of 2020: *Conseslus Kipruto v African Merchant Assurance Co. Ltd & Mildred Khatenje* (suing as the administrator of the estate of Raymond Odhiambo Ogada, deceased) & another.
20. It is a cardinal principle that the burden of proof is on he who alleges to prove his case on a balance of probabilities. It matters not therefore that the defendant opted to not attend court for the hearing to adduce evidence in support of its case. Section 107 of the *Evidence Act*, Chapter 80 of the Laws of Kenya is explicit 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.”



(21) Likewise, Section 108 of the *Evidence Act* provides that:

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

(22) To underscore the point, the Court of Appeal in the case of *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, held:

“...As a general proposition under section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act...”

(23) Accordingly, in *Wamwere & Others v Attorney General, Petition No. 26, 34, & 35 of 2019* (Consolidated) [2023] KESC 3 (KLR), the Supreme Court held, at PARA graph _21 21 that:

“...Even in situations where a respondent did not file or tender evidence to counter the petitioner’s case, the petitioner bore the burden of establishing his/her allegations on a balance of probabilities. As to whether such standard was met would depend on whether a court based on the evidence was satisfied that it was more probable that the allegation(s) in issue occurred.”

(24) I have consequently given careful thought to the averments set out by the plaintiff in his *Plaint* as well as the evidence adduced herein in support and the written submissions filed by learned counsel and the two issues arising therefrom for determination are:

- (a) Whether there was a valid Policy of Insurance in respect of Motor Vehicle Registration No. KBK 051L at the time of the subject accident.
- (b) Whether the plaintiff is entitled to the reliefs sought herein.

A. On whether there was a valid Policy of Insurance in respect of Motor Vehicle Registration No. KBK 051L at the time of the accident:

(25) The plaintiff adduced credible proof that, at all times material to this suit, it was the registered and beneficial owner of Motor Vehicle Registration No. KBK 051L, Nissan Diesel, and that the said motor vehicle was involved in a road traffic accident on 4th November 2014 along the Nairobi-Mombasa Road. The accident involved Motor Cycle Registration No. KMDJ 100L, which was being driven at the time by the deceased, Emmanuel Mutinda Mutemi. It is not in contention that the deceased succumbed to the injuries received as a result of the collision.

(26) The plaintiff relied on a Certificate of Insurance exhibited at page 3 of its Bundle of Documents. The documents show that a Policy of Insurance No. 080/000075/14/05/020 TPO was issued by the defendant, Xplico Insurance Co. Ltd in favour of the plaintiff with effect from 15th May 2014 and was to expire on 14th May 2015. In addition, the plaintiff relied on the document exhibited at page 4 of its Bundle of Documents. The document confirms that the plaintiff paid Kshs. 18,121/= as the premium due for the subject cover. The policy number is shown on the document and it confirms that the third party cover was valid from 15th May 2014 to 14th May 2015.



(27) In *Kenya Alliance Insurance Co. Ltd v Thomas Ochieng Apopa* (supra) it was held:

“A certificate of insurance issued by a licensed insurance company is prima facie evidence that the subject Motor Vehicle is duly insured and the law requires that such certificate of insurance must be displayed at a place and in a manner prescribed on the subject motor vehicle so that the law enforcement officers can easily see it on inspection of the vehicle while it is on the road, to ensure that it is insured. This is a mandatory requirement under section 9 of Cap 405 Laws of Kenya.”

(28) In addition to the foregoing, the plaintiff produced an Abstract from the Police dated 27th January 2015. It confirms that, in connection with the subject accident, the plaintiff's Motor Vehicle Registration No. KBK 051L, Nissan Diesel, was, at the material time insured by the defendant. There is therefore uncontroverted proof that at the time of the accident, the subject motor vehicle was insured by the defendant vide Insurance Policy No. 080/000075/14/05/020 TPO.

(29) In the premises, it is plain that the defendant is under obligation to indemnify the plaintiff in so far as there is no dispute that the accident occurred within the validity period of the insurance policy. In this regard, Section 10(1) of the *Insurance (Motor Vehicles Third Party Risks) Act*, Chapter 405 of the Laws of Kenya is explicit that:

“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 PARA graph (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.”

30. The essence of Section 10(1) of the Act was aptly captured by Hon. Gikonyo, J. in the case of *Joseph Mwangi Gitundu v Gateway Insurance Co Ltd* [2015] eKLR, thus:

“...under section 10(1) of Cap 405 Laws of Kenya, the insurer has a statutory obligation to 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.

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 the 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.”

(31) I am therefore satisfied that the plaintiff has proved that there was a valid contract of insurance between him and the defendant as at 4th November 2014 when his Motor Vehicle Registration No. KBK 051L was involved in a road traffic accident on the Nairobi-Mombasa Road.



B. On whether the plaintiff is entitled to the reliefs sought:

- (32) Ordinarily, a declaratory suit by an insured is brought after judgment has been passed in the primary suit. In this case the interested had already obtained a valid judgment and decree against the plaintiff in Mombasa SRMCC No. 2116 of 2017: Mwenda Mutemi (suing as personal representative of the Estate of Emmanuel Mutinda Mutemi) v Superstar Parcels & Chaka Shehi. There is no indication that the decision has been appealed or varied by way of review.
- (33) Additionally, at PARA graph 6 of their Supporting Affidavit, the interested parties deposed that the plaintiff was duly served with a Notice of Entry of Judgment in the matter. I am satisfied that the plaintiff, having proved that there was a valid contract of insurance in force as at 4th November 2014 when the subject accident occurred, is entitled to declaratory orders against the defendant as prayed for in the Plaint.
- (34) In the premises, the orders that commend themselves to the Court, and which I hereby grant are that:
- (a) A declaration be and is hereby made that the Policy of Insurance No. 080/000075/14/05/020 TPO issued by the defendant was valid at the date of the accident the subject of this suit.
 - (b) A declaration be and is hereby made that the defendant is liable to indemnify and/or hold the plaintiff indemnified and make good to the interested party the entire decretal sum in Mombasa SRMCC No. 2116 of 2017: Mwenda Mutemi (suing as personal representative of the Estate of Emmanuel Mutinda Mutemi) v Superstar Parcels & Chaka Shehi.
 - (c) An order is hereby made directing the defendant to pay and or make good the entire decretal sum awarded to the interested party against the plaintiff in Mombasa SRMCC No. 2116 of 2017: Mwenda Mutemi (suing as personal representative of the Estate of Emmanuel Mutinda Mutemi) v Superstar Parcels & Chaka Shehi as well as any/all amounts consequent thereto.
 - (d) Costs of the suit to be borne by the defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 13TH DAY OF JUNE 2024

OLGA SEWE

JUDGE

