Kenya Orient Insurance Company Limited v Mutua & another (Civil Appeal E102 of 2020) [2024] KEHC 9259 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9259 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CIVIL APPEAL E102 OF 2020

LW GITARI, J

JULY 25, 2024

BETWEEN

KENYA ORIENT INSURANCE COMPANY LIMITED ..... APPELLANT

AND

RUTH MUTUA ..... 1ST RESPONDENT

JOHN MBIJIWE T/A BEALINE KENYA AUCTIONEER ..... 2ND RESPONDENT

JUDGMENT

1. The respondent filed a suit vide a plaint dated 16th September, 2020 against the appellant seeking for a judgement against the Appellant seeking for payment of kshs 700,000/= plus interest from the date of filing suit until payment and costs of the suit and interest at court rates.

2. The respondent pleaded that she had taken out an insurance policy and insured his motor vehicle registration No. KBV 605D Toyota Ractis with the Appellant. That the vehicle was involved in an accident and Civil Suit No93 of 2017 Githongo was filed against the respondent. That when the case was finalized the Appellant failed to settle the decretal sum and motor vehicle registration no. KBV 605D Toyota Ractis was attached and sold to recover the decretal sum.

3. The respondent avers that the Appellant breached the insurance contract by failing to settle the decretal sum as per the insurance policy/contract. The respondent enumerated the particulars of breach of the insurance contract by the respondent as failing to settle the decretal sum as per the contract and as a result causing the attachment and subsequent sale of motor vehicle registration No. KBV 605D Toyota Ractis.

4. The respondent pleaded that as a result of the said breach of contract she has suffered substantial loss and inconveniences. That the respondent also hired a taxi from when the vehicle was attached until one month after the sale of the vehicle.

5. The respondent enumerated particulars of special damages as value of the motor vehicle KBV 605D Toyota Ractis Kshs.500,000 and Costs of hiring a taxi kshs 200,000 hence a total of Kshs 700,000.

6. The Appellant filed his defence dated 9th December 2020 wherein he denied the respondent's claim. The Appellant admitted that it insured motor vehicle KBV 605D Toyota Ractis but it however denies that it ever failed to satisfy the judgement in Githongo Civil Suit No. 93 of 2017 when the purported suit was finalized and is a stranger to any attachment of the respondent's assets as alluded and thus called for strict proof.

7. The Appellant denied being in breach of the insurance contract or clause thereof which the respondent is called to specifically demonstrate the purported breach as the same is neither pleaded nor demonstrated in subsequent documents in support of the respondent's case.

8. The Appellant denied the pleaded breach and further stated that the respondent is not entitled to special damages. Without prejudice the Appellant pleaded that the respondent's action of laches authored her own misfortune and that the same cannot be attributed to the Appellant's action or inaction as alluded and shall therein rely on the doctrine of Ex Turpi Causa Non Oritur Actio.

9. After considering the evidence adduced, the learned trial magistrate awarded the judgement for the respondent against the Appellant as follows:

    i. The respondent's claim against the Appellant succeeds to the extent of kshs 400,000/= being the value of the sold motor vehicle KBV 605D as assessed by the court based on the two conflicting valuation reports and kshs 200,000/=being the special damages for hiring of the taxi.

    ii. Interest on the cumulative amount in (i) above at court rates from the date of this judgement until payment in full.

    iii. The respondent shall have the costs of the suit as against the Appellant.

    iv. The Appellant's claim against the 3rd party fails and it is dismissed with costs to the 3rd party.

10. The appellant was dissatisfied with the said decision and filed this appeal on the following grounds-;

    1. The learned Magistrate erred in Law in making a finding of damages against the defendant.

    2. The learned magistrate's judgement be rendered/delivered per incuriam.

    3. The learned Magistrate erred in fact and law in finding that the appellant was aware of the warrants of attachments yet the warrants came to the appellants knowledge on 26th July 2019 where the appellant wrote a letter to the auctioneers with cheques attached and received by the auctioneers on the 27th July 2019.

    4. The learned Magistrate erred in fact and law in finding that the appellant was served with requisite documents including statutory notice and summons in PMCC 93 of 2017 in total disregard to the provisions of section 5 and section 10 of the Insurance (Motor Vehicle Third Party Risks) Act and under the insurance policy.

    5. The learned Magistrate erred in law and fact in holding that the appellant failed to defend PMCC 93 of 2017.

    6. The Learned Magistrate erred in law and fact in finding that the appellant had failed to settle the decretal sum in PMCC 93 of 2017.

7. The Learned Trial Magistrate erred in over relying on the evidence of the respondent which was not corroborated and thus misdirected himself in making a finding against the appellant.

8. The Learned Trial Magistrate erred in awarding special damages that were not proven to the required standard.

9. The Learned Trial Magistrate erred in holding that the respondent had proved its case.

10. The Learned Trial Magistrate erred in fact and in law by failing to appreciate the evidence tendered by the appellant with regard to the damages already settled.

11. The Learned Trial Magistrate erred in fact and law in holding that the respondent is entitled to the reliefs sought.

12. The learned Trial Magistrate erred in failing to consider or properly consider the written submissions filed by counsel for the defendant/Appellant and to case precedents of senior courts before it.

13. The Learned Trial Magistrate erred in finding that the issues raised by the appellant in its statement of defense had not been proved.

14. The learned Trial Magistrate erred in law and fact holding the Appellant to be 100% liable for the accident when there was no sufficient evidence to support that finding.

15. The learned trial magistrate erred in Law and fact by awarding cost to the respondent.

16. Ultimately, the Appellant seeks to have the impugned judgement set aside, reversed and/or varied as well as the dismissal of the entire case of the Respondent against it.

11. The appellant proposed that the appeal be allowed with costs, the judgement delivered by Honourable E.Tsimonjero delivered in Meru Chief Magistrate's Courts MCCC.E003 of 2020 be set aside and the same be substituted with a proper finding/judgement, that the court finds that the award of Kshs 400,000 and 200,000 is unlawful and cost of the appeal be borne by the respondent.

12. The appeal was canvassed by way of written submissions. The appellant filed his submissions dated 28th February, 2024 through the firm of Marienga Advocates LLP while the respondent filed her submissions dated 26th February 2024 through the firm of G.M Wanjohi, Mutuma & Co Advocates.The 2nd respondent also filed his submissions dated 21st March 2024 through the firm of Mwirigi Kaburu & Co.

Appellant's Submissions

13. The Appellant submitted on a detailed background of the matter and outlined the jurisdiction of an Appellate court. The Appellant relied in the case of China Zhong Xing Construction Company Ltd v Ann Akuru Sophia(2020),Selle & Another v Associated Motor Boat Co. Ltd & Others (1968)EA 123,Peters v Sunday Post Limited (1958) EA 424 and Mbogo v Shah (1968)EA 93,94.

14. The Appellant submitted that they are seeking to demonstrate to the court in why the learned magistrate applied his discretion incorrectly. The Appellant laid out three issues for determination whether the learned magistrate failed to take into consideration relevant factors which it should have considered thus arriving at a wrong decision.

15. It is the Appellant's submission that section 10 of CAP 405 Laws of Kenya mandates an insurance company to settle judgment against its insured persons and the said section outlines instances where the insurance company is not liable to do so.

16. The Appellant submitted that on this argument the third-party counsel has a duty to inform the insurance of the said suit vide a notice and separately the insured person has a duty to inform the insurance of such a claim under the uberrimae fidae principle as the insurance is not a party to that suit. In that regard they submit that in a suit of that nature where the insured persons sue the insurance company the first duty of a court addressing itself on such a dispute is to ascertain whether the insurance company was notified of such proceedings.

17. It is the Appellant's submission that in the suit before the trial court no evidence was tendered to demonstrate that the insurance company was aware of that suit at Githongo as no such statutory notice was tendered in evidence.

18. The Appellant submitted on whether the Appellant was notified of the warrants of attachment.The Appellant submitted that the legal maxim of significant application to the matter at hand is "Affirmati Non Neganti Incumbit Probatio" that "he who alleges must prove" applies. That rule is bedded in sections 107 of the *Evidence Act*.

19. The Appellant submitted that the 1st respondent alleges that he brought the warrants of attachment to the attention of the appellant for which the appellant declined to settle the same. That during trial the plaintiff witness (1st respondent) during cross examination stated that lost warrants of attachment served upon her by the auctioneers. That surprisingly the 1st respondent tenders in evidence the lost warrants of attachment which are produced as P.exhbit 3.

20. It is the Appellant's submission that to the benefit of this court P. Exhbit 3 is seen on page 23 of the record of appeal. That it begs the question whether the said warrants of attachment were lost is an explanation why they therefore find themselves in the plaintiffs' bundle of documents and no such explanation is given in re-examination.

21. The Appellant submitted on the notification of sale that the plaintiff also indicates that she notified the appellant of an alleged notification of sale and for which the appellant ignored. That in that regard they examine whether such notification of sale is tendered in evidence by either the plaintiff or the auctioneer. The Appellant submitted that no such notification of sale is evident in either 1st and 2nd respondents' documents.

22. The Appellant submitted that as such the allegation that the appellant was notified of such a notification of sale is not proven in evidence and its whereabouts. That to apply logic to that pattern if incase the warrants of attachment were as explained by the plaintiff were lost why not tender the notification of sale to the appellant or in evidence as those documents are not issued at the same time as the auctioneer rules are pretty standard that the same are not issued at the same time. The Appellant relied on section 12(f) of the auctioneer rules and Order 22 rule 57 of the civil procedure rules.

23. It is the Appellant submission that as proof the appellant was in the dark in all those circumstances leading to the attachment and sale of the vehicle as the debtor has the equity of redemption any time before the public auction. The Appellant relied in the case Syrilla A. Barasa & 2 others v Margaret Aseka Barasa [2022] eKLR.

24. The Appellant submitted that the Civil Procedure Rules 2010 binds the Auctioneer and must follow the process laid down in the Auctioneer's Act and the Rules made thereunder. That an essential step

in that process is that the judgment debtor must have the opportunity to pay the debt and release his property. The steps are Proclamation, attachment and auction by notice.

25. It is the Appellant submission that each step is distinct and each must take place on a separate date within the timescales set out. That the Act and the Rules expressly provide for the judgment debtor to be afforded an opportunity to pay the judgment debt"

26. The Appellant submitted that the failure to have that crucial document would vitiate such a sale and in any event the duty to prove the same is that of the 1st respondent the insured person which evidence was not tendered to show such notice was issued to the appellant which fact remain denied.

27. The Appellant submitted that the timelines of notice and pay are that of the plaintiff to prove as the burden rests on him. That there are no stamps or evidence of receipt of service tendered by the plaintiff and on this note they argue that it is unclear when the said notice sufficed.

28. The Appellant submitted that they shall demonstrate how prevaricating his evidence is as we ask the court to see page 10 of the record of appeal on cross-examination wherein PW-1 states "I went to the offices of the insurance company before my motor vehicle was sold, but I cannot remember the date"

29. The Appellant also relied in the closing statements made in cross-examination as seen in the page 10 going to page 11 of the record of appeal on cross she states

> " The auctioneers never told me the person they sold the motor vehicle to. I went to the public auction but I did not find my vehicle I do not know if it was in the auctioneer's yard.

30. The Appellant submitted that they wished to enjoin the cross-examination of Mr. Karanja on page 11 of the record of appeal where she states.

> " I do not know if they had paid and at the time of the sale of motor vehicle"

31. The Appellant submitted that they have highlighted those section to demonstrate to the court that the 1st respondent is unaware of the date of the sale of the vehicle. That the respondent confirms on the date of the alleged sale she did not find her vehicle and she is unaware whether the said vehicle was even sold on the said date or at a later date. That as such her guess as to whether her vehicle was sold or not was knowledge within the auctioneers' ambit. That as such she cannot succinctly confirm that at the time, she reported at the insurance her vehicle had not been sold.

32. It is the Appellant's submission that as at the date of notification to the insurance remains a burden not shifted to the Appellant by the plaintiff. The Appellant further submitted that the courts assessment on that was flawed as it placed the burden of notifying the appellant on them whilst it was not the one with whom the warrants had been served.

33. The Appellant further submitted that those are good faith contracts and the plaintiff has the burden to prove such notice and at that point the ball rolls to the defendant.

34. It is the Appellant's submission that a demonstration that the appellant moved with alacrity to avert any crisis once the same was brought to its attention sometime in July the appellant prepared the cheques in settlement of both the decree and the auctioneer charges which awaited the auctioneer to tabulate his costs formally which he did and presented them for payment on 26th July,2019 and both cheques released to the auctioneer for onward transmission to the decree holder.

35. The Appellant submitted that to apply logic to that matter it would make no sense why the appellant would pay the decretal sum in question if it had knowledge of the fact the vehicle had been sold and

whether the monies for which the vehicle was sold at covered the decree or and charges and to put that to perspective is that the decretal sum is 321,312/= cumulative auctioneer costs is Kshs 194,422/=(both proclamations) bringing the outlay as 515,734/=. Making the obvious deduction of Kshs 270,000 would make this sum Kshs 254,734/=. The Appellant questioned why he then proceed to pay 321,312/=.

36. It is the Appellants submission that there was a deliberate attempt at hiding information that the vehicle the subject of proclamation had been sold at the time the said cheques were being issued and to avoid the idea that the auctioneer had already been paid in the initial process. That the duty of an auctioneer is that it ought to uphold the integrity of the court process.

37. It is the Appellant's submissions that the auctioneers actions to sell a vehicle and move to insist on payment of a decree of the same amount after the said fact is an actionable event in which he is liable for the events leading to the suit before the trial court and for the court to hold those actions of abuse of court process as him merely being an agent of a disclosed principle is reducing the duty of an auctioneer to be higher than the duty to maintain the integrity of the court process which duty supersedes that of his client and/or principal.

38. The Appellant submitted that the auctioneer's costs would have to be assessed against the decree of 321,312 which was what the appellant was under obligation to pay against had it been disclosed of such facts. The Appellant relied on Section 23 of the *Auctioneers Act* which demands auctioneers to perform their duties in a manner befitting of an officer of the court.

39. The Appellant submitted that it is also a well settled principle of law that auctioneers while executing decrees of the court do so as agents of the court. The Appellant relied in the case of National Bank of Kenya Ltd v Joly Family Stores & another Civil Appeal No 473 of 1999 [2005] eKLR.

40. The Appellant submitted on the issue of quantum that the respondent pleaded the assessed value of the motor vehicle being Kshs 500,000/- and the loss of use 200,000. That the trial court awarded Kshs 400,000 based on the conflicting reports of two motor vehicle assessors who undertook an assessment of the vehicle one month apart. That faced with those conflicting reports the trial court analysed that the disparity on those reports is due to the fact that the said reports were done for different purposes.

41. It is the Appellant's submission that the trial court's discernment of differing purposes as the root cause of the disparity warrants critical scrutiny. That while it is acknowledged that distinct objectives may indeed yield varied methodologies and perspectives, that rationale alone does not absolve the necessity for impartiality in expert opinions. That by attributing the incongruity solely to the divergent purposes of assessment raises significant concerns regarding the integrity and objectivity of their findings.

42. It is the Appellant's submission that it is imperative to recognize that the impartiality of expert opinions is paramount in ensuring the fairness and reliability of judicial decisions. Any suggestion of partiality, whether implicit or explicit, undermines the credibility of the entire evidentiary process and jeopardizes the integrity of the legal proceedings.

43. The Appellant submitted that the trial magistrate therefore making an assessment that the sums arrived at and reported by the experts differed due to purpose of the report and not independent expert opinion would in their view render the reports lacking in credibility.

44. It is the Appellant's submission that consequently, as the reports are deemed lacking in credibility due to their perceived bias stemming from their differing purposes, the court would then be compelled to rely on additional corroborating evidence to ascertain the true value of the vehicle.

45. The Appellant submitted that, that kind of an assessment of conflicting expert reports was dealt with by the Court of Appeal decision in the case of Amosam Builders Developers Ltd vs Betty Ngendo Gachie & 2 others (Nakuru Court of Appeal Civil Appeal NO.193 of 2001) (2009) eKLR.

46. It is the Appellant's submission that given the trial court's contention that the witnesses' credibility is compromised by the apparent disparity of nearly Kshs 200,000/= between their assessments, attributed to their instructions rather than impartial expert opinion, they respectfully urge the court to consider an alternative approach. That specifically they proposed that the court refer to the value of the vehicle as determined in a public auction, where the highest bid amounted to Kshs 270,000/=. That figure, they argue, more accurately reflects the true market value of the vehicle compared to the contentious reports of the experts. That by doing so, the court can arrive at a fair and impartial assessment of the vehicle's worth, independent of the discrepancies identified in the expert reports.

47. The Appellant further submitted that it is important to note that upon proclamation, the vehicle in question was assessed at Kshs 300,000 by the auctioneer. That it is noteworthy that the 1st respondent did not contest that valuation, which would typically occur if there were concerns about undervaluation, as stipulated under Section 10 of the *Auctioneers Act*.

48. The Appellant submitted that given the absence of such challenge by the 1st respondent, coupled with the trial magistrate's reservations regarding the credibility of the reports prepared for various purposes, they contend that the trial magistrate was duty-bound to dismiss said reports.That instead, the court should have relied on other evidence presented and assessed it in conjunction with the right to object to valuation, as outlined in the *Auctioneers Act*.

49. It is the Appellant's submission that, that exercise, unfortunately, was not undertaken by the 1st respondent. That therefore, they submitted that the trial magistrate ought to have adopted the value established by the highest bidder, amounting to Kshs 300,000, as it accurately reflects the true market value of the vehicle at the time.

50. The Appellant also submitted on the loss of use and relied in the court of appeal decision In Madison Insurance Company Limited –v- Solomon Kinara t/a Kiii Physiotherapy Clinic (2004) eKLR.

51. It is the Appellant's submission that it is imperative to highlight that thus far, the respondent has failed to provide or submit evidence regarding the existence of the insurance contract purportedly containing provisions to cover consequential losses. That the omission is particularly significant given the respondent assertion of such provisions being invoked due to the defendant's alleged failure to settle the claim. That moreover, the Court of Appeal has been apprised of the plaintiff's claim pertaining to the alleged loss of use resulting from the appellant's repudiation and/or perceived inaction. However, it is crucial to underscore that a general insurance policy, as presumed in this case, typically does not encompass coverage for such eventualities and in light of this absence of substantive evidence regarding the purported insurance contract and its provisions, especially concerning consequential losses, they submitted that the plaintiff's claim remains unsubstantiated.

52. The Appellant submitted that therefore, it is incumbent upon the respondent to furnish the court with compelling evidence to support their contentions and validate their claim for consequential losses as asserted in the Court of Appeal.The Appellant relied in the decision of Milimani High Court Civil case No. 248 OF 1997 S.M Thiga v Phoenix E.A Assurance Co.Ltd [2016] eKLR which decision basing its footing on the Re Madison Insurance Company Limited case (supra).

53. The Appellant submitted that consequently, the evidence tendered by the plaintiff is at best vague and unspecific as to who the said invoices are issued to and even whether the said invoices were paid as no accompanying receipts in proof of payment were attached or tendered as evidence. That as such in the

milieu of that trite positions held by superior courts and the quality of evidence tendered in support of that prayer, they submitted that the same ought to have been declined.

Respondents Submission

54. The respondent submitted on a detailed background of the matter and identified two issues for determination. The first issue for determination was whether the respondent proved her case on a balance of probability.

55. It is the respondent's submission that the Appeal seeks to challenge the award of damages to the respondent. The Appellant relied in the case in the case of *James Muniu Mucheru v National Bank of Kenya Ltd C.A Civil Appeal No 365 of 2017*(2019)eKLR.The respondent further relied on section 107 and 109 of the *Evidence Act*.

56. The respondent submitted that she produced a list of documents that were adopted by the court as exhibits in support of her averments. That the documents proved that there existed a contractual relationship between the Appellant and the respondent by dint of an insurance contract. That at the time of the accident refered to in Civil Suit No.93 of 2017 Githongo the insurance policy was active as between 16th September 2016 and 24th June 2017.That the accident occurred on 22nd December 2016.

57. It is the respondent submission that there was a lawful judgement in place and the respondent had not applied for the stay of the same and the auctioneers acted upon them lawfully as opined in the judgement. That the judgement was delivered on 11th May 2022.That the Appellants were aware of the judgement as they sent a letter dated 26th July 2019 to the auctioneers informing them that cheques dated 4th July 2019 had been dispatched to settle the decretal sum and the auctioneers fees. That the warrants of attachment had been issued the previous day 25th July 2019 to the respondent.

58. The respondent submitted that the Appellant had faulted the learned magistrate insinuated that they were not aware of the warrants. That the decree had been in place since 12th April 2019 yet they waited for the warrants of attachment to be issued three months after to the detriment and distress of the respondent who had suffered loss and had incurred expenses since the delivery of the judgement in PMCC 93 of 2017.

59. The respondent submitted that appellant was reluctant in performing their contractual obligations a failure which caused the respondent's motor vehicle to be auctioned and the respondent incurring expenses of hiring a taxi.

60. The respondent submitted on whether they were entitled to damages and cost and she relied in the case of Provincial Insurance Co. E.A Ltd v Mordekai Mwanga Nandwa. (KSM Civil Appeal No. 179 of1995).

61. It is the respondent's submission that she produced documents that proved that she incurred the loss and she was able to prove that there existed an insurance contract by production of a valid Certificate of Insurance.

62. The Appellant submitted that the Appellant was therefore contractually bound under Sections 5 and 10 of the Insurance (Motor Vehicle Third Party Risks) CAP 405 Laws of Kenya.

63. It is the respondent's submission that there was also a valuation report on the Motor Vehicle at Kshs 500,000. That the respondent had proved her case by the production of the documents adopted in court as exhibits and which were relied upon in the award of damages.

64. The respondent submitted that having won the case she was awarded costs and she relied on section 27 of the *Civil Procedure Act* and book by Justice Kuloba as he then was titled Judicial Hints on Civil Procedure ,2nd Edition 2005 at 95 on the issue of costs follows the event.

65. It is the respondent submission that the import is that a successful party is entitled to costs unless he or she is guilty of any misconduct or there exists some other good reasons and or cause for not awarding costs to the successful party.

66. The respondent submitted that she deserved the award of damages and costs as she had proved her case and she urged the Court to uphold the judgment and dismiss appeal with costs as against the Appellant.

2nd Respondents submission

67. The 2nd respondent submitted on brief facts of the case to the effect that he is sued as an auctioneer who attached and sold the Motor vehicle herein subject to a valid Court orders as admitted at ground 3 of the Record of Appeal. That the 1st Respondent had taken out an insurance policy and insured her motor vehicle Registration number KBV 605D TOYOTA RACTIS with the Appellant. That the vehicle was involved in an accident and Civil Suit no 93 of 2017 Githongo was filed against the 1st Respondent. That when the case was finalized, the Appellant failed to settle the decretal sum and motor vehicle registration NO KBV 605D Toyota Ractis was attached and sold to recover the decretal sum.

67. The 2nd respondent submitted that the Appellant has preferred 16 grounds in his appeal which they have considered here below in unison however with emphasis to ground 2, 3 and 4 which directly affect the 2nd Respondent. The 2nd respondent pointed out that they had read the 1st respondent's submission and they agree explicitly.

68. The 2nd respondent submitted that they informed the Court during chief examination, that there were two sets of warrants of attachment. That the first is dated 30th April 2019 for Kshs.321, 312/-.That failure by the 1st Respondent to settle that amount prompted her KBV 605D TOYOTA RACTIS to be proclaimed and sold. That however the vehicle was sold at Kshs.270,000/- vide Public Auction which amount did not satisfy the decretal sum plus auctioneer's fees hence the second attachment dated 25th July 2019 to settle the balance plus auctioneers fees which the Appellant settled.

69. It is the 2nd respondent submission that the record confirms that both the Appellant and the 1st Respondent agreed that the 2nd Respondent attached the KBV 605D TOYOTA RACTIS vide a valid court order warrant of attachments dated 30/04/2019 and 25/07/2019.

70. The 2nd respondent submitted that they urged the court to scrutinize 2nd Respondent's List of Documents dated 29/11/2021 for reference. That In fact the 1st Respondent whom joined the 2nd Respondent indicated she doesn't understand why their Client was brought into the proceedings.

71. The 2nd respondent submitted that the auctioneers execute court warrants. That it is their duty to ensure the warrants are executed against the property of the judgment

72. The 2nd respondent submitted that besides availing evidence disclosing his principal, the 2nd Respondent also produced evidence which substantiated his case that he acted within the Law which position is not opposed. That in view of the foregoing, it is very clear that in selling the suit vehicle, the 2nd Respondent acted as an agent of a disclosed principal who was identifiable and hence the Appeal against the 2nd Respondent should be dismissed with Costs. The 2nd respondent relied in the case of City Council of Nairobi V Wilfred Kamau Githua t/a Githua Associates & Another [2016]eKLR.

73. The 2nd respondent submitted that they urged the court to make a similar finding in the interest of justice and affirm the Trial court's decision that the 2nd Respondent was wrongly joined in those proceedings including the instant appeal and proceed to dismiss the Appeal herein explicitly with costs to the 2nd Respondent.

Analysis & Determination

74. The Court of Appeal held in the case of Mark Oiruri Mose vs. R. (2013) eKLR that:-

> " This Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that."

75. Thus, this Court is required to review and analyze the entire Record and evidence presented before the lower courts in respect of the present appeal and draw its own conclusion, bearing in mind that the benefit of hearing firsthand evidence from the witnesses themselves is lacking.

76. Having perused the Record of Appeal, the trial file and the respective submissions of the parties, the following are pertinent issues for determination:

    i. Whether the trial Magistrate erred in making a finding of damages against the Appellant.

    ii. Whether the trial magistrate erred in awarding special damages that were not proven to the required standard

    iii. Who bears the costs of the suit?

Whether the trial Magistrate erred in making a finding of damages against the Appellant.

77. The respondent pleaded that she had taken out an insurance policy and insured his motor vehicle registration No. KBV 605D Toyota Ractis with the Appellant. That the vehicle was involved in an accident and Civil Suit No 93 of 2017 Githongo was filed against the respondent. That when the case was finalized the Appellant failed to settle the decretal sum and motor vehicle registration no. KBV 605D Toyota Ractis was attached and sold to recover the decretal sum. The respondent avers that the Appellant breached the insurance contract by failing to settle the decretal sum as per the insurance policy/contract. The respondent enumerated the particulars of breach of the insurance contract by the respondent as failing to settle the decretal sum as per the contract and as a result causing the attachment and subsequent sale of motor vehicle registration No. KBV 605D Toyota Ractis.

78. The respondent pleaded that as a result of the said breach of contract she has suffered substantial loss and inconveniences. That the respondent also hired a taxi from when the vehicle was attached until one month after the sale of the vehicle. The respondent enumerated particulars of special damages as value of the motor vehicle KBV 605D Toyota Ractis Kshs.500,000 and Costs of hiring a taxi kshs 200,000 hence a total of Kshs 700,000.

79. At the hearing the respondent testified and adopted her written statements and list of documents both dated 16th September 2020 as her evidence in chief. She stated that she took out a comprehensive insurance policy with the Appellant for her motor vehicle KBV 605D Toyota Ractis. That the motor vehicle was involved in an accident and she was sued vide Githongo PMCC No 93 of 2017.That the Appellant refused to settle the decree against her and as such the motor vehicle was attached and sold to recover the decretal sum.

80. The respondent stated that her motor vehicle was attached on 2nd May 2019 and she was issued with a proclamation notice which she presented to the Appellant's offices at Meru town and who contacted the Auctioneers and promised to settle the decree in two weeks. That on 14th May 2019 she was served with a notification if sale indicating that the motor vehicle would be sold on 21st May 2019 unless the money was paid.

81. The respondent testified that she took the notification of sale to the appellant and they promised to pay. That the motor vehicle was seized by the auctioneers as the respondent failed to pay. That about one month from the date of seizure she learnt the motor vehicle had been sold. She produced the judgement in Githongo PMCC No.93 of 2017 as pex-1,warrants of attachment dated 30th April 2019 as pex 2,warrants of attachment dated 25th July 2019 as pex 3,notification of ale as Pex-4,auctioneers fee note as pex-5,certificate of insurance as pex-6 insurance policy schedule as pex 7,vehicle valuation report dated 26th April 2019 as pex-8,proclamation of movable property as Pex-9,demand notice as pex-10 and receipts for special damages as Pex 11.

82. According to the Plaint, the Respondent's first and main prayer was that she ought to have been compensated Kshs 700,000 by the Appellant for the loss of his vehicle through the auction sale. The trial magistrate concluded that the Appellant owed the Respondent a duty to settle her claims and in failing to do so, the latter suffered a loss which could be compensated for as prayed. The trial magistrate therefore awarded the Respondent Kshs. 600,000/= which comprised of the value of the sold motor vehicle kshs 400,000 and kshs 200,000 being special damages for hiring of the taxi.

83. The Appellant was duty bound to settle the decretal amount in Githongo PMCC No.93 of 2017 as the insurance policy was valid as at the time of the accident leading to the institution of that suit.

84. In order to receive compensation from an insurance company, an insured person must demonstrate to the court that he indeed had an existing contract (Insurance policy) with the insurance company. Secondly, such a person must demonstrate that they had an insurable interest in the particular thing that they seek compensation for. The concept of insurable interest was defined in the case of Lucena vs. Crawford (1806) 2 BOS PNR 269 at 302 where Lawrence J. stated that an insurable interest is essentially the pecuniary or proprietary interest that the insured stands to lose if the risk attaches. Similarly, in Anctol vs. Manufacture Life Insurance Company (1899) AC 604, it was defined as:-

> " That basic requirement of an insurance contract unless waived, that it generally means that the party to the insurance contract who is the insured or policy holder must have a particular relationship with the subject matter with the insurance whether that be 'a life or property or a liability' to which he might be exposed. Every insurance contract requires an insurable interest to support it, otherwise it is invalid."

85. Simply put, an insurable interest has the connotation of a pecuniary interest or proprietary interest (see Halford vs. Kymer (1930) 10 B.C. 724.) Courts have outlined the following as determinants of an insurance interest:

a) A direct relationship between the insured and the subject matter.

b) The relationship must have arisen out of a legal or equitable right or interest in the subject matter.

c) The interest bears any loss or liability arising in the event the loss or risk attaches.

d) The insured's right or interest in the subject matter must be capable of pecuniary estimation or quantification.

86. In the circumstances of this case, I am clear that the Respondent had an insurable interest at the time of the accident. This interest would lapse at the end of the insurance contract. It is clear that an accident occurred during the pendency of the Insurance contract and during the subsistence of the legal ownership of the vehicle by the Respondent.

87. The Appellant testified during the hearing that they had insured motor vehicle KBV 605D.That he was aware of the decree and certificate of costs in CMCC 93 of 2017.That they obtained it on 26th July 2019 and they settled immediately. That the payment was in respect of the warrant of attachment dated 26th July 2019.

88. The Appellant further testified that they were not aware of any other warrants and further they were not aware of the warrants of attachment dated 30th April 2009.During cross examination the Appellant indicated that they did not have warrants dated 26th July 2019.He also stated that he was not aware that the motor vehicle was sold. That the motor vehicle was sold on 6th June 2019.

89. In the appellant's defence he indeed admitted that they had insured the respondent's motor vehicle KBV 605D and therefore he was duty bound to settle the decree in Githongo PMCC No. 93 of 2017.The Appellant cannot escape from liability.

90. In addressing the above issues for determination, it is imperative that I first deal with the law on the subject. Section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act*, Chapter 405 of the Laws of Kenya is what the respondent's claim is hinged on and it provides as follows -

> "Duty of insurer to satisfy judgements 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.
>
> (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 provisions 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) .....

(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 provisions 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 whim notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto.

91. 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. 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.

92. It is my finding that Appellant had the knowledge of the existence of the suit and the resultant decree and a certificate of cost and it failed to pay the decretal sum on behalf of the respondent.

93. I now consider the award made by the trial court and whether it was appropriate under the insurance contract. The purpose of an insurance contract and the subsequent compensation is not meant to give an insured person unnecessary benefit or a profit of sorts from his loss. This was aptly cautioned by the Court of Appeal in the case of Madison Insurance Company Ltd vs. Solomon Kinara t/a Kisii Physiotherapy Clinic [2004] eKLR. It is solely meant to operate on the principle of indemnity.

94. Indemnity according to Black's Law Dictionary 10th Edition is defined as:-

> "To reimburse (another) for a loss suffered because of third parties or one's own act or default."

95. This means that whatever losses may be incurred, an indemnifier's work is to make good such a loss so as to restore the person in his or her original position.

96. The Supreme Court of India defined this concept as the basis of an insurance contract in the case of United India Insurance Company vs. Kantika Colour Lab and others Civil Appeal No. 6337 of 2001 as follows:-

> "Contracts of Insurance are generally in the nature of contracts of indemnity. Except in the case of contracts of Life Insurance, personal accident and sickness or contracts of contingency insurance, all other contracts of insurance entitle the assured for the reimbursement of actual loss that is proved to have been suffered by him. The happening of the event against which insurance cover has been taken does not by itself entitle the assured to claim the amount stipulated in the policy. It is only upon proof of the actual loss, that the assured can claim reimbursement of the loss to the extent it is established, not exceeding the amount stipulated in the contract of Insurance which signifies the outer limit of the insurance company's liability. The amount mentioned in the policy does not signify that the insurance company guarantees payment of the said amount regardless of the actual loss suffered by the insured. The law on the subject in this country is no different from that prevalent in England; which has been summed up in Halsbury's Laws of England – 4th Edition." [Underlining mine for emphasis].

97. Therefore, indemnity seeks to make good an insured person's position as if that loss had not occurred. It should not bring unnecessary gain to the party seeking compensation. In this case, the Respondent asked the trial court to make a finding that he ought to have been compensated for the loss of value of the motor vehicle and special damages incurred. Which I agree with.

98. Considering the totality of the evidence availed in this case, and applying the legal principles outlined in law, I am satisfied that the learned trial magistrate was justified in arriving at the decision he made. The findings and holdings of the learned trial magistrates were well founded and I find no basis to interfere with it.

99. In the result, I find no merit in the appellant's appeal and the same is dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT MERU THIS 25TH DAY OF JULY 2024.

L.W. GITARI

JUDGE