



Owuor v Kenya Orient Insurance Company Limited (Civil Appeal E369 of 2023) [2024] KEHC 8879 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8879 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E369 OF 2023
JK NG'ARNG'AR, J
JULY 25, 2024**

BETWEEN

WYCLIFFE ODHIAMBO OWUOR APPELLANT

AND

KENYA ORIENT INSURANCE COMPANY LIMITED RESPONDENT

(Being an appeal from the Judgment of the Hon. Nyariki, J. (SRM) delivered on 14th December 2023 in Mombasa Chief Magistrate's Court Civil Suit No. E390 of 2023, Wycliffe Odhiambo Owor v Kenya Orient Insurance Company Limited)

JUDGMENT

1. The background of the appeal herein is that the Appellant filed a suit in the trial court against the owner and/or driver of motor vehicle registration number KAZ xxxF Subaru Wagon insured by the Respondent. That the said motor vehicle caused an accident on 13th November 2018 and the Appellant sustaining serious injuries. The suit was heard and judgment issued against the Respondent and in favour of the Appellant for Kshs. 405,450 plus costs of the suit and interest. Despite notice of the judgment to the Respondent's insured, the decretal sum remained unsatisfied. The Appellant then filed a declaratory suit against the Respondent for payment of the decretal sum issued against the insured. The trial court issued judgment on 14th December 2023 dismissing the declaratory suit on grounds that the Appellant had not satisfied requirements of Section 10(2) of the [Insurance \(Motor Vehicle Third Party Risks\) Act](#).
2. Being dissatisfied with the judgment and orders of the trial court, the Appellant filed the appeal herein through the Memorandum of Appeal dated 15th December 2023 on grounds that the learned magistrate erred in law and fact by dismissing the Appellant's plaint and subsequent prayers by indicating that the Appellant had failed to satisfy the requirements for granting of the same, and that the learned magistrate erred in law and fact by disregarding the evidence presented by the Appellant



which confirmed that he was compliant for satisfaction of the laid down requirements for success in a declaratory suit.

3. The appeal was canvassed by way of written submissions. The Appellant in his submissions dated 20th May 2024 argued that the basis of a declaratory suit is Section 10(1) of the [Insurance \(Motor Vehicle Third Party Risks\) Act](#) and that he complied with requirements set out in the case of [Indiatsi Suing as the Personal Representative of the estate of Michael Simbili \(Deceased\) v Invesco Assurance Company Limited](#) (Civil Case No. E034 of 2021) (2023) KEHC 22913 (KLR). That during the hearing, the Appellant testified that he was involved in a road traffic accident on 13th November 2018 which accident involved Motor Vehicle Registration Number KAZ xxxF Subaru Wagon insured by the Respondent herein. That a Statutory Notice dated 7th February 2019 was duly served upon the Respondent informing them of the suit, together with particulars of their insured. That the Statutory Notice contains the Respondent's stamp whose particulars are similar to the stamp appended on the summons issued to them for the declaratory suit which they entered appearance and participated in. That the stamp is therefore concrete proof that they were indeed aware of the primary suit against them.
4. According to the Appellant, the suit proceeded with the Respondent's full knowledge as the firm of advocates representing them in the primary suit was the same in the declaratory suit and subsequent appeal. That upon service of the Statutory Notice, the Respondent did not respond disputing any facts or in any way deny liability as provided under Section 12 (1A) of the [Act](#). That judgment was issued in favour of the Appellant against the Respondent which information was confirmed by the Court's Executive Officer who further produced a decree to that effect albeit uncertified. The Appellant stated that the Respondent's only contention was that they were not party to the suit and strangers to the insurance policy relied on having been obtained fraudulently. The Appellant relied on the holding in the case of [Invesco Assurance Co. Ltd v Annette Wataka](#) (2016) eKLR to submit that the defence of fraud could not be relied on by the Respondent as the contractual relationship was between the insured and the insurer.
5. The Respondent filed submissions dated 27th May 2024 and contended that the High Court in dealing with the suit presented by the Plaintiff, the issues that needed proof are highlighted in [UAP Co. Ltd v Patrick Charo](#) [2021] eKLR under paragraph 16. That the claimant/appellant had the burden of proof and the manner of discharging it was dealt with in the case of [Benson Mutira Jiji v Gateway Insurance Co. Ltd](#) (Civil Appeal 126 of 2018) [2022] KECA 368 (KLR) (11 February 2022) (Judgment). That the trial court could therefore not be faulted for dismissing the case.
6. The Respondent submitted that the Appellant as the claimant had the evidential burden of proving his case on a balance of probability even where the respondent chose to remain silent as held in the case of [Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi](#) [2014] eKLR. That this was reiterated in the case of [Charterhouse Bank Limited \(Under Statutory Management\) v Frank N. Kamau](#) [2016] eKLR. The Respondent argued that the Appellant had the obligation to prove that the Respondent insured the subject motor vehicle and that the Appellant had obtained judgment for personal injuries occasioned by the said car against the Respondent. That however, the Appellant does not mention the Respondent anywhere, that he neither produce a sticker from the insurance company, policy document nor police abstract that mentioned the defendant as the insurer.
7. The Respondent further submitted that although one of the documents produced in evidence was a statutory notice, there was no evidence at all tendered to prove that the same was ever served. That the Appellant's statement which was adopted in evidence did not allege service of the same, that the Plaintiff also did not call the person who may have served the statutory notice as a witness, that neither was an affidavit of service nor a certificate of posting produced, and that in cross examination, PW2 indicated that he had no role in the purported service. The Respondent stated that in the



circumstances, service was not proved in accordance with the holding in *Miriam Njeri Njau v Attorney General* [2016] eKLR. That failure to prove service of statutory notice and who the insurer of the motor vehicle was means that the Appellant did not prove the case on a balance of probability and the same should be dismissed with costs.

8. This being the first appellate court, it is guided by the principles in *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 where it was held that: -

“...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 retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

9. I have considered the record of appeal, submissions and grounds of appeal, and the issue for determination is whether the Appellant had satisfied the requirements under the *Insurance (Motor Vehicle Third Party Risks) Act* for grant of prayers in the declaratory suit.

10. Parties take out insurance policies with the expectation that in case the risk insured against occurs, payment thereof will be made by the insurance company. The insurer has a duty under Section 10 (1) of the *Insurance (Motor Vehicle Third Party Risks) Act* with respect to third parties. This court notes that when the accident occurred, a police abstract dated 22.11.2018 was filled with details that the Appellant sustained injuries occasioned by motor vehicle registration number KAZ xxxF Subaru Station Wagon insured by Kenya Orient Insurance Ltd under policy number MSA/0700/250 222/2018.

11. This court also notes that there is evidence on record to show that the Respondent was served with a statutory notice which bears the Respondent’s stamp as proof of service pursuant to Section 10 (2) of the *Insurance (Motor Vehicle Third Party Risks) Act* which provides: -

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 thirty 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 connection 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.

12. The Respondent on the contrary relied on Section 12 (1) of the *Insurance (Motor Vehicle Third Party Risks) Act* to submit that the Appellant had the obligation to prove that the Respondent insured the subject motor vehicle but the Appellant failed to mention the Respondent anywhere, that he neither produce a sticker from the insurance company, policy document nor police abstract that mentioned the defendant as the insurer. The said Section provides: -

“Duty of person against whom claim made to give information

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.
13. This court is of the view that the Respondent had the responsibility of supporting its contention that it did not hold a valid policy of insurance with the defendant in the primary suit. The court in in *APA Insurance Co. Ltd v George Masele* [2014] eKLR held that: -

“As to the certificate of insurance which Ms. Akonga insists should have been produced, I am of the contrary view. The Certificate of Insurance is usually issued to the insured and not the road accident victim. It is a document in the special knowledge and possession of both the insured and the insurer. The road traffic accident victim cannot access it. The details in the police abstract as to the details of insurance are in the ordinary course of events obtained by the police from the Certificate of Insurance affixed to the motor vehicle or are supplied by the insured ...”

14. In conclusion, this court finds that the Appellant proved its case to the required standard, this appeal has merit and is hereby allowed in the following terms: -
- a. The trial court judgment in the declaratory suit is set aside
 - b. Judgement is hereby entered in favour of the Appellant against the Respondent for Kshs. 405,450/= together with interests from the date of judgement in CMCC No. 390 of 2023 being 14th December 2023.
 - c. Costs be in the cause.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 25TH DAY OF JULY 2024

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J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

No appearance Advocate for the Plaintiff

No appearance Advocate for the Defendant



Court Assistant – Samuel Shitemi

Further Order;

Notice to issue

J.K. NG'ARNG'AR, HSC

JUDGE

