



**Apa Insurance Limited v Genesis Highway Junior School & 3 others (Civil Appeal E058 of 2023) [2024] KEHC 12357 (KLR) (14 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12357 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E058 OF 2023  
RE ABURILI, J  
OCTOBER 14, 2024**

**BETWEEN**

**APA INSURANCE LIMITED ..... APPELLANT**

**AND**

**GENESIS HIGHWAY JUNIOR SCHOOL ..... 1<sup>ST</sup> RESPONDENT**

**HIGHWAY JUNIOR SCHOOL ..... 2<sup>ND</sup> RESPONDENT**

**BENTER AKOTH JUMA ..... 3<sup>RD</sup> RESPONDENT**

**FLORENCE A OGOL ..... 4<sup>TH</sup> RESPONDENT**

*(An appeal arising out of the Ruling and Order of the Honourable C.N.C. Oruo in the Principal Magistrate's Court at Winam delivered on the 17th March 2023 in Winam Principal Magistrate's Court, Civil Suit No. E082 of 2022)*

**JUDGMENT**

**Introduction**

1. In the lower Court, the 1<sup>st</sup> – 3<sup>rd</sup> respondents filed an application dated 24<sup>th</sup> June 2022 seeking leave to issue a Third-Party Notice against the appellant herein on the grounds among others that sometime about the 8<sup>th</sup> February 2022, the 1<sup>st</sup> respondent entered into a contractual agreement with the appellant for insurance services under which the appellant undertook to indemnify the 1<sup>st</sup> respondent against any liability from accidents subject to payment of annual premiums of Kshs.107,884.
2. In response, the appellant filed a preliminary objection dated the 24<sup>th</sup> October 2022 opposing the application for issuance of Third-Party Notice on the ground that the application was premature and offended the provisions of Section 10 (1) of the Insurance (Motor Vehicle Third Party Risks) Act.



3. In his determination of the Preliminary Objection, the trial Magistrate found that there existed a relationship between the appellant and the 1st respondent and further that the points raised in the preliminary objection could be raised in evidence during the hearing of the main suit and would help the court in apportioning liability between the parties if need be.
4. Aggrieved by that ruling, the appellant filed this appeal vide a memorandum of Appeal dated 13<sup>th</sup> April 2023 raising the following grounds of appeal:
  1. The learned trial magistrate erred in law and in fact by completely ignoring the appellant's Notice of Preliminary Objection dated 24<sup>th</sup> October 2022 leading at decision in justifiable in law.
  2. The learned trial magistrate misdirected himself by ignoring the appellant's submissions on the Preliminary Objection dated 24<sup>th</sup> October 2022 and consequently coming to a wrong conclusion on the same.
  3. The trial learned magistrate misdirected himself in ignoring the well settled principles applicable in determining preliminary objections and causing a miscarriage.
  4. The learned trial magistrate grossly misdirected himself by finding that the issues raised in the Notice of Preliminary Objection dated 24<sup>th</sup> October 2022 can be raised in evidence during the hearing of the main suit.
5. The appeal was canvassed by way of written submissions.

### **The Appellant's Submissions**

6. The appellant submitted that by virtue of the provisions of section 10 (1) of the Insurance (Motor Vehicle Third Party Risk) Act, an insurance company only becomes liable after judgment has been obtained by third parties against the person insured under a policy of insurance and not before.
7. It was further submitted that the pleadings filed by the 4<sup>th</sup> respondent in the primary suit did not disclose any cause of action against the appellant thus the application dated 24<sup>th</sup> June 2022 was premature and must be struck out with costs to the appellant.
8. It was submitted that an insured person can thus only benefit from the insurance contract after judgment has been obtained against it.
9. The appellant relied on the cases of Idris Faridi & 2 Others v Karithi Peter Murungi (2018) eKLR, Laichard Shah & Another v Kenindia Insurance Company Limited (2005) eKLR, Josephat Njuguna Kariuki v Simon Karichu Irungu (2004) eKLR and Pan Africa Company Limited v Grace Washo [2007] eKLR where the court in all these instances held inter alia that the insurance companies therein could not be enjoined in a primary suit and that therefore the application against the appellant herein in the trial court was premature as the 1<sup>st</sup> respondent only had a right to seek indemnity after judgment had been delivered.
10. The appellant also relied on the case of Kenindia Assurance Company Limited v James Otieno (1991) KLR 38 where the Court of Appeal held that the right to enforce crystallizes after judgment is delivered against an insured.
11. The appellant thus urged this court to allow the appeal with costs and that the ruling of the trial court dated 1.3.2023 and delivered on 17.3.2023 be set aside and be substituted with an order upholding the appellant's preliminary objection dated 24.10.2022.



## **The Respondents' Submissions**

12. It was submitted that the grounds in the memorandum of appeal circumvented the actual principle of the law that guides the determination, hearing and finding on matters that a Preliminary Objection had been raised as was held in the locus classicus case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 695* that laid the basis of what constitutes a Preliminary Objection.
13. The respondents submitted that at the trial court it was established that the Preliminary Objection was not based on a pure point of law for having been speculative in nature and factual argument for example, that the section cited was deficient of disclosing the actual stage at which the disputed application should be placed before the court.
14. It was further submitted that a candid look at the submissions of the appellant before the trial court defeated ground 2 of the appeal for failure to establish the concrete reason behind the assertion of the appellant, and in essence going against the principle as raised in the *Mukisa Biscuit Manufacturing (supra)* Case.
15. The respondents submitted that the relationship between the insured and the insurer is based on a contract and that a contract is a basic binding document which stipulates the on-goings between the parties who are party to the contract and that to understand the contract, evidence MUST be submitted and the court would have the authority to examine the said contract and thus the assertion that the application was premature, misconceived and only meant to expose the respondents to suffering was wrong.
16. It was submitted that the respondents were entitled to indemnity as stated in the Civil Procedure Rules 2010 (Order 1 Rule 15(1)) and hence the fact that the defendants had been sued out of a relationship touching on an Insurance Contract, such contrary assertion can only be determined upon concrete production of evidence, which evidence can come out clearly at a hearing.
17. It was submitted that the issuance of a Third-Party proceedings was a practice that is anchored in law and the Preliminary Objection was rightfully disallowed by the primary court and on the same foot, the appeal herein should fail completely. It was further submitted that the appellant had a duty towards the insured and such duty cannot be abdicated at will.
18. The respondents submitted that based on the legal principle prevailing, the statutory provisions, the insurance practice and law, the legal authorities and constitutional provisions, the appeal fails at the onset and costs should be granted in favour of the respondents.
19. In further support of their contentions, the respondents relied on the cases of *Milimani HC Commercial Case No. 88 of 2019*, *David Musili v Directline* and that of *Thika ELC Misc. No. 8 of 2021*, *Peter Muigai v Joseph Ngara & Another*.

## **Analysis and Determination**

20. As this is a first appeal, this court is under a duty to re-evaluate and reassess the evidence and make its own conclusions. It must, however, bear in 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. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR*, the court stated as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine



whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

21. The appellant’s case simply put is that the trial court erred by failing to sustain the Preliminary Objection in which it was contended that the application to have the appellant insurance company enjoined as a Third Party to the suit therein was in contravention of section 10 (1) of the *Insurance (Motor Vehicles Third Party Risks) Act*.
22. The trial court in its ruling noted that the issues raised in the appellant’s Preliminary Objection could be raised in evidence during the hearing of the main suit and would assist the court in apportioning liability between the parties if need be.
23. The question this court is faced with is whether the appellant’s preliminary objection was a Preliminary Objection as envisaged by law and case law. I have perused the trial court record herein and further considered the submissions by both parties through their counsel. The case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors (1969) EA 696* is the locus classicus on the issue of what constitutes a preliminary objection. The Court observed thus:

“...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case Sir Charles Newbold, P. stated:

“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

24. The Supreme Court in *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others* cited the *Mukisa Biscuit Manufacturing Co. Ltd supra*, and restated what the Court stated as follows on what a Preliminary Objection is:

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

25. The Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others [2015] eKLR* made the following observation as relates to Preliminary Objections:

“... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be



committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

26. In view of the foregoing, this Court shall seek to establish whether the grounds outlined in the Preliminary Objection dated 24.10.2022 meet the threshold set out in the aforementioned cases.
27. The appellant in its preliminary objection contended that an insurance company only becomes liable after judgment has been obtained by third parties against the person insured under a policy of insurance and not before.
28. In considering this Appeal, the main issue that emerges for determination by this court is whether the application and subsequent order on the issuance of Third Party Notice against the appellant was premature. The answer lies in section 10 of the Insurance (Motor Vehicle Third Party Risks) Act which provides 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 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 or that sum by virtue of any enactment relating to interest on judgments.”
29. A similar question has been considered by the courts in various decisions. In the case of *Laichard Shah & another v Kenindia Insurance Company Limited* [2005] eKLR Ang’awa J. when dealing with a similar situation held that:

“The insurance company according to Law are never enjoined as a party in a tort suit. This is because the cause of action against an insurance company arises after liability and quantum has been determined by a court of law. All the party suing requires to do before trial is to issue a statutory notice to the insurance company to notify them that a suit will be filed against their insured where the tort case is finalized and there is no pending appeals, review application and any issues. The insurance company on behalf of its insured would be obliged to pay. If it fails to do so, the plaintiffs are to file a declaratory suit in the High Court seeking for the court to pronounce that they are owed the award.”
30. It is not in doubt that there existed a relationship between the appellant and the 1<sup>st</sup> respondent as the appellant was the 1st respondent’s insurer. For that reason, Section 10 (1) of the *Insurance (Motor Vehicles Third Party Risks) Act* thus constitutes a pure point of law. This is because the section and authorities cited above are clear that the insurance company can only be brought into proceedings such as the ones subject of this appeal as the insurer after a determination on liability is made against the insured.
31. For the above reasons, and without much ado, I am persuaded that the Preliminary Objection dated 24.10.2022 was merited and that the ruling by the trial magistrate dated 1<sup>st</sup> March 2023 was in error. The application dated 24/6/2022 seeking leave of court to issue a Third-Party Notice against the appellant is struck out with costs to the intended Third Party/ Appellant herein.



32. The ruling dated 1<sup>st</sup> March, 2024 by Hon. C. Oruo, Principal Magistrate in Winam SPM CC No. E082 of 2022 is set aside and the Preliminary Objection dated 24.10.2022 is upheld.
33. As the issue which brought the parties before this court could easily have been resolved by the parties who ought to know the law and practice, I order that the appellant shall have costs of this appeal assessed at Kshs 40,000 to be paid by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents jointly and severally within 60 days of today and in default, the appellant shall be at liberty to execute for recovery.
34. This file is closed.
35. I so order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 14<sup>TH</sup> DAY OF OCTOBER, 2024**

**R.E. ABURILI**

**JUDGE**

