



**Kenya Orient Insurance Company Limited v Ondiek & another (Civil Appeal 623 of 2019) [2023] KEHC 1955 (KLR) (Civ) (17 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1955 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
CIVIL APPEAL 623 OF 2019  
AN ONGERI, J  
MARCH 17, 2023**

**BETWEEN**

**KENYA ORIENT INSURANCE COMPANY LIMITED ..... APPELLANT**

**AND**

**MILLICENT OWUOR ONDIEK ..... 1<sup>ST</sup> RESPONDENT**

**ABUBAKAR SALIM ABUBAKAR ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. Oburu (SPM) in Nairobi Milimani CMCC no. 6734 of 2013 delivered on 8/10/2019)*

**JUDGMENT**

1. The two appeals herein no. 623 and 642 of 2019 were consolidated for ease of disposal since they involve the same cause of action.
2. The two appeals arose from Milimani CMCC no. 6734 of 2013.
3. Appeal no. 623 of 2019 is in respect of the judgment delivered on 8/10/2019 by Hon. A. M. Obura (SPM) while Appeal no. 642 of 2019 is in respect of the same judgment but in respect of the dismissal of the appellant's suit against the 2<sup>nd</sup> respondent (Abubakar Salim Abubakar).
4. A summary of the case was that on December 13, 2008, the appellant was knocked down by motor vehicle registration KBB 303G Toyota Station wagon while she was walking along Lenana Road.
5. The said motor vehicle was insured by the 1<sup>st</sup> respondent and the insurance policy was registered under Abubakar Salim Abubakar (the 2<sup>nd</sup> respondent).



6. The plaint was amended on December 13, 2017 and the 2<sup>nd</sup> respondent Abubakar Salim Abubakar was enjoined as the 2<sup>nd</sup> defendant.
7. The case against Abubakar Salim Abubakar was dismissed on 8/10/2019.
8. On October 23, 2018 interlocutory judgment had been entered against Abubakar Salim Abubakar.
9. The appellant has sought a partial appeal against the order dismissing the suit against Abubakar Salim Abubakar when there was an interlocutory judgment entered against him.
10. The parties filed submissions as follows; the 1<sup>st</sup> respondent in her written submission argued that it is well settled that interlocutory judgement can only be entered where a defendant fails to enter appearance in a suit involving a liquidated claim, a liquidated claim together with another claim or in a suit for detention of goods. That its request for judgement dated October 23, 2018 the appellant sought for a judgement against the 2<sup>nd</sup> respondent who had failed to enter appearance and file a defence within the requisite time despite having been served with summons to enter appearance. In this case the request was allowed and judgement on liability was entered.
11. The 1<sup>st</sup> respondent submitted that the role of the court after entering an interlocutory judgement was only to assess damage awardable to it. The trial court however dismissed the suit against the 2<sup>nd</sup> respondent and occasioned a miscarriage of justice. The decision to dismiss the suit against the 2<sup>nd</sup> respondent without an express prayer from the parties was reached in excess of authority and was in breach of natural justice.
12. The 1<sup>st</sup> respondent further submitted that the trial court having entered the interlocutory judgement, the learned magistrate made an error when she determined that the 2<sup>nd</sup> respondent ought not to have been enjoined and as a consequence sat in its own appeal.
13. This being a first appeal, the duty of the 1<sup>st</sup> appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion as to whether to support the findings of the trial court.
14. The issues for determination in this appeals are as follows:
  - i. Whether the court was right in dismissing the suit against the 2<sup>nd</sup> defendant when there was an interlocutory judgment.
  - ii. Whether the partial appeal should be allowed.
15. On the issue as to whether the court was right in dismissing the suit against the 2<sup>nd</sup> respondent, I find that interlocutory judgment having being entered, the issue of liability was settled and the only issue to be determined by the trial court was quantum of damages.
16. The trial court had no basis for dismissing the suit against the 2<sup>nd</sup> respondent.
17. I find that the partial appeal is meritorious and I accordingly allow it with costs to the respondents.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 17<sup>TH</sup> DAY OF MARCH, 2023.**

.....

**A. ONGERI**

**JUDGE**

**In the presence of:**



..... for the Appellant  
..... for the 1<sup>st</sup> Respondent  
..... for the 2<sup>nd</sup> Respondent

