



**Fidelity Shield Insurance Ltd v Ndirangu (Civil Appeal 114 of 2021)
[2023] KEHC 18472 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18472 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 114 OF 2021
HK CHEMITEI, J
JUNE 15, 2023**

BETWEEN

FIDELITY SHIELD INSURANCE LTD APPELLANT

AND

DAVID NDERITU NDIRANGU RESPONDENT

*(Being an Appeal from the Judgement of Hon D Mosse (SRM)
dated September 21, 2021 In Nakuru CMCC No 1127 Of 2017)*

JUDGMENT

1. This appeal arises from a declaratory suit. The respondent had filed a claim for damages pursuant to a road traffic accident against the appellants insured vide case no Nakuru CMMCC 471 of 2017 and he obtained judgement. His efforts to execute against the defendant bore no fruits as he was unavailable.
2. He then filed a declaratory suit No CMCC 1127 of 2017 against the appellant. The trial court ordered the appellant to settle the claim since it had insured the defendant in the primary suit. The appellant dissatisfied with the said judgement has filed this appeal citing several grounds.
3. Principally there are two substantive grounds namely whether the court shifted the burden of proof against the appellant and whether a proper notice was issued to the appellant as provided under the [Cap 405](#) Laws of Kenya.
4. The parties were directed to file written submissions which they have complied.
5. The appellant argued that the court shifted the burden of prove to it without taking into considerations the provisions of the [Evidence Act](#) that he who alleges must prove. It denied that it admitted the respondent's defence, namely, that it had insured the defendant in the primary suit.



6. On the issue of notice, it submitted that no proper statutory notice was issued by the respondent in line with Section 10 of [Cap 405](#). In the absence of a valid statutory notice the trial court ought to have dismissed the respondent's suit.
7. The respondent on his part supported the findings by the trial court and argued that the notice and other documents it relied on in the trial clearly indicated that the appellant was well aware of the matter and that indeed the cover was alive within the period of the accident.
8. He went on to state that the notices issued were valid and in line with the requirements of the Act and all that the appellant was doing was running away from its responsibility. He stated that the appellant did not call any witness to rebut the respondent's claim.

Analysis and determination.

9. The court at this level is expected to re-evaluate the evidence and come up with an independent finding as was stated in *Selle v Associated Motor Boat Company Ltd* (1968) EA 123.
10. The court proposes to begin with the issue of whether a proper notice was issued before the primary suit was instituted. Section 10 (2) (a) of cap 405 provides as follows;

- “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 thirty days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings; “

11. Clearly all that the claimant must do is to issue a notice as stipulated above. It was the contention of the appellant that there was no notice issued by the respondent. I have perused the record of appeal as well as the original court file and it appears that there are two sets of notices issued by the respondent.
12. The first one was a letter dated February 21, 2017 addressed to Jodefa Rizwan Salim and copied to the appellant. The copy to the appellant contained the policy number.
13. Then there is the Notice of institution of suit dated February 21, 2017 which formed part of the respondent's evidence. Can the two documents be termed as adequate notice as anticipated by the Act.?
14. Looking at the provisions of Section 10 above there is no proper format requiring a party issuing the notice to use. It simply mentions a “the insurer had notice of the bringing of the proceedings”
15. If parliament wanted a specific format, then it should have stated so and provided it under the subsidiary legislation in the usual manner. This argument was clearly stated in [Philip Kimani Gikonyo v Gateway Insurance company limited](#) (2007) eKLR where the learned court stated as hereunder;

“So, what form should a notice take? It simply does not matter. A notice is a notice. The main purpose of a notice is to alert the insurer of a potential claim, a potential liability, so that the insurer can take steps to protect its interest by defending the action, investigating the same, attempting to settle the same and doing anything it wants to in order to protect its rights and interests. The notice need not be in any particular format, and with due respect to the Lower Court, there is nothing like an “actual” notice, or a “not-so-actual” notice. Any notice, howsoever given, as long as it sufficiently outlines the happening of an event giving



rise to a claim under the insurance policy, is good notice under the Act. So, here in this case, was such a notice given? In my view, most definitely it was. It is not in dispute that the insurer was served with a copy of the demand letter dated 25th March, 1985 from the Appellant's advocates addressed to the insured Fibre Reinforced Plastics Limited. The insurer's witness, Mr. Washington Makau Kaveke, acknowledged this notice in his testimony before the Lower Court (see page 15 of the Record). However, the Lower Court rejected this as not being "actual notice". It was clearly wrong in doing so.

16. The appellant submitted that the notice produced as exhibit p3 indicated that the defendant was Fidelity shield insurance company limited instead of the insured. Looking at the said notice, and although the same states as the appellant has stated, the other details especially the insurance cover as well as the insured clearly all points out to the appellant. This in my view does not lessen the fact that the same was clearly understood by whoever was meant to receive.
17. In any case the demand letter earlier alluded to was as well sufficient and it was buttressed by the police abstract which indicated an occurrence of an accident and details of the parties involved and in this case the insurer which was the appellant.
18. I find the argument whether the notice was delivered to the appellant spurious and holds no water as the same were produced at the trial court without any let or hindrance. At any rate and as rightfully submitted by the respondent the appellant did not consider it necessary to call any witnesses to rebut the respondent's evidence in the suit.
19. On the last issue I do not think it is true that the trial court shifted the burden to the appellant. The respondent did testify and produced the documents or exhibits he relied on. The appellant on the other hand chose not to. The court therefore relied on what was before it in arriving at the impugned decision.
20. This court however agrees with the appellant's submissions that the trial court erroneously stated that the appellant in its defence had admitted the respondent's claim. On the contrary the defence on record does not state so.
21. For the foregoing reasons I find no merit in the appeal and the same is hereby dismissed with costs.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 15TH DAY OF JUNE 2023.

H K CHEMITEI

JUDGE

