



Fidelity Shield Insurance Company Limited v Maindi (Civil Appeal E010 of 2021) [2023] KEHC 20049 (KLR) (17 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20049 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E010 OF 2021
WM MUSYOKA, J
JULY 17, 2023**

BETWEEN

FIDELITY SHIELD INSURANCE COMPANY LIMITED APPELLANT

AND

JOSEPH SANDE MAINDI RESPONDENT

(An appeal arising from the judgment of Hon. Lucy Ambasi, Chief Magistrate, CM, delivered on 15th February 2021, in Busia CMCCC No. 52 of 2017)

JUDGMENT

1. The suit at the primary court was initiated by the respondent against the appellant, for a declaratory order that it pays to the respondent a sum of Kshs. 507,670,00, with costs and interests, in satisfaction of a decree in Busia CMCCC No. 109 of 2015. The respondent had alleged that he had been injured in an accident involving motor vehicle, registration mark and number KBY 792F, insured by the appellant, during the duration of the cover, and he had obtained a decree in Busia CMCCC No. 109 of 2015, which the appellant declined to settle, despite the cover being valid, and notice being duly given. The appellants filed a defence, in which they denied liability.
2. A trial was conducted, in which the respondent testified, and the appellant called a witness. A judgment was delivered on February 18, 2020. A declaratory order was made in favour of the respondent, directing the appellant to settle the decretal amount in Busia CMCCC No. 109 of 2015.
3. The appellant was aggrieved, hence the instant appeal. The grounds in the memorandum of appeal, dated March 11, 2021, revolve around the appellant having provided evidence that it had not issued a policy of insurance to the respondent to cover the alleged vehicle; the trial court relying on a police abstract which had been marked for production but was not eventually produced; shifting burden of proof to the appellant before the respondent had established a case against it; and the trial court handling the matter in a cursory and speculative manner.



4. Directions were given on March 6, 2023, for disposal of the appeal by way of written submissions. There has been compliance. Both sides have filed written submissions.
5. The appellant submits that the respondent did not provide proof that the appellant had insured the accident vehicle, and had ever issued a certificate of insurance to Kassim Juma and Benson Ongoma; that there was no evidence that there was a contract of insurance between the appellant and the defendants in Busia CMCCC No. 109 of 2015, in terms of sections 5 and 10 of the *Insurance (Motor Vehicle Third Party Risks) Act*, Cap 405, Laws of Kenya; that the decisions in *Peter Gichibi Njuguna vs. Jubilee Insurance Company Limited* [2016] eKLR and *Joseph Mwangi Gitundu vs. Gateway Insurance Company Limited* [2015] eKLR, relied on by the trial court, were distinguishable, as the insurers, in these cases, had admitted that they had insured the subject vehicles.
6. The respondent submitted that he had satisfied the requirements for a declaratory order, as set out in *The New Great Insurance Company of India Limited vs. Lilian Evelyn Cross and another* [1966] EA (Newbold VP, Crabbe & Sir Clement de Lestang, JJA); that the evidential burden had shifted to the appellant once he satisfied the requirements for a declaratory order, and cites *Ng'ang'a vs. Wangui & another* [2022] KEHC 10228 (KLR) (Gikonyo, J); and that the appellant failed to prove that the certificates of insurance that it issued in 2014/2015 excluded that whose number was set out in the statutory demand given to it by the respondent.
7. It is not in dispute that the alleged accident happened, involving the respondent and the vehicle in question. From the testimony of DW1 it is not disputed that a notice of entry of judgment was made in Busia CMCCC No. 109 of 2015. The only issue in contention is whether there was a contract of insurance between the appellant and the defendants in Busia CMCCC No. 109 of 2015, to warrant a declaratory order being made that the appellant settle the decree passed in that suit.
8. The respondent was not the owner of the accident vehicle, and he could not possibly be the insured person in respect thereof. He could not be privy to the insurance contract, so as to be in a position to produce the documents on the contract of insurance, the subject of the dispute. He could only rely on information or material generated on that contract by parties privy to it. What he relied on was a police abstract report on the accident, which he claimed had details of the insurer of the accident vehicle, inclusive of the number of the insurance policy and certificate number. I agree with the positions taken by my colleagues at the High Court, approved by the Court of Appeal, that information in the police abstract, on ownership of a motor vehicle, is good enough evidence of ownership thereof, as that information is usually drawn from the insurance sticker on the windscreen of the accident vehicle. See *Superfoam Ltd & another vs. Gladys Nchororo Mbero* [2014] eKLR (Makau, J), *Fredrick Odongo Otiemo vs. Al-Hussain Motors Ltd* [2020] eKLR (Aburili, J), *Bernard Muia Kiloo vs. Fresh Produce Exporters* [2020] eKLR (Gitari, J) and *Cyprian Sibwoga Mokurumi vs. Richard Mutwol Kipyegon* [2021] eKLR (Ng'etich, J). By analogy, the information on the insurer of the said vehicle, drawn from the same insurance sticker, should be taken as adequate proof that the vehicle was insured by the insurance company indicated.
9. The challenge with this matter is that the respondent did not produce the police abstract before the trial court, in Busia CMCCC No. 52 of 2017. The same was marked, on August 9, 2018, for identification, to be produced later as an exhibit, ostensibly by either its maker or by an officer from the police station which had issued it. On March 28, 2019, the Advocate for the respondent is on record asking for an adjournment, to enable him procure attendance of a traffic police officer from Bumala Traffic Police Base, where the accident was reported, and that plea was accepted by the court. The traffic police officer was never called, for the respondent closed his case on 12th January 2021. There is no evidence that the police abstract report was ever produced as an exhibit, by consent of the parties. Consequently, the



same never became part of the court record. It was, therefore, not available for the trial court to place any reliance of on it. See *Kenneth Nyaga Mwige vs. Austin Kiguta & 2 others* [2005] eKLR (Visram, Mwilu & Otieno-Odek, JJA) and *Finmax Community Based Group & 3 others vs. Kericho Technical Institute* [2021] eKLR (Ouko P, Musinga & J Mohammed, JJA).

10. The police abstract report would have been the only evidence, that the respondent could rely on, to prove that there was contract of insurance between the appellant and the defendants in Busia CMCCC No. 109 of 2015, and without it the case by the respondent collapsed. It was submitted that once the number of the certificate of insurance was made available to the appellant, the burden of proof shifted to the appellant, to prove that it did not issue an insurance policy or a certificate of insurance bearing that number in the years in contention. The evidential burden would have shifted to the appellant only upon the police abstract report being placed on record as an exhibit, whether the original or its certified copy, or upon a police officer from the Bumala Police Traffic Base coming to court with the police file, and giving details of what was established from their investigations of the subject accident. Without that, there was no foundation to require the appellant to do anything. All what the respondent had was a number, of the alleged insurance policy or certificate of insurance. There was a duty on his part to show where he got the number from, for that number to be given some authenticity, before the appellant could be asked to give evidence on it. The respondent failed to do that. His case against the appellant was not established, and the suit in Busia CMCCC No. 52 of 2017 should have been dismissed.
11. Overall, I find merit in the appeal herein. I, accordingly, therefore, allow it, set aside the orders made in the judgment delivered in Busia CMCCC No. 52 of 2017, on February 18, 2021, and substitute them with an order that the suit in Busia CMCCC No. 52 of 2017 is hereby dismissed. Each party shall bear their own costs. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 17TH DAY OF JULY 2023

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances

Mr. Muma, instructed by Muma Nyagaka & Company, Advocates for the appellant.

Mr. F. Omondi, Advocate for the respondent.

