Kenya Orient Insurance Company Limited v Choga (Suing on Behalf of the Estate of Katana Ngalia Mwaro) (Civil Appeal E002 of 2020) [2023] KEHC 20699 (KLR) (19 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20699 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E002 OF 2020

OA SEWE, J

JULY 19, 2023

BETWEEN

KENYA ORIENT INSURANCE COMPANY LIMITED .... APPELLANT

AND

SIMEON YAAH CHOGA (SUING ON BEHALF OF THE ESTATE OF KATANA NGALIA MWARO) .... RESPONDENT

(Being an Appeal from the judgment of Hon. E. Muchoki (CM), delivered in Mombasa on 20{{^th}} August, 2020 in Mombasa CMCC No. 1574 of 2018)

JUDGMENT

1. This appeal arose from the Judgment delivered by Hon. E. Muchoki on 20th August 2020 in Mombasa CMCC No. 1574 of 2018: Simeon Yaah Choga (suing on behalf of the Estate of Katana Ngalia Mwaro) v Kenya Orient Insurance Company Ltd. In the said suit, the appellant had been sued by respondent for a declaration that the Appellant is statutorily bound under the *Insurance (Motor Vehicles Third Party Risks) Act*, Chapter 405 of the Laws of Kenya, to pay the decretal sum of Kshs. 1,246,897.00/= awarded in CMCC NO. 1929 of 2009. The respondent also asked for costs of the primary suit together with interest from 9th February 2018 till payment in full as well as costs of the declaratory suit.

2. The respondent's cause of action in the declaratory suit was that, at all material times, the appellant was the insurer of Motor Vehicle Registration No. KAU 661X, Toyota Sprinter, vide insurance Policy No. 201070523 which it issued under the *Insurance (Motor Vehicles Third Party Risks) Act*, whereby the appellant agreed to insure the owner of the subject motor vehicle in respect of perils involving third parties, such as death or bodily injuries arising in connection with the use of the said motor vehicle. The respondent further averred in his Plaint in the declaratory suit that, on or about the 29th April 2008 during the currency of the insurance Policy No. 201070523/TPO, the deceased was travelling as a lawful fare paying passenger in Motor Vehicle Registration No. KAT 069B when Motor Vehicle

Registration KAU 661X was so negligently driven that it collided with Motor Vehicle Registration No. KAT 069B, thereby causing the deceased, Katana Ngalia Mwaro, fatal injuries.

3. At paragraphs 5 to 8 of his Plaint, the respondent explained that, on account of the accident, he commenced legal proceedings for general and special damages against the appellant's insured in Mombasa CMCC No. 1929 of 2009 in which judgment was entered in favour of the estate of the deceased on 9th February 2018 in the sum of Kshs. 1,246,897/= together with interest and costs. Thereafter the respondent notified the appellant of the liability, pursuant to the provisions of *Insurance (Motor Vehicles Third Party Risks) Act*, before commencing the declaratory suit on 3rd August 2018.

4. In his judgment dated 20th August 2020, the learned magistrate, found in favour of the respondent and consequently entered judgment for him as prayed in the Plaint in the sum of Kshs. 1,246,897/= together with interest from 9th February 2018 till payment in full and costs of the declaratory suit.

5. Being aggrieved by that decision, the appellant filed the instant appeal on 28th September 2020 on the following grounds:

   (a) The learned magistrate erred in law and in fact in not properly appreciating the evidence that was before him;

   (b) The learned magistrate erred in law and in fact in making a finding that the appellant was the insurer of Motor Vehicle Registration No. KAU 661X, Toyota Sprinter;

   (c) The learned magistrate erred in law and fact in finding that the appellant issued Insurance Policy No. 201070523;

   (d) The learned magistrate erred in law and in fact in finding the appellant liable under the *Insurance (Motor Vehicles Third Party Risks) Act*;

   (e) The learned magistrate erred in law in failing to appreciate the evidence that was before him;

   (f) The learned magistrate erred in law and in fact in considering irrelevant matters and in failing to consider relevant matters in making his award for damages;

   (g) The learned magistrate erred in law and in fact in generally making erroneous findings in the suit.

6. Accordingly, the appellant prayed that the appeal be allowed and the judgment of the lower court delivered on 20th August 2020 in Mombasa CMCC No. 1574 of 2018 be set aside and be substituted with an order of this Court dismissing the said suit. The appellant also prayed that the costs of the appeal be provided for.

7. The appeal was urged by way of written submissions pursuant to the directions given herein on 11th May 2022. Accordingly, learned counsel for the appellant, Mr. Okello, relied on his written submissions filed on 27th June 2022. He identified the central issue to be, whether the appellant issued a Policy of Insurance No. 201070523. The secondary issue, according to Mr. Okello is whether the learned magistrate considered irrelevant matters while failing to consider relevant matters, thereby making erroneous findings.

8. On whether the appellant issued a Policy of Insurance, Mr. Okello submitted that, whereas this was the key issue in the declaratory suit between the respondent and the appellant, the respondent utterly failed to prove this aspect of his case; opting instead to rely on the Police Abstract. He pointed out that, on the other hand, the appellant presented cogent evidence through its Branch Manager, Caroline Simiyu (DW1) that no such policy as purported by the respondent was ever issued by the appellant.

Counsel therefore relied on Section 107(1) of the *Evidence Act*, Chapter 80 of the Laws of Kenya to submit that the subordinate court's decision was plainly wrong. He made reference to Alice Wanjiru Ruhiu v Messiac Assembly of Yahweh [2021] eKLR; Kirugi & Another v Kabiya & 3 Others [1987] KLR 347 and Thuranira Karauri v Agnes Ncheche, Civil Appeal No. 192 of 1996, for the proposition that the burden of proof was on the respondent in this regard.

9. Mr. Okello further submitted that, the mere fact that the lower court did not even consider the sworn evidence of DW1 was a misdirection and therefore a sufficient ground, in itself, for this Court to overturn the decision of the subordinate court. He relied on Selle v Associated Motor Boat Company Ltd [1968] EA 123 and Platinum Car Hire and Tours Ltd v Samuel Arasa Nyamesa & Another [2019] eKLR in urging the Court to consider the evidence adduced before the lower court, evaluate it and draw own conclusions thereon. He added that, had the lower court placed appropriate weight on the evidence of DW1, it would have come to the correct conclusion, namely, that the alleged policy did not exist.

10. Mr. Okello also contended that, by considering whether a statutory notice had been served and whether the appellant was bound by a police abstract produced in a case in which the appellant was not a party, the subordinate court was considering irrelevant matters; and consequently arrived at an erroneous decision. Counsel accordingly prayed that the appeal be allowed and the orders prayed for by the appellant granted.

11. On his part, Mr. Musyimi for the respondent relied on his written submissions dated 4th July 2022. He started off from the premise that there is a judgment in existence dated 9th February 2018 in Mombasa CMCC No. 1929 of 2009 as against the owner of Motor Vehicle Registration No. KAU 661X, who is the insured for purposes of this appeal. Accordingly, he submitted that the insurer of the said motor vehicle is under obligation to settle the judgment debt in CMCC No. 1929 of 2009 in accordance with Section 10(2) of the *Insurance (Motor Vehicles Third Party Risks) Act*. Counsel further submitted that the appellant was duly served with the statutory notice dated 2nd February 2009 before the declaratory suit was filed; and that the appellant did not raise any issue with the service of the said notice.

12. On whether the appellant was the insurer of the subject motor vehicle, Registration No. KAU 661X Toyota Sprinter, Mr. Musyimi submitted that, in order to support the facts pleaded in the declaratory suit, CMCC No. 1574 of 2018, the respondent relied on a police abstract dated 3rd May 2008 in which the appellant's name featured as the insurer. He added that the respondent's evidence was uncontroverted as the appellant opted to not avail documents to disprove the respondent's assertions. He urged the Court to rely on the evidence adduced before the lower court and find that the respondent proved his case to the requisite standard. He made reference, in this regard, to Section 34(1)(a), (b) and (d) as well as Section 38 of the *Evidence Act* and the cases of Kenya Alliance Insurance Co. Ltd v Thomas Ochieng Apopa (suing as the Administrator of the Estate of Pamela Agola Apopa, deceased) [2020] eKLR, Martin Onyango v Invesco Assurance Company Limited [2015] eKLR, Judith Anyango v Invesco Assurance Limited [2021] eKLR, David Wambua Kisau v Invesco Assurance Co. Ltd [2019] eKLR and APA Insurance Company Limited v George Masele [2014] eKLR for the submission that a police abstract is sufficient proof of insurance in such cases. Accordingly, Mr. Musyimi prayed for the dismissal of this appeal with costs.

13. This being a first appeal, it is the duty of this Court to re-evaluate the evidence placed before the lower court and make its own conclusions thereon, while giving due consideration for the fact that it did not have the advantage of seeing or hearing the witnesses (see Selle & Another v Associated Motor Boat Co. Ltd & Others, supra). Accordingly, I have re-examined the evidence presented before the lower court. The respondent's evidence was that the appellant was the insurer of motor vehicle number KAU 661X Toyota Sprinter under insurance policy number 201070523, issued under the Insurance

(Third Party Risks) Act. The Respondent added that on 29th April 2008, during the currency of the said insurance policy number 201070523/TPO, the deceased, Katana Ngalia Mwaro, was a lawful fare paying passenger in motor vehicle KAT 069B when the appellant's insured/authorized driver so negligently, recklessly and carelessly drove, managed and/or controlled motor vehicle KAU 661X that it collided with motor vehicle KAT 069B causing fatal injuries to the deceased.

14. It was the evidence of the respondent that he commenced legal proceedings for recovery of general and special damages against the appellant's insured in Mombasa CMCC No. 1929 of 2009 where judgment was entered against the appellant's insured on 9th February 2018 for Kshs. 1,246,897/= with costs and interest. The respondent added that the appellant was duly served with the requisite Statutory Notice before the commencement of the said suit on 26th June 2009. As proof that the appellant was the insurer, the respondent relied on the police abstract indicating the policy number and insurer.

15. In response to the respondent's case, the appellant, through its Branch Manager, Caroline Simiyu (DW1), denied that the defendants in Mombasa CMCC No. 1929 of 2009 were ever insured by the appellant and testified that the policy number in the Plaint was not in the appellant's receipt record. DW1 further denied that the appellant was ever served with the requisite statutory notice.

16. Having considered the grounds of appeal, the evidence adduced before the trial court, as well as the submissions and the authorities referred by learned counsel, the only issue arising for determination is whether the respondent proved his case before the lower court to the requisite standard, and in particular whether it was sufficiently proved that the appellant was the insurer of Motor Vehicle Registration No. vide Policy Number 201070523/TPO.

17. In determining the above issue, the Court must always bear in mind the precept in Peters v Sunday Post Limited [1958] EA 424 that:

> " It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion..."

18. There is no dispute that the respondent obtained judgment in the primary suit, namely CMCC No. 1929 of 2009 against the owner of the suit motor vehicle Motor Vehicle Registration No. KAU 661X; and that thereafter, he filed a declaratory suit and obtained judgment against the appellant on the basis of Sections 4 and 10(1) of the *Insurance (Motor Vehicles Third Party Risks) Act*, Chapter 405 of the Laws of Kenya. The latter provision states:

    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 on that sum by virtue of any enactment relating to interest on judgments."

19. The essence of Section 10(1) of the Act was captured by Hon. Gikonyo, J. in the case of Joseph Mwangi Gitundu v Gateway Insurance Co Ltd [2015] eKLR, as hereunder:

> "Therefore, under section 10(1) of Cap 405 Laws of Kenya, the insurer has a statutory obligation to 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 on that sum by virtue of any enactment relating to interest on judgments.
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> The obligation is statutory and a strict one; it cannot be shifted or abrogated by a term in the contract of insurance or in the manner proposed by the Defendant, lest the noble intention of the Act to guarantee compensation of third parties who suffer injuries arising from the use of the insured motor vehicle on the road should be lost. Similarly, if the statutory obligation placed by law on the insurer was to be shifted to the insured as proposed by the Defendant, the purpose for taking out an insurance policy and the compulsion by the Act for such insurance cover to be taken out on vehicles to be used on the roads to cover third party risks under Cap 405 Laws of Kenya will also be defeated.
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> The only legal way liability and obligation to pay third party claims may be avoided, is by strictly following the prescriptions provided for under section 10 of Cap 405."

20. Section 10(4) of the *Insurance (Motor Vehicles Third Party Risks) Act* goes further to set out the parameters within which an insurer, such as the appellant, may challenge the obligation to satisfy judgments premised on insurance policies. That provision states that:

> "No sum shall be payable by an insurer under the foregoing provisions of this section if in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto."

21. A perusal of the proceedings of the lower court leaves no doubt that the appellant was served with a statutory notice for purposes of Section 5 of the *Insurance (Motor Vehicles Third Party Risks) Act*. There is no indication that the appellant attempted to take advantage of the options available to its under Section 10(4) of the Act. Instead, it put forth a defence that was geared at distancing itself from the subject policy of insurance.

22. In the declaratory suit, the issue was whether the appellant was indeed the insurer of Motor Vehicle Registration No. KAU 661X vide the policy insurance number 201070523. Accordingly, in its grounds of appeal, the appellant faulted the lower court for relying on a police abstract produced by the respondent. In its submissions, the appellant urged the court to find that the respondent had failed

to discharge the burden of proof to show that the appellant was the insurer in policy insurance number 201070523.

23. In terms of burden of proof Sections 107,108 and 109 of the *Evidence Act*, Chapter 80 of the Laws of Kenya, are explicit that:

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(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those acts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108 The burden of proof in a suit or proceeding lies in that person who would fail if no evidence at all were given an either side.

109 the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

24. The Court of Appeal in the case of Antony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank [2004] eKLR held: -

> " ...we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or the Court on the basis of those pleadings pursuant to the provisions of order XIV of the Civil Procedure Rules. And the burden of proof is on the plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail..."

25. And, in Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another [2015] eKLR, it was held that:

> " Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say; -
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> a. "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
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> b. This burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

26. Although the appellant denied having insured the subject motor vehicle, the learned magistrate believed the evidence presented by the respondent and found the appellant liable on the basis of the

police abstract. The appellant impugned the decision on the ground that the best evidence in the matter ought to have been the policy of insurance itself. There are however, numerous decisions to support the position taken by the lower court. For instance, in the case ofMartin Onyango v Invesco Insurance Company Ltd [2015] eKLR the court held that information in the police abstract is sufficient proof of the insurer because police are charged with the responsibility of investigating accidents and gather relevant information and evidence which they use to charge the offending driver or owner thereof or for closure of an accident case even where it is self-involved or where there is no fault attributable to anyone.

27. A similar position was taken in the case of APA Insurance Company Limited v George Masele (supra) in which the court had this to say: -

> " 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 cause of events obtained by the police from the Certificate of Insurance affixed to the motor vehicle or are supplied by the insured. In this regard, I am unable to agree with Ms. Akonga that the Respondent should have produced the Certificate of Insurance for Policy No. 010/810/000005/2001/04 in order to prove who the insurer was."

28. The police abstract annexed on the respondent's Supplementary Record of Appeal on page 4 clearly indicates that the appellant was the insurer of motor vehicle KAU 661X and that the policy number issued against the vehicle was 201070523, commencing on 8th November 2007 and expiring on 25th May 2008. In the premises, the learned magistrate was entitled to rely on the police abstract as clear evidence that the appellant was the insurer and therefore, under obligation pursuant to Section 10(1) of the *Insurance (Motor Vehicles Third Party Risks) Act* to satisfy the judgment sum.

29. In this regard, I am satisfied that from the evidence on record, the trial court cannot be faulted for holding as it did in the declaratory suit, that the respondent proved on a balance of probability that the appellant was the insurer of policy insurance number 201070523 and it is therefore legally obligated to pay the decretal sum of Kshs. 1,246,897.00/= with costs and interest. Consequently, since the appellant did not raise any dispute on the other parameters set out in Section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act*, I find that this appeal lacks merit and it is hereby dismissed with costs to the respondent.

30 It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 19TH DAY OF JULY 2023

OLGA SEWE

JUDGE