



**Aruwa v Kenya Orient Insurance Co. Limited (Civil Appeal
E056 of 2022) [2023] KEHC 23610 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23610 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E056 OF 2022
DO OGEMBO, J
OCTOBER 12, 2023**

BETWEEN

KENNEDY ONYANGO ARUWA APPELLANT

AND

KENYA ORIENT INSURANCE CO. LIMITED RESPONDENT

*(Being an appeal from the Judgment and decree of the Hon. L. Simiyu Principal
Magistrate in Siaya CMCC No. 47 of 2020 delivered on 2nd December 2022)*

JUDGMENT

1. The appellant, Kennedy Onyango Aruwa filed this declaratory suit against the Respondent Kenya Orient Insurance Company Limited before the lower court, being Siaya CMCC no 47 of 2020. The appellant sought a declaratory order that the Respondent be held liable to settle the decretal sum awarded, interest on the decretal sum from 17-10-2018 till the date of full payment as ordered in the original suit, Siaya PMCC no 76 of 2016. The appellant's declaratory suit was dismissed. Each party was ordered to bear own costs.
2. Aggrieved by the lower court's verdict, the appellant has appealed to this court.
3. In the Memorandum of appeal filed herein and dated 19-12-2022, the appellant raises 4 grounds of appeal as follows: -
 - a. That the learned trial magistrate erred in law and in fact in ignoring uncontroverted evidence adduced before her by the appellant which was sufficient to prove the appellant's case on a balance of probability and instead seeking for evidence that is exclusively in the custody of the Respondent and the Respondent's insured, which evidence the Respondent chose to keep away from the court.



- b. That the learned trial magistrate erred in law and in fact in finding that the appellant did not prove his case on a balance of probability despite the appellant having adduced sufficient evidence to prove the same.
 - c. That the learned trial magistrate erred in law and in fact in failing to critically analyse the evidence on record, the pleadings and the appellant's written submissions.
 - d. That the learned trial magistrate erred in law and in fact in delivering the above referred judgment contrary to the facts as supported by the evidence, the applicable law and the principles established by the precedents.
4. The appellant prays that this appeal be allowed with costs and that costs in the trial suit be awarded to the appellant, and a declaration that the Respondent is liable to settle the decretal sum emanating from Siaya PMCC no 76 of 2016 and order that the Respondent forthwith settle the decretal amount. The Respondent opposes this appeal.
 5. The appeal was canvassed by way of written submissions following a consent order recorded on 24-5-2023.
 6. From the appellant's side, it was submitted that in compliance with the statutory provisions of Section 10(2) of the *Insurance (Motor Vehicle Third Party Risks) Act*, Cap 405 Laws of Kenya, the Plaintiff in Siaya CMCC no 76 of 2016 served a statutory notice dated 15-12-2016 on the Defendant's insurance company, the Respondent herein. The appellant exhibited Exh-5(a) to (c), being an Affidavit of service, the statutory notice and a copy of courier service waybill as proof.
 7. It was further submitted by the appellant that as a result of the Judgment in Siaya PMCC no 76 of 2016, a demand letter dated 6-4-2020 was sent to the Respondent requesting them to honour the Judgment and settle the decretal amount but the same fell on deaf ears.
 8. The Defendant did not make any payment neither did they appeal against the said judgment. It was submitted that this is what necessitated the filling of the declaratory suit, which was dismissed, giving rise to this appeal.
 9. The appellant's submission was that this being the first appellate court and as a statutory requirement in Section 78 of the *Civil Procedure Act*, this court must reassess and re-evaluate the evidence adduced before the trial court and arrive at its own independent conclusion bearing in mind the fact that it never heard nor saw the witnesses as they testified (*Sielle v Associated Motor Boat Co. Ltd Others* (1968) EA 123).
 10. It was further submitted that the appellant produced a police abstract (Exh-2) and motor vehicle insurance sticker (Exh-3). That it was discernible that the learned magistrate focused on the insurance sticker and totally disregarded the police abstract whose evidential significance the court ignored.
 11. Counsel for the appellant relied on the case of *Kenya Alliance Insurance Co. Ltd v Thomas Ochieng Apopa* (2020) in which the Hon. Justice Aburili held;

“this court is inclined to agree with the holding in the persuasive decision in *Martin Onyango v Invesco Insurance C. Ltd* [2015] eKLR where the court held that the information in the police abstract is sufficient proof of the insurer because the police are charged with the responsibility of investigating accidents and gather relevant information and evidence which they use to found a charge against the offending driver or owner thereof or for closure



of an accident case even where it is self-involving or where there is no fault attributed to anyone.....”

12. Finally, the appellant relied on *Superfoam Ltd and another v Gladys Nchororo Mbero* [2014]eKLR in which Justice Makau cited the Court of Appeal decision in *Wellington Ng'ang'a Wathioro v Akamba Public Road Services Ltd and another* (2010) in which it was held;

“.....where a Police Abstract was produced and there was no evidence adduced by the Defendant to rebut it and not even challenge it, the Police Abstract being a prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases within the standards of probability and not beyond reasonable doubt as in criminal cases.....”
13. The Respondent, on the other hand, submitted that they are not liable to settle the Plaintiff's claim as they did not insure Awili Nelson and that there existed no policy of insurance or other contractual relationship between the Respondent and Awili Nelson. That in the declaratory suit they duly entered appearance and filed a statement of defence.
14. I have considered the record of appeal herein. I have also considered the 2 rival submissions of the parties herein. As a first appellate court, this court is mandated to re-assess and re-evaluate the evidence before the lower court and to come up with its own conclusion (*Sielle v Associated Motor Boat Co. Ltd and Others* (1968) EA 123). In my view, 3 issues are up for determination in this appeal. These are:
 - i. Whether the Respondent insured the alleged insured Awili Nelson.
 - ii. Whether the statement of defence filed in the original suit was sufficient to avert liability.
 - iii. Whether the appellant is entitled to the relief sought.
15. On the first issue for determination, this court has considered the evidence on record and especially the insurance sticker produced (Exh-3). From the record of the proceedings the learned trial magistrate indeed considered the same but noted that the name of the insurer was not clear. A critical and closer look at the same exhibit however, reveal that the commencing date of the cover is 2-5-2015 with the date of expiry as 29-2-2016. This Registration number of the insured motor vehicle is shown to be xxxx and the name of the insurer is Kenya Orient Insurance Co. Ltd. These registration details are on the sticker exhibited and had the trial court keenly observed the same, it probably would have reached a different finding, and in favour of the appellant herein.
16. A further perusal of the Police Abstract produced confirms that the registered owner of the motor vehicle xxxx as the date of the accident is Nelson Bonyo Awili and the insurer is shown to be Kenya Orient Insurance Co. Ltd, the Respondent herein. On this issue therefore, I am inclined to agree with my sister Hon. Justice Aburili in her decision in the case of *Kenyan Alliance Insurance Co. Ltd v Thomas Ochieng Apopa* (2020) as seen hereinabove.
17. As to the weight of the evidence on the Police abstract, the Court of Appeal in *Wellington Nganga Mathiora v Akamba Public Road Services & another* (2010) settles the same. That where a Police Abstract is produced, and there is no evidence by the Defendant to rebut it.
18. It could be relied on as proof of ownership in the absence of anything else, since proof in civil cases is within the standard of probabilities and not beyond reasonable doubt as in criminal cases.
19. The Respondent, did not, in any way adduce evidence whatsoever to challenge or rebut the evidence on the Police Abstract. In the circumstances therefore, I am convinced that the Police Abstract produced



by the appellant bears sufficient proof as to the identities of both the insured and the insurer, clearly shown to be Kenya Orient Insurance Co. Limited, the Respondent herein.

20. On the 2nd issue for determination, I have noted from the record of appeal, and the lower court proceedings thus the Respondent filed a memorandum of appearance and filed a statement of defence, the Respondent did not however, file any document of evidentiary value nor adduce any evidence in defence to challenge the evidence of the Plaintiff (appellant). I take guidance in the case of Margaret Njeri Mbugua v Kirk Mweya Nyaga [2016]eKLR, in which the court held;

“.....a mere denial is not sufficient defence and a Defendant has to show either by Affidavit, oral evidence or otherwise that there is a good defence.”

21. In the instant case, the Respondent (as Defendant) did not adduce any evidence in defence against the claims made by the Petitioner. I accordingly therefore find his statement of defence as filed deficient of evidence to avert liability. I also find that the Respondent is liable to settle the decretal sum, costs and interest.
22. Lastly, on the 3rd issue of whether the appellant is entitled to the reliefs sought herein, I find that the appellant’s appeal succeeds on a balance of probabilities. I accordingly allow the appellant’s appeal filed herein on 20-12-2022 as prayed.
23. I also order that this Judgment, finding and order do apply similarly to the related cases being HCCA nos. E057/2022, E058/2022, E059/2022 and E060/2022.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 12TH DAY OF OCTOBER, 2023

D.O. OGEMBO

JUDGE

12.10.2023

Court:

Judgment read out in Open court in the presence of Mr. Peter Karanja for Respondent and Ms. Muhongo for the appellant.

D.O. OGEMBO

JUDGE

12.10.2023

