



**Ondiek alias Dedan Ondieki v Invesco Assurance Company Limited; Muindi & another
(Proposed Interested Parties) (As Legal Representatives of the Estate of Manaseh Guya Mwale,
Deceased) (Civil Case E056 of 2021) [2024] KEHC 13425 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13425 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE E056 OF 2021
OA SEWE, J
OCTOBER 17, 2024**

BETWEEN

DETAN ONDIEK ALIAS DEDAN ONDIEKI PLAINTIFF

AND

INVESCO ASSURANCE COMPANY LIMITED DEFENDANT

AND

JOSEPH MWALE MUINDI PROPOSED INTERESTED PARTY

MBUVE KIMWELE PROPOSED INTERESTED PARTY

**AS LEGAL REPRESENTATIVES OF THE ESTATE OF MANASEH GUYA
MWALE, DECEASED**

JUDGMENT

1. By a Plaint dated 2nd June 2021, the plaintiff, Detan Ondiek alias Dedan Ondieki, sued Invesco Assurance Company Limited (the defendant) praying for:
 - (a) A declaration that he is not bound to make any payments and that the defendant is bound to make payments and or settle the decretal sum and to take up the defence of all the matters yet to be filed and settle the Third Party claims that may arise out of the accident involving Motor Vehicle Registration No. KAA 153P on 11th August 2012 including the decretal sum in Mombasa PMCC No. 182 of 2013 and Mombasa CMCC No. 244 of 2019.
 - (b) Costs of the suit.
 - (c) Any other or further reliefs that the Court may deem fit to grant.



2. The plaintiff averred that the defendant is a company registered as such pursuant to the relevant laws of Kenya and carries on insurance business within the Republic of Kenya. The plaintiff added that, at all times material to this suit, he was the registered owner of Motor Vehicle Registration No. KAA 153P, which was insured by the defendant vide Policy No. 080/087/1/003991/2010 for the period between 14th December 2011 and 13th October 2012. The plaintiff further stated that, in accordance with the Policy, the defendant agreed to indemnify him against all claims which he would be legally liable to pay by way of damages.
3. The plaintiff's cause of action was that, on or about the 11th August 2012, during the validity of the Policy, his driver, one Julius Kegusu was involved in a road traffic accident while driving the subject motor vehicle along Mombasa-Nairobi Road at Salama area. He added that the motor vehicle collided with Motor Vehicle Registration No. KAZ 880C/ZD 0265; by reason whereof the passengers aboard Motor Vehicle Registration No. KAA 153P sustained fatal or severe personal injuries. That, as a result, various parties commenced court proceedings seeking compensation for the loss and injuries suffered. He added that, in respect of Makindu PMCC No. 182 of 2013 and Mombasa CMCC No. 244 of 2019 the defendant appointed counsel to conduct his defence.
4. The plaintiff complained that, despite having paid the excess charge as was requirement of him, the defendant declined to pay or take over the claims, thereby exposing him to execution as well as arrest and imprisonment or failure to satisfy the decrees. Thus, the plaintiff contended that he stands to suffer irreparable damage if the defendant is not compelled to pay, settle and/or take up the claims arising from the subject accident. He accordingly prayed that his suit be allowed and the orders sought granted as set out in the Plaint.
5.
 - (5) Although duly served with the Plaint and Summons to Enter Appearance, the defendant neither entered appearance nor filed a Defence. In the course of time, the interested parties joined the proceedings on behalf of the estate of the deceased Manasseh Guya Mwale.
6. A perusal of the court record shows that, although the defendant was duly served with the pleadings along with Summons to Enter Appearance, it neither entered appearance nor filed a defence. Accordingly, the suit was fixed for hearing in terms of Order 10 Rule 9 of the Civil Procedure Rules. The provision states:

“Subject to rule 4, in all suits not otherwise specifically provided for by this Order, where any party served does not appear the plaintiff may set down the suit for hearing.”
7. The Court of Appeal underscored the importance of this procedural requirement in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR as follows:

“...It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side. see Mwangi Muriithi (supra) and [*Mumbi M'Nabea v. David Wachira Civil Appeal No. 299 of 2012.*](#)



8. Accordingly, the suit proceeded to hearing on 29th April 2024, whereupon the plaintiff adopted his witness statement dated 2nd June 2021. He also produced his Bundle of Documents as the Plaintiff's Exhibits 1 to 8.
9. The plaintiff confirmed his ownership of Motor Vehicle Registration No. KAA 153P; and testified that the said motor vehicle was insured by the defendant for the period between 24th December 2011 and 13th October 2012. He also confirmed that the Policy No. was 080/087/1/003991/2010/1 and that it covered the driver, the turn boy as well as third parties. The plaintiff also gave uncontroverted evidence that the subject motor vehicle was involved in a road traffic accident on 11th August 2012 in which three people lost their lives. He added that claims were made in respect of the occurrence which he reported to the defendant; but which the defendant neglected or refused to pay. Consequently, the claimants filed Makindu PMCC No. 182 of 2013 and Mombasa CMCC No. 244 of 2019 against him for compensation in damages.
10. The plaintiff produced a copy of the pleadings and proceedings in Makindu PMCC No. 182 of 2013 as well as Mombasa CMCC No. 244 of 2019 and stated that, although the defendant took up his defence in the first case, the decree is yet to be paid. He was therefore apprehensive that, unless the orders sought are granted, he stands to suffer irreparably if held personally liable by third parties for the loss suffered in the accident.
11. On behalf of the estate of the Manasseh Guya Mwale, the deceased, Joseph Mwale, who is the 1st interested party herein, testified on 29th April 2024. He adopted his witness statement dated 5th February 2024 in which he stated that the deceased was his son; and that he was employed by the plaintiff as a turn boy. He further testified that the deceased succumbed to injuries sustained in a road traffic accident that occurred on 11th August 2012. He added that, when he visited the offices of the defendant in Nairobi, he was informed that the deceased was not covered in their Policy No. 080/087/1/003991/2012 and hence his claim was declined.
12. The 1st interested party therefore prayed for the dismissal of this suit contending that the plaintiff is trying to push them to the defendant for payment and yet they have no judgment against the company. Thus, the interested parties prayed that the plaintiff be compelled to pay the decretal sum of Kshs. 1,116,914.20 awarded in Makindu PMCC No. 182 of 2013.
13. In his closing submissions, the plaintiff submitted that the sum awarded in Makindu PMCC No. 182 of 2013 is within the insurance limit of Kshs. 3,000,000/=; and therefore the defendant is under obligation to settle the claim. He urged the Court to take into consideration that the defendant opted to not defend the suit; and therefore that the facts as pleaded and testified to by him are uncontroverted. The plaintiff also impugned the interested parties' Limited Grant issued on 29th January 2023 contending that it was limited to filing suit and cannot therefore be the basis for defending this declaratory suit. Reliance was placed on the following authorities:
 - (a) Murang'a ELC No. E021 of 2021 (O.S.) Gabriel Macharia Njoroge v ABSA Bank Kenya PLC.
 - (b) Moses Karanja v Xplico Insurance Company Ltd.
 - (c) Machakos HCCA No. 88 of 2019: UAP Insurance Co. Ltd v Patrick Charo Chiro.
 - (d) Bungoma HCCA No. 28 of 2016: Jubilee Insurance Co. Ltd v Walter Tondo Soita.
 - (e) Nairobi Milimani HCCC No. 88 of 2019: David Musili Muthui v Directline Insurance Co. Ltd & others.



- (f) Kisii HCCC No. 24 of 2013: ICEA Lion General Insurance Co. Ltd v The Board of Governors Rioma Mixed Secondary School and 24 others.
14. On their part, the interested parties submitted that they have a decree on behalf of the estate of the deceased which the plaintiff is liable to personally pay. They pointed out that, although the plaintiff alleged the existence of a Policy of Insurance, no such document was produced before the Court to prove the exact scope of the cover. They relied on County Government of Homabay v Oasis Group International & G.A. Insurance Co. Ltd [2017] eKLR.
15. The interested parties also submitted that the suit is time-barred in so far as it is based on an insurance contract. They posited that the suit was filed 9 years after the subject accident and therefore was outrightly time-barred. They also took issue with the fact that the plaintiff has sought to stop payment of the claim in Mombasa CMCC No. 244 of 2019 yet the decree holder in that matter, one Frida Rakamba, the administrator of the estate of David Osebe Bosire (deceased), had not been notified of this suit. They accordingly urged for the dismissal of this suit with costs.
16. In their Supplementary Submissions, the interested parties responded to the issue of the Limited Grant. They insisted that, since this suit related to and affects the recovery of damages awarded to the estate of Manasseh Guya Mwale, they are before this Court as a matter of right to prosecute the estate's defence. They relied on Loice Wanjiru Meru & 3 others v John Migui Meru [2017] eKLR to buttress their argument. I am entirely in agreement that the plaintiff's objection has no basis in the circumstances.
17. I have given consideration to the technical point raised by the interested parties as to time bar and again, not much turns on it. An interested party cannot be heard to object to a suit in which he is only marginally involved. The Supreme Court pointed out in Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others [2014] eKLR that:
- “A suit in Court is a ‘solemn’ process, “owned” solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings.”
18. In the light of the foregoing, the issues for determination are:
- (a) Whether there was a valid insurance contract between the plaintiff and the defendant.
- (b) Whether the defendant should be compelled by way of a declaration to honour the contract of insurance.

A. On whether there was a valid contract of insurance:

19. The plaintiff adduced credible proof that, at all times material to this suit, it was the registered and beneficial owner of Motor Vehicle Registration No. KAA 153P and that the said motor vehicle was involved in a road traffic accident on 11th August 2012. There is no dispute that the accident occurred at Salama Area on the Nairobi-Mombasa Road when the subject motor vehicle collided with Motor Vehicle Registration No. KAZ 880C. The accident claimed the lives of three persons, including the deceased herein, Manasseh Guya Mwale, who was then employed by the plaintiff as the turn boy of the subject motor vehicle, Registration No. KAA 153P.



20. The plaintiff adduced uncontroverted evidence to the effect that the subject motor vehicle was, at all times material to this suit, insured by the defendant vide Insurance Policy No. 080/087/1/003991/2012. Although the interested parties took issue with the fact that the policy document was not produced before the Court, they did not refute the fact of existence of the Policy. Their assertion was simply that it ought to have been produced to prove the scope; to enable the Court determine whether the deceased was covered thereby.

21. In any case, one of the documents relied on by the plaintiff was a copy of the Police Abstract in which the particulars of the Policy are set out. In *APA Insurance Company Limited v George Masele* (supra) it was held:

“...The details in the Police Abstract as to the details of insurance are in the ordinary course 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.”

22. Consequently, on the basis of the evidence presented herein by the plaintiff, I am satisfied that the defendant is under obligation to indemnify him in respect of the claims arising from the subject accident. In this regard, Section 10(1) of the *Insurance (Motor Vehicles Third Party Risks) Act*, Chapter 405 of the Laws of Kenya is explicit that:

“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.”

23.

(23) Similarly, in *Joseph Mwangi Gitundu v Gateway Insurance Co Ltd* [2015] eKLR it was held:

“...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.

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.



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.”

24. The foregoing notwithstanding, the ultimate responsibility to satisfy the decretal sum due to the estate of Manasseh Guya Mwale remains that of the plaintiff and that cannot be extinguished by a declaratory order as sought herein by the plaintiff. In connection with the capping of the sum payable by an insurer under Section 5 of the Insurance (Third Party Motor Vehicle Risks) Act, it was held in *Law Society of Kenya v Attorney General & 3 others* [2016] eKLR that:

“What the Principal Act has done is cap the amount of money that the insurer pays to the injured person. Nothing in the Principal Act stops a litigant or the injured person from pursuing a claim against the insured individual where an award in excess of the amount recoverable from the insurer is made...It only limits who pays how much by apportioning a maximum of Kshs. 3,000,000/= to be paid by the insurer and the additional if any by the insured.”

25. I therefore take the view that the insured is the last point of call for an aggrieved third party. It must likewise be pointed out that, although the plaintiff pitched a case that included directions in respect of Mombasa CMCC No. 244 of 2019, that aspect of the case was not proved to the requisite standard. In the case of Makindu PMCC No. 182 of 2013, the plaintiff exhibited the following documents, among others:

- (a) A copy of the Judgment dated 15th March 2017
- (b) Decree and Certificate of Costs dated
- (c) Application for Execution of Decree
- (d) Notices to Show Cause why execution should not issue

26. None of such documents were presented in respect of Mombasa CMCC No. 244 of 2019; an indication that the matter was yet to be concluded by the time this declaratory suit was filed. The liability is therefore yet to be fixed. Under those circumstances, it would be speculative for the Court to pronounce itself on a claim that is yet to be proved or awarded. It has oft been said that Court orders are not issued in vain. For instance, in *B. v Attorney General* [2004] 1 KLR 431, Hon. Ojwang, J (as he then was) in that:

“The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.”

B. Whether the defendant should be compelled by way of a declaration to honour the contract of insurance:

27. It flows from the above that the plaintiff is indeed entitled to a declaratory order in respect of the decree passed in Makindu PMCC No. 182 of 2013. The aspect that he is not obliged or legally bound to settle any claim or to honour any judgment obtained in respect of Policy No. 080/087/1/003991/2010/11 is however undeserved and is accordingly declined.

28. In the result, judgment is hereby entered in favour of the plaintiff in the following terms:

- (a) A declaration be and is hereby made that the defendant is bound to make payments and or settle the decretal sum awarded in Mombasa PMCC No. 182 of 2013.



(b) Costs of the suit be borne by the defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 17TH DAY OF OCTOBER, 2024.

OLGA SEWE

JUDGE

