Mugo v Directline Assurance Co Ltd & another (Civil Appeal E875 of 2023)
[2024] KEHC 13662 (KLR) (Civ) (6 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13662 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E875 OF 2023

TW OUYA, J

NOVEMBER 6, 2024

BETWEEN

MARY WAMBURA MUGO ..... APPELLANT

AND

DIRECTLINE ASSURANCE CO LTD ..... 1ST RESPONDENT

INVESCO ASSURANCE CO LTD ..... 2ND RESPONDENT

(Being an appeal against the judgement and decree of the Hon. S.A. Opande (PM) delivered on 16th August, 2023 in Nairobi Milimani CMCC No. 1461 OF 2020)

JUDGMENT

Background

1. Mary Wambura Mugo, (hereinafter the Appellant), the Plaintiff before the lower Court, initiated Nairobi Milimani CMCC No. 1461 of2020 (hereinafter lower Court suit) as against Directline Assurance Co. Ltd and Invesco Assurance Co. Ltd (hereinafter the 1st and 2nd Respondent/ Respondents), the 1st and 2nd Defendant/Defendants before the lower Court by way of a plaint dated 16.01.2020 seeking a declaration that the Respondents are jointly and severally bound to fully satisfy the decretal sum, costs and interest in Nairobi CMCC No. 5212 of 2016 plus costs and interest in that suit; Kshs1,733,576.98/- and interest at Court rates from 21.11.2019 to date of full payment; and costs of the suit.

2. It was averred that at all material times the 1st Respondent was the insurer of motor vehicle registration number KBW XXXX under policy of insurance number 00030XXXX, certificate number A642XXXX expiring on 14.10.2014 while the 2nd Respondent was the insurer of motor vehicle registration number KBW XXXX under policy number 020/084/1XXXXX certificate

Number A638XXXX. That whilst the said policies were in force, the Appellant sustained injuries in an accident involving the Respondents insureds motor vehicles and sued the Respondents insured in Nairobi Milimani CMCC No. 5212 of 2016. (hereinafter the primary suit).

3. That final judgment in the primary suit was entered on 14.06.2019 for the Appellant against the Respondents insured, jointly and severally plus costs and interests to the tune of Kshs. 1,733,576.98/- per the decree and certificate of costs issues on 28.11.2019. The Appellant thus averred that the primary suit gave rise to a statutory cause of action for a declaration under the Insurance (Motor Vehicle Third Party Risks) Act, to wit the Respondents were liable to satisfy the primary suit decree therefore a declaration ought to issue that the Respondents are duty bound to satisfy the decree in the primary suit under Section 10 of the said Act.

4. The 1st Respondent filed a statement of defence admitting to being the insurer of motor vehicle registration number KBW XXXX and being alive to the institution of the primary suit. It further averred that on 09.11.2019, it paid Kshs. 518,511/- which was 50% of the decretal sum in the primary suit thereafter duly informed the Appellant's counsel vide a letter dated 28.11.2019. That having settled part of its claim per the primary suit judgment the Appellant has not claim as against it therefore the lower Court suit is frivolous, vexatious and a waste of valuable judicial time.

5. Despite service, the 2nd Respondent failed and or opted not to file a defence as against the Appellant's suit whereafter judgment in default was entered as against it.

6. The suit proceeded to full hearing, during which both the Appellant and 1st Respondent called evidence in support of the averments in their respective pleadings. In its judgment, the trial Court dismissed the Appellants suit with no orders as to costs.

The Appeal

7. Aggrieved with the outcome, the Appellant preferred the instant appeal challenging the finding by the lower Court premised on the following grounds in her memorandum of appeal as itemized hereunder: -

> " 1. The learned Magistrate erred by dismissing the suit.
>
> 2. The learned Magistrate erred by finding that the 1st Respondent had not fully paid and then dismissing the claim fully against the 1st Respondent.
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> 3. The learned Magistrate erred by dismissing the suit against the 2nd Respondent yet there was interlocutory or final judgment against it.
>
> 4. The learned Magistrate erred by misunderstanding the effect of apportionment of blame between tortfeasors vis a vis liability of each for the entire damage(s).
>
> 5. The learned Magistrate erred by framing the wrong issue for determination or misunderstanding or misinterpreting the first trial Court's decision in the primary suit.
>
> 6. Having found each defendant/respondent liable to the extent of 50% the learned magistrate erred by failing to enter judgment against each to the extent of 50% severally.
>
> 7. The learned Magistrate erred by failing to consider the Appellants submissions and authorities." (sic)

8. In light of afore-captioned itemized grounds of appeal, the Appellant seeks before this Court orders to the effect that: -

> "(a) The decision appealed against be set aside and be substituted with a judgment for the Appellants jointly and severally for the entire award.
>
> (b) Alternatively, judgment against each Respondent to the extent of 50% of the award plus costs and interest.
>
> (c) Costs of the appeal and of the suit be to the Appellant.
>
> (d) Such further or other relief the Court deems just." (sic)

9. Directions were taken on disposal of the appeal by way of written submissions which this Court has duly considered.

Submissions

10. On the part of the Appellant, counsel began by anchoring his submissions on the provisions of Section 78 of the *Civil Procedure Act* and the decision in Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123 on the duty of the first appellate Court to re-evaluate the evidence before the trial Court and arrive to its own conclusion subject to the trial Court's having had the benefit of the demeanor of witnesses that appeared before it.

11. Restating the events leading up to the instant appeal, counsel opted to contemporaneously address the grounds in the Appellant's memorandum of appeal. At the outset, it was contended that the 2nd Respondent has since not paid any amount towards settlement of the decretal sum in the primary suit meanwhile did not defend the lower Court suit whereafter judgment in default was entered as against it on accord of the latter. That in light of the request, the judgement entered as against the 2nd Respondent was for a liquidated amount and was thus final. Counsel argued that the trial Court completely failed to notice the judgment and went ahead to dismiss the entire suit, in error. That at the very least, it ought to have entered judgment as against the 2nd Respondent for the entire sum or on half of the primary suit award. Therefore, the trial Court decision ought to be faulted, as it were, when it set-aside the default judgment against the 2nd Respondent without any application.

12. It was further submitted that the Appellant having in the primary suit sued two (2) tortfeasors wherein the driver and owners of the respective vehicles were held equally liable, the Appellant later sued the insurers of the respective vehicles in the lower Court suit, seeking that both insurers be held individually and jointly liable. The trial Court's finding on the issue that since one insurer had paid one half therefore the entire suit was for dismissal, was in error. Counsel argued that the finding of equal apportionment of blame related to liability in the primary suit however did not mean that each tortfeasor is only liable to pay one half of the award when the tortfeasors are several and concurrent. That the forestated simply means that each is liable fully for the entire judgment. In summation counsel cited the decisions in Zarina v Noshir (1963) EA 239, Republic v PS Interior & Another Exparte Joshua Mutua Paul [2013] eKLR and Nairobi HCCC No. 1153 of 2002 - Lawrence Gitonga & Others v Kinoro Tea Factory Ltd & Another in urging the Court that if one of the Respondents settles the decretal amount fully, they have recourse as against each other by way of a suit for contribution. Counsel thus implored upon the Court to allow the appeal as lodged.

13. On the part of the 1st Respondent, counsel condensed the Appellant's appeal on a singular issue. Submitting on whether the decision of the trial Court ought to be upheld, it was summarily argued

that the lower Court rightly held that there was no mention in the primary suit of the Respondents being jointly and severally liable meanwhile the 1st Respondent had satisfied its part of the decretal sum in the primary suit prior to institution of the declaratory lower Court suit. Counsel submitted that the Appellant's pleadings before the lower Court failed to capture that the 1st Respondent satisfied its portion of the primary suit judgment, therefore the reliefs in the lower Court suit were mischievous in trying to force on party to settle the entire decretal sum in the primary suit. While placing reliance on Order 2 Rule 6(1) of the Civil Procedure Rules (CPR), the Indian decision in Arikala Narasa Reddy v Venkata Ram Reddy Reddygari & Another, Civil Appeal No. 5710-5711 of 2012 [2014] 2 S.C.R as cited with approval by the Supreme Court of Kenya in Raila Amolo Odinga & Another v IEBC & 2 Others [2017] eKLR, it was posited that the Appellant having withheld the crucial fact that the 1st Respondent had settled its portion of the primary suit judgment in its pleadings, the learned Magistrate was well within his rights to dismiss the entirety of the Appellant's suit. In conclusion, counsel urged the Court to dismiss the appeal with costs.

14. On the part of the 2nd Respondent, counsel equally condensed the Appellant's appeal on the singular issue whether the trial Court erred by dismissing the Appellant's suit. It was submitted that the trial Court did not err in arriving at the finding that each party was only liable to the extent demarcated in the primary suit whereas in arriving at the said conclusion the trial Court exercised its discretion judiciously. While calling to aid the decisions in Anthony Francis Wareham & 2 Others v Kenya Post Office Savings Bank [2004] eKLR and Salim Abdalla Salim v Omar Abdalla Salim [2017] eKLR, counsel asserted that it is trite that parties are bound by their own pleadings whereas evidence that is at variance with pleadings must be disregarded. That the Appellant's appeal is devoid of merit given that she urged the trial Court to grant orders that were not pleaded by way of the Respondent being held 50% liable to satisfy the primary suit decree. Further the Appellant did not seek that the 2nd Respondent be specifically held 50% liable to satisfy the entire decretal sum. Lastly, it was argued that notwithstanding interlocutory judgment having been entered as against the 2nd Respondent, onus was on the Appellant to discharge her burden of proof of which she failed to do. Counsel concluded that the trial Court exercised its discretion judiciously in dismissing the Appellant's suit whereas the trial Court decision ought to be upheld by this Court.

Disposition and Determination

15. At this juncture, it would be apt to observe that the instant appeal was disposed of as part of the Judiciary Rapid Result Initiative (RRI) matters. That said, the original lower Court record did not form part of the record before this Court however I have duly taken the liberty of considering entirety of the Record of Appeal as well as the respective parties' submissions.

16. As rightly submitted by the Appellant, this is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate Court in Selle (supra). Further, it is trite that an appellate Court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the Court below acted on wrong principles in arriving at the finding it did. Ephantus Mwangi & Another vs Duncan Mwangi Wambugu [1982 – 1988] 1 KAR 278.

17. That said, a revisit of the itemized grounds in memorandum of appeal and submissions by the respective parties before this Court it is ostensible that the instant appeal turns on the singular issue whether the trial Court erred in both law and fact by dismissing the Appellants suit in its entirety. Pertinent to the determination of issues before this Court are the pleadings, which formed the basis of the parties' respective cases before the trial Court. Court of Appeal decision in Wareham (supra). With the latter in reserve, this Court had earlier outlined the gist of the respective parties' pleadings, as such it serves no purpose restating the same. Further, having equally identified what the dispute before

the trial Court gyrated on, the key question for determination is whether the trial Court's findings on the issues falling for determination therein were well founded. To contextualize the latter, it would be apposite to quote in extenso the relevant facets of the impugned judgment.

18. The trial Court after restating the evidence tendered before it addressed itself as follows: -

> ...."I have considered the pleadings before the Court, testimonies, as well as the evidence on record as well as the parties' submissions and in my view the issue for determination is;
>
> Whether the Court which heard the primary suit, intended for each insurer to pay only 50%
>
> .....
>
> ....., the intention of the Court was clear, liability was to be shared equally, and it captured the same in its judgment. What did the Court intend, when it split liability equally? In my view, the purpose was to demarcate the extent of the liabilities between the parties before the Court. The Court having done so, each party was only liable to the extent demarcated by the Court.
>
> Since the Court did not order for judgment to be entered jointly and severally, the Plaintiff cannot proceed to seek from another Defendant, what another Defendant ought to pay. Again, if two people have been held equally to be blame by a Court, and in absence of the verdict jointly and severally, the Plaintiff has no basis to demand from another Defendant, where such a Defendant has paid extent of liability. Since the total award granted by the Court was Kshs. 1,311,423.60/- as well as the costs of the suit plus interest. The 1st Defendant was only liable to pay half this amount. Therefore, prayer (a) and (b) of the plaint herein, cannot be granted. However, the 1st Defendant has not paid its 50% Kshs. 518,511/- is not 50% of the judgment sum i.e. Kshs. 1,311,423.60/- together with costs and interest. For clarity, the 1st Defendant is still required to settle some amount to the Plaintiff, subject to calculation after its payment which was made on 9th November 2019, is taken into account, as well as what the costs of the suit are and interest which has accrued on the remaining amount.
>
> Reasons whereof judgment is hereby entered as follow;
>
> a. The plaint dated 16th January 2020 is hereby dismissed. Each party shall bear its own costs" (sic)

19. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. Whereas, it is well trodden that the same is on a balance of probabilities meaning that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. Court of Appeal decision in Mumbi M'Nabea v David M. Wachira [2016] eKLR. As appropriately submitted in this appeal, the duty of proving the averments contained in the plaint lay squarely on the Appellant and vice versa with respect to the averments contained in the Respondents statement of defence. The Court of Appeal decision in Karugi & Another v Kabiya & 3 Others (1987) KLR 347.

20. However, it would be notable to state that the 2nd Respondent failed and or opted not to file defence before the trial Court nevertheless has proceeded to participate in the instant appellate proceedings. Therefore, as is, the 2nd Respondent did not present and or agitate a position before the trial Court to wit a finding by the latter can be interrogated vide the instant appeal. Nevertheless, as rightly argued by counsel for the 2nd Respondent, this Court reasonably agrees that the dicta Wareham (supra) and Karugi (supra) still hold true and are good law, given that at all material times, onus is on the party that

alleges in its averments to prove his or her case on a balance of probabilities in civil matters. The latter notwithstanding the adverse party failing to participate in the proceedings under examination.

21. The material facts leading up the instant appeal are not in contested. However, relevant to the instant appeal, it is undisputed that the lower Court suit was a declaratory suit presented on the backdrop of a judgment rendered in favour of the Appellant in the primary suit as against the Respondents respective insureds. A declaratory suit in the nature of the Appellant's suit as presented before the trial Court, is premised on provisions of The Insurance (Motor Vehicle Third Party Risks) Act Cap 405 Laws of Kenya, particularly Section 10(1) of the Act. It is trite that for judgment by way of declaration of liability on the part of the Respondents to be bound to settle fully and or satisfy the decretal sum in the primary suit, onus was on the Appellant to prove the Respondents statutory obligation pursuant to Section 10(1) & (2) of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 Laws of Kenya.

22. Section 10(1) & (2) of the Insurance (Motor Vehicle Third Party Risks) Act states that; -

(1) 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.

(1A) .....

(1B) .....

(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; or

(b) in respect of any judgment, so long as execution thereon is stayed pending an appeal; or

(c) in connection with any liability if, before the happening of the event which was the cause of the death or bodily injury giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provision contained therein, and either—

(i) before the happening of the event the certificate was surrendered to the insurer, or the person to whom the certificate was issued made a statutory declaration stating that the certificate had been lost or destroyed; or

(ii) after the happening of the event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer, or the person to whom the certificate was issued made such a statutory declaration as aforesaid; or

(iii) either before or after the happening of the event, but within a period of twenty-eight days from the taking effect of the cancellation of the policy, the insurer

has notified the Registrar of Motor Vehicles and the Commissioner of Police in writing of the failure to surrender the certificate.

23. The above provision sets out the statutory ingredients necessary for the success of a suit seeking a declaration that an insurer is under an obligation to satisfy a decree arising from a liability covered under a policy of insurance. The provision was recently discussed by Court of Appeal in *Jiji v Gateway Insurance Co. Ltd (Civil Appeal 126 of 2018)* [2022] KECA 368 (KLR). This Court will address the same latter in this judgment.

24. With the forestated in reserve, what appears to have been the 1st Respondent contestation before the trial Court, was not necessarily the Appellant's compliance with requisite ingredients as framed in Jiji (supra) but whether the Appellant was entitled to judgment as sought for against the Respondents.

25. At the hearing, the Appellant testified as PW1. She began by adopting her written witness statement as her evidence meanwhile adduced into evidence the documents appearing in her list of documents as PExh. 1 – 12. The gist of her evidence was that she was paid Kshs. 518,511/- by the 1st Respondent however she was to be paid a total of Kshs. 1,311,423.60. On cross examination she confirmed having been paid by the 1st Respondent however insisted that the same was not half the amount she was supposed to have been paid. That having not being paid in full she wants the 1st Respondent to settle the balance. In re-examination it was her evidence that the Respondents were the respective insurers wherein the 1st Respondent was to pay Kshs. 758,135.99/- however the said amount plus costs has never been settled in full.

26. On behalf of the 1st Respondent, Kelvin Ngure testified as DW1. He began by identifying himself as the Deputy Claims manager with the 1st Respondent meanwhile he too adopted his written witness statement as his evidence in chief and thereafter proceeded to adduce into evidence the documents appearing in 1st Respondent's list of documents as Dexh.1. On cross examination, it was his evidence that liability was 50% for the 1st and 2nd Respondent however he did not know why the Court failed to divide the amount. That the 1st Respondent paid Kshs. 518,511/- whereas the dispute relates to whether the judgment in the primary suit was 50:50 and payment of interest. In re-examination, he stated that the judgment in the primary suit was not delivered as joint and several. That the 1st Respondent settled the full amount of the decretal sum in the primary suit in November 2019 meanwhile the balance thereof was to be paid by part of the Respondents.

27. Here, it is not in dispute that the Respondents were the insurers of the respective vehicles that occasioned an accident in which resulted in the Appellant sustaining injuries. On accord of the latter, the Appellant filed the primary suit as against both the Respondents insured and successfully obtained a judgment that was delivered on 14.06.2019, which was adduced by the Appellant as Pexh.12, before the lower Court. Thus, from the forestated, at the heart of the disputation between the Appellant and the Respondents was the primary suit judgment, particularly the degree and extent of their liability towards settling the same.

28. The learned Magistrate to a great extent relied on Pexh.12 to arrive at the conclusion he did. It would bear importance to quote the relevant facets of the said decision as was done by the learned Magistrate in order to contextualize the matter. The primary suit decision elaborately addressed itself to the question of liability as hereunder; -

> "The manner in which the Plaintiff was crushed is consistent with her version of what happened. Both drivers were competing for passengers and that is how they caused the Plaintiff's injuries.....They knew there would be people alighting and boarding motor vehicles and, in the circumstances, find no reason to blame the Plaintiff for having been at

the stage. Both drivers are liable. Their employers are equally liable for the negligent acts of their drivers. Liability will be equally shared between both the driver and the owner of motor vehicle registration number KBW XXXX at 50% and owner of motor vehicle KBW XXXX at 50%.

.....

Judgment entered for the Plaintiff against the Defendants as follows

1. Liability – 1st Defendant and 2nd Defendant 50%. 3rd Defendant and 4th Defendant 50%
2. ...
3. ...
4. ...
5. Costs of suit plus interest."

29. It is on the premise of the primary suit judgment that the Appellant filed the lower Court suit wherein he sought among others "a declaration that the Respondents are jointly and severally bound to fully satisfy the decretal sum cost and interest in Nairobi CMCC No. 5212 of 2016 plus costs and interest in that suit". The Appellant took issues with the learned Magistrate finding on two fronts. Firstly, given that there was interlocutory judgment on a liquidate sum as against the 2nd Respondent, at the very least the trial Court ought to have entered judgment as against the 2nd Respondent for the entire sum or on half of the primary suit awards. Secondly, the primary suit judgment having been entered equally as against two (2) tortfeasors sued, the finding therein on liability did not mean that each tortfeasor is only liable to pay one half of the award when the tortfeasors are several and concurrent.

30. The 1st Respondent took great exception to the Appellant's argument by summarily arguing that lower Court rightly held that there was no mention in the primary suit of the Respondents being jointly and severally liable meanwhile the 1st Respondent had satisfied its part of the decretal sum in the primary suit prior to institution of the declaratory lower Court suit. Further, the Appellant having withheld the crucial fact that the 1st Respondent had settled it portion of the primary suit judgment in its pleadings, the learned Magistrate was well within his rights to dismiss the entirety of the Appellant's suit. The 2nd Respondent, on its part argued that the Appellant did not specifically plead that the Respondents each ought to be held 50% liable to satisfy the primary suit decree therefore she was bound by her pleading.

31. From the respective argument by the Respondents, they do not seem to advance the Appellant failed to meet the test set out in Jiji (supra), they merely challenge their extent of liability. The 1st Respondent particularly argued that it had settled Kshs. 518,511/- which was full and final settlement of its portion of the primary suit decretal award. That said, to contextualize the rival arguments, the authors in "Charlesworth and Percy on Negligence" 12th edition at para 3-87 address themselves to the concept of jointly and severally liable in negligence as follows; -

> " Wrongdoers are deemed to be joint tortfeasors, within the meaning of the rule, where the cause of action against each of them is the same, namely that the same evidence would support an action against them individually. There must be concurrence in the act or acts causing damage not merely a coincidence of secret acts which by their conjoined effect cause damage. Accordingly, they will be jointly liable for a tort which they both commit or which

they are responsible because the law imputes the commission of the same wrongful act to two or more persons at the same time."

32. Further, the concept joint and several liability, is well trodden within our jurisdiction to which this Court concurs with the rendition of Odunga J. (as he then was) in the case of Republic v PS in Charge of Internal Security ex parte Joshua Paul [2013] eKLR, wherein he cited with approval the decision in Dubai Electronics v Total Kenya & 2 others: Nairobi High Court Civil Case No 870 of 1998 in which the concept was explained as follows: -

> " Clearly therefore where you have joint liability all the tortfeasors are and each one of them is liable to settle the full liability. However, in a purely several liability each tortfeasor is only liable to settle the sum due to the tune of his liability. Where, however, the liability is joint and/or several the plaintiff has the option of either directing his claim against any one of the tortfeasors or making his claim against each one of the tortfeasors according to their individual liability. Either way he cannot recover more than the total sum decreed. However, the defendants are entitled to reimbursement from the co-defendants in the event that the plaintiff only opts to recover from one of them."

33. Applying my mind to the forestated, this Court does not agree with the Appellant's representation that she could recover the entirety of the decretal sum from either Respondent. The trial Court rightly held that the intention of the primary suit judgment was clear that liability was to be shared equally and ultimately demarcate to extent to which each party is liable to settle the primary decretal award. Further the lower Court correctly noted that the primary suit decision did not order for judgment to be entered jointly and severally, therefore the Appellant cannot proceed to seek from one Respondent, what either Respondent ought to pay.

34. As fittingly observed in Jiji (supra), one of the ingredients to be met for a declaration to issue pursuant to Cap 405 Laws of Kenya, is that the primary judgment sought to be enforced as against the insurer ought to have been as against the insurer's insured. Therefore, this Court cannot turn a blind eye to the intention of the learned Magistrate's pronouncement in Pexh.12 and principally the extent to which the respective Respondents insured where held liable. If the primary suit judgment had the intention of holding the Respondents insured jointly and severally liable, the same would have expressly come out in the primary suit judgment. As is, each of the Respondents insured extent of liability is only 50% of the total decretal sum in the primary suit. Therefore, in the declaratory suit, the Appellant could only seek judgment as against the respective insurer to the extent of their insured's liability as decreed in the primary suit judgment, this notwithstanding the fact the insurers insured were sued as joint tortfeasors in negligence.

35. As earlier observed in this judgment, pertinent to the determination of the real issues in controversy before this Court are the pleadings, which formed the basis of the parties' respective cases before the trial Court. Here, it is noteworthy to observe that the 2nd Respondent did not participate in the proceedings before the lower Court therefore the evidence as against was uncontroverted. Nevertheless, taking due cognizance of the ingredients in set out in Jiji (supra) that the Appellant was required to establish that:

    (a) she was a claimant within the meaning of Section 5(b) of the Insurance (Motor Vehicle Third Party Risks) Act;

    (b) that judgment was as against the Respondent's insured;

    (c) service of the statutory notice was effected upon the Respondents and;

(d) existence of a valid policy of insurance between the Respondent and its insured at the time of the accident, this Court reasonably believes that the said burden of proof was sufficiently discharged as against both Respondents.

36. Further, on the question of pleadings as assailed by the 2nd Respondent, it is trite that a Court is duty bound to pronounce itself on issues canvassed through the parties' pleadings. The Court of Appeal in North Kisii Central Farmers Limited v Jeremiah Mayaka Ombui & 4 others [2014] eKLR stated: -

> " The complaint running through the submissions by the learned counsel for the appellant in this appeal was that the learned judge wrote and delivered a judgement on issues that were not pleaded in the plaint and which were therefore not be before the learned judge for determination.
>
> .....One of the issues for determination on appeal in the case of Abdul Shakoor Sheikh v Abdul Najeid Sheikh Civil Appeal No. 161 of 1991 (ur) was the complaint that the trial judge dealt with an issue which was not properly before him as it had not been pleaded in the plaint. It was also contended in that appeal that in making this part of the order dependent on a non-existent appeal the judge grossly erred in that he granted a relief which had not been sought. This court differently constituted agreed and held that a plaintiff is not entitled to reliefs which he has not specified in his statement of claim as pleadings play a very pivotal role in litigation. The court cited a quote from the authors Bullen and Leake (12th edition) page 3 under the rubric Nature of Pleadings: -
>
> > "The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which the parties can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial."
> >
> > See also: - Galaxy Paints Co. Limited v Falcon Guards Limited [2000] 2 EA 385

37. Thus, despite the specific reliefs sought in the lower Court suit, the Appellant had pleaded at paragraph 8 of the plaint that "The Plaintiff prays for a declaration that the defendants are bound to satisfy the decree in Nairobi CMCC No. 5212 under Section 1o of the said Act (Cap 405)". The learned Magistrate was obliged to holistically read the Appellant's pleadings whereas the reliefs ought not to have been read independent of the body of the plaint.

38. Therefore, as can be garnered from a holistic reading of the plaint, the real issue in controversy before the learned Magistrate was whether a declaration could issue as against the Respondents pursuant to Cap 405, on the backdrop of the primary suit judgment? This Court faults the learned Magistrates decision for failing to address himself to the real issues in controversy despite the Appellant having specifically pleaded the same in his plaint. Further, as earlier noted 1st Respondent's main defence was that it had settled its portion of the primary suit decree to the tune of Kshs. 518,511/- meanwhile the 2nd Respondent failed to tender any defence thereby leading to entry of an interlocutory judgment as against it. The learned Magistrate equally failed to address himself to the latter in his judgment and his decision is similarly faulted on the issue.

39. Ultimately, had the trial Court applied itself to the totality of the Appellant's pleadings it would have identified the real issue in controversy and probably arrived at a different determination than the one it did. The forestated is premised on the fact that by the judgment in Pexh.12, the amount acceded to have been settled by the 1st Respondent to the tune of Kshs. 518,511/- cannot be said to be full and final settlement of the primary suit decretal sum. Further, the 2nd Respondent having failed to present a defence before the trial Court and interlocutory judgment have been entered as against it, reviewing the Appellant's claim supporting documents, abiding by the dicta in Jiji (supra), it can be judiciously be concluded that the Appellant established a case on balance of probabilities as against the 2nd Respondent. In any evident, the 2nd Respondent's challenge at this stage would only be limited on legal questions, to wit having interrogated the same does not offer succor to its cause. Therefore, by the Appellant's pleadings a declaration ought to have issued as against the Respondents only to the extent as decreed by the primary suit accordingly the learned Magistrates finding on the question ought to be interfered with.

40. In conclusion, this Court while applying its mind to the facts and law sensibly believes that the Appellant established his case on a balance of probabilities that a declaration ought to issue as against the Respondents that they are duty-bound to satisfy the decree in Nairobi Milimani CMCC No. 5212 of 2016 pursuant to Section 10 of the Cap 405, only to the extent of the respective Respondents liability as decreed therein. Consequently, the lower Court decision ought to be set-aside and a find made allowing the appeal herein with costs of the appeal being borne by the respective Respondents to the extent of their liability as decreed in the primary suit.

DETERMINATION

i. This Appeal is hereby allowed.

ii. The lower Court decision is hereby set aside and substituted with an order entering judgment in favour of the Appellant by way of a declaration that each of the Respondents are liable to pay and or duty bound to settle 50% of the decretal sum in Nairobi Milimani CMCC No. 5212 of 2016 plus costs and interest until payment in full, less any paid amount.

iii. Cost of the appeal herein as awarded to the Appellant is equally apportioned at 50% between each Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 6TH DAY OF NOVEMBER, 2024

ROA 14 days.

HON. T. W. OUYA

JUDGE

for Appellant.....Kanana

For Respondent.....Kabita

Court Assistant.....Martin