



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 69 OF 2015**

**KENYA ORIENT INSURANCE CO. LTD.....APPELLANT**

**VERSUS**

**1. RASHID LIBONDO HAMISI**

**2. RAAPHU ALI JUMA.....RESPONDENTS**

**(An appeal from the Judgment of Honourable S.K. Gacheru, Principal Magistrate, delivered on 23<sup>rd</sup> April, 2015 in SRMCC No. 2048 of 2011)**

**JUDGMENT**

1. The brief background giving rise to this appeal is that the respondents filed Kwale SRMCC No. 150 of 2009 against one Jonathan Mwachoo and another. On 3<sup>rd</sup> March, 2010, the Hon. Magistrate who presided over the case awarded general damages to the respondents in the sum of Kshs. 845,250/= plus costs and interest. Afterwards, Mr. Jonathan Mwachoo filed an application dated 6th September, 2010 seeking stay of execution and the setting aside of the *ex parte* Judgment. The submissions by the respondents' Counsel indicate that Mr. Mwachoo in his affidavit filed before the said court averred that he made a routine call to his insurers whereby he learnt that they had been sued due to the accident, the subject of this appeal. Arising from the said application, the Kwale court set aside the *ex parte* Judgment and ordered Jonathan Mwachoo to deposit the decretal amount, which was not deposited. The plaintiffs (respondents herein) then filed a declaratory suit in Kwale SRMCC No. 143 of 2010 which was transferred to Mombasa. It was given the number Mombasa SRMCC No. 2048 of 2011.

2. The facts of the case filed in Mombasa show that the Hon. Magistrate after hearing the parties entered Judgment in favour of the respondents, Rashid Libondo Hamisi and Raaphu Ali Juma as prayed in the plaint for the sum of Kshs. 941,340,000, plus costs and interest. The appellant being aggrieved by the said decision filed a memorandum of appeal on 20th May, 2015 raising the following grounds of appeal:-

(i) That Learned Trial Magistrate erred in law and in fact in holding that the respondents had proved their case on a balance of probability;

(ii) That the Learned Trial Magistrate erred in law and in fact in shifting the burden of proving who was the Appellant insured, to the appellant, contrary to the elementary principle of law that he who alleges has the burden of proof;

(iii) That the Learned Trial Magistrate erred in law and in fact in holding the Respondent had proved that Jonathan Mwachoo was the Appellant insured, simply because the appellant had not disclosed the name of its insured in complete contravention and disregard of section 3(4) of the Evidence Act, Chapter 90 (sic) Laws of Kenya;

(iv) The Learned Trial Magistrate erred in law and in fact and acted contrary to the evidence on record in holding that there was evidence to show that the appellant had issued Jonathan Mwachoo with an insurance cover for the motor cycle subject matter of the case; and

(v) That the Learned Trial Magistrate erred in law and in fact and misapprehended the evidence that was before him hence made a decision that was erroneous.

3. The appellant prays for the appeal to be allowed and for the Judgment delivered on 23<sup>rd</sup> April, 2015 to be set aside and substituted with an order dismissing the suit with costs and for the appellant to have the costs of the case in the subordinate court and this appeal.

4. The appellant's Counsel filed his written submissions on 5<sup>th</sup> June, 2017 whereas Counsel for the respondent filed his on 3rd July, 2017. They thereafter highlighted the said submissions. Mr. Jengo, Learned Counsel for the appellant invited this court to bear in mind the duty of the first appellate court as enunciated in the case of **Mwanasokoni vs Kenya Bus Services Ltd.** [1985] eKLR. He stated that the burden of proof as provided by Sections 107, 108 and 109 of the Evidence Act was on the respondents whom the lower court found to have discharged the burden of proof. He stated that although it was argued in the lower court that a policy for a motor cycle was given to Jonathan Mwachoo, the said allegation was denied by the appellant. Counsel for appellant made reference to a Chamber Summons application dated 25th June, 2010 where the appellant in its further affidavit disclosed that the insured was one Paul Mwapesa and not Jonathan Mwachoo. He relied on the case of **Palace Investment Ltd. vs Geoffrey Kariuki Mwenda and Another** [2015] eKLR where the court cited the decision of Denning J in **Miller vs Minister of Pensions** [1947] 2 ALL ER 372 on the burden of proof.

5. With regard to the evidence of PW2, Mr. Jengo stated that the said witness was not the Investigating Officer and he did not bring to court the police file. It was contended that he did not indicate who the insured was, for motor cycle registration No. KBC 080X. Counsel indicated that the said witness produced a photocopy of the police abstract which bears the name of the owner of the motor cycle as Jonathan Mwachoo. He added that the particulars thereof did not set out the name of the insured.

6. It was submitted for the appellant that the motor cycle insurance sticker which was produced by DW1 showed that the insured was Paul Mwapesa. In the Counsel's view, more weight should have been placed on the motor cycle insurance sticker than on the police abstract. He argued that the Hon. Magistrate should not have admitted and given much weight to the evidence of PW2, as it amounted to hearsay.

7. To fortify his submissions, he referred to the case of **Prime Bank Ltd. v Josephat Ogora Esige** HCCA No. 812 of 2004 and **Black's Law Dictionary, 7th Edition** on the inadmissibility of hearsay evidence under the rules of evidence.

8. It was further argued that the certificate of insurance was not produced by the respondents, yet they had the burden of proof. He cited **Timsales Ltd. vs Harun Thuo Ndungu** [2010] eKLR and **Kenya Power and Lighting Company Limited vs Margaret Akoth Olang**, Civil Appeal No. 72 of 2016 where the court held that where a party withholds evidence from the court, the presumption is if the evidence was called it would have been prejudicial to the person who should have called it.

9. On failure for the respondent's Counsel, to cross-examine DW1 on the motor cycle insurance sticker, it was contended that it was acquiescence on the part of the respondents.

10. It was further argued that the Hon. Magistrate misdirected himself by holding that the insured was Jonathan Mwachoo and that a police abstract can be relied upon to prove ownership of a motor cycle. Mr. Jengo stated that the foregoing applies where the other party does not produce evidence to the contrary but in the present case, the appellant showed that the insured was a different person. He further stated that the pleadings in Kwale SRMCC No. 150 of 2009 were not produced in the declaratory suit.

11. In making reference to the case of **Joseph Mbuta Nziu vs Kenya Orient Insurance Co. Ltd.**, Mombasa High Court Civil suit No. 156 of 2006 referred to by Mr. Ananda in his written submissions, Counsel for the applicant stated that in the said case Judgment was entered against the authorized Driver of the insured owner, thus the insurance was liable, but in this case, there is no Judgment against the insured. He indicated that the name of the Driver in this case was given as Mbatha Ngala.

12. Mr. Jengo submitted that if the Hon. Magistrate felt that he was unsure about the case, he should have applied the provisions of section 3(4) of the Evidence Act and deem the facts of the case as disproved. He prayed for the appeal to be allowed.

13. Mr. Ananda, Learned Counsel for the respondents opposed the appeal. He indicated that the respondents are the personal representatives of Bahati Ali Libodo who died in an accident when he was knocked down by motor cycle registration No. KBC 080 X. In making reference to the statement of defence filed by the appellant, Counsel for the respondent stated that it was a general denial. He further submitted that when Mombasa SRMCC No. 2048 of 2011 commenced, PW1 was very specific that his brother Bahati was hit by a motor cycle insured by the appellant and that he was given a copy of the police abstract and the insurance policy number by the police. PW1 gave the name of the insured as Jonathan Mwachoo.

14. It was submitted for the respondents that PW2 produced the police abstract and confirmed that the motor cycle was insured by the appellant. Mr. Ananda asserted that PW2 on cross-examination confirmed that Jonathan Mwachoo was the insured. Counsel stated that even the pleadings before the lower court showed that Jonathan Mwachoo was their insured as he swore an affidavit to set aside the *exparte* Judgment. It was submitted that the Honourable Magistrate who delivered the Judgment the subject of this appeal believed that Jonathan Mwachoo was the insured owner of the motor cycle.

15. Mr. Ananda argued that the appellant had in its defence not pleaded that the insured of the motor cycle was Paul Mwapesa and not Jonathan Mwachoo. Counsel cited **Joseph Mbuta Nziu vs Kenya Orient Insurance Co. Ltd.** and **Independent Electoral Boundaries Committee and Another vs Stephen Muinda Mule and 3 Others** [2014] eKLR on the importance of pleadings. He stated that Paul Mwapesa was not called to testify to state that he was the owner of the motor cycle and as such, the appellant is trying to avoid paying the decretal amount.

16. On failure to serve a notice to the insurer, it was submitted that it was not a pleaded issue. Counsel for the respondents relied on the case of **Philip Kimani Gikonyo vs Gateway Insurance Co. Ltd.** [2007] eKLR on the provisions of Section 5(b) of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405, to assert that the law is clear that once a motor vehicle is involved in an accident, the insured should pay. He prayed for the appeal to be dismissed with costs.

17. In response to the foregoing submissions, Mr. Jengo stated that the appellant was not a party to the primary suit and since the file was not produced in the declaratory suit, the appellant was not aware of the pleadings therein. He further stated that the issue of Paul Mwapesa was always a live issue. He referred to Order 2 rule 3(1) of the Civil Procedure Rules on matters to be pleaded generally and to Order 2 rule 4 of

the Civil Procedure Rules on matters to be pleaded specifically.

## ANALYSIS AND DETERMINATION

The issue for determination is whether the respondents proved their case in the lower court on a balance of probabilities.

18. This court is alive to the duty of the first appellate court as pronounced in the case of **Sumaria and Another vs Allied Industrial Limited** [2007] 2 KLR 1, as follows:-

***“Being a first appeal, this court is obliged to reconsider the evidence, re-evaluate it and make its own conclusions. A Court of Appeal would not normally interfere with a finding of fact by the trial court unless:***

***(a) It was based on no evidence; or***

***(b) It was based on a misapprehension of the evidence; or***

***(c) The judge was shown demonstrably to have acted on the wrong principle in reaching the finding he did.”***

19. The evidence tendered for the respondents in the lower court was by PW1, Rashid Libondo Hamisi who testified that his brother, Bahati Ali Libondo, was hit by a motor cycle insured by the appellant. He died after being knocked down. He stated that they got a Judgment for Kshs. 830,000/= as general damages, plus costs in a case they had filed against Jonathan Mwachoo. A copy of the Judgment was produced as plf. exh. 2, a copy of the death certificate was produced as plf. exh. 3. PW1 produced a copy of grant of the letters of administration as plf. exh. 4. He testified that the accident was reported to Likoni Police Station where a police abstract was issued. The said abstract was marked as MFI - 5. He stated that the motor cycle involved in the accident was registration No. KBC 080X insured by the appellant through policy No. 203080447. PW1 also produced a demand letter and a statutory notice as plf. exh. 6 that were issued to the appellant on 2<sup>nd</sup> May, 2009. He produced a copy of a notice of Judgment, as plf. exh. 7. PW1 testified that Jonathan failed to pay them and their prayer was for the appellant was pay them.

20. On being cross-examined, PW1 stated that they initially sued Jonathan and Abson Motors at Kwale Law courts. He asserted that the owner of the motor cycle was Jonathan Mwachoo as per the police abstract. The said motor cycle was insured by the appellant. He stated that he did not know that the motor cycle belonged to Paul Mwapesa.

21. PW2 was No. 41359 PC Simon Mwinya was attached to Likoni Police Station, Traffic Section. He had with him in court a police abstract for an accident that occurred on 25<sup>th</sup> October, 2008 along Shelly Beach Road involving a pedestrian, Bahati and a motor cycle registration No. KBC 080X. It was PW2's evidence that the motor cycle belonged to Jonathan Mwachoo and it was insured by the appellant under policy No. 203080447 commencing on 12<sup>th</sup> August, 2008 and expiring on 11th August, 2009. He testified that Bahati died as a result of the said road traffic accident. He testified that the police abstract was issued on 9th December, 2008 at Likoni Police Station. An amount of Kshs. 200/= was paid for the same. PW2 produced the Police abstract as plf. exh. 5 and a receipt thereof as plf. exh. 8.

22. On cross-examination, PW2 stated that Jonathan Mwachoo owned the said motor cycle as shown on the insurance certificate. He could not tell if Jonathan was the real owner.

23. In the lower court, the appellant called DW1, Stephen Mutuku Kisego who was the Branch Manager of the appellant Company, Mombasa branch since 1<sup>st</sup> April, 2014. He stated that he was aware of the primary suit against Jonathan Mwachoo and Abson motors. DW1 stated that the two were not their clients but they had insured the motor cycle. He stated that Paul Mapesa (sic) was their insured then and if he had been sued in the primary suit, they could have settled the claim. DW1 produced a certificate of insurance as def. exh. 1, listing the insured as Paul Mapesa (sic). He stated that they sent a notice to renew the policy to Paul, upon expiry on 11<sup>th</sup> August, 2009.

24. On cross-examination, DW1 stated that he was aware that the appellant sought to have the initial suit in the Kwale court set aside and that Jonathan Mwachoo swore an affidavit as their client in the Kwale court case to set aside the Judgment. DW1 stated that Jonathan Mwachoo may have had to be their client (sic) in the Kwale court. DW1 further stated that the police abstract shows that Jonathan Mwachoo was the insured, for the accident motor cycle. He also said that Paul Mapesa (sic) was not shown as their insured in the defence statement in the case in the lower court.

25. On re-examination, DW1 stated that Jonathan Mwachoo was not their client hence they were not liable to pay. He indicated that the particulars offered on the abstract were for the owner of the motor cycle not for the insured.

26. The Hon. Magistrate in his Judgment considered the evidence laid before him and found that Judgment had been entered against Jonathan Mwachoo in the primary suit, namely, Kwale SRMCC No. 150 of 2009 and that the said person thereafter swore an affidavit on behalf of the appellant in support of an application to set aside the default Judgment in the Kwale case. This court has noted that the foregoing fact was not disputed by the appellant.

27. I have perused the exhibits produced by the respondents in support of their case and noted that the police abstract produced as plf. exh. 5 shows that the motor cycle registration No KBC 080X was owned by Jonathan Mwachoo of P O Box 86324, Mombasa. The name of the insurance company under which the motor cycle was insured was Kenya Orient Insurance Ltd., the appellant herein. The policy number as per the police abstract is given as 203080447 TPO. Armed with the foregoing information, the personal representatives of the deceased, Bahati Libondo, sued Jonathan Mwachoo filed Kwale SRMCC No. 150 of 2009 and obtained an *ex parte* Judgment against him for the sum of Kshs. 845,250/=. A copy of the said Judgment was produced in evidence.

28. PW1 produced plt. exh. 6 which was a copy of the statutory notice that was issued to the Manager, Kenya Orient insurance Co. Ltd. It is dated 14<sup>th</sup> April, 2009. It was sent by way of registered post as per the forwarding letter from the respondents' Advocates dated 22<sup>nd</sup> May, 2009. The assertion by the appellant's Counsel that his client was not issued with a statutory notice can therefore not hold in light of the above evidence adduced by the respondents. It is therefore apparent that as at the time the primary suit was filed against the appellant, it was well aware of the accident and the impending institution of the suit in the Kwale court.

29. When the declaratory suit was filed, the appellant filed a defence and in paragraph 3 thereof, it denies having issued a policy of insurance No. 203080447 for motor vehicle (sic) registration No. KBC 080X or at all as alleged. The appellant denied owing the respondents any statutory obligations or at all to make good the respondents' loss as alleged and averred that it would put them to strict proof thereof.

30. In paragraph 4 of the plaint, the respondents averred that insurance policy No. 203080447 TPO was issued by the appellant to one Jonathan Mwachoo and the claim was in respect to an accident arising out of the use on the road of Motor cycle registration No. KBC 080X make Haojin.

31. The above shows that the respondents were very specific in their pleadings. Although paragraph 7 of appellant's further affidavit sworn by Tom Omiti on 20<sup>th</sup> April, 2011 states that the insured of the said motor vehicle (sic) was Paul Mwapesa, in its statement of defence filed on 9<sup>th</sup> June, 2010, it failed to disclose that their insured was Paul Mwapesa and not Jonathan Mwachoo. At all material times, the appellant was aware of the identity of their insured, and should have disclosed the said information at the earliest opportunity. It is my finding therefore that the late disclosure by the appellant that their insured was Paul Mwapesa was an afterthought. I do agree with Counsel for the respondents that the appellant is bound by its pleadings.

32. In **Independent Boundaries Commission and Another v Stephen Mutinda Mule and 3 Others** [2014] eKLR, the Court of Appeal considered the decision of the Malawi Supreme Court of Appeal in Malawi **Railways Ltd vs Nyasulu** [1998] MWSC 3, in which the Learned Judges quoted with approval from an article by Sir Jack Jacob entitled "*The present importance of pleadings*". The same was published in [1960] current Legal problems, at page 174 whereof the author stated:-

*"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings.....for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it on other than to adjudicate upon the specific matters in dispute which the parties themselves have raised in the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to were to pronounce any claim or defence made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice.....In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is completely adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."*

33. After considering the evidence tendered in the court below, the submissions and authorities relied upon before this court, I find that the evidence of DW1 is not plausible. In cross-examination he admitted that they had insured the motor cycle and that the police abstract showed that Jonathan Mwachoo was the insured. In re-examination, he stated that the particulars given in the police abstract were for the owner of the motor cycle and not for the insured.

34. Mr. Jengo referred to the evidence of PW2 as hearsay thus inadmissible. That cannot be. Even though PW2 was not the Investigating Officer, he gave evidence based on the police abstract that he produced in court. He did not give evidence based on what he was told by third parties who were not called to give evidence. He restricted his evidence to the said document.

35. I do not agree with the submission by Counsel for the appellant that the Hon. Magistrate shifted the burden of proof to the appellant by stating that Paul Mwapesa did not record a statement to be filed in the court file nor was he called by the appellant as its witness to attend court to confirm if it was actually true that he was the insured owner of the motor cycle when the accident occurred. It is my finding that the Hon. Magistrate did not misdirect himself when he made the above observation. If anything the authorities cited by Mr. Jengo of **Timsales Ltd. vs Harun Thuo Ndungu** (supra) and **Kenya Power and Lighting Company Limited vs Margaret Akoth Olang** (supra) apply aptly to the appellant who failed to call Paul Mwapesa as its witness. The only presumption that this court can arrive at is that his evidence if he had testified, would have been unfavourable to the appellant.

36. It is apparent from DW1's evidence that the appellant is trying to escape from liability by denying that Jonathan Mwachoo was their insured. It is my finding that he was the owner of motor cycle registration No. KBC 080X insured by the appellant at the time when the accident in issue occurred. The Hon. Magistrate considered all the evidence tendered before him carefully and in a well reasoned Judgment, he found in favour of the respondents. I find no justifiable reasons to depart from the said Magistrate's finding. I hold that the respondents discharged their onus of proof on a balance of probabilities. I therefore dismiss the appeal. I award costs of this appeal and of the declaratory suit to the respondents herein. I also award interest at court rates, to the respondents.

It is so ordered.

**DELIVERED, DATED and SIGNED at MOMBASA on this 6th day of April, 2018.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Mr. Kazungu holding brief for Mr. Jengo for the appellant

Mr. Masila holding brief for Mr. Ananda for the respondents

Mr. Oliver Musundi - Court Assistant