REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. E090 OF 2025

KENYA ORIENT INSURANCE LIMITED …….……... APPELLANT

- VERSUS -

FESTO ONZERE OKINDA …….....……...……..… RESPONDENT

(Being an appeal from the judgment and decree of Hon. J. Kimetto PM delivered on the 11/3/2025 in Maseno PMCC No. E118 of 2021, Festo Onzere Okinda v Kenya Orient Insurance Limited

J U D G M E N T

1. The respondent filed a declaratory suit vide a plaint dated **10/08/2021** in which he sought a declaratory order against the appellant to settle the decree in **Maseno PMCC 54 of 2015** with costs and interest from **25/2/2020** till payment in full.

2. The appellant opposed the suit vide a statement of defence dated **26/08/2021** in which it denied being the insurer of the defendants in **Maseno PMCC 54 of 2015 ("the primary suit")** and further that it was not served with Statutory Notice as required under the Insurance (Motor Vehicles Third Party Risks) Act.

3. The matter proceeded to trial and by a judgment delivered on **11/3/2025,** the trial court ruled in favour of the respondent and ordered the appellant to settle the decree in the primary suit with interest accruing from the date of the judgment.

4. Being dissatisfied with the said Judgment/decree, the appellant lodged this appeal vide the Memorandum of Appeal dated **4/4/2025** and raised nine (9) grounds of appeal summarized as follows: -

    a) ***The learned trial magistrate erred in law and in fact in holding that a statutory notice was served upon the Appellant without any evidence that it was served.***

    b) ***The learned trial magistrate erred in law in failing to consider and follow decisions binding upon her on the need for proof of delivery by a courier service provider and thus reached on unsupportable decision.***

    c) ***The learned trial magistrate erred in fact in finding that the Appellant was aware of the filing of the primary suit because the Advocates in the primary suit was the same Advocate in the declaratory suit.***

    d) ***The learned trial magistrate erred in law in finding that the Appellant was the insurer of the accident vehicle on the basis of an objected exhibit, namely the police abstract, which was not produced at the trial, and was only marked for identification.***

    e) ***The learned trial magistrate erred in law in relying on inadequate evidence led by the Respondent on the basis merely that it was uncontroverted.***

5. The appeal was disposed off by written submissions. The appellant submitted that contrary to the trial court's holding, there was no pleading by the respondent that she had served the statutory notice to the advocate as an agent of the appellant and further there was no evidence that the said advocate had defended the initial suit on the appellant's instructions.

6. That consequently the trial court could not determine a suit based on issues not pleaded as parties were not allowed to depart from their pleadings. That there was no evidence adduced to prove that the statutory notice was served on the appellant as the courier waybill adduced by the respondent was not sufficient to prove service of the notice.

7. That there was no evidence adduced to show that the appellant was the insurer of motor vehicle registration number **KBN 974C** in the primary suit as the appellant had denied this allegation.

8. On the other hand, the respondent submitted that the Record of Appeal dated 4/07/2025 was incomplete as the pleadings and lower court trial proceedings in the primary suit were missing and were part of the proceedings in Maseno **PMCC number E118 of 2021** particularly as the proceedings in the primary suit had led to the declaratory suit that culminated with this appeal.

9. That there was proper service upon the appellant and further that the appellant actively participated and defended the primary suit through the firm of **Messrs. Peter M. Karanja Advocates**.

10. As regards the Police abstract, the respondent submitted that the same may not have been proof of a valid insurance policy cover but it contained the details of the policy under which the cover was obtained as was held in the case of **Peter Kanithi Kimunya v Aden Guyo Haro [2014] eKLR.** That in the present case, the same was prima facie evidence that the appellant had issued the policy in the absence of credible evidence to the contrary.

11. This being a first appeal, the Court is duty bound to evaluate the evidence before the trial court afresh and come to its own independent findings and

conclusions. See **Selles & Anor v Associated Motor Boat Co Ltd & Others [1968] EA 123.**

12. In **Gitobu Imanyara & 2 others v Attorney General [2016] eKLR**, the Court of Appeal held that: -

> ***"This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect."***

13. ***Order 42 of the Civil Procedure Rules*** provides: -

> ***"Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say-***
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> ***a) the memorandum of appeal;***
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> ***b) the pleadings;***
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> ***c) the notes of the trial magistrate made at the hearing;***
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> ***d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;***

e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;

f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

Provided that—

i) a translation into English shall be provided of any document not in that language;

ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f)".

14. It is thus evident that the record of appeal is required to contain the listed documents. However, the Court may dispense with the production of any document it deems irrelevant. However, the production of the memorandum of appeal, the pleadings and the decision appealed against may not be dispensed with.

15. In the present case, the proceedings in **Maseno PMCC number 54 of 2015** which were produced in evidence before the trial court as **Exhibit P5** are missing from the record. The said proceedings are vital in the determination of this appeal as they are the basis upon which the impugned proceedings before the trial court emanated from. The Court did not dispense with their production. In the premises, the record of appeal is incomplete.

16. Besides the record of appeal, I have carefully considered the original file from the subordinate court with a tooth comb and I have been unable to find

the missing documents therein. If they were, this Court would have been able to proceed and determine the appeal on merit.

17. Courts have time and again Courts pronounced themselves on incompleteness of records of appeal. In **Hamida Yaroi Shek Nuri v Faith Tumaini Kombe & 2 others [2019] eKLR**, the Supreme Court considered an application for striking out the record of appeal which did not contain the record of proceedings before the Court of Appeal and stated: -

> ***"(22) Under Rule 33(4), the contents of a Record of Appeal (from a court or tribunal in its appellate jurisdiction) contains the following documents from the first appellate court: the certificate, if any, certifying that the matter is of general public importance; the memorandum of appeal; the record of proceedings; and the certified decree or order. This Court has timely reiterated that under Rule 33(6) a document omitted may be filed in a Supplementary Record without leave of the Court with fifteen days of filing of the Record of Appeal; and subsequently with leave of the Court, the same document may be filed.***
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> ***(23) It therefore emerges that failure to include the 'record of proceedings of the court of Appeal" in the Record of Appeal does not automatically render the appeal filed before this Court fatal. For if the law contemplates that such an omitted document may be filed later, the same law cannot be said to render a Record of Appeal with that omission outrightly fatal. However, we hasten to add that where a required document lacks in the Record of Appeal, devoid of a***

sufficient explanation for the omission, is a ground for the striking out of that Record of Appeal."

18. My understanding of the foregoing, is that any omitted document may be filed in a supplementary record. However, where this is not done and no sufficient explanation for the omission has been provided, such record of appeal is for striking out.

19. Although the appellant filed a supplementary record of appeal dated **7/8/2025**, the same did not contain the omitted documents. All it has, is the copy of the impugned judgment. It is not clear why the said proceedings were omitted yet the same were produced in court as Exhibit P5 and not objected to. Further, the said proceedings are vital to the determination of this appeal. No explanation for the omission has been proffered.

20. Where there is an omission of required documents in the record of appeal and no sufficient explanation for the omission is proffered, the Court will be justified in striking out that record of appeal. (see **Hamida Yaroi Shek Nuri case,** (supra)). In **Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others [2015] eKLR,** the Supreme Court considering the incompleteness of a record of appeal stated: -

"(41) Without a record of appeal a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law, or the Constitution, where an appeal is incompetent. An incompetent appeal divests a Court of the

jurisdiction to consider factual or legal controversies embodied in the relevant issues."

21. In view of the forgoing, I find that with an incomplete record, the appeal is incompetent and defective. It is for striking out.

22. The upshot is that the appeal is incompetent and is hereby struck out with costs of **Kshs.20,000/-** to the respondent.

It is so decreed.

DATED and **DELIVERED** at Kisumu this **9th** day of **October, 2025**.

A. MABEYA, FCI Arb

JUDGE