Kenya Orient Insurance Limited v Onyino (Civil Appeal E089 of 2025)
[2025] KEHC 14121 (KLR) (9 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14121 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E089 OF 2025

A MABEYA, J

OCTOBER 9, 2025

BETWEEN

KENYA ORIENT INSURANCE LIMITED ..... APPELLANT

AND

LILIAN KELA ONYINO ..... RESPONDENT

(Being an appeal from the judgment and decree of Hon. J. Kimetto PM delivered on the 11/3/2025 in Maseno PMCC No. E117 of 2021, Lilian Kela Onyino v Kenya Orient Insurance Limited)

JUDGMENT

1. The respondent filed a declaratory suit vide a plaint dated 10/08/2021 in which she sought a declaratory order against the appellant to settle the decree in Maseno PMCC 53 of 2015 ("the primary suit") with costs and interest from 1/12/2020 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 the primary suit and 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 found in favor of the respondent and entered judgment against the appellant to settle the decree in the primary suit with interest 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 the 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 for the primary suit were missing although they were part of the proceedings in suit the subject of the appeal herein.

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 although the same was not proof of a valid insurance policy cover, it nevertheless 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 as follows: -

> " 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;
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> e. all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
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> f. the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:
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> Provided that—
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> i. a translation into English shall be provided of any document not in that language;
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> 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. From the foregoing, it is clear that a record of appeal is required to contain the listed documents. However, the Court may dispense with the production of any document that 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 trial proceedings of the primary suit (Maseno PMCC number 53 of 2015) which were produced in evidence before the trial court as Exhibit P5 are missing from the record. The said proceedings are vital for the determination of this appeal as they are the basis upon which the impugned proceedings emanated from. This Court did dispense with the same. In the premises, the record of appeal is incomplete.

16. Courts have time and again pronounced themselves on incompleteness of records of appeal. While the High Court would ordinarily not strike out a record for failure to be complete since the record of the trial court is ordinarily before it, in the present case, the circumstances are different. The original record of the trial Court is before Court, but the record that led to that suit, although produced before the trial Court, is nowhere to be seen. The present appeal cannot be determined justly in the absence of that record.

17. 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. It is clear from the foregoing 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 may be struck 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. In this regard, the record is incomplete and there is no explanation has been advanced.

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)).

21. 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."

22. In this regard, I find that with an incomplete record, the appeal is incompetent and defective. The Court is thus divested of the jurisdiction to consider the issues placed before it.

23. The upshot is that the Appeal herein being incompetent, 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