



REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MAKINDU

CIVIL CASE NO. E153 OF 2025

DANIEL JUMA KAKYEWA ALIAS DANIEL
JUMA.....PLAINTIFF

VERSUS

DIRECTLINE ASSURANCE COMPANY
LIMITED.....DEFENDANT

JUDGMENT

INTRODUCTION

"Justice delayed is justice denied" is a legal maxim meaning that if legal redress is available for a party that has suffered some injury, but is not forthcoming in a timely fashion, it is effectively the same as having no redress at all. This principle is the basis for the right to a speedy trial and similar rights which are meant to expedite the legal system, because it is unfair for the injured party to have to sustain the injury with little hope for resolution. The phrase has become a rallying cry for legal reformers who view courts or governments as acting too slowly in resolving legal issues either because the existing system is too complex or overburdened, or because the issue or party in question lacks political favour. The late Martin Luther King, Jr. used the phrase in the form ***"justice too long delayed is justice denied"*** in his ***"Letter from Birmingham Jail"***, smuggled out of jail in 1963.

As Chief Justice of the United States, Warren E. Burger noted in an address to the American Bar Association in 1970 thus:

"A sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people and three things could destroy that confidence and do incalculable damage to society: that people come to believe that inefficiency and delay will drain even a just judgment of its value; that people who have long been exploited in the smaller transactions of daily life come to believe that courts cannot vindicate their legal rights from fraud and over-reaching; that people come to believe the law (in the larger sense) cannot fulfil its primary function to protect them and their families in their homes, at their work, and on the public streets."

THE CLAIM

Daniel Juma Kakyewa (hereinafter referred to as the plaintiff) has been in the corridors of justice since 2024 in a bid to touch its pure fountain. This suit is premised on a road traffic accident that is said to have occurred on 26th August, 2024. The accident involved motor vehicle registration number KDD 613H. The plaintiff averred that the defendant was the Insurer of motor vehicle registration number KDD 613H at the time of the accident. The plaintiff further averred that in order to be compensated, he instituted a suit against the defendant's insured vide Makindi SCCC No. E131 of 2024- Daniel Juma Kakyewa v Azan Motors Limited & another (hereinafter referred to as the primary suit).

That the suit was heard and judgment was entered for the plaintiff on 2/12/2024 in the sum of Ksh. 155,550/= plus costs and interest. The plaintiff averred that he extracted a decree and certificate of costs in the sum of Ksh. 185,652/= but has been unable to recover the said sum. That the defendant has an obligation to settle the entire amount but has refused to do so. Despite having obtained judgement in the primary suit, the plaintiff herein is yet to enjoy the fruits of successful litigation. In his quest for justice, the plaintiff filed the instant declaratory suit against the defendant in which he seeks the court to declare the defendant liable and compel it to satisfy the decree in the primary suit. Consequently, the plaintiff prays for judgment against the defendant for:

- a) A declaration that the defendant is bound to settle the entire decretal amount of Ksh. 185,652/= arising from the judgment in Makindu Small Claims Court Civil case No. E131 of 2024-Daniel Juma Kakyewa alias Daniel Juma v Azan Motors Limited and Cosmas Mulinge;
- b) An order do issue compelling the defendant to settle the entire decretal amount of Ksh. 185,652/= arising from the judgment in Makindu Small Claims Court Civil case No. E131 of 2024-Daniel Juma Kakyewa alias Daniel Juma v Azan Motors Limited and Cosmas Mulinge;
- c) Interest on (b) above from the date of judgment in Makindu Small Claims Court Civil case No. E131 of 2024 until payment in full;
- d) Costs and interest.
- e) Any other relief.

THE DEFENCE

The defendant filed a notice of appointment of Advocates and a statement of defence in which it denied the plaintiff's claim in toto. The defendant denied that it was the insurer of motor vehicle registration number KDD 613H against any claim arising out of an accident. The defendant further denied knowledge of the primary suit and averred that it was not a party to the same nor was it served with a statutory notice or notice of intention to sue. The defendant averred that it is not bound to satisfy any judgment arising out of the primary suit and prayed that the plaintiff's suit be dismissed with costs.

THE EVIDENCE

The Plaintiff's Case

At the hearing of the suit, the only the plaintiff testified in support of his case. The plaintiff adopted his statement filed in court as part of his testimony. The plaintiff testified on how he was involved in an accident then later filed the primary suit. That judgment was delivered in his favour and a decree and certificate of costs issued in the sum of Ksh. 185,652/=. The plaintiff stated that the defendant was the insurer of the accident motor vehicle but has declined to settle the decretal sum awarded in the primary suit. The plaintiff produced documents in support of his claim.

The Defence Case.

The defendant did not call any witness in its defence.

MAIN ISSUES FOR DETERMINATION

In my view, the main issues for determination are:

- 1) Whether the defendant was the insurer of motor vehicle registration number KDD613H at the time of accident;
- 2) Whether the defendant is bound to satisfy the decree in Makindu Small Claims Civil Case No. E131 of 2024;
- 3) Who should bear the costs of this suit?

SUBMISSIONS

None of the parties filed submissions in support of their cases.

ANALYSIS AND DETERMINATION

I have carefully considered the evidence on record and given due regard to the applicable law. Section 10(1) of the Insurance (Motor vehicle Third Party Risks) Act Cap. 405 Laws of Kenya provides 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.

Provided that the sum payable under a judgment for a liability pursuant to this section shall not exceed the maximum percentage of the sum specified in section 5(b) prescribed in respect thereof in the Schedule."

Ordinarily, under section 10 (2) of the same Act, the Insurer can only be exempted from liability arising out of a policy if:

- a) in respect of any judgment, the insurer had no notice of the proceedings in which the judgment was given. Such notice ought to be given either before or within 30 days after the commencement of the proceedings giving rise to the judgment;
- b) in respect of any judgment, execution therein is stayed pending an appeal; or
- c) in connection with any 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 (now Inspector General of Police) in writing of the failure to surrender the certificate.

Section 10(3A) of the Act provides that no judgment or claim shall be payable by an insurer unless the claimant had, before determination of liability at the request of the insurer, subjected themselves to medical examination by a certified medical practitioner.

Section 10 (4) of the same Cap 405 provides as follows:

" No sum shall be payable by an insurer under the foregoing provisions of this section if in an action commenced before, or within three months after the commencement of the

proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto".

The legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA of the Court of Appeal of Singapore in the case of *Britestone Pte Ltd v Smith & Associates Far East Ltd [2007] 4 SLR (R) 855 at 59* when he observed as follows:

"The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed upon him ".

With respect, I agree. Section 107 (1) of the Evidence Act provides as follows:

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist ".

Sub-section (2) thereof provides that:

"When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person ".

Section 108 of the Evidence Act provides that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Sections 107, 108 and 109 of the Evidence Act which place the burden of proving a fact on the party who asserts the existence of any fact in issue or relevant fact as the case may be, concern the legal rather than the evidential burden of proof. The evidential burden, whilst not expressly provided for in the Evidence Act, exists in the form of a tactical onus to contradict, weaken or explain away the evidence that has been led by the adverse party. The evidential burden may shift from one party to the other. In ordinary civil cases, the standard of proof is usually on a balance of probabilities. That is the standard upon which the plaintiff herein is required to prove his case against the defendant.

In the case of *Kirugi & Another v Kabiya & 3 Others [1987] KLR 347*, the Court of Appeal held thus:

“The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof.”

The plaintiff alleges that the accident motor vehicle was insured by the defendant. He relies on the information contained in the police abstract which indicates that the defendant was the insurer of motor vehicle registration number KDD 613H vide policy number 00258786. No certificate of Insurance or other documentary evidence was adduced to show that the defendant was the insurer of the motor vehicle in issue. A police abstract is an extract of police records in respect of an accident. It contains information that came to the knowledge of the police in the course of their investigations into an accident. It therefore follows that according to the police records, the defendant was the insurer of motor vehicle registration number KDD 613H at the time of accident. It is expected that the police conducted investigations and found that the defendant was the insurer of the accident motor vehicle at the material time.

In the case of *Joel Muga Opija v East African Sea Food Limited [2013] eKLR*, the Court of Appeal was faced with the question of whether a police abstract is sufficient to prove ownership of a motor vehicle in the absence of a search certificate from the Registrar of motor vehicles and where there is no contrary evidence. The learned judges of Appeal held as follows:

"We have anxiously considered this aspect of the appeal as it is a legal matter as to what constitutes evidence that would establish ownership of a motor vehicle involved in an accident particularly in a situation such as obtained in this appeal before us..... In any case in our view an exhibit is evidence and in this case, the appellant's evidence that the Police recorded the respondent as the owner of the vehicle and Ouma's evidence that he saw the vehicle with words to the effect that the owner was East African Sea Food were not seriously rebutted by the respondent who in the end never offered any evidence to challenge or even to counter that evidence. We think, with respect, that the learned Judge in failing to consider in depth the legal position in respect of what is required to prove ownership, erred on point of law on that aspect. We agree that the best way to prove ownership would be to produce to the court a document from the Registrar of Motor vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in court without any objection, its contents cannot be later denied."

The above case involved proof of ownership of a motor vehicle but in my view, the same reasoning would apply by way of analogy in the circumstances of this case. When the police abstract was produced in evidence, its contents became evidence. The contents of the police abstract were *prima facie* evidence that the defendant was the insurer of the accident motor vehicle at the time of accident. The defendant did not adduce any evidence to controvert the contents of the police abstract. The evidence thus remained unchallenged. Whereas it would have been desirable for the plaintiff to produce a copy of the certificate of insurance, it should be borne in mind that the plaintiff was not the owner of the accident motor vehicle and is thus not expected to have in his possession the certificate of insurance or the Policy of insurance. Section 112 of the Evidence Act provides that:

"In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

Whether or not the defendant was the insurer of motor vehicle registration number KDD 613H is a fact within the knowledge of the defendant. In the face of *prima facie* evidence, the defendant had the duty to disprove the plaintiff's evidence. It did not do so. The defendant cannot purport to rely on the mere denial in its statement of defence. Pleadings remain mere allegations unless and until they are supported by evidence. It is thus

my finding that the plaintiff has proven on a balance of probabilities that the defendant was the insurer of motor vehicle registration number KDD 613H at the time of the accident

Is the defendant duty bound to settle the claim in the primary suit? To resolve this issue, the following questions are germane:

- a) Was the judgment in the primary suit obtained against the defendant's insured?
- b) Do the facts of the case entitle the defendant to the exemptions stipulated under the Act?

The wording of section 10(1) of Cap. 405 is that the judgment must have been "**obtained against any person insured by the policy.**" This would imply that judgment ought to have been obtained against the insured. The plaintiff produced in evidence a copy of the statement of claim in the primary suit. The plaintiff produced a copy of the judgment as well as the decree in the primary suit. There is sufficient evidence of existence of the primary suit and the judgment therein. There is no contrary evidence to show that the persons sued in the primary suit were not the defendant's insured in light of the fact that there is evidence to show that the defendant insured the accident motor vehicle. I am satisfied that the plaintiff obtained judgment against the defendant's insured. The defendant has not shown that it is entitled to any exemptions under the law.

The evidence on record indicates that the defendant was given a statutory notice of intention to sue and served on 5/9/2024 and another notice on 24/9/2024 before the primary suit was instituted. The defendant cannot therefore claim that it had no notice of the proceedings in the primary suit. In any event, the defendant did not bring a witness to deny service of the statutory notice or knowledge of the primary suit. I find that the plaintiff has satisfied the conditions precedent for granting of the orders sought. I have no reason to hesitate. The plaintiff's evidence on record remains unchallenged. There is no doubt that the plaintiff has discharged the legal and evidentiary burden placed upon him. He is entitled to the reliefs sought.

DISPOSITION

In view of the foregoing, I find that the plaintiff has proven his case against the defendant on a balance of probabilities. Consequently, the orders which commend themselves to me and which I hereby make are as follows:

- a) Judgment is hereby entered in favour of the plaintiff as against the defendant;
- b) A declaration is hereby issued that the defendant is bound to satisfy the entire decretal sum in Makindu SCCC No. E131 of 2024- Daniel Juma Kakyewa alias Daniel Juma v Azan Motors Limited and Cosmas Mulinge;
- c) The defendant is adjudged to pay the plaintiff the decretal sum of Ksh. 185,652/=;
- d) The defendant shall also pay accrued interest on the decretal sum at court rates from 3/12/2024 when interest was last awarded until payment in full;
- e) The plaintiff is awarded costs of this suit.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 16TH DAY OF
DEEMBER, 2025.**

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.