

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL SUIT NO. E005 OF 2020

MARTIN KAMAKYA alias MARTIN KAMAKYA
MUTISYA.....PLAINTIFF

VERSUS

RESOLUTION INSURANCE COMPANY LIMITED.....
DEFENDANT.

AND

PETER NGUMBI alias PETER NGUMBI MWALYO.....INTERESTED
PARTY

JUDGEMENT

Pleadings

1. The Plaintiff instituted the instant suit vide a Plaint dated 30/10/ 2020, seeking for prayers that :-
 - a) A stay of execution of the judgment and the proceedings in Civil Suit No. 448/2019 in the lower court Chief Magistrate's Court Machakos be granted pending hearing and determination of the suit.
 - b) The Defendant be ordered to satisfy the judgment in the lower court Chief Magistrate's Court Machakos Civil Suit No. 448/2019 as the insurance company (the Defendant) is bound by section 10 (1) of the Insurance (Third Party Risks) Act Cap 405 to pay third party claims.
 - c) General damages.
 - d) Costs and interests of the suit.
2. The defendant filed an appearance and a Statement of defence dated 25/8/2021 denying the claim.

3. The Interested Party filed a Statement of Defence dated 12/11/2020.

The evidence

4. The Plaintiff testified as PW1 and adopted his witness statement dated 30/10/ 2020 as his evidence in chief and was cross examined. He also produced the Plaintiff's list of documents of even date as Plaintiff's Exhibit 1 to 10 in the order they appear in the list as follows:-
 - a) *The Notification of sale of movable property issued by Crater View Auctioneers as exhibit 1*
 - b) *Warrants of sale of property dated 26/8/2020 issued in civil suit No. 448/2019 Machakos Lower Court as exhibit 2.*
 - c) *Warrant of attachment of movable property issued in Civil Case No. 448/2019 Lower Court Machakos and the proclamation of attachment of movable property as exhibit 3.*
 - d) *Notice of intention to institute declaration suit served to Resolution Insurance Company Limited as exhibit 4.*
 - e) *Statutory Notice Pursuant to Section 10(2) (a) Insurance (Motor Vehicle Third Party Risk) Act served to Resolution Insurance Company Limited as exhibit 5.*
 - f) *Letter dated 16th October 2020 forwarding the Notices to the Defendant as exhibit 6.*
 - g) *The Police abstract issued by Base Commander Machakos Police Station in respect of motor vehicle No. KCP 392X dated 12th June, 2019 as exhibit 7.*
 - h) *Judgment of Machakos CMCC No. 448 of 2019 certified on 21st May, 2020 as exhibit 8.*
 - i) *Decree of Machakos CMCC No. 448 of 2019 certified on 25th August 2020 as exhibit 9*
 - j) *Pleadings CMCC 448 of 2019 as exhibit 10.*
3. The basis of the Plaintiff's suit against the Defendant is that at all material times relevant to the suit, the Defendant was the insurer of the Plaintiff's motor vehicle registration number KCP 392X under policy number P100/0708/2018 issued on **10/5/2018**, and expiring on **9/5/2019** and was at all material times valid and subsisting when the said motor vehicle was involved in a road traffic accident on **5/3/2019** whereof one Peter Ngumbi Mwalyo the Interested Party who was a passenger on board suffered personal injuries.
4. The Plaintiff testified that the Defendant did not avoid or cancel the policy and therefore was entitled to pay the Interested Party of the judgment amount in Machakos CMCC 448/2019 as the Insurance Motor Vehicle Third Party Risks) Act statutorily oblige

an insurer to pay the decretal sum in respect of an accident covered by its insurance policy.

5. Although the Defendant cross examined the Plaintiff, it did not attend court to give evidence and their defence was closed by the court on 5/3/2025. Further, the Defendant did not participate during the hearing of the Interested Party's case.
6. At the hearing the Interested Party adopted his witness statement dated 29/6/2021 as his evidence in chief and produced his list of documents of even date as exhibit 1 to 10 in the manner they appear in the list.
7. According to the interested party after the judgment the Plaintiff was further served with a Notice of Entry of Judgment and notice of intention to execute on the 22nd Day of May 2020 and which he accepted service. He is aware that even after being served with the draft decree, notice of entry of judgment and the notice of intention to execute, the Plaintiff reported to the defendant insurance who did not act. The decree was thereafter executed and endorsed by the trial court and issued on the 25th day of August 2020.
8. On his instructions, his advocate applied for execution of the decree by way of attachment and sale by way of public auction of the Plaintiffs movable property to recover the decretal sum. The Plaintiffs motor vehicle registration number KCP 392X which had caused the road traffic accident was the subject of attachment.
9. The Interested Party testified that he could not understand why he was dragged in these proceedings owing to the fact that the insurance policy was as between the Plaintiff and the Defendant. That being a contractual relationship between the two parties it followed therefore that the Interested Party was not a necessary party to the proceedings pitting a contract that he was not privy to.
10. The Interested Party's position is that he filed Machakos CMCC No. 448 of 2019 for compensation for injuries he had sustained when he was involved in a road traffic accident on 5/3/2019 when carefully and lawfully travelling a board motor vehicle registration number KCP 392X along the Machakos-Muvuti Road, and which motor vehicle belongs to the Plaintiff herein.
11. The Interested Party provided evidence to the effect that the Plaintiff was served with Summons to Enter Appearance, a fact that was not denied by Plaintiff, but the Plaintiff chose not defend the suit and therefore the matter proceeded by way of formal proof hearing on 21/1/2020 a judgment delivered on 21/5/2020 awarding the Interested Party; General Damages in the sum of Kshs.150,000/=,

Special Damages in the sum of Kshs.2,110/=-, plus costs and interests of the suit.

Submissions

12. Upon closure of the Parties cases, directions were given on the filing of the final submissions. The Plaintiff's submissions are dated 3rd August 2025 while the Interested Party's submissions are dated 15th August 2025. The Defendant did not file any submissions despite service of the mention notice and submissions by the Plaintiff as witnessed in the Affidavit of service sworn on 11th September 2025 by one Andrew K. Mwanzia, a process server.

Analysis and determination

13. I have considered the Pleadings, evidence on record and the submissions filed by the Plaintiff and the Interested Party in the absence of the Defendant's submissions.
14. In the instant suit, it is not in dispute that the Plaintiff is the **Judgment Debtor** in in Civil Suit No. 448/2019 at the Chief Magistrate's Court Machakos (***the primary suit***) whereas the Interested Party is the **Decree Holder**. It then follows that there is a valid judgment in favour of the Interested Party that the Plaintiff is legally liable to settle.
15. The Plaintiff's case is that he paid for and took out Third Party insurance cover under policy Number P100/0708/2018 from the Defendant for his vehicle registration No. KCP 392X which was involved in the subject accident herein as a result of which the Interested Party (Third Party) was injured. According to the Plaintiff, pursuant to the said insurance contract and sections 5 and 10 of the Insurance (motor vehicle third party risks) Act Cap 405 the Defendant was obliged in law to pay the decretal sum awarded. However, in this case the Plaintiff was abandoned by the Defendant and his vehicle KCP 392X was attached by Crater View Auctioneers and took it to their yard at Nairobi for auction, warrants of attachment and sale were issued on 26th August, 2020, proclamation of attachment of movable property was done on 1st September 2020. But, before they could conduct the auction, a stay of execution was granted and proceedings in the subordinate court were stayed and the Plaintiff was ordered to avail a bank guarantee of Kshs.218,537 which he complied.

16. The main issue for determination in this suit is whether the Plaintiff's suit herein is merited meaning that the Defendant should be ordered to satisfy the judgment in the Chief Magistrate Court Machakos in civil suit No. 448 of 2019 Pursuant to the provisions of section 10(1) of the Insurance (Third Party Risks) Act Cap 405.
17. The Court considers that Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act provides for the duty of an insurer to settle a decretal amount as follows:-

"10.Duty of insurer to satisfy judgments against persons insured(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.

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.

18. Upon entry of judgment accident claims where the Defendant was insured, the above provisions require the insurer to settle the decretal amount as awarded and in accordance with the provisions of the Act. It is however not always the case that the insurers willingly settle the claim and this necessitates the filing of a declaratory suit to compel the insurer to settle the decree such as in the instant suit. Ordinarily, such declaratory suits may be filed by the Defendant and/or Judgment Debtor in the primary suit.
19. In evidence, the Plaintiff and the Interested Party produced statutory notices to show that the Defendant herein was duly served with the same as evidenced by the Defendant's stamp as proof of service. The Interested Party's statutory notice was served on 14/6/2019 whereas the Plaintiff's statutory notice was served on 19/10/2020

pursuant to the provisions of Section 10(2) of the Insurance (Motor vehicle Third Party Risks Act).

20. The statutory law that enables a successful Plaintiff to obtain a valid judgement from the Insurer is Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act, Cap 405 Laws of Kenya which provides that:-

" an Insurer shall pay the persons entitled to the benefit of the Judgement any sum payable thereunder in respect of liability, costs and interest as long as the Insurer had notice of the institution of proceeding."

21. It is noteworthy that the Police Abstract shows that the Defendant insured the Plaintiff's Motor Vehicle herein between 10/5/2018 to 9/5/2019 by policy No. P100/0708/2018 which insurance was active on the date of accident on 5/3/2019 therefore this evidence collaborates the Plaintiff's evidence that the Defendant had insured the motor vehicle as at the date of the accident.
22. The Defendant herein was served with statutory notice to sue dated 13/6/2019 pursuant to Section 10(2) of the Insurance (Motor Vehicle Third Party Risks) Act, as shown in the Interested Party's list of documents, exhibit 2, which shows that Resolution Insurance Company received the statutory notice on 14/6/2019.
23. Further pursuant to Section 10 of the Insurance (Motor Vehicle Third Party Risk) Act Cap 405 laws of Kenya, the Plaintiff duly issued a statutory notice and notice of intention to institute a declaratory suit against the insurer (Defendant) as aforesaid in full compliance of the law on 19th October, 2020 and a statutory notice pursuant to section 10 (2) (a) insurance (motor vehicle third party risks) act on 19th October, 2020 and the Defendant never responded.
24. In **Kenya Orient Insurance Limited vs. Otieno (Civil Appeal E166 of 2023) [20241 KEHC 7637 (KLR) (25 June 2024) (Judgment)** where the Court on the issue of declaratory suits stated as follows:

"What then is a declaratory suit? Relevant to this case, a declaratory suit is one that seeks to compel a judgement debtor's insurer to settle the decree passed against the insured. "

25. In this matter although the Defendant filed a defence dated 25/8/2021 alleging that policy regulations were never complied with and alleging that the Plaintiff case was incompetent, no witness was called to give evidence on behalf of the Defendant therefore the Plaintiff's case stands unchallenged as the Defendant's allegations are unsubstantiated. It is trite law that documentary evidence cannot be contradicted by hearsay oral testimony. It is also trite that he who alleges must prove. Section 107 of the Evidence Act provides that:-

“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.

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

26. The Defendant did not avoid or cancel the policy and is entitled to pay the interested party of the judgment amount in CMCC 448/2019 as the insurance (motor vehicle third party risks act statutorily oblige an insurer to pay the decretal sum in respect of an accident covered by its insurance policy).

27. The upshot is that, the Plaintiff's claim is found to be merited and the same is allowed. The Defendant is ordered to satisfy the judgment in the lower court Chief Magistrate's Court Machakos Civil Suit No. 448/2019 as the insurance company (the Defendant) is bound by section 10 (1) of the Insurance (Third Party Risks) Act Cap 405 to pay the Interested Party's claim.

28. The prayer for general damages is declined.

29. The Defendant will also pay the costs of this suit and interest at court rates from the date of this judgement till payment in full.

JUDGMENT WRITTEN, DATED & SIGNED AT MACHAKOS THIS 20TH JANUARY 2026

**NOEL I. ADAGI
JUDGE**

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 21TH JANUARY
2026

In the presence of:

Mr. Kimeu for Plaintiff

Mr. Kivui h/b for Ms. Mutuku for Interested Party

MillyGrace -Court Assnt.