REPUBLIC OF KENYA
HIGH COURT OF KENYA AT MIGORI
CIVIL APPEAL NO. E098 OF 2023

LAMECK ONYANGO MBANI & ANOTHER ..... APPELLANT

- versus -

CORPORATE INSURANCE CO. LIMITED .....RESPONDENT

(Being an appeal from the judgment and decree by Hon.* S.N. MUTAVA (RM) in Rongo PMCCC No. E064 of 2023 delivered on 27th November 2023*).

JUDGMENT

By a plaint dated 10th July, 2023 the Appellants sued the Respondent seeking that the court declares that the Respondent is obliged and liable to satisfy the decree and costs of the suit and all other / further incidental costs arising from Rongo PMCCC No. 16 of 2022;

The Appellants also sought for costs of the suit and interest at 14% p.a on the award and costs in Rongo PMCCC No. 16 of 2022;

The Appellants claim arose from a Road Traffic Accident involving Motor Vehicle Reg. No. KDA 294 W where the deceased Nehemia Onyango Mbani died. The Appellants sued the registered owner of the accident motor vehicle one Romano Kimathi Kubania who had taken 3rd Party Risks insurance for his motor vehicle vide Policy No. CO1/070/1/054925/2020 COMP.

It was the Appellants' case that during the pendency of the said policy motor vehicle Reg.No. KDA 294 W was involved in RTA on 28th August 2021 in which the deceased sustained fatal injuries.

That despite demand having been made and notice of intention to sue having been given the Respondent failed, ignored, refused and/ or neglected to liquidate the said decree rendering the filing of the suit herein necessary.

That when the Appellants instituted the suit against the insured the Respondent being the insurer was served with the Plaint, verifying affidavit, notice of institution of the suit as required under Section 10 of the Act and judgment was entered for Kshs. 234,000/= together with costs assessed at Kshs. 115,000/= and interest at court rates.

The Respondent did not enter appearance and the suit proceeded on formal proof where the Appellants testified and produced documentary exhibits including police Abstract indicating that the accident motor vehicle was insured by the Respondent.

The Trial Magistrate confirmed that the Appellants produced a Police Abstract that informed the court that the Defendant insured the motor vehicle Reg. No. KDA294W pursuant to Section 10(1) & (2) of the Insurance Act. However, the Trial Magistrate dismissed the suit for the reason that the Policy document was not availed for her as evidence and she could not determine whether the ‘Plaintiff’ was liable for payment of the decretal sum pursuant to Section12(1A) of the Act.to verify and confirm that indeed the Respondent insured the accident motor vehicle.

The Appellants were aggrieved by the decision of the Trial Magistrate and they lodged the appeal herein vide Memorandum of appeal dated 14th December 2023 on the following grounds:

1. THAT the Learned Trial Magistrate was in error of both law and facts by giving judgment that is against the weight of evidence and that law relating to the claim before it.

2. THAT the Learned Trial Magistrate was in error of both law and facts in basing the judgment on extraneous matters/ issues or by digressing from the real issues before it.

3. THAT the Learned Trial Magistrate was in error of both law and facts in failing to give due consideration to the Appellants' submissions and judicial precedent placed before her which if considered could have led her to find in favour of the Appellants.

4. THAT the Learned Trial Magistrate was in error of both law and facts in failing to appreciate the well settled principle that upon entry of judgment, the issue of liability became mute and only quantum was the subject of the court's determination.

5. THAT the Learned Trial Magistrate judgment is riddled with glaring contradictions so much that it does not represent a just verdict/ decision given the facts, evidence and circumstances of the case.

6. On 12th May 2025 this court gave directions for hearing of the appeal by way of written submissions and when the matter came up for hearing it was confirmed that the Appellants had duly filed and served their submissions.

IT IS proposed to ask the court for orders:-

a. THAT the appeal be allowed and the judgment and decree of the Trial Magistrate dated 27th November 3034, be set aside and/ or varied and substituted with an order allowing the Appellants' claim as prayed inn the plaint

b. THAT the costs of this appeal and costs incurred in the subordinate court be borne by the Respondent.

This appeal was canvassed by way of written submissions.

The Appellants' submissions are dated 18th August 2025 and are to the effect that the deceased died as a result of a road traffic accident which occurred 28th day of August 2021 involving motor vehicle registration number KDA 294 W owned by one ROMANO KIMATHI KUBANIA (hereinafter referred to as the insured) and insured by the Respondent herein against 3rd Party risks. The Appellants then filed a suit vide Rongo PMCC No 1 of 2022 (hereinafter referred to as the primary suit) against the said insured for damages and judgment and decree was issued in their favour on the 1 I th January 2023 in the sum of Kshs 234,000/= together with costs and interests.

It was submitted that the insured however, failed to pay the decretal sum and the Appellants filed another suit vide Rongo PMCC No 65 of 2023 the subject of this appeal against the Respondent as the insurers of the insured seeking a declaration that it is obliged to settle the decree in the primary suit.

The Respondent never entered appearance nor file a statement of Defence and the matter proceeded by way of formal proof.

It was submitted that the learned magistrate erred in law in finding that failure to produce a policy of insurance meant that the appellant herein had failed to discharge the burden of proof. That from the Plaintiff Exhibit 6 which is the Police Abstract dated 7h September 2021 it is evident that the said motor vehicle had been insured by Corporate Insurance Company Limited and the Abstract should serve as sufficient proof on a balance of probabilities that

the Respondent's vehicle was insured by Corporate Insurance Company limited being that there is no other evidence to the contrary. As such there was no need to either produce the policy of insurance or the sticker and requiring the Appellant herein to do so would be akin to placing a higher burden of proof than what is required by law.

The Appellants relied on the case of "APA Insurance Company Ltd vs George Masele (2014) eKLR" where the court held:

> **"The Certificate ofInsurance is usually issued to the insured and not the road accident victim. It is a document in the special knowledge andpossession ofboth the insured and the insurer. The road traffic accident victim cannot access it. The details in the Police Abstract as to the details ofinsurance are in the ordinary cause ofevents obtained bp the police from the Certificate of Insurance affixed to the motor vehicle or are supplied bp the insured. In this regard. I am unable to agree with Ms. Akonga that the Respondent should have produced the Certificate of Insurance (or Policy No. 010/810/000005/2001/04 in order to prove who the insurer was.„**

They also relied on the holding in Isapa Omulima v Invesco Assurance Limited [20211 KEIIC 2660 (KLR) where Justice W. MUSYOKA held:

> **"I agree entirely with APA Insurance Co. Ltd vs. George Masele [2014] eKLR (Mabeya J). The trial court need not have looked further than from the police abstract. The appellant had established on a balance, from the police abstract, that there was a valid insurance policy inforce, and the burden shifted to the respondent to prove otherwise.„**

It was submitted that the Appellants proved that there was an insurance policy issued in favour of the insured; which evidence was uncontroverted and the trial court erred in its finding that a policy document ought to have been placed before it to prove the existence of a valid policy.

It was similarly submitted that the court having entered interlocutory judgment against the insured, the issue of liability was settled and the court could not proceed to dismiss the suit on grounds that liability had not been proved when the claim had not been denied and the documents produced not disputed.

The Court of Appeal in the case of Felix Mathenge v Kenya Power & Lighting Company Ltd NRB

CA Civil Appeal No. 215 of 2002 [20081 eKLR observed as follows

> **"The respondent havingfailed to enter appearance within the prescribed time after the appellant had requestedfor it, it became mandatory upon the court to enter interlocutory judgment andfor the appellant to set down the suitfor assessment ofdamages. Having entered interlocutory judgment, it was not open once again for the same court in the instant case to state that the appellant had not proved liability against the respondent. The role of the court after entering the interlocutory judgment in such a case like this was only to assess damages since interlocutoryjudgment having been regularly obtained there can never be any doubt that judgment was final with regard to liability and was unassailable. "**

The Appellant argued that once the court enters interlocutory judgment, the question of liability becomes a foregone conclusion and in the case herein the court was only left to determine whether there was a valid decree against the insured which has not been settled and proceed to issue a declaration for settlement.

On whether the Respondent was notified of the institution of the primary suit, it was submitted that the Appellants herein produced a letter dated 23rd September 2021 (page 58 of the Record of appeal) duly served upon the Respondent notifying the Respondent of the accident and the intention to institute a suit against the insured. Subsequent to filing the suit the Appellants also served the Respondent with a notice dated 20th January 2022 and received on 1st February 2022 (see page 59 ofthe record ofappeal).

Section 10(2) of the **Insurance (Motor Vehicles Third Party Risks) Act** Cap 405 provides:

> **No sum shall be payable by insurer under theforegoing provisions ofthis section-**
>
> > **(a) in respect of any judgment, unless before or within fourteen days after the commencement ofthe proceedings in which the judgment was given, the insurer had notice ofthe bringing ofthe proceedings; (emphasis added)**

It was therefore evident that the Respondent was aware of the suit having been duly notified by the appellant herein and it is unfortunate that the trial court did not even consider this issue.

On whether the Respondent was bound to pay the decretal sums, it was submitted that once it has been established as is the case herein that there was a valid policy of insurance issued by the insurer in favour of the insured and that the insurer was duly served with a statutory notice, the insurer is bound to settle the decree.

The obligatory duty of insurance companies to satisfy judgements is provided for under **Section 10(1)** of **Insurance (Motor Vehicles Third Party Risks) Act** as follows:;

> **"Duty ofinsurer 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 map be entitled to avoid or cancel. or map have avoided or cancelled, the policy, the insurer shall, subiect to the provisions ofthis section. pap to the persons entitled to the benefit ofthe judgment any sum payable thereunder in respect ofthe liability, including any amountpayable in respect of costs and any sum payable in respect of interest on that sum by virtue ofany enactment relating to interest on judgments" emphasis added.**

The Appellant cited the holding in **Isaack Wakoli Vs Xplico Insurace Co. Ltd. (2021) eKLR** where In interpreting this clause, the court held as follows;

> **"Undersection 10(1) of the Insurance Motor Vehicle 3rd Parties Risks Act Cap 405, where the owner ofmotor vehicle has taken out a policy ofinsurance which purports to indemnify him and other authorized persons in respect of liability to third parties intended to beprotected under Section 5(b) ofthe**

Actfor injuries or death to them in the use ofthe Motor Vehicle on the road; and

a) **ajudgment in respect ofliability as is required to be covered is obtained against such owner ofmotor vehicle (the insured);**
b) **Then, notwithstanding that the insurer may in accordance with the terms of The insurance contract be entitled to avoid or may even have avoided thepolicy or liability**

   (under Section 8), or would have restricted or limited the liability as per the terms of the policy (under section 16);
c) **Nevertheless. the insurer is under mandatory statutorp liability first to pap the full iudgment sum to the persons entitled to the benefits of the judgment (the iniured or estate ofthe deceased); and (emphasis added).**
d) **Thereafter, the insurer may recover the due sum so paid to the third party under a clause in the terms ofthe insurance contract, ifany under the Act (as Per the proviso to Section 8) or a statutory obligation or liability created against the insured under the Act (as per provision to Section 10)."**

Further Gikonyo J., in **Joseph Mwangi Gitundu v Gateway Insurance Co Ltd MLHCCC No. 224 012007 [2015] eKLR** expounded on this statutory duty of insurers to satisfy judgments by stating as follows:

> **"The obligation is statutory and a strict one: it cannot be shifted or abrogated bp a term in the contract ofinsurance or in the manner proposed by the Defendant, lest the noble intention of the Act to guarantee compensation of third parties who suffer injuries arisingfrom by use ofthe insured motor vehicle on the road should be lost. '**

The Appellants submitted that aside from the fact that the Respondent never disputed the claim herein and default judgment had been entered against it the Respondent settling most of the issues discussed herein-above, the Appellant in his evidence proved all the issues and the trial court erred in its finding that the Appellant had not proved his case.

It was submitted that the appeal herein is meritorious and the court was urged to allow the same and set aside the trial court's finding dismissing the appellant's claim. The appellants also prayed for costs of the appeal.

The Respondent did not file submissions.

ANALYSIS AND DETERMINATION

As a first appellate court, this Court is obliged to re-evaluate, re-analyse, and reconsider the evidence on record and draw its own conclusions, bearing in mind that it did not see or hear the witnesses. This position was settled in the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**. This court is also aware of the principle that an appellate court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of evidence or the court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in ***Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278*** *and* ***Kiruga –versus- Kiruga & Another (1988) KLR 348).***

Having carefully considered the records of the trial court, the ground of appeal and the submissions by the Appellant as well as the decisions referred thereto, the issues for determination are:

1. Whether a police abstract is sufficient prima facie evidence of insurance in a declaratory suit.
2. Whether the Appellants bore the burden of producing the actual insurance policy.

3. Whether the trial court erred in dismissing the suit in view of the evidence and the statutory framework under Section 10 of the Act.

On the issue as to whether the police abstract was sufficient evidence of insurance it is trite that a police abstract is prima facie proof that a motor vehicle was insured by the insurer indicated, unless rebutted.

This position has long been established in several authorities including but not limited to:-

a. **Kenindia Assurance Co. Ltd v Otiende (1989)** where it was held that a police abstract is prima facie evidence which the insurer must rebut;
b. **In Gateway Insurance Co. Ltd v Moses Jaika Luvai [2016] eKLR** it was held that the insurer must provide contrary evidence to rebut evidence contained in police abstract that they are the insurers of the subject accident motor vehicle
c. In the case of **Invesco Assurance Co. Ltd v Mercy Wanjiru [2021] eKLR** it was held that statutory liability arises once insurer is served and fails to rebut;
d. **The holding in Cannon Assurance v Peter Mulei [2020]** was to the effect that the plaintiffs cannot be expected to produce policy documents in possession of the insurer.

In the present case, the police abstract set out the insurer's name (Respondent), the Policy number the particulars of the Motor vehicle, and the date of the accident. The Respondent did not file any evidence to dispute that information and the trial court accepted the authenticity of the police abstract but nonetheless discounted it solely

because the actual policy was not produced. That was erroneous and misdirection on the part of the trial court and cannot be sustained in the circumstances.

Under **Section 10(1) & (2)** of the Act once a judgment is obtained against the insured, and the insurer has been served with statutory notice, the insurer becomes legally bound to satisfy the judgment unless it proves a statutory defence.

The plaintiff in a declaratory suit does not bear the burden of producing the policy document.
The insurer, being the custodian of the policy, bears the duty to file the policy or an affidavit denying coverage if it disputes liability.

This is reinforced by **Section 12(1A)**, which the magistrate misapplied. Section 12(1A) is a defence provision that can only be invoked by the insurer to avoid the policy. It does not impose a burden on the plaintiff to produce the policy.

By shifting that burden to the Appellants, the trial court acted on a wrong principle.

Pursuant to the provisions of **Section 10 of the Act,** the Respondent received the statutory notice, was served with pleadings and did not enter appearance or challenge the insurance; neither did it invoke the avoidance under Section 12 or file any affidavit of non-coverage. Once the Respondent remained silent, liability followed by operation of law. The trial magistrate therefore erred in holding that she could not determine liability without sight of the policy, when in fact the law does

not require the plaintiff to produce it—and the insurer itself gave no contrary evidence.

In conclusion, having re-evaluated the evidence and the law afresh, the court finds that the trial court misapprehended the statutory framework under Section 10; misapplied Section 12(1A); shifted the evidentiary burden wrongly; ignored binding precedent and reached a decision against the weight of evidence. This appeal therefore has merit and the same is allowed. The judgment of the Trial Magistrate delivered on 27th November 2023 is set aside and substituted with an order that:

> "A declaration is hereby issued that the Respondent is obligated to satisfy the judgment, costs, and all incidental sums arising from Rongo PMCCC No. 16 of 2022 in accordance with Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405."

1. Costs of the appeal and of the subordinate court are awarded to the Appellants.
2. Right of appeal within 30 days is explained to the parties accordingly.

Orders accordingly

DATED, SIGNED AND DELIVERED AT MIGORI THIS 12TH DAY OF FEBRUARY, 2026.

ANNE ONG'INJO
JUDGE