

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CIVIL APPEAL NO. E173 OF 2024

PETER WAFULA WAKHUNGU..... APPELLANT

-VERSUS-

FIRST ASSURANCE COMPANY LIMITED..... RESPONDENT

(Being an Appeal from the Judgment of the Chief Magistrates' Court at Bungoma, CMCC No. E251 of 2023 delivered by Hon. T.K. Ng'etich, Resident Magistrate on 6th August 2024).

JUDGMENT

1. The Appellant filed this Appeal through a Memorandum of Appeal dated 13th December 2024, seeking to set aside the judgment of the trial court and for the Court to substitute the same with an order or finding that the Appellant had locus standi to institute a declaratory suit against the Respondent together with an order entering judgment for the sum of Kshs. 599,670/= as claimed in the Plaint, together with the costs of the Appeal.
2. The Appellant raised four (4) issues of appeal as follows: -
 - (1) The trial magistrate erred in law and fact by finding that the Appellant had no *locus standi* to institute a declaratory suit against the Respondent when in fact the Appellant had *locus standi*.**
 - (2) The trial magistrate erred in law and fact by misinterpreting the law under the**

Insurance (Motor Vehicle Third Party) Risks Act, Cap 405 Laws of Kenya.

(3) The trial magistrate erred in law and fact by dismissing the suit on the ground that the Appellant has no remedy by way of a declaratory suit.

(4) The trial magistrate erred in law and in fact by dismissing the Appellant's suit for want of privity (*sic*) to the Insurance contract.

3. The background of this case is that the Appellant, who was the Plaintiff in the trial court, sued the Respondent in a declaratory suit via Plaint dated 18th May 2023, seeking the following prayers: -

(a) An order directing the Defendant to satisfy the judgment and/or decree in Bungoma CMCC 287 of 2021.

(b) Costs of the suit

(c) Interest on the decretal amount till settlement.

(d) Any other reliefs

4. The Appellant/Plaintiff's case was that, on or about 4th April 2021, the Plaintiff was lawfully riding a motorcycle along Bungoma-Webuye Road, particularly at Mabanga area, when a motor vehicle with registration No. KBP 681X, owned by JOB MUKOYA NDALI who was the owner and/or insured, was negligently driven by the agent and/or servant of the insured, causing it to lose control and knock the

Plaintiff. As a result, the Plaintiff sustained severe bodily injuries.

5. He stated that the Defendant/Respondent had insured the vehicle No. KBP 681X, a Toyota Fielder, under Policy Number 03007013757362021 (comp), covering such person or class of persons in regard to injuries or death arising from the said policy, within the scope of Section 10 of the Insurance Motor Vehicle Third Party Motor Risks Act Cap 405 Laws of Kenya.
6. It was his case that on or about 25th October 2021, he filed a suit vide BUNGOMA CMCC NO. 287 OF 2021 against the Respondent/Defendant's insured, where judgment was delivered on 27th June 2022 in his favour for the sum of Kshs. 506,000/= and a Decree drawn at Kshs. 599,670/= for costs and interests. That the said judgment was covered under Section 10 of Cap 405 Laws of Kenya, having issued the requisite notice under the said section.
7. I note that the Respondent in this case was duly served by the Appellant but did not enter an appearance or file a defence in the matter.
8. Consequently, the matter was scheduled for hearing, during which the Respondent presented evidence as PW1 and adopted his statement dated 18th May 2023. He submitted the following documents as exhibits (P.Exh1-6): -
 - (1) *Judgment and/or Decree in Bungoma CMCC No. 287 of 2021*
 - (2) *Police Abstract*
 - (3) *Copy of the Certificate of Insurance*

(4) Demand Notice dated 27th July 2021

(5) Notice of Institution of suit in Bungoma CMCC No. 287 of 2021 and certificate of postage

(6) Response to the Notice of Institution of suit by the Defendant.

9. Vide judgment delivered on 6th August 2024, the trial court found that the suit lacked merit and held that the appropriate party to pursue the declaratory relief was the insured (defendant in the primary suit), not the Plaintiff/Respondent. Consequently, the court stated that the Respondent's recourse was to execute the decree against the insured and dismissed the suit with no order as to costs.
10. The above is the background that led to the present appeal, which the parties were directed to address through written submissions.

THE SUBMISSIONS

11. Counsel for the Appellant submitted that the Court should find that the Appellant had locus standi to file the declaratory suit against the Respondents because the trial court erred in its interpretation of Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act as read with Section 5. The case of Jubilee Insurance Co. Ltd vs. Walter Tondo Soita, Bungoma HCCA 28 of 2016 was cited, where the court held that the law of insurance operates in a way that the issue of privity of contract is not strictly adhered to. It was also submitted that the suit was unchallenged and never rebutted for lack of appearance

and filing of defence by the Respondent and that, as a third party under Section 5, the Appellant was privy to the insurance contract and therefore entitled to institute the declaratory suit. Counsel urged the Court to allow the appeal.

12. The Respondent did not file any submissions.
13. As this is a first appeal, I am aware of the court's duty as outlined by the Court of Appeal in the case of Kenya Ports Authority versus Kusthon (Kenya) Limited (2000) 2 EA 212, wherein the Court of Appeal held, inter alia, that: -

“On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

ANALYSIS AND DETERMINATION

14. I have considered the grounds of appeal, the trial record, and the submissions against the law. The only issue for my determination is whether the appeal is merited. The Court will consider whether the Appellant had locus standi to file a declaratory suit against the Respondent for the satisfaction of his judgment debt.

15. As a preliminary issue, I start by setting out the provisions of **Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act**, which 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.

16. **Section 5(b)** of the same Act provides; -

(b) In order to comply with the requirements of section 4, the policy of insurance must be a policy which insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road.

17. I have considered what a declaratory suit involves, as explained in the case of Kenya Orient Insurance Limited vs. Otieno (Civil Appeal E166 of 2023) [2024] KEHC 7637 (KLR), where Aburili J described it as follows:

“What then is a declaratory suit? Relevant to this case, a declaratory suit is one that seeks to compel a judgment debtor’s insurer to settle the decree passed against the insured.”

18. The Court in the above case stated as follows: -

“21. Upon entry of judgment in such 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. Ordinarily, such declaratory suits may be filed by the Defendant and/or Judgment Debtor in the primary suit.”

19. In the present case, it was not disputed that the Appellant was involved in a road traffic accident with one Job Mukoya Andali, who was insured by the Respondent under Policy Number 03007013757362021 (comp), and that judgment was entered in his favour, with a decree issued for the sum of Kshs. 599,670/= . I note that the parties in the primary suit in BUNGOMA CMCC NO. 287 OF 2021 were the Appellant and the Respondent's insured, the said Job Mukoya. The Respondent herein was not a party to this suit.
20. It follows, then, that after obtaining a judgment debt and securing a decree against the Respondent's insured, the next step for the Appellant would have been to pursue execution against the Respondent's insured rather than filing a declaratory suit against the Respondent. Such a suit could only be initiated by the insured against the Respondent, since they were the parties bound by or privy to the insurance contract under Section 10 and 5(b) of the Act.
21. To further support this stance, I also find it inappropriate for the Appellant to attempt to enforce his decretal rights against the Respondent, who was never originally a party to the primary suit. I base this position on the Court of

Appeal's decision in David Kinyanjui & 2 Others vs. Meshack Omari Monyori [1998] KECA 104 (KLR), where it was held thus:

“It is trite law that anyone who is not a party to the suit cannot be made liable to meet any decree in the suit unless he is brought into the suit and given an opportunity to state his case or defend his position.

It appears that at one stage previously when the present applicants had filed an appeal against the judgment of the superior court (O'kubasu J) the insurer had given some bond or surety for security pending appeal which appeal was allowed and the decree was set aside. Once the decree is set aside, the surety bond such as it may have been, becomes a dead letter. But the important point is that the insurer was never made a party to the suit, if indeed it could be so brought into the suit. It must be borne in mind that in respect of a material damage claim the party suffering damage cannot eventually proceed against the tortfeasor's insurer as there is no provision in our law for such eventuality. The Insurance (Motor Vehicles Third Party Risks) Act, Cap 405, Laws of Kenya gives right to such a person to file a declaratory suit against the

tortfeasor's insurer if the claim is for physical injuries or death.

The order to execute the decree against the insurer is a nullity and an illegality and although the application before us is one under rule 5(2) (b) of the Rules of this court we set aside that order ex-debito-justitiae.”

22. Therefore, I find that the Plaintiff/Appellant lacked the proper legal basis to file a declaratory suit against the Respondents and could instead seek to enforce the judgment decree against the Respondent's insured. I therefore uphold the judgment of the trial court and dismiss the appeal as it lacks merit. There shall be no orders as to costs. Orders accordingly.

Dated, signed and delivered in Bungoma this 13th Day of March 2026.

**R.OUGO
JUDGE**

In the presence of:

Miss Akinyi h/b for Mr. Kweyu -For the Appellant

Respondent - Absent

Wilkister - C/A