Madison Insurance Company Limited v AM (Suing through mother and next friend Mary Wanjiru) (Civil Appeal E002 of 2024) [2026] KEHC 3721 (KLR) (18 March 2026) (Judgment)

Neutral citation: [2026] KEHC 3721 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E002 OF 2024

JRA WANANDA, J

MARCH 18, 2026

BETWEEN

MADISON INSURANCE COMPANY LIMITED ..... APPELLANT

AND

AM (SUING THROUGH MOTHER AND NEXT FRIEND MARY WANJIRU) ..... RESPONDENT

(Appeal from the Judgment dated 15/12/2023 delivered in Eldoret Small Claims Court No. E653 of 2023 by Hon. T.W. Wambugu - Adjudicator)

JUDGMENT

1. This Appeal arises from the Judgment delivered in the said Small Claims Court case in which the Respondent obtained a declaration that the Appellant, an insurer, is statutory bound to pay to the Respondent a sum of Kshs 255,286/-.

2. In his Statement of Claim filed before the Small Claims Court, dated 27/07/2023 through Messrs Morgan Omusundi Law Firm, the Respondent pleaded that the Appellant was the insurer of the motor vehicle registration number KBV 785A, which motor vehicle was involved in an accident in respect to which the Respondent sued one Samuel Chege and Benjamin Gachie, as owners of the motor vehicle, in Eldoret Small Claims Court Claim No. E265 of 2022 claiming loss and damages. It was pleaded that the Appellant was also served with the Statutory Notice required under the provisions of the Insurance (Motor Vehicle Thid Party Risk Act), Cap. 405, and that Judgment was entered on 17/02/2023 in the said claim in favour of the Respondent for the sum of Kshs 258,286/- but the Appellant, as the insurer, has failed to pay.

3. The Appellant, in his Response dated 14/08/2023, filed through Messrs. Kitiwa & Partners Advocates, denied the above allegations, and also pleaded that the Respondent sued the said Benjamin Gachie only in Eldoret Small Claims Court Case No. E265 of 2022 as owner of the insured motor vehicle, and that

the said Bernard Gachie was a stranger as he was neither the insured or the owner of the motor vehicle. The Respondent also denied that it was statutory bound to pay the claim as there was no Judgment in respect to the insured or owner of the motor vehicle.

4. The matter then proceeded for trial in which each side called 1 witness, whose testimonies I will now recount.

5. The Respondent, Mary Wanjiku, testifying as CW1, adopted her Witness Statement, and stated that the insurance policy ran from 6/07/2022 to 05/07/2022 and the accident occurred on 22/05/2022, and that she notified the Respondent of entry of Judgment. In cross-examination, she conceded that although she had sued one Benjamin Gachie in the primary suit, according to the statutory notice, the insured is Kiarie Chege Samuel, who was also indicated as owner of the motor vehicle, and whom she had initially sued but later withdrew the suit against.

6. The Appellant's witness, one Moses Barasa, testifying as RW1, too, adopted his Witness Statement, and introduced himself is a Legal Officer at the Respondent. He denied knowledge of Benjamin Gachie and reiterated that its insured was Samuel Chege Kiarie, the owner of the motor vehicle. He pointed out that the Respondent had also filed other earlier similar cases against Samuel Kiarie Chege but which were withdrawn as Samuel Kiarie Chege was deceased. He insisted that the Respondent could not satisfy the decree because the said Bernard Gachie was not the insured nor owner of the motor vehicle, and that the Appellant in responding to the Statutory Notice served upon it, pointed out this contention. He also agreed that Samuel Kiarie Chege died on 17/04/2022 during which date the policy was still valid.

7. As aforesaid, by its Judgment delivered on 15/12/2023, the Adjudicator entered Judgment for the Respondent as prayed. The main basis for the Judgment was that the Appellant did not take out proceedings under Section 10(4) of the Act to avoid the claim, which ought to have been done within 3 months of filing of the suit.

8. Aggrieved by the Judgment, the Appellant filed this Appeal by way of the Memorandum of Appeal dated 23/08/2023. The grounds listed are as follows:

    a. That the learned Adjudicator erred in law in holding that the Appellant should satisfy the decree in Eldoret Small Claims Court Claim number 265 of 2022.

    b. The learned trial Magistrate erred in law in failing to dismiss the Claimant's claim for failing to prove on a balance of probabilities.

    c. The learned trial Magistrate erred in law in holding that the Appellant should satisfy the decree in Eldoret Small Claims Court Claim number 265 of 2022 because it did not take out proceedings under Section 10(4) of the *Insurance (Motor Vehicles Third Party Risks) Act*.

    d. The learned trial Magistrate erred in law in failing to find that there was no privity of contract between the Appellant and Benjamin Gachie.

    e. The learned trial Magistrate erred in law in failing to find that there was no judgment against the Appellant's insured and owner of motor vehicle for the Appellant to be ordered to satisfy the decree as required under the provisions of the Insurance (Motor Vehicle Third Party Risks) Act.

    f. The learned trial Magistrate erred in law in failing to find that the Respondent's suit was incurably defective.

9. The Appeal was then canvassed by way of written Submissions. The Appellant's Submissions is dated 30/06/2025, while the Respondent's is dated 30/07/2025.

Appellant's Submissions

10. Counsel for the Appellant submitted that the doctrine of privity of contract remains one of the most fundamental principles of contract law, providing that a contract cannot confer rights or impose obligations upon anyone who is not a party thereto. He cited the case of Bharminder Singh Osahan v Helicopters International Limited [202l] eKLR, and also the case of Savings & Loan (K) Limited vs. Kanyenje Karangaita Gakombe & Another (2015) eKLR. He urged that the application of this principle to insurance contracts is particularly crucial because insurance is fundamentally a contract of indemnity between the insurer and the insured, which is personal to the contracting parties and creates rights and obligations only between them. He cited Civil Appeal 111 of 2017, Kenya Women Finance Trust v Bernard Oyugi Jaoko & 2 others [2018] eKLR, and also Court of Appeal Civil Application 194 of 2009, Aineah Liluyani Njirah v Agha Khan Health Services [2013] eKLR. He submitted that in the present case, there is no evidence of any contractual relationship between the Appellant and Benjamin Gachie, as the policy was entered into between the Appellant and Samuel Chege Kiarie, and that Benjamin Gachie who was never a party thereto, never paid premiums, never had any insurable interest in the vehicle, and never had any communication with the Appellant regarding insurance coverage. He pointed out that the police abstract and documentary evidence confirm that Samuel Chege Kiarie was the registered owner and the insured, as such, Benjamin Gachie was entirely unconnected to the insurance arrangement. He contended that the trial Court's failure to consider the principle of privity of contract was a serious error in law that undermines the foundation of the Judgment, and that by imposing liability on the Appellant for a judgment against Benjamin Chege, it effectively created a contractual relationship where there was none.

11. Counsel agreed that the statutory framework governing motor vehicle insurance in Kenya is contained in the *Insurance (Motor Vehicles Third Party Risks) Act*, Section 10(l) whereof provides the foundation for the Respondent's claim. He cited Court of Appeal Civil Appeal 88 of 2019, UAP Insurance Co. Ltd v Patrick Charo Chiro [2021] eKLR. He however took the position that Section 10 does not apply in this case because the foundational requirement that the judgment be obtained against "any person insured by the policy" is not satisfied, and further averred that Section 10(4) provides insurers with a mechanism to avoid liability even where there is a valid insurance relationship, further demonstrating that the legislature intended to provide protection for insurers against spurious claims. According to him, if the legislature intended to impose unlimited liability on insurers for judgments against any person, regardless of whether they were insured, it would be inconsistent with the same statute providing mechanisms for insurers to avoid liability in appropriate circumstances, and submitted that that the trial Court's interpretation of Section 10 effectively renders meaningless the phrase "against any person insured by the policy", and would create unlimited liability for insurers regardless of whether they have any contractual relationship with the judgment debtor. He added that the interpretation is contrary to established principles of statutory interpretation and would create serious commercial and legal difficulties for the insurance industry. He urged that the burden of proof rests on a plaintiff to establish the facts to support the relief sought, and he cited Section 109 of the *Evidence Act*, which burden, he urged, the Respondent did not discharge.

Respondents' Submissions

12. Counsel for the Respondent submitted that it is not disputed that the Respondent was served with a Statutory Notice before the first suit was filed against the driver, that the policy was still in force, and that it did cover the accident motor vehicle. According to him therefore, the only issues for

determination in this appeal include; (i) whether there was a valid insurance at the occurrence of the accident; (ii) whether the insured (policy holder) must be enjoined in any suit relating to the insured vehicle; (iii) whether the insurer can be called upon to settle an accident claim involving a vehicle covered in the insurance policy where the policy holder (insured) has not been sued, (iv) whether the driver of an insured (policy holder) can attract the liability of the insurer to settle a claim wherever the risk attaches, and (v) whether the Appellant was served with the requisite notice. Counsel urged that the duty of the insurers to satisfy, compensate or settle decrees against their insured is a statutory duty which stems from Sections 10(1) and (2) of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405, and that the Respondent sued Benjamin Gachie, who was the driver, and the beneficial owner of the motor vehicle.

13. He pointed out that the police abstract produced as an exhibit in the primary suit indicates that the Appellant was the insurer and also stated the policy number, which commenced on 6/07/2021 and was to expire on 5/07/2022, and covered all authorized drivers. He contended that a Certificate of Insurance is prima facie evidence that the subject motor vehicle is duly insured and the law requires that such certificate of insurance must be displayed at a place and in a manner prescribed as under Section 9 of the Act. Counsel submitted that the Appellant did not challenge or repudiate the Respondent's evidence in the first suit, and its failure to enter appearance left the trial Court with no option but to believe and correctly so, the evidence of the Respondent on the legal ownership and identity of the person who insured the motor vehicle. He also submitted that the Appellant did not take out proceedings under Section 10 (4) of the Act to avoid the claim despite being served with the Statutory Notice, which ought to have been done within 3 months of filing Eldoret SCCOM E261 of 2022. He cited the case of Jason Nyawira Kagu & Another vs Intra Africa Assurance Co. Ltd [2014] eKLR, and also the case of Philip Kimani Gikonyo v Gateway Insurance Company Limited (2007) eKLR among others.

Determination

14. The question placed before this Court is to determine "whether the Small Claims Court erred in allowing the declaratory suit filed against the insurer".

15. Since this is an Appeal from a decision of the Small Claims Court, the same can only be entertained on points of law. This is the import of Section 38 of the *Small Claims Court Act*. I am satisfied that the matters raised herein are proper points of law, and thus properly before this Court.

16. The action before the Small Claims Court being a declaratory suit, was anchored on the provisions of Section 10 of the Insurance Motor Vehicle (Third Party Risks) Act. I am however aware of absence of unanimity by different Courts on whether the Small Claims Court possesses jurisdiction to entertain declaratory suits. As such, the issue is not a settled one. Since that matter was never raised or canvassed before the trial Court, and has also not been raised or canvassed in this Appeal as an issue for determination, I will leave it at that.

17. As for duty of an insurer to satisfy or settle decrees obtained against its insured, the same is a statutory duty which emanates from the provisions of Sections 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act, which provides as follows:

> " 10. Duty of insurer to satisfy judgments against persons insured
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> 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." [Emphasis mine]

18. However, Section 10(4) of the Act provides as follows:

> "(4) 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:
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> > 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.

19. While therefore Section 10(1) aforesaid compels an insurer to satisfy a judgment against the person insured, that burden is removed under Section 10(4) from an Insurer if it obtains a declaration that it is entitled to avoid the Policy of Insurance. To benefit from this exception however, the insurer must have served a Notice of Repudiation and also successfully filed a declaratory suit seeking confirmation of such repudiation, before a personal injury suit against the insured person has been commenced by or on behalf of a third party injured or killed in an accident contemplated in the insurance policy. If, however, the personal injury suit has already been commenced, then the insurer must have served the Notice of Repudiation within 14 days after the filing of such personal injury suit, and also filed the declaratory suit within 3 months after the filing of such personal injury suit.

20. According to the Respondent therefore, the Appellant's refusal to settle the decree is a non-starter in view of Section 10(4) because the Appellant having neither served a Notice of Repudiation nor filed a declaratory suit seeking confirmation of such repudiation, before or after the personal injury suit against its insured was commenced, the escape window provided in Section 10(4) is not available to it. I disagree because what Section 10(4) addresses is repudiation by the insurer on the basis that the policy was either "obtained by the non-disclosure of a material fact", or "by a representation of fact which was false in some material particular". The Appellant's contention in this case is not that it has repudiated liability, but that that the Judgment in question does not affect it at all because it was not "obtained against any person insured by the policy, but against a stranger, not its insured. To this extent, Section 10(4) does not bar apply and cannot therefore be invoked to defeat the Appellant's defence. Section 10(4) only applies in cases of repudiation, which this one is not.

21. On the above issue therefore, my finding is that the Adjudicator fell into error when she rejected the Appellant's defence on the sole ground that the Appellant did not file a declaratory suit before the first suit was commenced, or 3 months after its commencement.

22. That, however, is not the end of the matter. Considering that the Appellant's contention is that it cannot be called upon to settle the decree because the Judgment was not "obtained against any person insured by the policy", the relevant question in this case is therefore what is the meaning of the term "any person insured by the policy".

23. According to the Appellant, the term "person insured by the policy" should only apply strictly where the Judgment has been obtained against the policy holder and/or owner of the motor vehicle. On this one, it is the Appellant I disagree with this time. An insurer remains liable to satisfy a Court decree obtained against a driver, even if the owner of the motor vehicle or policyholder was not personally sued, provided the driver was an authorized user covered under a valid policy at the time of the accident. This is because the *Insurance (Motor Vehicles Third Party Risks) Act* compels insurers to cover liability for authorized drivers, and it must be recalled that the primary purpose of the Act is to ensure third parties are compensated. Insurers cannot therefore escape this liability simply because the claimant sued the driver instead of the owner, as long as the vehicle was being used within the terms of the insurance. Technically, therefore, it is not the owner of the motor vehicle or the policy holder that is insured but it is in fact the motor vehicle itself that is insured. In any event, the Courts have ruled on many occasions that it is not mandatory for the vehicle owner or the policy holder to be the judgment debtor. The position is therefore that if the driver is found culpable and a decree is obtained against him, the insurer still is liable to settle the claim. The term "person insured" cannot be limited to only the policy-holder or vehicle owner. To give meaning to the spirit of third-party insurance, the meaning of that phrase must be extended and liberally interpreted to include any person specified in the policy, and this no doubt includes the driver authorized under the Act.

24. For my above holding, I find company in the case of Philip Kimani Gikonyo v Gateway Insurance Company Limited [2007] KEHC 1612 (KLR), in which A. Vishram J (as he then was), held as follows:

> "Secondly, and more importantly, is the Judgment against the insured's driver enforceable against the insurer?
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> Mr. Chege, Counsel for the Respondent, argued strongly that for an insurer to be liable there must be a Judgment against its insured. Here, the Judgment is against the insured's driver, but not the insured. He relied on Section 10(i) of the Act, and on the cases of Kenindia Assurance Company Limited v. James Otiende (1989) 2 KAR 162 and Kasereka v. Gateway Insurance Company Limited (2003) 2 EA 502.
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> .....
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> Now, it is important to note that in the Kenindia case the claimant was an employee of the insured, not a third party, and therefore was an exception to the categories of the people required to be covered under Section 5 of the Act. The issue before that Court was one of "jurisdiction", that is, whether the High Court in the first place had jurisdiction to entertain a claim by an "employee" against the insurance company. And, of course, applying Section 5(b) (i), the Court held that there was indeed no Judgment against the insured capable of enforcement. That, indeed, is a very different situation from the facts in the case before this Court.

> Here, the Appellant (Plaintiff in the Lower Court) was a third party in respect of whom it was mandatory to take out third party insurance covering the risk of death or bodily injury.

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Clearly, Section 5(b) makes it mandatory for motor vehicle owners and/or operators to obtain third party cover for death or bodily injury to all persons, except for those categories of people specifically excluded such as employees or passengers. Therefore, the Appellant before this Court was one such person. Now, the next issue is whether there had to be Judgment against the insured in addition to a Judgment against his authorized driver. Let us go back to Section 10(1) of the Act. The critical words of that Section are

> " If..... judgment is obtained against any person insured by the policy .... the insurer shall ..... pay to the persons entitled to the benefit of the judgment ....."

So, then, who is a person "insured by the policy"? The answer to that question is found in the insurance policy itself.

.....

The person "insured by the policy" is any authorized driver provided he shall as though he were the insured observe the terms of the policy.

It is not in dispute that the driver in this case was indeed the authorized driver. In fact, he was the director of the insured company, and if the insured's corporate veil was lifted, he would emerge as the insured.

So, if he is deemed to be the "insured" in accordance with the terms of the Policy, and the injured third party here, the Appellant, is a person "entitled to the benefit of the Judgment", the inevitable conclusion is that the Appellant's Judgment against the insured's driver is enforceable against the insurer, the Respondent.

.....

I therefore find that the required notice was properly served upon the Respondent, within the time stipulated in the Act, and that the Lower Court Judgment is enforceable against the Respondent."

25. Similarly, S. Chitembwe J, in the case of James Akhatioli Ambundo v Lion of Kenya Insurance Co Limited (2021) eKLR, held that:

> " In the current case, the core of the dispute is that the driver of the accident vehicle was not the insured. That he was sued as the owner yet he is not and therefore he is a stranger to the insurer. The respondent admits that it was served with a statutory notice before the first suit was filed against the driver, that the policy was still in force and that it did cover the accident vehicle.
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> .....
>
> In my view, the law requires the insurer to satisfy the claim of the third party so long as the damage can be attributed to the accident vehicle. That is the essence of Section 10 of Cap. 405. Even if the insured has not been made a party to the suit, the insurer is under obligation to compensate the injured third party even if the insurer is in a position to repudiate the claim. This could be the case where part of the insurance premium had not been paid. The insurer cannot escape liability wherever the policy is valid and covers the risk which has attached, that is the accident involving a third party.

.....

The position stated by DW1 that third parties injured by a driver who is covered under the third party insurance policy are covered by the policy is the correct position in law. The presumption is that the insured vehicle will not always be driven by the insured owner. Although the third party can easily escape these huddles by enjoining the owner or insured to the case, it does not follow that where the owner of the insured vehicle is not enjoined then the third party's claim is not covered by the policy. The mandatory aspects of the third party policy calls upon the insurer to settle the third party's claim first and cannot avoid making good the damage. Section 4 of Cap. 405 states that no person shall use or permit to be used a vehicle on the road without a third party insurance policy. The owner of the accident vehicle permitted the vehicle to be used on the road. He had a third party policy which has to settle the claim by the appellant.

.....

It is therefore evident that the policy did cover an authorized driver. The effect of this is that where the insured driver causes an accident and is found culpable by a court, then the insurer must settle the claim since the driver is covered by the policy just like the policy holder or the owner of the vehicle. It's not mandatory that the insured must be the judgment debtor for the insurer to be called upon to settle the claim by the injured third party."

.....

..... It is the third party who is protected by the law. The insurer has to satisfy the claim first and therefore deal with his insured. It is therefore my finding that Michael Njaraita having been authorized to drive the accident vehicle and since he was covered under the insurer policy, the respondent insurer is liable to make good the claim as required by Section 10 of Cap. 405. The respondent cannot escape liability. The policy was in force and the vehicle was driven by a driver covered by the policy. That is all what is important. The non-joinder of the insured owner is of no effect. Even if Michael Njaraita, the driver, was described in the first or second suit as the owner it still does not make the insurer insulated from the third party claim."

26. Where therefore an authorized driver is found liable for an accident, the insurer's duty to satisfy that judgment immediately arises. Section 10 above therefore creates a unique exception to the principle of privity of contract in that it allows a third-party victim of an accident involving the insured motor vehicle to benefit from an insurance contract that he/she is not party to, once he/she holds a valid judgment against the policy-holder of the motor vehicle, or a person authorized under the policy to drive the vehicle at the time of the accident.

Final Orders

27. Under the above circumstances, this Appeal fails, and is accordingly dismissed with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 18TH DAY OF MARCH 2026

.....

WANANDA JOHN R. ANURO

JUDGE

Delivered in the presence of:

Ms. Saita h/b for Mr. Kitiwa for the Appellant

Mr. Lubanga h/b for Mr. Kagunza for the Respondent

Court Assistant: Brian Kimathi