REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILLIMANI LAW COURTS
CIVIL APPEAL NO. E1449 OF 2024

MUKULU MWAMUTI..... APPELLANT

VERSUS

BRITAM INSURANCE COMPANY LIMITED..... RESPONDENT

(BEING AN APPEAL ARISING FROM THE JUDGMENT/DECREE OF HON S.G GITONGA (MRS) (PRINCIPAL MAGISTRATE) DELIVERED ON 6th DAY OF DECEMBER, 2024 IN NAIROBI MILLIMANI MCCC NO E221 OF 2024)

BETWEEN

MUKULU MWAMUTI..... PLAINTIFF

VERSUS

BRITAM INSURANCE COMPANY LIMITED..... DEFENDANT

J U D G M E N T

A. Introduction

1. This Appeal arises from the judgment of ***Hon S.G Gitonga (Mrs), Principal Magistrate*** dated 6th December 2024, where she dismissed the declaratory suit filed by the appellant on the basis that he had failed to prove the nexus between the insurer of the offending motor vehicle and the insured and secondly on the basis that he had also failed to prove that he had served the statutory notice on the insurer as mandated under ***Section 10(2) of the Insurance (Motor Vehicle Third party risks) Act, Cap 405 laws of Kenya***. Each party was to bear their own costs.

B. Background.

2. The appellant vide his plaint dated 29th January 2024 filed a suit as against the respondent claiming that they were the insurer of motor vehicle registration No ***KBJ 290E (hereinafter referred to as the suit motor vehicle)*** owned by one ***Robinson Gichuhi*** and that on the 10th December 2015, he was a passenger on the said suit motor vehicle which was carelessly and recklessly driven, managed and/or controlled by the insured driver, agent and/or servant, that the said suit was allowed to lose control and caused an accident as a consequence of which the appellant sustained serious bodily injuries.

3. As a result of the said accident, he had filed a suit as against the owner of the suit motor vehicle, being ***Milimani MCCC No 4915 of 2018*** and subsequently obtained judgment as against the respondents insured on 30th January 2023 in the sum of ***Kshs.482,265/=.*** The appellant did further contend that the suit motor vehicle was specifically insured by the respondent under policy number ***P/No 590/807/1/00002/2010/12*** covering such persons or classes of persons specified in respect of any injuries or death caused by or arising out of use of the said suit motor vehicle within the meaning of ***Section 5(b) of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405 laws of Kenya*** and that before filing the suit, he had served a copy of the demand letter and statutory notice upon the respondent.

4. The decree issued in ***Milimani MCCC No 4915 of 2018***, was a liability covered by the said policy and thus the respondent was bound to settle the same under ***section 10 of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405 laws of Kenya*** . The appellant thus prayed that the respondent be directed to pay him a sum of ***Kshs.520,159/=,*** which constituted the said decretal amount plus interest accruing thereon.

5. In response the respondent, filed their statement of defence denying in toto all the averments made by the appellant and

specifically denied ever being the insurer of the suit motor vehicle and/or being served with any demand or statutory notice before ***Milimani MCCC No 4915 of 2018*** was filed. They were therefore not liable to settle the said decree and urged the trial court to dismiss the suit filed as against them.

6. At trial, the appellant adopted his witness statement as his evidence court, and produced all his supporting documents as exhibits. Under cross examination he insisted that he sent the statutory notice to the respondent on 02.06.2016, which was stamped by the insurer and later sent the 2nd notice on 28.05.2018. The respondent opted to close their case without calling any witness and upon considering the evidence adduced and the submissions of both parties, the trial court did hold that the appellant had failed to tender sufficient evidence before the court to prove that the suit motor vehicle was insured by the respondent and secondly that he did also not prove that he served the statutory notice as mandatorily obligated under ***Section 10(2) of the Insurance (Motor vehicle Third Party risks) Act, Cap 405, laws of Kenya.*** This suit was therefore dismissed with no orders as to costs.

7. Being dissatisfied with the said Judgment, the appellant filed his memorandum of appeal dated 10th December, 2024, raising thirteen (13) grounds of appeal, namely: -

a) That the Honourable learned trial court erred in law and in fact in dismissing the appellant's suit.

b) That the Honourable learned trial court erred in law in finding and holding that the appellant had not proved his claim on a balance of probabilities.

c) That the Honourable learned trial court erred in law in raising the standard of proof in a civil case, beyond balance of probability.

d) That the Honourable learned trial court erred in law in failing to appreciate and consider the totality and nature of the appellant's claim.

e) That the Honourable learned trial court misunderstood the burden and standard of proof.

f) That the Honourable learned trial Magistrate erred in law and in fact when he failed to appreciate the history of the suit leading to the said suit by the plaintiff which could have largely informed the decision of the court.

g) That the Honourable learned trial court erred in law and in fact in misapprehending the evidence adduced before him.

h) That the Honourable learned trial court erred in fact by holding that the respondent was not liable to the appellant.

i) That the Honourable learned trial court erred in its appreciation and application of the provisions of the insurance (Motor vehicle Third Party

Risks) Act, Chapter 405 laws of Kenya to the effect that it's the insurer' duty to satisfy judgments against persons insured if judgment in respect of any liability insured against.

j) That the Honourable learned trial court erred in and fact by finding that the statutory notice was not served upon the insurer, evidence that was not controverted by the defendant.

k) That the Honourable learned trial court erred in appreciation and application of the provisions of Section 68 of the Evidence Act in deciding that the plaintiff should have produced the Policy Document to substantivate their claim that the defendant is liable to pay the decretal sum.

l) That the Honourable learned trial court failed to appreciate and therefore to find and hold that the appellant's evidence was not controverted.

m) That the Honourable learned trial court misunderstood the evidence materially.

8. The Appellant thus prayed that this Appeal be allowed, the judgment of the trial court be set aside and substitute it with an order allowing his claim as presented in the primary suit. He also sought to be awarded the costs of this Appeal.

C. Analysis and Determination

9. I have considered this appeal and the impugned judgement. I have also considered the submissions filed, the decisions relied

on, and perused the trial court's record. This being a first appeal, it is by way of a retrial, and this court, as the first appellate court, must re-evaluate, re-analyze, and re-consider the evidence afresh and draw its conclusions on it. The court should, however, bear in mind that it did not see the witnesses as they testified and give due allowance for that. (see ***Selle v Associated Motor Boat Co Ltd & Others*** **[1968] EA 123) &** ***Peters Vs Sunday Post Limited (1968) EA 123).***

10. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of ***section 78 of the civil procedure Act*** a court of first appeal can appreciate the entire evidence and come to a different conclusion. See ***Kurian Chacko Vs Varkey Ouseph AIR 1969 Kerala 316***

11. This Appeal turns on one issue, which is whether the Appellant sufficiently proved his case on a balance of probabilities. **The halsbury's laws of England, 4th Edition, Volume 17 at para 13 and 14** where it states that;

> ***" The legal burden is the burden of proof which remains constant through a trial; it is the burden of***

establishing the facts and contentions which will support the parties case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied in respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is essential to his case. There may therefore be separate burdens in a case with separate issues.

{16} The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. These constitutes evidential burden. Therefore, while both legal and evidential burden initially rests upon the appellant, the evidential burden may shift in the course of trial depending on the evidence adduced. As to weight of evidence given, by either side during the trial varies; so will the evidential burden shift to the party who would fail without further evidence."

12. In the case of ***Evans Nyakwana Vs Cleophas Rwana ongaro (2015) eKLR*** it was held that_

> "***As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purpose of section 107(i) of the Evidence Act, Chapter 80 laws of Kenya. Furthermore, the evidential burden…… is cast upon any party, the burden of proving any particular fact which he desired the court to believe in its existence. That is captured in section 109 and 112 of the law that proof of that fact shall lie on any particular person….. The appellant discharged that burden and as section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side.***"

13. During trial, the appellant produced the police abstract, which confirmed that indeed an accident did occur involving the suit motor vehicle and lists the appellant to have suffered grievous harm. The said abstract confirmed that the suit motor vehicle was insured by the respondent under policy No ***590/080/1/001601/2008/11-Comp***. The respondent did not offer any evidence to rebut this evidence but submitted that the said police abstract was not sufficient to establish the

relationship between them and the insured, which submission found favour with the trial Magistrate.

14. My take is that while it is true that a police abstract is not conclusive proof, it constitutes prima facie evidence of insurance coverage unless controverted. In ***Gateway Insurance Co. Ltd vs. Moses Jaika Luvai [2010] eKLR***, the court held that: -

> ***"A police abstract is prima facie proof of insurance cover where not challenged by the production of a disclaimer or repudiation notice from the insurer."***

15. Similarly, in ***Zainab Musa vs. Invesco Assurance Co. Ltd [2017] eKLR***, it was held that:

> ***"The insurer, having failed to rebut the presumption created by the police abstract, cannot later deny coverage in declaratory proceedings."***

16. In the instant case, the Respondent did not adduce any evidence to rebut the evidence adduced by the appellant. This means that evidence of coverage under policy number ***590/080/1/001601/2008/11-Comp*** remained uncontroverted. I find that the trial court therefore erred in dismissing the claim on grounds of insufficient proof.

17. Turning on to the question as to whether the statutory notice was served, ***Section 10(1) of the Insurance (Motor Third Party Risks) Act, Cap 405***, provides as follows: -

> ***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.***

18. ***Section 10(2) of the Insurance (Motor Third Party Risks) Act, Cap 405*** further provides:

> ***"10(2). No sum shall be payable by an insurer under the foregoing provisions of the section.***
>
> ***(a)in respect of any judgment, unless before or within 30 days after the commencement of the***

proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings…..”.

19. The import of the above provision of the law to be that for liability to accrue under ***Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405***, there is a 4-fold test to be met. Firstly, that the motor vehicle in question was insured by the respondent; Secondly, that the appellant has a judgement in his favour against the insured; Thirdly, that statutory notice was issued to the insurer before or within 30 days of filing the suit where judgement has been obtained and finally, the Respondent was a person covered by the insurance policy.

20. The appellant produced a demand notice dated 16th October 2023 demanding that the respondent settles the decretal amount issued in ***MILIMANI MCCC NO 491of 2018,*** which demand was received and stamped by the respondent on 1st November 2023 and further produced a statutory notice dated 30th May 2016 purportedly served upon the respondent before the primary suit was filed.

21. ***Section 10(2) of the of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405*** is couched in mandatory terms and expressly provides that no sum shall be payable by

an insurer under the aforegoing provisions, in respect of any judgment, unless before or within 30 days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings.

22. The Appellant therefore had the duty to show by way of evidence that the statutory notice was duly served as require, either through registered post, courier, electronic service or through physical service upon the respondent at their place of business. Unfortunately, they miserably failed to do so and thus the trial magistrate cannot be faulted for arriving at the same conclusion.

C. **<u>Disposition</u>**

23. Having arrived at the above finding, I do find and hold that this Appeal lacks merit and the same is dismissed with half costs, which is assessed at ***Kshs.75,000/=*** all inclusive.

24. It is so ordered.

Dated, signed, and **delivered** in open court at **MARSABIT** this **18th** day of **MARCH, 2026.**

FRANCIS RAYOLA OLEL
JUDGE

Delivered on the virtual platform, Team this **18th** day of **MARCH, 2026.**

In the presence of: -

N/A .....Appellant

N/A ..... Respondent

MMr. Jarso ..... Court Assistant