



REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MAKINDU

CIVIL CASE NO. 239B OF 2023

AWALE ABDINUUR.....1ST PLAINTIFF

AWALE TRANSPORTERS LTD.....2ND PLAINTIFF

VERSUS

MONARCH INSURANCE CO.
LIMITED.....DEFENDANT

AND

SHREEJI ENTERPRISES (K) LTD.....INTERESTED
PARTY

JUDGMENT

INTRODUCTION

"Justice delayed is justice denied" is a legal maxim meaning that if legal redress is available for a party that has suffered some injury, but is not forthcoming in a timely fashion, it is effectively the same as having no redress at all. This principle is the basis for the right to a speedy trial and similar rights which are meant to expedite the legal system, because it is unfair for the injured party to have to sustain the injury with little hope for resolution. The phrase has become a rallying cry for legal reformers who view courts or governments as acting too slowly in resolving legal issues either because the existing system

is too complex or overburdened, or because the issue or party in question lacks political favour. The late Martin Luther King, Jr. used the phrase in the form "***justice too long delayed is justice denied***" in his "***Letter from Birmingham Jail***", smuggled out of jail in 1963. As Chief Justice of the United States, Warren E. Burger noted in an address to the American Bar Association in 1970 thus:

"A sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people and three things could destroy that confidence and do incalculable damage to society: that people come to believe that inefficiency and delay will drain even a just judgment of its value; that people who have long been exploited in the smaller transactions of daily life come to believe that courts cannot vindicate their legal rights from fraud and over-reaching; that people come to believe the law (in the larger sense) cannot fulfil its primary function to protect them and their families in their homes, at their work, and on the public streets."

THE CLAIM

This is a declaratory suit arising out of a case that was filed by the interested party against Awale Abdinuur (hereinafter referred to as 1st plaintiff) in 2016. The suit was initially filed at the Mombasa High court but was later transferred to this court. It is said that judgment was entered against the 1st plaintiff in the 2016 matter. This suit is premised on a road traffic accident that is said to have occurred on 31st December, 2014 at Kalimbini area along Nairobi-Mombasa road. The accident involved motor vehicles registration numbers KAR 843F and KBM 510K/ZD 5268. The plaintiffs averred that at all material times, they were the holders of insurance policy number MSA/0800/000152/13 TPO issued by the defendant herein.

The plaintiffs further stated that by the insurance policy aforementioned, the defendant agreed to indemnify the plaintiffs against, *inter alia*, all sums that the said plaintiffs would be legally liable to pay in respect of any claim by any persons including passengers, pedestrians and other third parties or other accidents caused by or arising out of the use of motor vehicle registration number KAR 843F. The plaintiffs averred that on or about 31/12/2014, motor vehicle registration number KAR 843F was involved in a road accident at Kalimbini

area along Nairobi-Mombasa Highway, which resulted in damage to a third party motor vehicle registration number KBM 510K/ZD 5268.

The plaintiffs further averred that the said accident occurred during the currency of the insurance policy and through their insurance brokers Al-Amin Insurance Brokers, the plaintiffs notified the defendant by way of a letter dated 24/2/2017. That as a consequence, the interested party sued the 1st plaintiff vide Makindu civil case No. 186 of 2016 on account of damage to the third party motor vehicle, seeking costs of repairs totalling to Ksh. 1,746,960/=, assessment fees of Ksh. 50,000/=, loss of user totalling to Ksh. 2,179,908/= plus costs of the suit and interest. The plaintiff stated that through the insurance brokers, they requested the defendant to settle the decretal sum in the civil suit aforesaid but the defendant declined to do so.

The plaintiffs contended that by virtue of the insurance policy, the defendant was and remains liable to pay the interested party the entire decretal sum in Makindu Civil suit No. 186 of 2016 and all amounts consequential thereto. That the refusal to settle the decretal sum amounts to breach of contract or insurance policy. The plaintiffs thus pray for judgment against the defendant for:

- a) A declaration that the defendant is liable to indemnify the plaintiffs and make good to the interested party the entire decretal sum in Makindu civil suit No. 186 of 2016;
- b) An order directing the defendant to pay and/or make good the entire decretal sum awarded to the interested party against the plaintiffs in Makindu civil case No. 186 of 2016 as well as all amounts consequent thereto;
- c) Costs and interest.

THE DEFENCE

The defendant entered appearance and filed a statement of defence. It denied that the plaintiffs were the holders of the insurance policy stated and issued by the defendant. The defendant denied that it agreed to indemnify the plaintiffs as was stated in the plaint. The defendant further denied that the accident occurred during the currency of the alleged policy of insurance and that it was notified of the same. In the alternative, the defendant averred that if the alleged accident occurred during the currency of the alleged insurance

policy, then the circumstances of the accident did not give rise to a claim under the alleged insurance policy or the Insurance (Motor Vehicle Third Party Risks) Act.

That further in the alternative, if the alleged accident occurred involving the two motor vehicles, resulting to the material damage claim, then the same did not give rise to a liability covered under the provisions of the Insurance (Motor Vehicle Third Party Risks) Act and the interested party was not a third party within the meaning of the said Act. The defendant denied that the plaintiff, through Al-Amin Insurance Brokers, served the defendant with summons to enter appearance and attendant pleadings in Makindu Civil suit No. 186 of 2016 for purposes of representation and defence, denied that it acknowledged the said documents without exception, reservation and/or qualification.

The defendant denied that by way of a letter through Al-Amin Insurance Brokers, they informed the plaintiff that they had instructed an Advocate to defend the suit against the plaintiffs and averred that it was negligent, indolent and/or irresponsible of the plaintiffs to fail to take part in the proceedings in Makindu Civil suit No. 186 of 2016 when they were the ones who had been sued. The defendant further averred that it was not under any statutory or contractual obligation to settle the decretal sum arising from Makindu Civil suit No. 186 of 2016 and denied being liable to pay the interested party the entire decretal sum plus any or all consequent amounts. The defendant denied being in breach of any law, contract or insurance policy and further denied the particulars of breach pleaded in the plaint. It further denied having failed to take responsibility and thus exposing the plaintiffs to prejudice and loss. It prayed that the plaintiff's suit be dismissed with costs.

THE EVIDENCE

The Plaintiffs' Case

At the hearing of the suit, the only the 1st plaintiff testified in support of their case. The 1st plaintiff adopted his statement filed in court as part of his testimony. The 1st plaintiff testified that he was the Director of the 2nd plaintiff company. That by an insurance policy, the defendant agreed to indemnify the plaintiffs against all sums that the plaintiffs would be legally liable to pay in respect of any claim by any persons including passengers, pedestrians

and other third parties or other accidents caused by or arising out of the use of motor vehicle registration number KAR 843F.

The 1st plaintiff testified that on 31/12/2014 at Kalimbini area along Mombasa-Nairobi Highway, while the insurance policy was still in force, the said motor vehicle was involved in an accident which caused material damage to a third party motor vehicle registration number KBM 510K/ZD 5268. It was the evidence of the 1st plaintiff that he notified the defendant of the accident and upon being sued by the interested party, he sent the documentation to the defendant. The 1st plaintiff was later served with a notice to show cause why he should not be committed to civil jail for failing to settle the decretal sum in the primary suit. That the 1st plaintiff requested the defendant to settle the decretal sum but the latter declined. The 1st plaintiff stated that the refusal by the defendant to settle the decretal sum amounts to breach of law and contract or the policy of insurance. He prayed that the defendant be compelled to settle the entire decretal sum in Makindu Civil suit No. 186 of 2016. The 1st plaintiff produced in evidence, several documents in support of their case.

The Defence Case.

The defendant did not call any witness in its defence.

MAIN ISSUES FOR DETERMINATION

In my view, the main issues for determination are:

- 1) Whether the defendant was the insurer of motor vehicle registration number KAR 843F vide policy number MSA/0800/000152/13 TPO at the time of accident;
- 2) Whether the defendant is bound to satisfy the decree in Makindu SPMCC No. 186 of 2016;
- 3) Who should bear the costs of this suit?

THE PLAINTIFFS' SUBMISSIONS

In their written submissions, the plaintiffs relied on the evidence on record and submitted that they had produced a certificate of insurance to prove that the motor vehicle in issue had been insured by the defendant. They argued that their evidence was not controverted by the defendant. The plaintiffs relied on section 10 of the Insurance (Motor

Vehicle Third Party Risks) Act and urged the court to find that the defendant was liable to settle the decretal sum in the primary suit. The plaintiffs argued that in the absence of proof that material damage was excluded by virtue of contractual clauses in the insurance policy, the defendant was duty bound to settle the decretal sum.

The plaintiffs submitted that the defendant was aware of the primary suit and even participated by appointing a firm of Advocates to defend the suit against the plaintiffs. The plaintiffs urged the court to find the defendant liable for the entire decretal sum and interest accrued since it was the defendant who, by its inaction, caused the decretal sum to accrue such interest. That the defendant cannot hide behind the statutory cap to avoid paying the whole amount. The plaintiffs further prayed for costs of the suit. The plaintiffs relied on several authorities but did not bother to annex copies thereof. It is improper and quite unprofessional for counsel to cite authorities and expect the court to embark on a hunting mission for the same.

THE DEFENDANT'S SUBMISSIONS

The defendant submitted that the contract of insurance between the defendant and the 2nd plaintiff over the insured motor vehicle was limited to third party claims only within the meaning of the Insurance (Motor Vehicle Third Party Risks) Act, yet the primary suit was in respect of a material damage claim. That the plaintiffs did not produce any agreement in which the defendant undertook to cover cases outside the ambit of the Insurance (Motor Vehicle Third Party Risks) Act. The defendant relied on sections 5 and 10 of the Insurance (Motor Vehicle Third Party Risks) Act and submitted that an insurer can be held statutorily liable for a claim relating to personal injury or death and it cannot be presumed that the policy covered any other accident outside section 5 of the governing Act.

The defendant argued that the primary suit having arisen out of a material damage claim, the court should find that the defendant does not bear any statutory liability to satisfy the judgment and decree issued therefrom within the meaning of section 10 of the governing Act. That the defendant is not obliged to pay a sum above Ksh. 3,000,000/= . The defendant urged the court to dismiss the suit with costs and relied on the following authorities:

- a) *Madison General Insurance Kenya Ltd v Sadera [2024] KEHC 13547 (KLR);*
- b) *Real Insurance Co. Ltd & another v Mokaya [2023] KEHC 1672 (KLR).*

ANALYSIS AND DETERMINATION

I have carefully considered the evidence on record and given due regard to the parties' submissions. I have also directed my mind to the applicable law. Section 10(1) of the Insurance (Motor vehicle Third Party Risks) Act Cap. 405 Laws of Kenya provides that:

"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."

Ordinarily, under section 10 (2) of the same Act, the Insurer can only be exempted from liability arising out of a policy if:

- a) in respect of any judgment, the insurer had no notice of the proceedings in which the judgment was given. Such notice ought to be given either before or within 30 days after the commencement of the proceedings giving rise to the judgment;
- b) in respect of any judgment, execution therein is stayed pending an appeal; or

- c) in connection with any liability, the policy was cancelled by mutual consent or by virtue of any provision contained therein, and either—
- (i) before the happening of the event the certificate was surrendered to the insurer, or the person to whom the certificate was issued made a statutory declaration stating that the certificate had been lost or destroyed; or
 - (ii) after the happening of the event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer, or the person to whom the certificate was issued made such a statutory declaration as aforesaid; or
 - (iii) either before or after the happening of the event, but within a period of twenty-eight days from the taking effect of the cancellation of the policy, the insurer has notified the Registrar of Motor Vehicles and the Commissioner of Police (now Inspector General of Police) in writing of the failure to surrender the certificate.

Section 10 (4) of the same Cap 405 provides as follows:

" 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:

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".

The legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA of the Court of Appeal of Singapore in the case of *Britestone Pte Ltd v Smith & Associates Far East Ltd [2007] 4 SLR (R) 855 at 59* when he observed as follows:

"The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed upon him".

With respect, I agree. Section 107 (1) of the Evidence Act provides as follows:

"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".

Sub-section (2) thereof provides that:

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

Section 108 of the Evidence Act provides that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Sections 107, 108 and 109 of the Evidence Act which place the burden of proving a fact on the party who asserts the existence of any fact in issue or relevant fact as the case may be, concern the legal rather than the evidential burden of proof. The evidential burden, whilst not expressly provided for in the Evidence Act, exists in the form of a tactical onus to contradict, weaken or explain away the evidence that has been led by the adverse party. The evidential burden may shift from one party to the other. In ordinary civil cases, the standard of proof is usually on a balance of probabilities. That is the standard upon which the plaintiffs herein are required to prove their case against the defendant. In the case of *Kirugi & Another v Kabiya & 3 Others [1987] KLR 347*, the Court of Appeal held thus:

"The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof."

The plaintiffs allege that their motor vehicle which was involved in the accident was insured by the defendant. A copy of the certificate of insurance was produced in evidence

and no contrary evidence was adduced by the defendant. Indeed, there appears to be no contention that the plaintiffs and the defendant had a third party policy insurance contract in respect of motor vehicle registration number KAR 843F. It is thus my finding that the plaintiffs have proven on a balance of probabilities that the defendant was the insurer of motor vehicle registration number KAR 843F at the time of the accident.

Is the defendant duty bound to settle the claim in the primary suit? To resolve this issue, the following questions are germane:

- a) Was the judgment in the primary suit obtained against the defendant's insured?
- b) Does the claim in the primary suit being Makindu Civil suit No. 186 of 2016, fall within such claims as the defendant would be duty bound to satisfy by virtue of the policy of insurance?
- c) Do the facts of the case entitle the defendant to the exemptions stipulated under the Act?

The wording of section 10(1) of Cap. 405 is that the judgment must have been "**obtained against any person insured by the policy.**" This would imply that judgment ought to have been obtained against the insured. The plaintiffs produced in evidence a copy of the plaint in the primary suit. The plaintiffs produced a copy of a notice to show cause in execution of a decree in the primary suit. The notice to show cause is sufficient evidence of existence of the primary suit and there was judgment therein, against the 1st plaintiff herein. There is no contrary evidence in light of the fact that there is evidence to show that the defendant insured the accident motor vehicle. I am satisfied that there was judgment against the defendant's insured. The evidence on record indicates that the defendant had notice of the proceedings in the primary suit.

An argument has been raised as to whether a material damage claim falls within the actionable third party claims that the defendant is duty bound to settle. The defendant contends that a third party insurance policy does not, by law, cover material damage claims. The defendant relies on sections 5 and 10 of the Insurance (Motor Vehicle Third Party Risks) Act. Section 5 thereof provides:

“In order to comply with the requirements of section 4, the policy of insurance must be a policy which—

- (a) is issued by a company which is required under the Insurance Act (Cap. 487) to carry on motor vehicle insurance business; and***
- (b) 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 the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road:***

Provided that a policy in terms of this section shall not be required to cover—

- (i) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or***
- (ii) except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arose; or***
- (iii) any contractual liability;***
- (iv) liability of any sum in excess of three million shillings, arising out of a claim by one person”. (Emphasis supplied)***

I agree with the defendant that section 10 of the governing Act must be read together with section 5. In the authority of ***DAVID KINYANJUI & 2 OTHERS v MESHACK OMARI MONYORI [1998] KECA 104 (KLR)***, the Court of Appeal had this to say:

“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”.

The above authority has been followed in subsequent decisions of the High court, among them, the following:

- a) *Madison Insurance v Procel Transport Limited [2026] KEHC 3034 (KLR)*, wherein the court held:

“Pursuant to the afore and applying the plain and/or literal meaning rule to the provisions section 5 and 10, it is the finding of this court that those provisions are clear and have no ambiguity that call for any other interpretation and meaning. It is clear that material damage claim is not covered under those provisions”.

- b) *Directline Assurance Company Ltd v Kabai [2025] KEHC 7045 (KLR)*, wherein the court held that the decree having arisen from a material damage claim falls outside the purview of the Insurance (Motor Vehicles Third Party Risks) Act and that the Insurance company is, therefore, not required to settle the same.

The foregoing reveals that in as much as there is judgment against the defendant’s insured, the nature of the claim did not impose a duty on the defendant to settle the claim. The law is clear that a claim under the Insurance (Motor Vehicle Third Party Risks) Act relates to death or personal injury to persons covered under the Act. A claim based on material damage is outside the ambit of the Act. On that ground alone, the suit must of necessity fail.

DISPOSITION

In view of the foregoing, I find that the plaintiffs have failed to prove their case against the defendant on a balance of probabilities. Consequently, the orders which commend themselves to me and which I hereby make are as follows:

- a) A declaration is hereby issued that the defendant is **NOT BOUND** to satisfy the judgment or the decretal sum in Makindu SPMCC No. 186 of 2016;
- b) The suit against the defendant is hereby dismissed;

c) The defendant is awarded costs of this suit.

DATED, SIGNED AND DELIVERED VIA CTS THIS 17TH DAY OF MARCH, 2026.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.