

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CIVIL APPEAL NO. E007 OF 2023

EMILY MUTAI.....APPELLANT

-VERSUS-

**AFRICAN MERCHANT ASSURANCE CO.
LTD.....RESPONDENT**

PATRIC ADIKO BULUKU.....1ST
INTERESTED PARTY

AGATHA MATAKALE SHIKONYI..... 2ND INTERESTED
PARTY

JUDGEMENT

Background of the Appeal

1. By an Amended Memorandum of Appeal dated 27/07/2023, the Appellant approached the Court seeking to overturn a ruling delivered by the Honorable M.C. Kesse, Principal Magistrate, on the 7th March 2023 in Kitale CMCC No. 394 of 2021.
2. The Memorandum is predicated on six grounds of appeal challenging the trial Magistrate's findings on both law and fault the judgment on the basis

THAT:

- a. **The Trial learned trial Magistrate erred in law and fact in dismissing the application for stay of execution in Kitale CMCCC No. 87 and 89 of 2015.**
- b. **The learned trial Magistrate erred in law and fact when she failed to appreciate that the respondent was under a legal obligation to pay the claims in Kitale CMCCC No. 87 and 89 of 2015 having insured her motor vehicle with the respondent.**

6. Prior to the accident, the Appellant had taken out an insurance policy with the Respondent, designated as Policy No. AMI/070/1/057148/2012/03 which was issued to commence on the 29th day of April 2013 with an expiry date of 25th March 2014. The Appellant maintains that she had fulfilled all her contractual obligations, including the payment of premiums, in expectation of indemnity should a risk materialize.
7. Accordingly, when served with the summons for the two claims, she forwarded the documents to the Respondent. The Respondent by way of acknowledging its role as the insurer instructed the firm of *M/S C.K. Yano & Company Advocates* to enter appearance and defend the Appellant and the driver in both matters.
8. In CMCC No. 87 of 2015, the 1st Interested Party testified as PW1 and called medical testimony from Dr. Samuel Chege Njenga (PW2), which detailed severe injuries including a comminuted fracture of the left femur and an ulna fracture resulting in a permanent shortening of his limb. Similarly, in CMCC No. 89 of 2015, the 2nd Interested Party led evidence regarding her injuries, which included a compound fracture of the left patella and tibia/fibula, necessitating treatment with crutches.
9. Throughout the proceedings, the Respondent through its appointed advocates, opted not to call witnesses to testify on behalf of the appellant even though it had filed defences alleging contributory negligence on the part of the motorcycle rider.
10. On the 14/06/2018, the trial court delivered judgments in favour of the Interested Parties. In CMCC No. 87 of 2015, the court awarded the 1st Interested Party a principal sum of Kshs. 772,000 plus costs and interest. In CMCC No. 89 of 2015, the 2nd Interested Party was awarded a sum that, with interest and costs, amounted to approximately Kshs 705,620.
11. The judgments became final and binding upon the appellant because the Respondent did not prefer any appeals or seek to set them aside within the prescribed time.

12. Despite the existence of the final decrees, the respondent remained silent between the years 2018 and 2021 thus prompting the Interested Parties to commence execution proceedings directly against the Appellant.
13. On 27/09/2021, the Appellant was arrested under a warrant of arrest in execution only to sign a written consent undertaking to liquidate the decretal sums through monthly instalments of Kshs. 60,000/= to secure her liberty.
14. Facing the imminent threat of financial ruin for a debt she believed her insurer was statutorily and contractually bound to pay, the Appellant filed the declaratory suit, Kitale CMCC No. 394 of 2021 on 21/10/2021. In the suit, she sought a formal declaration that the Respondent was liable to indemnify her and satisfy the 2015 judgments. Accompanying the plaint were two pivotal applications; one dated the 21st October 2021 for a stay of execution of the two judgments, and another dated the 9th December 2021 for summary judgment against the Respondent.
15. In response, vide its Statement of defense filed on the 29/11/2021, the Respondent denied the allegations and claimed to be a stranger to the 2013 accident, the 2015 suits and even denied insuring the vehicle in question. This was even after the Respondent issued a cheque for Kshs. 50,000 in October 2021 toward the settlement of the claims.
16. The learned trial Magistrate after full hearing the applications delivered the impugned ruling of 7th March 2023, dismissing both. The court argued that the Appellant had failed to provide security and that the Respondent's defense raised triable issues. It is for this that lay the basis of this Appeal.

Submissions

17. This court on 15th July 2025 gave directions that the appeal be canvassed by way of written submissions. Having perused the court file,

both physical and soft and only able to see the submissions by the appellant dated 4th August 2025 on record.

18. In the submissions, the Appellant submit that the existence of a valid insurance policy at the time of the accident was a fact beyond any reasonable doubt. They relied on the police abstract and the policy certificate number AM1/070/1/057148/2012/03. The Appellant argued that the Respondent's denial of this policy was a patent falsehood given that the Respondent had in fact instructed the firm of C.K. Yano & Co. Advocates to defend the primary suits. They submitted that the letter of instructions (Exhibit EM2) created a form of issue estoppel, preventing the Respondent from denying the existence of the insurance contract in a subsequent suit.
19. A primary focus of the submissions was the Respondent's part payment of Kshs. 50,000/= in October 2021. The Appellant argues that part payment of a debt constitutes a waiver of a defense to the claim. The Appellant argued that there is no logical reason for an insurance company to pay fifty thousand shillings toward a judgment unless it admits that it is the insurer and that the judgment is a covered risk. Therefore, they submitted that the trial court's finding that there were triable issues was a fundamental error, as the part payment had narrowed the issues to a point where only arithmetic calculations remained.
20. On the issue of the stay of execution, the Appellant submitted that the trial Magistrate had misapplied the principles of Order 42 Rule 6 of the Civil Procedure Rules. While that order governs stays pending appeal, the Appellant was seeking a stay pending a *declaratory suit* to enforce a statutory indemnity. The Appellant relied heavily on the precedent of **Charles Makenzi Wambua v Africa Merchant Assurance Co. Ltd & another (2014) eKLR** where the court observed that where an insurer has abdicated its statutory duty under Cap 405, it is unjust to require the insured to deposit the full decretal sum as security for a stay. The

Appellant argued that requiring her to pay the very debt she is suing the Insurer to pay would render her suit nugatory.

21. The Appellant concluded by submitting that the Respondent's conduct, denying knowledge of suits it actively defended and refusing to pay after making part payments, amounted to bad faith and an abuse of the court's time. They argued that the purpose of the Insurance (Motor Vehicles Third Party Risks) Act is to protect the public and ensure that victims of road accidents are compensated by the entity that took premiums for that risk. The Appellant urged this Court to use its appellate power to correct the Magistrate's draconian refusal to grant summary judgment and to ensure that justice is finally delivered to both the Appellant and the Interested Parties.

Issues, Analysis and Determination

22. Having thoroughly perused the Amended Memorandum of Appeal, the trial record in its entirety and the rival submissions of the parties, the Court identifies the issues for determination to be:

- a. Whether the Respondent's Defense in the Declaratory Suit Raised Bona Fide Triable Issues;**
- b. Whether the Application for Summary Judgment was Correctly Dismissed;**
- c. Whether the Appellant Met the Legal Threshold for a Stay of Execution; and,**
- d. The Statutory Obligation under Section 10 of Cap 405.**

23. The summary judgment procedure established under Order 36 of the Civil Procedure Rules is a critical tool for the expeditious administration of justice. Its purpose is to prevent the clogging of court calendars with cases where the defendant has no genuine defense and is merely using the litigation process to delay the inevitable. However, because a summary judgment shuts the door on a full trial, courts have consistently held that it is a draconian remedy that should only be granted where the

defense is clearly a sham, frivolous, or an abuse of the court process. Thus, in **Job Kilach vs Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono (2015) eKLR**, the Court of Appeal reiterated the position of the law to be that: -

“Before the grant of summary judgment, the court must satisfy itself that there are no triable issues raised by the defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner...What then is a defence that raises no bona fide triable issue? A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term “triable” as, “subject or liable to judicial examination and trial”. It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court.”

24. Similarly, in **Giciem Construction Company v Amalgamated Trade & Services LLR No.103 CAK**, quoted with approval in **Job Kilach v Nation Media Group (supra)** the court held that:

“....A triable issue is said to exist if there is a dispute in the facts, which dispute can only be resolved after ventilation in a full hearing. As a general principle, where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that he has a bona fide defence, he ought to have leave to defend.”

25. In this matter, the Respondent's in its Statement of Defense in Kitale CMCC No. 394 of 2021 denied insuring the vehicle, denied occurrence of the accident, and denied too the knowledge of the 2015 suits. That was done without challenging the fact that it had not only instructed counsel

to defend the suit but also made part settlement of the decree against the appellant. There was equally no assertion that the document exhibited by the appellant were fraudulent or just made up.

26. To the contrary, the trial record contains insurmountable evidence that renders these denials not only implausible but deliberately misleading. Exhibit EM2, the Respondent's own letter of instructions to *M/S C.K. Yano & Co. Advocates*, specifically mentions the accident date of 22/11/2013 and the primary suit numbers. To this court, that document was sufficient a proof that the Respondent was not only aware of the risk but actively took control of the litigation for years until the judgement was delivered. There was then a wide berth on the documents showing that indeed an insurance certificate was issued and after judgment part payment was made.
27. The defendant always bore an obligation and onus to traverse allegations by the appellant specifically. A general denial that is contradicted by the defendant's own previous conduct or public documents is considered a sham. In **Gladys Jepkosgei Boss v Star Publication Limited [2021] KEHC 3113 (KLR)**, the court held that where a defense raises no *bona fide* triable issue, it should be struck out straight away to prevent procedural abuse. The Respondent's claim of being a stranger to the 2015 cases, the cases it funded and managed through its appointed advocates, is an attempt to litigate in bad faith.
28. Furthermore, the Respondent's silence regarding the Kshs. 50,000 cheque issued in October 2021 (Exhibit EM6) is fatal to its case. The court points that under Kenyan debt recovery jurisprudence, part payment is widely recognized as an admission of the underlying liability. In **Southern Credit Banking Corp. Ltd v Charles Wachira Ngundo [2005] KEHC 1573 (KLR)**, the court held that a party who makes a part payment toward a claim is generally held to have waived their right to a full defense unless they can demonstrate a specific mistake of fact. AMACO herein offered no such explanation in its Replying Affidavit.

Consequently, there were no factual triable issues regarding the existence of the policy or the Respondent's awareness of the 2015 judgments. The trial Magistrate thus erred in law by adjudging the bare denial as raising a triable issue and thus refusing to strike out the sham defense.

29. On whether the Application for Summary Judgment was properly dismissed, the court points that of the main objectives of the Insurance (Motor Vehicles Third Party Risks) Act objectives is to ensure that innocent victims of road accidents are not left without a remedy due to the insolvency or recalcitrance of a motor vehicle owner. Section 10(1) of the Act creates a statutory bridge between the third party and the insurer that bypasses the private contractual relationship between the insurer and the insured.
30. The section provides that if a judgment is obtained against an insured person for a liability required to be covered by a policy, the insurer *shall* pay to the persons entitled to the benefit of the judgment any sum payable thereunder. The statutory language is mandatory, not discretionary. An insurer can only avoid this obligation if it has obtained a court declaration that the policy was void due to non-disclosure or false representation before or within three months of the commencement of the primary suit.
31. In this case, the Respondent failed to make any attempt at and totally failed to fulfil any of the conditions that would allow it to repudiate the policy under Section 10(4). On the contrary, it adopted the defense of the primary suits in 2015. Once the judgments of 14/06/2018 were delivered and reached finality, the Respondent's liability to the Interested Parties became absolute under the Act. The court holds and finds that the judgments in CMCC 87 and 89 of 2015 are final expressions of the court's adjudication on the issues of negligence and damages. Therefore, there was no legal basis for the trial court to allow a new suit to proceed on these already decided facts.

32. On whether the Appellant met the legal threshold for a stay of execution orders, the trial court's primary reason for dismissing the stay of execution was the Appellant's failure to provide security for the decretal sum. This Court finds that this was a misapplication of the principles of equity in the context of insurance law. Order 42 Rule 6(2) of the Civil Procedure Rules, which requires security for a stay, is typically designed for cases where an appellant is challenging a judgment and the respondent needs protection against the loss of the fruits of judgment while the appeal is pending.
33. However, the Appellant here was not appealing the 2018 judgments; she was seeking to enforce a statutory indemnity against a third party (the Insurer) who was already legally bound to pay those very judgments. In **Charles Makenzi Wambua v Africa Merchant Assurance Co. Ltd & another (2014) eKLR**, the court addressed an identical scenario where AMACO (the Respondent herein) had refused to pay third-party claims. The court held that requiring an insured person, often an individual with limited means, to deposit the full decretal sum in court as a condition for a stay against a solvent insurance company is unjust and would aid the insurer in avoiding a contract dictated by statute.
34. The Appellant in this case demonstrated that she would suffer substantial loss if the stay were denied. Her property was being attached, and she faced incarceration for a debt that she had paid premiums to avoid. If her property were sold, the eventual victory in the declaratory suit would remain mere academic exercise because the damage would be irreversible. The trial court failed to balance the balance of convenience, which overwhelmingly favoured the Appellant, especially since the Respondent had already made a part payment.
35. On the statutory obligation under Section 10 of Cap 405, the court notes the existence of the 27/09/2021 consent, where the Appellant undertook to pay Kshs. 60,000 per month to the Interested Parties. The Interested Parties argued that the Appellant's filing of the declaratory suit

was a breach of this consent. This Court acknowledges that a consent is a contract between the parties and should generally be honoured.

36. However, the evidence shows that this consent was entered into while the Appellant was under the duress of arrest. More importantly, the Respondent's own conduct in issuing a Kshs. 50,000 cheque in October 2021, after the Appellant filed for a stay, supersedes the private arrangement between the Appellant and the Interested Parties. By paying toward the judgment, the Insurer effectively took over the debt.
37. In **Michael Obadha v Invesco Assurance Co. Ltd; Lilian Atieno Omoro & 3 others (Proposed Interested Parties/Applicants) [2019] KEHC 693 (KLR)**, the court emphasized that courts must look at the interest of justice and the fidelity to the law. If this Court were to allow the lower court's ruling to stand, it would be endorsing a situation where an insurance company can take premiums for a risk, defend a suit for five years, make a part payment toward the judgment, and then successfully argue in a new suit that it doesn't know who the insured is. This would be a manifest absurdity that undermines the entire mandatory third-party motor vehicle insurance framework as legislated in Kenya.
38. In the upshot, the Court finds the instant appeal to be wholly merited. The Respondent's defense in the lower court was a sham designed to frustrate the finality of litigation and avoid a clear statutory duty under Section 10 of Cap 405. There was no triable issue because the existence of the policy and the Respondent's liability were admitted through the appointment of advocates to defend the suit and the part payment made in the year 2021.
39. Consequently, the ruling and orders of the Principal Magistrate in Kitale Chief Magistrate's Civil Case No. 394 of 2021, delivered on the 07/03/2023, dismissing the application for striking out and summary judgment are hereby set aside in their entirety. In place of that decision is substituted an order allowing the application dated 9.12.2021 on terms

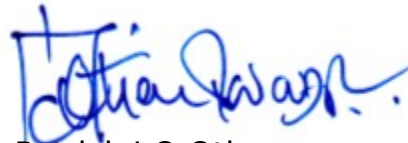
that the defence filed be struck out and summary judgment entered for the appellant as prayed in the plaint.

40. The court thus determines and makes a declaration that the respondent is legally bound and liable to satisfy the judgments and decrees issued in Kitale CMCC No. 87 of 2015 and Kitale CMCC No. 89 of 2015 in full, including all costs and interests accrued therein from the date of the judgments in the primary suit until payment in full.

41. In doing so, the Respondent shall refund to the appellant the Appellant any payments she may have made to the Interested Parties under the consent of 27/09/2021.

42. The Respondent shall bear the costs of this appeal and the costs of the declaratory suit.

Dated, signed and delivered virtually this 9th day of April, 2026.



Patrick J O Otieno

Judge