REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CIVIL APPEAL NO. E058 OF 2024

KENYA ORIENT INSURANCE COMPANY LIMITED……..APPELLANT

-VERSUS-

SUSAN NJERI NDINGURI & 2 OTHERS (Legal administrators of the estate of the Late EDDAH WANJIRU NDINGURI (Deceased) ……RESPONDENT

JUDGEMENT

Background of the Appeal

1. The dispute herein stems from a road traffic accident that occurred on November 20, 2008, along Kenyatta Avenue within Naivasha. It was alleged that a motor vehicle with registration number KXT 880, described as a Mitsubishi Canter, was involved in an incident that resulted in fatal injuries to one Eddah Wanjiru Ndinguri. The vehicle was owned by Francis Makumi Njoroge, who was the primary defendant in the primary suit proceedings.
2. Following the accident, the legal representatives of the estate of the late Eddah Wanjiru Ndinguri; Susan Njeri Ndinguri, Betty Rose Ndinguri and Nellie Njoki Ndinguri, instituted Naivasha CMCC No. 642 of 2010. After full trial of that primary suit, the trial court delivered a judgment on October 5, 2018, finding Francis Makumi Njoroge liable and awarded to the estate a sum of Kshs. 416,030 in general damages, plus costs and interest.
3. When the judgment debtor failed to satisfy the decree, the respondents filed a declaratory suit, Naivasha CMCC No. 251 of 2020, against the appellant, Kenya Orient Insurance Company Limited, seeking to compel

the insurer to satisfy the decree pursuant to Section 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act.

4. In the declaratory suit, the respondents alleged that at the time of the accident, the subject motor vehicle was insured by the appellant under Policy No. 802080093 TPO.
5. The appellant, in its defense, categorically denied the existence of any insurance contract with the owner of the vehicle on the material date and further argued that it had never been served with the requisite statutory notice under Cap 405.
6. The trial magistrate, Hon. W.O. Rading, after evaluation of the evidence delivered a judgment on 4th June 2024, finding in favour of the respondents and ordering the appellant to pay the decretal sum of Kshs. 692,150, which included interest and costs. It is that findings and subsequent orders that form the basis of the instant appeal.

The Appeal

7. The appellant being dissatisfied with the judgment and orders of the trial court set forth six primary grounds of appeal in the Memorandum of Appeal filed on 13th June, 2024. These grounds challenge the trial court’s evaluation of both the evidence and the law applicable to declaratory suits against appellant.
8. The first ground of appeal asserts that the learned magistrate erred in law and fact by disregarding the defendant's evidence and submissions on record. The appellant contends that the magistrate failed to give proper weight to the evidence that directly contradicted the respondents' claims of insurance cover on the material date.
9. The second and fourth grounds are closely related, focusing on the specific status of the insurance coverage. The appellant argues that the learned magistrate failed to find that the appellant was not the insurer of motor vehicle KXT 880 on November 20, 2008, and specifically disregarded documentation showing the same.

10. In the third ground, the appellant challenges the prerequisite statutory steps required of the respondent and contending that the suit was never competent for failure to comply with the mandatory requirements of Sections 5 and 10 of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405. In the fifth and sixth grounds, the appellant contends that the magistrate failed to consider that it was not liable to pay the decretal sum since the judgment in the primary suit was in favour of a party who was not insured by the defendant.
11. These grounds collectively aim to demonstrate that the trial court reached its conclusion without considering the applicable principles established by statute, thus making the entire decision fundamentally flawed in law.

Summary of the Appellant's Case

12. The appellant’s case at the trial was anchored on denial of the insurance relationship. In its Statement of Defense filed on 21/09/2020, the appellant categorically denied having insured motor vehicle KXT 880 owned by Francis Makumi Njoroge on the date of the accident. It further denied having been served with a statutory notice in respect of the primary suit, CMCC No. 642 of 2010, which it claimed was a fatal blow to the respondents' cause of action.
13. The appellant’s defense was anchored on the testimony of David Njoroge, the Branch Manager of the Nakuru Branch. He produced a motor commercial policy schedule as Exhibit 1, which detailed the insurance history of Francis Makumi Njoroge with the company. According to this document, the insured had taken out policies for two specific periods: 14/03/2008 to 13/04/2008 and a later period from 01/09/2017 to 30/09/2017.
14. The appellant argued that the accident, which occurred on 20/11/2008, fell squarely outside the period of the cover, approximately seven months after the expiry of the first policy schedule produced.

15. The appellant also challenged the validity of the policy number cited by the respondents, 802080093 TPO. It was asserted that this policy number did not belong to the appellant and was not present in their records. Instead, he provided the company's actual policy numbers for Francis Makumi Njoroge, which were NKU/102/095365/2008 and MSA/0800/105891/2017. Its case was that the respondents had relied on erroneous information from the police abstract that did not reflect the actual status of the insurance contract.
16. On the issue of the statutory notice, the appellant maintained that no such notice was ever received. It argued that the demand letter and notice produced by the respondents did not bear any official receipt stamp from the insurance company, which is the standard practice for acknowledging service. The appellant contended that without proof of service of this notice, the declaratory suit was incompetent and should have been dismissed with costs.
17. During cross-examination, the witness admitted that the appellant had appointed the law firm of Muri Mwaniki & Wamiti Advocates to defend Francis Makumi Njoroge in the primary suit. He further admitted that the company did not repudiate liability against the insured during the pendency of that suit.

Summary of the Respondent's Case

18. The respondents, suing as the legal administrators of the estate of Eddah Wanjiru Ndinguri, grounded their case on the statutory protections offered to third-party victims. Their primary contention was that they had obtained a valid decree against Francis Makumi Njoroge, who was at all material times the appellant's insured. They sought a declaration that the appellant was statutorily bound to satisfy this decree under Section 10 of Cap 405.
19. The respondents' evidence cantered on the information gathered by the police at the time of the accident. Susan Njeri Ndinguri testified that

she was issued with a police abstract which identified the insurer of motor vehicle KXT 880 as Kenya Orient Insurance Company Limited under Policy No. 802080093. The respondents argued that as road accident victims, they had no access to the private insurance certificates of the owner and were entitled to rely on the official documents generated by the police during their investigation.

20. To address the requirement of the statutory notice, the respondents produced a Notice of Institution of Suit dated in 2010, along with a forwarding letter and a certificate of postage. They argued that the evidence, combined with the fact that the appellant actually appointed advocates to defend the insured, proved that the statutory notice had been served and acted upon. The respondents contended that the insurer could not have known about the suit or appointed a law firm unless it had been properly notified.

21. The respondents further argued that the appellant's conduct in the primary suit created an estoppel. By instructing advocates to represent the insured and failing to repudiate liability for over eight years, the appellant had led the respondents to believe that it was the insurer. The respondents maintained that it would be a gross injustice to allow the insurer to wait until the final judgment was delivered before denying the existence of the policy.

Summary of the Appellant's Submissions

22. The appellant's submissions for the appeal, dated 4th December 2024, focus on the evidentiary burden in declaratory suits. The appellant argues that the trial magistrate erred by relying on a police abstract to establish the existence of a contract, rather than requiring primary evidence of the contract itself. The appellant maintains that a declaratory suit is a contractual action, and the party asserting the contract must prove its terms and its validity on the material date.

23. The appellant relies heavily on the case of **John Muthee Mwaniki v African Merchant Assurance Co. Ltd [2022] eKLR**. In that case, the court dismissed a declaratory suit because the plaintiff failed to produce a Certificate of Insurance or an insurance policy to prove that the vehicle was covered. The appellant argues that the same principle applies here: the respondents failed to produce a certificate of insurance, and the police abstract they relied on was insufficient as it was not corroborated by any official certificate of examination.
24. Furthermore, the appellant challenges the magistrate's interpretation of the policy schedule. It argues that the schedule produced for March and April 2008 clearly showed that the coverage had ended well before the accident in November 2008. The appellant contends that the magistrate had no legal basis to extend the coverage period beyond what was explicitly stated in the document. The appellant also emphasizes that the policy number cited by the respondents was completely foreign to their records, suggesting that the police abstract contained erroneous information.
25. On the issue of the statutory notice, the appellant's submissions maintain that there was no proof of service. It argues that the certificate of postage is not conclusive proof of delivery and that the lack of a receipt stamp from the insurance company is evidence that the notice never reached its destination. The appellant contends that compliance with the notice requirements of Section 10 of Cap 405 is mandatory, and failure to prove service is fatal to a declaratory suit.
26. Finally, the appellant addresses the issue of the appointment of advocates. It argues that the mere appointment of a firm to defend a suit does not constitute an admission of insurance coverage for all purposes. The appellant suggests that such appointments may be made for various administrative or investigative reasons and should not preclude the insurer from later challenging the validity of the policy if investigations reveal that it had lapsed or was non-existent.

Summary of the Respondent's Submissions

27. The respondents' in their submissions argue for the dismissal of the appeal and the upholding of the trial magistrate's judgment. They contend that the magistrate correctly applied the law and reached a decision based on the preponderance of evidence. The respondents emphasize the disparity in access to information between an insurance company and a third-party victim.
28. The respondents rely on the case of **Martin Onyango vs Invesco Assurance Company Limited [2015] KEHC 6060 (KLR)**. In that case, the court held that a road accident victim is not required to produce a Certificate of Insurance, as it is a document held by the insurer and the insured. The respondents argue that the police abstract is the standard and acceptable evidence for a victim to establish the identity of an insurer. They contend that the details in the police abstract are obtained from the official insurance stickers affixed to the vehicles, making them a reliable secondary source of information.
29. Regarding the appellant's evidence, the respondents argue that it was contradictory and incomplete. They point out that while the appellant produced a schedule for 2008, it failed to provide information about the owner's other policies or who Policy No. 802080093 belonged to if not the insured. That once the police abstract was produced, the evidentiary burden shifted to the appellant to provide definitive proof that the specific policy number did not exist, which it failed to do.
30. Concerning the appointment of advocates in the primary suit, it is contended that the appellant's decision to instruct *Muri Mwaniki & Wamiti Advocates* to defend the insured is the clearest evidence of an admission by conduct. They argue that the appellant cannot claim to be a stranger to the owner when it actively paid for his defense for eight years. The respondents maintain that this conduct effectively waived any right the insurer had to deny coverage on the basis of a non-existent policy.

31. Finally, the respondents address the case law cited by the appellant. They argue that *John Muthee Mwaniki* is distinguishable because it involved a dispute between an insured and an insurer, where the insured should have possessed the certificate. They maintain that in a third-party claim, the standard of proof is balanced by the victim's inability to access private contracts, and the trial magistrate correctly favored the victims' reliance on official police documentation.

Issues, Analysis and Determination

32. The resolution of this appeal hinges on the clarity of the legal relationship between the insurer, the insured judgment debtor, and the third-party victim. Having perused the trial record and the respective submissions, this Court identifies the following issues for determination: (i) *Did the respondents provide sufficient evidence to establish, on a balance of probabilities, that the Appellant was the insurer of motor vehicle KXT 880 on 20/11/2008*? (ii) *Were the mandatory requirements of Section 10(2) of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405, met regarding the service of the statutory notice of the institution of the suit*? And, (iii) *What is the legal effect of the appellant appointing a law firm to defend the judgment debtor in the primary suit*?

33. Having identified the issues for determination as above, the court proceeds to their in-depth analysis. Notably, the issues themselves are intertwined and must be analyzed collectively to determine soundness of the trial court's judgment. Onto the first issue, and being the gist of the appeal, the court is tasked to determine whether a police abstract is sufficient to establish a contract of insurance when the insurer produces contrary internal documents. Section 107 of the Evidence Act dictates that the person who desires the court to give judgment as to any legal right or liability must prove the facts upon which that right or liability depends. In a declaratory suit under Section 10 of Cap 405, the plaintiff must prove that a policy of insurance was in effect at the material time.

34. The appellant's argument is that the Certificate of Insurance is as good evidence as a contract. While this is true in a general contractual sense, courts have long recognized the unique position of third-party accident victims. In **Martin Onyango vs Invesco Assurance Company Limited [2015] KEHC 6060 (KLR)**, the court acknowledged that victims do not have access to these certificates. Consequently, a police abstract is accepted as prima facie evidence of the insurer's identity.

35. The reasoning behind this is that police officers, in the course of their investigative duties under the Traffic Act, are required to verify the insurance status of vehicles involved in accidents. The details recorded in a police abstract are typically taken from the insurance certificate or the windshield sticker. Therefore, when a plaintiff produces a police abstract listing an insurer and a policy number, the evidentiary burden shifts to the insurer to provide cogent evidence to rebut that information.

36. In the instant, the appellant produced a policy schedule showing coverage ending in April 2008. However, the appellant did not explain the origin of Policy No. 802080093, which was specifically cited in the police abstract. The failure of the appellant to provide a comprehensive underwriting history for Francis Makumi Njoroge for the entire year of 2008 is a significant omission.

37. Moreover, the appellant's own witness admitted that Njoroge was a loyal customer who insured multiple vehicles. In the face of this admission, the production of a single one-month policy schedule does not conclusively disprove the existence of other policies or renewals. The trial magistrate correctly identified that the appellant was the party in possession of the special knowledge regarding the policy numbers and renewals. The appellant's failure to produce its full underwriting records to disprove the policy number recorded by the police, combined with its admitted conduct in defending the owner, led to the correct conclusion that the respondents had met their burden of proof.

38. The next issue for determination is whether the requirements of Section 10(2) of the Insurance (Motor Vehicle Third Party Risks) Act were met. Notably, the service of a statutory notice under Section 10(2)(a) of Cap 405 is a mandatory condition precedent for an insurer to be held liable to satisfy a decree obtained against its insured. The purpose of this notice is to inform the insurer of the proceedings so that it may take steps to protect its interests, such as defending the suit or seeking a declaration to avoid the policy.

39. The appellant contends that the respondents failed to prove service of this notice because they relied on a certificate of postage rather than a stamped copy. However, the standard for service in civil matters has evolved to prioritize substance over form. In **Mui v First Assurance Company Limited (Civil Appeal E645 of 2024) [2024] KEHC 13794**, the court held that a demand letter or notice is sufficient as long as it adequately informs the insurer of the claim, regardless of its specific format.

40. More importantly, the evidence in this case reveals that the appellant actually acted upon the notice. The appointment of *Muri Mwaniki & Wamiti Advocates* to defend the primary suit is an irrefutable indication that the insurer was aware of the institution of the suit. It is legally inconceivable that an insurance company would provide a legal defense for a party in a civil suit unless it had received notice of that suit and accepted that the party was its insured. The court holds that the appellant's conduct in appointing advocates serves as a waiver of any technical deficiency in the service of the statutory notice. The magistrate's finding that notice was served and received is supported by the preponderance of the evidence.

41. By the foregoing, the court proceeds in determining the final issue on the legal effect of the appellant appointing a law firm to defend the judgment debtor in the primary suit. The doctrine of estoppel is a principle of fairness that prevents a party from blowing hot and cold by

asserting a position that contradicts their prior conduct to the detriment of another party. In the context of insurance litigation, the act of an insurer taking over the defense of an insured in a primary suit has significant legal consequences.

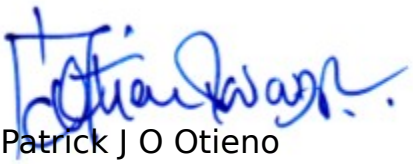
42. When the Appellant instructed advocates to represent Francis Makumi Njoroge in CMCC No. 642 of 2010, it effectively represented to the plaintiffs and the court that it was the insurer of the vehicle involved. The plaintiffs relied on this representation by proceeding with the suit against Njoroge, believing that a successful decree would be satisfied by the insurer. Had the appellant denied coverage at the outset in 2010, the plaintiffs might have explored other avenues or sought earlier clarification of the insurance status.

43. By allowing the suit to proceed for eight years without repudiating liability, the appellant led all parties to believe that the insurance relationship was intact. In **Kenya Orient Insurance Company Limited v Mutua & another [2024] KEHC 9259 (KLR)**, the court noted that insurers have a duty to act in good faith and inform parties of repudiation promptly. To deny the existence of the policy only after a final judgment has been delivered is a violation of the principle of utmost good faith that underpins insurance contracts. The court finds that the trial magistrate was correct in determining that the appellant's conduct created an irrevocable admission of the insurance nexus.

44. In the upshot, and in line with the above, this Court finds that the appeal merited and is allowed as prayed. Consequently, the judgment of the lower court Naivasha in Civil Suit No. 251 of 2020 is set aside and, in its place, substituted a judgment dismissing the suit at trial with costs to the appellant.

45. Having succeeded, the court awards the costs of this appeal to the appellant

Dated, signed and delivered virtually this 27th day of March, 2026



Patrick J O Otieno

Judge