Abwao & 2 others v Saham Assurance Limited (Civil Appeal E725 of 2023) [2025] KECA 1129 (KLR) (20 June 2025) (Judgment)

Neutral citation: [2025] KECA 1129 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E725 OF 2023

DK MUSINGA, F SICHALE & FA OCHIENG, JJA

JUNE 20, 2025

BETWEEN

GODFREY NYANDERA ABWAO ..... 1ST APPELLANT

MARTHA ADHIAMBO NYANDERA ..... 2ND APPELLANT

LABAN OKOTH OMINDE ..... 3RD APPELLANT

AND

SAHAM ASSURANCE LIMITED ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Nairobi (Mulwa, J.) delivered on 3rd May 2023 in Civil Suit No. 213 of 2017)

JUDGMENT

1. This is an appeal from the judgment of the High Court at Nairobi (Mulwa, J.) delivered on 3rd May 2023 in Civil Suit 213 of 2017.

2. The background to this appeal is that the appellants (then as plaintiffs) brought suit, to wit, Nairobi High Court Civil Case 2182 of 2001 against Mothers Favourite Bakeries Co. Ltd (in receivership), the registered owner of motor vehicle registration number KAE 988, and one Ndiason Kamau, who was the driver of the said vehicle, following a road accident that occurred on 3rd January 1999. At the time of the accident, motor vehicle KAE 988 was insured by Mercantile Life and General Assurance Company Limited (hereinafter referred to as "Mercantile"), the predecessor of the respondent.

3. It was alleged that the appellants were lawfully travelling in their motor vehicle registration number KXQ 344, when Ndiason Kamau negligently drove motor vehicle registration number KAE 988, resulting in a collision between the two vehicles. The appellant sustained injuries from the said accident. Mothers Favourite Bakeries Co. Ltd and Ndiason Kamau failed to enter appearance or file a

defence, leading to the entry of interlocutory judgment, after which the matter proceeded to formal proof.

4. Vide a judgment dated 16th October 2012, the trial court (Odunga, J.) (as he then was,) held that Martha Adhiambo Nyandera (the 2nd appellant) had sustained severe injuries, including a leg amputation and awarded her Kshs.2,000,000 in general damages and Kshs.360,278.10 in special damages. Godfrey Nyandera Abwawo (the 1st appellant), who had sustained minor injuries was awarded Kshs.60,000 in general damages and Kshs.6,900 in special damages. Laban Okoth Ominde (the 3rd appellant), having suffered soft tissue injuries was awarded Kshs.80,000 in general damages and Kshs.96,080.70 in special damages. Judgment was entered against Mothers Favourite Bakeries Co. Ltd and Ndiason Kamau jointly and severally, together with interest and costs.

5. The appellants subsequently filed a declaratory suit, to wit, Nairobi High Court Civil Suit No. 213 of 2017, seeking to compel Saham Assurance Company Limited (the successor to Mercantile) to satisfy the judgment obtained in Nairobi HCCC No. 2182 of 2001. They contended that Saham Assurance (the respondent herein), as the insurer of motor vehicle registration number KAE 988, was liable under section 10 of the Insurance (Motor Vehicle Third Party Risks) Act (hereinafter referred to as "the Act") to settle the decretal sum of Kshs.2,602,978, together with interest and costs.

6. The respondent denied liability, contending that it had not been served with the statutory notice as per the requirements under the Act, either prior to or within 30 days of the commencement of the original proceedings. The respondent further argued that the insured company was under receivership at the material time, and that no leave of the court had been obtained prior to instituting proceedings against a company in such status, thereby rendering the original suit irregular.

7. The appellants maintained that they had duly served the statutory notice and relied on the existence of a valid insurance policy covering the subject vehicle at the time of the accident.

8. The court (Mulwa, J.) vide a judgment dated 3rd May 2023 held that there was no evidence adduced to substantiate service of the statutory notice upon the respondent or its predecessor, Mercantile. The purported notice lacked any acknowledgment of receipt, such as a stamp or postal certificate. The court ultimately concluded that the appellants had failed to satisfy the legal requirements under section 10 of the Act, primarily due to the absence of proof that the insurer was notified of the proceedings within the stipulated timeframe. The court further held that the primary suit had been irregularly instituted without obtaining leave, despite the insured being under receivership at the time. As a result, the court dismissed the suit with costs to the respondent, finding that the insurer could not be held liable for a judgment arising from procedurally defective litigation.

9. The appellants were dissatisfied with the judgment and preferred this appeal on the grounds that the learned judge erred in law and in fact by: concluding that the appellants had not served a statutory notice on the respondent before instituting the primary suit yet the appellants had served a statutory notice dated 11th May 2000 and which notice was made reference to in the letter dated 20th April 2016; concluding that the appellant had not sought leave to institute the primary suit (Nairobi HCCC No. 2182 of 2001) which amounted to a reopening of the primary suit, yet what was before court was the declaratory suit; reopening and adjudicating the primary suit, thus denied the appellants an opportunity to address any and all issues that could only be completely raised and addressed in the primary suit; adjudicating on a dispute where a final judgment had been delivered on merit and by doing so, she contravened the inveterate doctrine of functus officio; and by purporting to sit on appeal of a judgment issued by a court of concurrent jurisdiction, thereby setting aside the judgment of Odunga, J. which had been delivered on 16th October 2012.

10. At the hearing hereof, learned counsel Mr. Munyua appeared for the appellants, while the respondent was represented by learned counsel Mr. Isolio. Both counsel elected to rely on their respective clients written submissions without making any oral highlights.

11. In their written submissions dated 6th May 2024, the appellants assert that a statutory notice dated 18th May 2000 was duly served upon Mercantile. They contend that the respondent did not dispute service of the notice until the filing of its amended defence in the declaratory suit. To support their position, the appellants refer to a letter from Mercantile dated 7th July 2000, in which Mercantile makes reference to earlier correspondence from the appellants' advocate. The appellants contend that this reference amounts to an acknowledgment of receipt of the statutory notice. In any event, they argue, the essential requirement under section 10 of the Act is that the insurer be notified of the impending suit, a requirement that was met in this case.

12. On the sufficiency of notice under the Act, the appellants rely on Philip Kimani Gikonyo v. Gateway Insurance Company Limited [2007] eKLR, where the Court held that any form of notice is sufficient, provided it reasonably communicates the occurrence of an event giving rise to a claim under the insurance policy.

13. It is further submitted that the learned judge placed undue emphasis on the absence of a receiving stamp or any other mark on the face of the statutory notice to confirm service. In support of this position, the appellants rely on the decision in James Makau Mativo v Co-operative Insurance Co. Ltd [2020] eKLR, where the Court held, in part, as follows:

> " The respondent's insistence on affixing a stamp to prove service is its own house keeping issue which is good but cannot be the yardstick for determining whether a document has been served or not. Such rigidity would greatly enable insurance companies and other parties to avoid liability in the guise of a missing stamp yet they are in control of the said stamp. As correctly submitted by the Appellant, the important thing is that a claimant is able to establish, on a balance of probability, that the insurance company was put on notice before the suit was filed or within 14 days after filing."

14. In this regard, the appellants contend that, notwithstanding the absence of a stamp on the face of the statutory notice, the court ought to have found that service was properly effected in light of Mercantile's letter dated 7th July 2000.

15. Regarding the nature of a declaratory suit, the appellants contend that certain defences are not available at that stage of proceedings.

    Specifically, a party cannot raise issues of non-service of pleadings, as such matters ought to be addressed in the primary suit through an application to set aside. Similarly, procedural objections concerning the conduct of the primary suit must be raised within that suit and not in a subsequent declaratory action. Furthermore, a party cannot, in a declaratory suit, challenge the findings on liability or the quantum of damages as determined in the primary suit, nor can they contest the exercise of discretion by the trial court. In support of this position, reliance is placed on the decision of Mwita, J. in Gerald Njuguna Mwaura v. Africa Merchant Assurance Co. Limited [2020] eKLR .

16. In this regard, the appellants contend that the learned judge acted ultra vires by making a determination on whether leave had been obtained prior to instituting suit against a company under receivership. They argue that the appropriate recourse available to the respondent on the issue of leave was to challenge the judgment in the primary suit, whether by way of an appeal, review, or an application to set it aside. It is submitted that since the respondent has never sought to challenge that judgment

through any of these avenues, this Court should condemn the respondent's conduct, which is intended to delay the execution of a valid decree issued by the trial court.

17. The appellants further contend that Mulwa, J. lacked jurisdiction to review the judgment entered by Odunga, J. (as he then was) in the primary suit. They argue that once a court of competent jurisdiction has conclusively exercised its authority over a matter, it is impermissible for a court of concurrent jurisdiction to revisit or re-exercise that same jurisdiction.

18. In sum, the appellants contend that as there was a valid insurance policy in force at the time of the accident, and there was no demonstrable breach of its terms, the respondent is statutorily obligated to satisfy the decree issued in the primary suit.

19. On its part, the respondent through its written submissions dated 3rd July 2024, contends that the appellants failed to serve it, or its predecessor, with the statutory notice required under section 10 of the Act. It asserts that it only became aware of the proceedings upon receipt of the Notice of Entry of Judgment dated 20th April 2016, and not at the time of filing or during the pendency of the primary suit. The respondent further challenges the form and authenticity of the alleged statutory notice, noting that, unlike the Notice of Entry of Judgment which appears on the official letterhead of the appellants' advocates, the notice dated 18th May 2000 is not on the advocate's letterhead. Moreover, the notice bears no evidence of service: it lacks a stamp, receipt, or signature acknowledging delivery, and no certificate of postage was produced. The respondent therefore contends that the learned judge correctly found, on the basis of the evidence that the statutory notice was never served, and in any event, the burden of proving service rested entirely upon the appellants.

20. In addition, the respondent contends that the appellants are improperly seeking to introduce new evidence at the appellate stage. Specifically, it is argued that the letter from Mercantile dated 7th July 2000 was not part of the evidentiary record in either the primary suit or the declaratory proceedings, and that the appellants are now attempting to surreptitiously introduce it on appeal. The respondent submits that allowing such evidence would be prejudicial, as it would have been denied the opportunity to verify the letter's authenticity or confirm whether it genuinely originated from Mercantile. Accordingly, the respondent urges this Court to expunge the letter dated 7th July 2000 from the record.

21. Regarding the leave required by the appellants to institute the primary suit against a company in receivership, the respondent argues that the learned judge was correct, both in law and in fact, to find that the primary suit was irregular and incompetently filed due to the lack of prior leave. As a result, any judgment obtained from that suit cannot be enforced. The respondent asserts that the court properly held that it could not be called upon to validate an illegality. In support of this position, the respondent references Nairobi Employment and Labour Relations Court Cause No. 507 of 2013, George Mureithi & Others v. Kenatco Taxis Limited and Nairobi High Court Commercial Civil Suit No. 483 of 2016, David Gathungu v. Chase Bank (Kenya) (In Receivership) & 2 others, where it was established that leave must first be obtained before commencing a suit against a company in receivership. The respondent further submits that for a judgment to be enforceable, it must be both regular and competent, which the court correctly took into account in its decision.

22. In sum, the respondent submits that the learned judge was correct, both in law and in fact, in finding that it was not liable to satisfy the decree of the trial court. The respondent urges this Court to dismiss the appeal with costs.

23. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. It was put more appropriately in Selle -vs- Associated Motor Boat Co. [1968] EA 123, thus:

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)."

24. We have considered the record of appeal, the submissions filed and the law. Although the appellants have raised numerous issues for this Court's determination, the only issues we find ripe for determination are whether the learned judge erred in finding that a statutory notice had not been served upon the respondent in accordance with the requirements of the Act; and whether she erred in concluding that the appellants had not sought leave to institute the primary suit on account of the insured being in receivership, and if such a finding was properly made at the stage of a declaratory suit.

25. It is undisputed that, at the time of the accident in question, motor vehicle KAE 988R was duly insured by Mercantile (the respondent's predecessor) under Policy No. MGL/08/080/00/000960/97. The vehicle therefore had valid insurance coverage at the time of the accident. The central issue, however, is whether the respondent was liable to satisfy the judgment entered in the appellants' favour arising from the said accident. The respondent contended before the High Court that the requirements of section 10(2) of the Act specifically regarding the service of a statutory notice were not complied with, either before or after the institution of the primary suit, and that it was consequently not liable to satisfy the judgment. The appellants, on the other hand, maintained that they duly served Mercantile with a statutory notice prior to instituting the primary suit. In support of this position, they relied not only on a copy of the statutory notice but also on correspondence between their advocate and Mercantile, which they assert clearly demonstrated that Mercantile had sufficient notice of the suit.

26. In the impugned judgment, the High Court was explicit that the appellants had failed to prove that the insurer was served with a statutory notice, either prior to the filing of the primary suit or within 30 days thereafter. Consequently, the court held that liability could not attach to the respondent under section 10 of the Act.

27. Section 10(2) of the Act provides that:

> " 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 thirty days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings ..."

28. The above statutory provision clearly stipulates that, before an insurance company can be held liable to satisfy a judgment awarded in the primary suit, it must have received notice of the institution of the proceedings either prior to the filing of the suit or within 30 days thereafter.

29. The appellants' bundle of documents filed in the declaratory proceedings included a copy of a notice from Rachier & Company Advocates, dated 18th May 2000, addressed to the Managing Director of Mercantile. The reference section of the said notice reads as follows:

> " Re: Statutory Notice
>
> Accident On 3Rd January 1999 Involving Motor Vehicles Kae 988r And Kxq 344 Our Clients: (1) Martha A. Nyandera
>
> (2) (2) Laban Ominde

30. In the said notice, the advocates provided details of the alleged accident, including the date, time, location, the motor vehicles involved, and the policy number of the vehicle insured by Mercantile. They also gave notice of their intention to institute legal proceedings within seven days should Mercantile fail to admit liability.

31. Having carefully reviewed the said notice, we concur with the learned judge's finding that there is nothing on the face of the document or otherwise to establish that it was ever served upon Mercantile or received by the company. The notice does not bear any acknowledgment of receipt, such as a stamp, signature, or other mark indicating it was delivered to or accepted by Mercantile. Moreover, the appellants' advocate did not produce a certificate of postage or any other evidence of service. On the face of it, therefore, the notice appears not to have been served upon Mercantile.

32. The above notwithstanding, we note that there was correspondence between Mercantile and the firm of Rachier & Co. Advocates prior to the filing of the primary suit, which was initiated by a plaint dated 11th December 2001 and filed on 18th December 2001. In this regard, we refer to a letter dated 7th July 2000 from Mercantile's Claims Manager to Rachier & Co. Advocates. Although the respondent objects to the late production of this letter, a concern that, in our view, has not been sufficiently demonstrated, it does not explicitly deny having authored the letter and/or that it originated from its predecessor.

33. The key content of the said letter is noteworthy and merits reproduction:

> " Re: Your Ref: C/294/2000
>
> Accident On 3/1/99 Involving M/vehicles Kae 988r & Kxq 344 Our Insured: Mothers Favourite Claimants: 1) Martha A. Nyandera
>
> 2) 2) Laban Ominde _
>
> We refer to your various letters addressed to us. Note, our insured to date has not reported the accident to us and it appears that they do not want to involve us.
>
> Kindly deal directly with them without our involvement.
>
> Yours faithfully,
>
> For: Mercantile Life & General. Ass. Co. Ltd
>
> J. Grewal (miss) Claims Manager"

34. It is evident from the contents of the aforementioned letter from Mercantile that the firm of Rachier & Co. Advocates had sent several letters to Mercantile concerning the accident. However, despite being aware of the incident, Mercantile declined to address the matter, saying that their insured had not yet

reported the accident to them. This raises the question: in light of Mercantile's letter dated 7th July 2000, can it be said that Mercantile did not have sufficient notice of the accident and the intention to sue prior to the institution of the primary suit? More specifically, was the notice from Rachier & Co. Advocates dated 18th May 2000 adequate notice under section 10(2) of the Act?

35. From our reading of that section, it is clear to us beyond any peradventure that the said provision does not prescribe a specific form of notice to the insurer. What is required is simply a notice to the insurer of the intention to bring proceedings.

36. Visram, J. (as he then was), while dealing with the question of notice under Section 10 (2) of the Act stated as follows in Philip Kimani Gikonyo vs. Gateway Insurance Company Limited [2007] KEHC 1612 (KLR):

> "With regard to the first issue involving the statutory notice, both Counsels agree that Section 10(2) (a) of the Act simply requires that "notice" be given to the insurer "of the bringing of the proceedings", but the Act does not stipulate the format of the notice...
>
> So, what form should a notice take? It simply does not matter. A notice is a notice. The main purpose of a notice is to alert the insurer of a potential claim, a potential liability, so that the insurer can take steps to protect its interest by defending the action, investigating the same, attempting to settle the same and doing anything it wants to in order to protect its rights and interests. The notice need not be in any particular format, and with due respect to the Lower Court, there is nothing like an "actual" notice, or a "not-so-actual" notice. Any notice, howsoever given, as long as it sufficiently outlines the happening of an event giving rise to a claim under the insurance policy, is good notice under the Act." [Emphasis added]

37. We fully endorse the reasoning of Visram, J. in Philip Kimani Gikonyo (supra). We reiterate that the primary objective of a notice is to inform the insurer of a potential claim and the associated risk of liability, thereby allowing the insurer to take proactive measures to protect its interests. These measures may include defending the action, conducting investigations, pursuing settlement options, or taking any other step deemed necessary to safeguard its rights.

38. In the circumstances of this case, we are satisfied that prior to the institution of the primary suit, Mercantile had been provided with adequate notice of the potential claim by the appellants, as evidenced by the notice served by the appellants' advocate on 18th May 2000. Mercantile, in its letter dated 7th July 2000, acknowledged its awareness of the accident but directed the appellants' advocate to liaise directly with their insured, citing the insured's failure to comply with the policy condition relating to the reporting of the accident.

39. Consequently, the absence of Mercantile's receiving stamp or any other indication of receipt on the statutory notice does not, in light of the letter dated 7th July 2000, constitute conclusive evidence of non-service. In our view, the respondent's challenge to the said letter is a veiled attempt to avoid the liability it incurs under the law. It is therefore our finding that the learned judge erred in finding that no statutory notice was served upon the respondent, either before or after the institution of the suit, thereby preventing liability from accruing against the respondent.

40. Turning to the second issue, that is, whether the learned judge erred in concluding that the appellants had not sought leave to institute the primary suit due to the insured being in receivership, and whether such a determination was properly made at the stage of a declaratory suit, the starting point, in our view, is to understand the nature of a declaratory suit within the context of insurance law. While Black's

Law Dictionary, 11th Edition, does not specifically define the term 'declaratory suit,' it does provide the definition of a 'declaratory judgment-act' at page 514, as follows:

> " A federal or state law permitting parties to bring an action to determine their legal rights and positions regarding a controversy not yet ripe for adjudication, as when an insurance company seeks a determination of coverage before deciding whether to cover a claim."

41. From the foregoing definition, a declaratory suit serves as a mechanism for resolving disputes concerning an insurer's liability under the terms of an insurance policy. In situations where there is uncertainty about the insurer's obligation to indemnify, particularly where the policy terms are ambiguous or contested, the court is called upon to determine and clarify the extent of the insurer's liability to the insured.

42. As part of its defence to the declaratory suit, the respondent contended that the appellants and/or their advocates ought to have first obtained leave of the court to sue Mothers Favourite Bakeries Company Limited, which had been placed under receivership on 15th November 2009. The respondent argued that, in the absence of such leave, the declaratory suit was unsustainable, as it was founded on an incompetent primary suit. In its judgment on the declaratory suit, the court held as follows:

> " ...Further, the plaintiffs having admitted that the Defendants insured was at the material time of the accident under Receivership, a fact agreed to by the Defendant itself, and that they failed to prove that leave of Court was obtained to file the suit, the court cannot be called upon to sanitize an illegality. It therefore follows that the primary suit was irregularly and incompetently filed and any judgment obtained therefrom cannot be enforced. This court is by no way attempting to sit on a non- existing appeal on the latter pronouncement, but again the court will not fail to point to any illegalities committed by any party at any stage of court proceedings."

43. With respect to the learned judge, we are of the view that she exceeded the proper scope of a declaratory suit. The suit had been instituted for the specific purpose of compelling the respondent, as the judgment debtor's insurer, to satisfy the decree issued against the insured. In our view, the proceedings ought to have been confined to determining legal questions such as whether the respondent, as insurer, was liable to indemnify the insured in respect of the accident in question; whether there had been any breach of the insurance contract by the insured; and the extent of the respondent's liability under the terms of the policy.

44. The question of whether leave was obtained prior to instituting the suit against the respondent's insured who was under receivership ought, in our view, to have been determined at the primary suit stage. It was belated and procedurally improper for the respondent to raise this issue for the first time in its defence to the declaratory suit. The appropriate course for challenging the absence of leave would have been by way of appeal, review, or an application to set aside the judgment in the primary suit. While we agree with the learned judge's views that the court cannot be used to sanitize an illegality, any such alleged illegality should have been addressed through the proper legal channels. By entertaining and determining this issue at the declaratory suit stage, the learned judge effectively assumed the role of an appellate court over a concluded matter, thereby falling into error.

45. In sum, having established that a valid policy of insurance was in place at the time of the accident, and in the absence of any evidence demonstrating a breach of policy conditions, the respondent was, by virtue of section 10 of the Act, under a statutory obligation to satisfy the decree issued in the primary

suit. The learned judge therefore erred in holding that the appellants had failed to prove their case to the required standard.

46. In upshot, this appeal has merit and is hereby allowed. We accordingly set aside the judgment delivered by the High Court on 3rd May 2023. The appellants shall have costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JUNE 2025.

D. K. MUSINGA, (PRESIDENT)

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

Deputy Registrar .