



Madison Insurance Co. Ltd v Kirui & another (Suing as the Legal Representatives of Vincent Kipkorir Ngeno - Deceased) (Civil Appeal E041 of 2023) [2025] KEHC 3673 (KLR) (25 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3673 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CIVIL APPEAL E041 OF 2023
JK NG'ARNG'AR, J
MARCH 25, 2025**

BETWEEN

MADISON INSURANCE CO. LTD APPELLANT

AND

LILIAN CHEPKEMOI KIRUI 1ST RESPONDENT

SHEILA CHEPNGENO NGENO 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVES OF VINCENT KIPKORIR
NGENO - DECEASED**

*(Being an Appeal from the Judgment of Chief Magistrate, Boke E. at the
Chief Magistrate's Court at Bomet, Civil Suit Number E109 of 2021)*

JUDGMENT

1. In the trial court, the Respondents (then Plaintiffs) as the legal representatives of the deceased Victor Kipkorir Ngeno filed a declaratory suit against the Appellant (then Defendant) to compel them to pay the decretal sum of Kshs 1,611,064/= as ordered by the court in Bomet Principal Magistrate's Court Civil Suit Number 4 of 2017 (primary suit).
2. Both parties called one witness each and closed their cases.
3. In its Judgment delivered on 10th July 2023, the trial court found in favour of the Respondents and declared That the Appellant was obligated to satisfy the full Decree and costs of the primary suit.
4. Being aggrieved with the Judgment of the trial court, the Appellant filed its Memorandum of Appeal dated 9th August 2023 appealing against the whole Judgement and relied on the following grounds:-



- I. That the learned trial Magistrate erred in law and fact in failing to consider the Defence tendered by the Appellant herein.
 - II. That the learned trial Magistrate erred both in law and fact by failing to take into account and/or consider the evidence of DW1.
 - III. That the learned trial Magistrate erred both in law and fact by failing to consider the relevant authorities and submissions by the Appellant.
 - IV. That the learned trial Magistrate erred in law and fact in failing to address the real issues raised by parties in their pleadings and evidence.
 - V. That the learned trial Magistrate erred and misdirected herself in law by holding That the Appellant's Defence raised no triable issues whereas the Defence on record raised triable issues That ought to have been heard and determined on merit.
 - VI. That the Judgement of the learned trial Magistrate is against the law, judicial and legal principles and weight of the evidence on record.
5. My duty as the 1st appellate court is to re-evaluate and re-examine the evidence in the trial court and come to my own findings and conclusions. See *Selle & Another v Associated Motor Boat Co. Ltd and Others* [1968] EA 123.
 6. I now proceed to summarize the Appellant's and Respondent's cases in the trial court and their respective submissions in this Appeal.

The Plaintiffs'/Respondents' case.

7. Through their Complaint dated 23rd August 2021, the Respondents stated That the deceased (Vincent Kipkorir Ngeno) suffered fatal injuries when he was involved in a road traffic accident on 24th December 2015 when he was hit by motor vehicle registration number KCD 526V while aboard motorcycle registration number KMCV 006F. That the said motor vehicle belonged to Kalikia Jason Kiriku who was insured by Madison Insurance Co. Ltd (Appellant) vide Policy Cover Number MCK/709/094154/2015 -COMP.
8. It was the Respondents' case That they instituted a civil suit (Bomet Principal Magistrate's Court Civil Suit Number 4 of 2017) against the registered owner of the subject motor vehicle (Kalikia Jason Kiriku) for general and special damages for the estate of the deceased. That Judgement was entered against the owner (Kalikia Jason Kiriku) on 3rd March 2021 for Kshs 1,611,064/= and costs of Kshs 243,450/=.
9. The Respondents stated That they had not been paid the decretal sum and this necessitated them to file a declaratory suit against the Respondent for them to fully satisfy the decretal sum.
10. Through their written submissions dated 14th January 2025, the Respondents submitted That the trial court considered the Appellant's defence. That the Appellant was served with the notice of institution of the primary suit and defended itself in the primary suit. The Respondents further submitted That the Appellant failed to point out the specific clause That they had breached and further the Appellant did not prove That they had filed the Repudiation suit as the same pleadings were not placed before the trial court.
11. It was the Respondents' submission That the issue of whether the Respondents had breached the terms of the Policy could only be determined in the Repudiation suit and the resultant order could then be used as a defence in the declaratory suit. They relied on *Blue shield Insurance Co. ltd v Raymond Buuri M'Rimbera* (1998) eKLR.



12. The Respondents submitted That they proved their case through production of documentary evidence. That the trial court in the declaratory suit could not delve into issues That arose out of the alleged breach of contract. That the alleged Repudiation suit was filed more than three months after the primary suit had been filed and if an order was to be obtained in the primary suit, the same could not be used as a defence in the primary suit. They relied on *Geminia Insurance Company Limited v EN* (minor suing through his father and next friend AAO (2019) eKLR. They further submitted That the Appellant’s defence of breach of contract was unavailable.

The Defendant’s/Appellant’s case

13. Through its Statement of Defence dated 14th December 2021, the Appellant admitted That it had insured Kalikia Jason Kiriku and the term of the policy for motor vehicle registration number KCD 526V was That the vehicle was covered under “Private hire on chauffer driven basis” only. The Appellant stated That motor vehicle registration number KCD 526V was involved in a road accident with an oncoming motorcycle and That the vehicle was being driven on a “self-drive” basis which was contrary to the terms of the Insurance Policy.
14. It was the Appellant’s case That due to the breach of the terms of the Policy it was not liable to satisfy any third party claims and specifically it was not liable to satisfy the decree in the primary suit.
15. The Appellant stated That they filed a Repudiation suit in this court being Bomet High Court Civil Suit Number 6 of 2016 where they sought orders to avoid liability in respect of the accident That occurred on 24th December 2015. They further stated That the orders they sought in the Repudiation suit in the High Court would have an impact on the declaratory suit.
16. It was the Appellant’s case That they were not served with the Complaint, Verifying Affidavit and Notice of Institution of Suit in relation to the declaratory suit.
17. Through its written submissions dated 24th January 2025, the Appellant submitted That they tendered sufficient evidence against the Respondents in the trial court. They submitted That the issue of the breach of the Policy was a paramount issue upon which the declaratory suit was filed and the trial Magistrate unfairly failed to determine the issue of the contract between the Appellant and the insured. That for the Appellant to be obligated to satisfy the decree in the primary suit, the subject motor vehicle had to be operated within the agreed terms of the Policy i.e. on a “private hire on chauffer driven basis” and not on “self-drive” basis as the Respondents did.
18. It was the Appellant’s submission That even though the decree in the primary suit was valid, the same could not be executed as it arose out of an illegality and a breach of the Policy. That according to the documents it produced in the trial court, the cover for motor vehicle registration number KCD 526V stated That the vehicle was leased to a car hire firm M/S Rana team Services Company Limited. It was their further submission That at the time of the accident, the vehicle was driven by Victor Justice Ochieng Osee (self-drive) to his rural home which was clear breach of the Policy and as such they were entitled to repudiate the contract. They relied on *Kenya Alliance Insurance Company Limited v Rose Achieng Abdullah* (2021) eKLR.
19. The Appellant submitted That the insured was liable to satisfy the decree of the primary suit as he had breached the terms of the Policy. That the breach of the Policy terms ought to have been heard and determined by the trial court.
20. It was the Appellant’s submission That the requirement for an insurer to file a declaratory suit was intended only for liabilities which the insurer was entitled to repudiate beyond the express provisions of the Policy, specifically for non-disclosure or misrepresentation of material facts. They relied on



Occidental Insurance Company Limited v Dulu [2023] KEHC 20188 (KLR). It was their further submission That the subject motor vehicle was not being used in accordance with the terms of the Policy and thus they had no obligation to seek a declaration to avoid liability as the same was provided by the express provisions of the Policy.

21. I have gone through and carefully considered the Record of Appeal, the Appellants' written submissions dated 24th January 2025 and the Respondent's written submissions dated 14th January 2025. The sole issue for my determination was whether the Appeal has merit.

Analysis

22. It is important to set out the background to the present Appeal. The Appellant (Madison Insurance) had insured motor vehicle registration number KCD 526V belonging to Kalikia Jason through Policy Number MCK/709/094154-COMP. The said motor vehicle was involved in a road traffic accident on 24th December 2015 which caused fatal injuries to Vincent Kipkorir Ngeno (deceased).
23. The Respondent who were relatives of the deceased filed a civil suit being Bomet Principal Magistrate's Court Civil Suit Number 4 of 2017 (primary suit) on 16th January 2017 against the registered owner of the subject vehicle, Kalikia Jason Kiriku. The matter was concluded and the trial court issued a Judgement dated and delivered on 3rd March 2021. Sheila Chepngeno (PW1) produced a Decree as P.Exh 2 and it showed That the trial court had awarded them the decretal sum of Kshs 1,611,064/= being the sum of general damages, special damages and interest and Kshs 243,450/= being costs. The Decree was issued on 16th August 2021.
24. When the decretal sum was not satisfied, the Respondents filed a declaratory suit being Bomet Principal Magistrate's Court Civil Suit Number 109 of 2021 (now the subject of this Appeal) which sought to compel the Appellant to settle the decretal sum as awarded in Bomet Principal Magistrate's Court Civil Suit Number 4 of 2017.
25. Moses Barasa (DW1) who was the Appellant's legal officer admitted in his testimony That they had insured Kalikia Jason Kiriku's subject motor vehicle on "private hire on chauffeur driven" basis. DW1 further testified That when the accident happened, they commenced investigations and learnt That the subject motor vehicle was being used on a "self-driven" basis, which was contrary to the terms of the Insurance Policy. It was DW1's further testimony That upon the breach of the Policy terms, they were entitled to repudiate their liability. DW1 stated That he produced the Insurance Policy Document as D.Exh1 and the Investigation Report as D.Exh 2.
26. I have carefully gone through the trial court file and I have noted That no such documents were filed by the Appellant. What is on record was the Appellant's list of documents dated 10th February 2022. In essence, the Appellant filed a list of documents and not the actual documents. To avoid any lapse of Judgement, I have also carefully gone through the Record of Appeal That was prepared and filed by the Appellant's advocates, M/S Mukite Musangi & Co. Advocates. The said documents (Policy Documents and Investigation Report) were not placed in the Record of Appeal. This led me to the irresistible conclusion That the Appellant never filed the said documents in the trial court.
27. Section 107 of the *Evidence Act* describes the burden of proof as follows:-
 - (1) 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.
 - (2) When a person is bound to prove the existence of any fact it is said That the burden of proof lies on That person.



28. In the case of *Mbuthia Macharia v Annah Mutua Ndwiga & another* [2017] KECA 290 (KLR), the Court of Appeal stated That: -

“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced.”

29. Flowing from the above and in the absence of the said documents, it is my finding That there was no evidence to support the Appellant’s claim That the Insurer had breached the terms of the Policy and as such the Appellant were entitled to avoid liability. It is salient to note That the Appellant referred to a Repudiation suit That they had filed in this court seeking to avoid liability in the primary suit. Again, there was no evidence attached by the Appellant of the existence of the said suit and its resultant orders. It therefore remained an allegation. In sum, the Appellant failed to discharge its burden of proof.

30. On the issue of the declaratory suit, it was an undisputed fact That the Appellant insured motor vehicle registration number KCD 526V. It was also an undisputed fact That the said motor vehicle was involved in a road traffic accident on 24th December 2015 which led to the fatality of one Vincent Kipkorir Ngeno. The Respondents being the legal representatives of the deceased successfully sued the insured (Kalikia Jason Kiriku) and were awarded damages of Kshs 1,611,064/= and costs of Kshs 243,450/=.

31. Section 10 (1) of the Insurance (Motor Vehicle Third Party Risks) Act provides:-

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.

32. The Court of Appeal in *Denis Costello Doyle & another v Diamond Trust Bank (K) Ltd & another* [2018] KECA 836 (KLR) held:-

“.....In our understanding, under section 10(1) of the Act, which the learned judge invoked, a judgment (a decree) against the insured is a condition precedent before the insurer can be called upon to pay the decree.....”

33. The cited provision of the law and the case law above are clear That once a Judgement has been entered in the primary suit and a decree issued on the same, it was the primary responsibility of the Insurer to pay a claim as covered under the Policy. As I have stated above, there was no evidence presented by the Appellant to suggest That the insured beached the terms of the Insurance Policy and as such the Appellant was obligated to satisfy the decree in the primary suit.

34. Section 10 (2) (a) of the Insurance (Motor Vehicle Third Party Risks) Act provides:-



No sum shall be payable by an insurer under the foregoing provisions of this section 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.....

35. The Respondents produced the Notice of Institution of Suit as P.Exh 3. The same was addressed to the Appellant and it stated That the Respondents intended to file a suit against their insured, Kalikia Jason Kiriku. The Notice was dated 25th January 2017 and received by the Appellant on 3rd February 2017 which was within the statutory 30 day period as provided by the law above. For clarity, the primary suit was filed on 16th January 2017. It is my finding therefore That the Respondents complied with the provisions of Section 10 (2) (a) of the Insurance (Motor Vehicle Third Party Risks) Act.
36. As I pen off, it is salient to note That the Judgement in the primary suit (Bomet Principal Magistrate Number 4 of 2017) had neither been reviewed nor appealed. It was still a lawful Judgement capable of being executed.
37. In the final analysis, I agree with the trial court's findings That the Appellant was obligated to fully satisfy the decree in Bomet Principal Magistrate Number 4 of 2017
38. In the end, the Appeal dated 9th August 2023 has no merit and is dismissed with costs to the Respondents. The costs of the declaratory suit shall remain as awarded by the trial court.
39. 30 days stay of execution granted.

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 25TH DAY OF MARCH, 2025.

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J.K.NG'ARNG'AR

JUDGE

Judgement delivered in the presence of the Ms Bett for the Appellant, Orayo for the Respondents and Siele/ Susan (Court Assistant).

