



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kenya Orient Insurance Co Ltd v Ndalila (Civil Appeal
E014 of 2023) [2025] KEHC 5388 (KLR) (29 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5388 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E014 OF 2023
SC CHIRCHIR, J
APRIL 29, 2025**

BETWEEN

KENYA ORIENT INSURANCE CO LTD APPELLANT

AND

HENRY NDALILA RESPONDENT

*(Being an Appeal against the Judgment of Hon. C. Cheruiyot (SRM) delivered
on 16th January 2023 in Kakamega Small claims Case No. 136 of 2021)*

JUDGMENT

1. This Appeal arises from the judgment of Hon. Caroline Cheruiyot on 16th January, 2023 in Kakamega Small Claims court No. 136 of 2021. In the suit, the appellant was sued by respondent for a declaration that the appellant is statutorily bound under the *Insurance (Motor Vehicles Third Party Risks) Act*, Chapter 405 of the Laws of Kenya, to pay the decretal sum of Kshs. 350,000/= awarded in CMCC NO. 219 of 2018.
2. The respondent's case was that, at all material times, the appellant was the insurer of Motor Vehicle Registration No. KCE xxxE,, vide insurance Policy No. B86xxxx which it issued under the *Insurance (Motor Vehicles Third Party Risks) Act*; that the appellant insured the owner of the subject motor vehicle in respect of perils involving third parties, such as death or bodily injuries arising in connection with the use of the said motor vehicle.
3. The respondent averred that judgment was entered in his favour in CMCC NO. 219 of 2018 on 13/1/2020 but the appellant has refused, failed and /or neglected to pay the awarded sum by the trial court necessitating the respondent to commence the declaratory suit.
4. In a judgement delivered on 16th January, 2023, the trial court found in favor of the respondent and consequently entered judgment in the sum of Kshs. 441,366/= being payment of the decrees and certificate of costs issued in favor of the respondent as well as costs of the declaratory suit.



5. Aggrieved by the judgment, the appellant filed the instant appeal, setting out the following grounds:
 1. That the learned trial magistrate erred in law and fact by making an order compelling the appellant to satisfy the judgment in Kakamega CMCC No. 219 of 2018
 2. That the learned trial magistrate erred in law and fact by relying on the police abstract to make a finding that the appellant was indeed the insurer of the motor vehicle registration No. KCE xxxE
 3. That the learned trial magistrate erred in law and fact by relying on a certificate of insurance that was not produced before court, as required by law and the Evidence Act Cap 81 Laws of Kenya.
 4. That the learned trial magistrate erred in law and fact by failing to dismiss the respondent's suit in view of the documentary evidence on record.
 5. That the learned trial magistrate erred in law and fact by failing to hold the appellant was not served with a statutory notice in accordance with section 10 (1) of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 Laws of Kenya.
 6. That the learned trial magistrate erred in law and fact by failing to take into account the appellant's submissions on record thereby arriving at a wholly erroneous decision.
6. Accordingly, the appellant prayed that the appeal be allowed, the judgment of the subordinate court be set aside ,and be substituted with an order of this Court dismissing the said suit plus an order on costs in favour of the Appellant.
7. The appeal was canvassed by way of written submissions.

Appellant's Submissions

8. The appellant submitted the following three issues for determination:
 - a. Whether the trial magistrate erred in law and in fact in making an order compelling the appellant to settle the decretal sum in Kakamega CMCC No. 219 of 2018.
 - b. Whether the trial magistrate erred in law and in fact in relying on the police abstract to make a finding that the appellant was the insurer of motor vehicle registration number KCE xxxE.
 - c. Whether the learned trial magistrate erred in law and in failing to hold that the appellant was not served with the requisite statutory notices in accordance with Section 10 (1) of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 Laws of Kenya.
9. On the first issue, the appellant counsel submits that the respondent did not produce a certificate of insurance before the trial court; that the police officer who testified did not testify about the suit motor vehicle (KCE xxxE), instead he testified of a motor vehicle registration number KCE xxxE. It is further submitted that the certificate of insurance was barely legible and that the appellant name was handwritten at the bottom of the photocopied page and not on the certificate of insurance.
10. The appellant further submits that Section 10 (1) of the Insurance (Motor Vehicle Third Party Risks) Act operates only when there was a valid insurance policy existing before the occurrence of the accident. Further, that the relationship between the insurance and the insured is a contractual one and it cannot work retrospectively. Therefore, it is submitted, there was no insurance contract valid hence the appellant could not be bound to settle the decretal sum in the primary suit.



11. It is the Appellant's further submission that the respondent did not have a decree against the appellant and therefore failed to prove a nexus between the appellant and the suit motor vehicle, which only meant that the appellant was an innocent third-party.
12. On the third issue, the Appellant submitted that the respondent did not serve the appellant with the statutory notice and therefore they were not in a position to repudiate the claim herein. That indeed during trial the respondent admitted that he was not sure whether the statutory Notice was served or not.
13. It was therefore the appellant submission that the trial court erred in fact and in law in concluding that there existed an insurance contract between the appellant herein and the judgment debtor in Kakamega CMCC No. 219 of 2018 and consequently that the appellant herein should settle the decree in the said suit as the respondent did not prove any nexus between the appellant herein and the suit motor vehicle.

Respondent Submissions.

14. The respondent submitted that the appellant failed to repudiate liability upon receipt of the statutory notice as required by law. The respondent further submits that while the appellant denied that it was the insurer of the subject Motor vehicle it has not denied that it is liable to satisfy the judgment
15. The respondent further submits that even though the appellant has faulted him for failing to produce the certificate of insurance, this contention fails to appreciate that there was no way he could have accessed such a document.
16. It is further submitted that the traffic police officer captured the insurance details of the subject motor vehicle and entered the same in the said police abstract. That the burden was on the appellant to disapprove that it had insured motor vehicle registration number KCE 580 E . It has not done so.

Analysis and Determination

17. An appeal from the small claims court to this court has to be on points of law only.(see: section 38(1) of the *small claims court Act*). The Appeal is centered on whether the Appellant should have satisfied the judgment in SCCA NO.219 of 2018. The obligations to satisfy a judgment by an insurer of a motor vehicle is founded on the Insurance (motor vehicle third party risks) Act. This is an issue of law and am therefore satisfied that the Appeal is admissible by this court.
18. I have considered the grounds of appeal, the evidence adduced before the trial court, as well as the submissions and the authorities referred by learned counsel and am of the view that issues for determination are:
 - a). whether a statutory Notice under cap 405 was issued.
 - b). Whether Motor vehicle Registration No. KCE xxx E was insured by the Appellant.

Whether the statutory Notice was issued.

19. The requirement for Notice prior to or soon after, filing a declaratory suit is a requirement of section 10 (2) (a) of the Insurance (Motor vehicle third party Risks) Act(The Act). The section provides as follows:
 - “2. No sum shall be payable by an insurer under the foregoing provisions of section :-



- (a) in respect of any judgment unless before or within 30 days after the commencement of the proceedings in which the judgment was given the insurer had Notice of the bringing of the proceedings”

20. The dispute between the parties herein is whether the Notice was issued or not. It is the Appellant’s submission that no such Notice was served. When the respondent (pw1) was asked about the Notice he stated that the stamped statutory Notice was with the police. I have looked at the exhibits and seen a statutory Notice dated 16th may 2018. I have also seen an Affidavit of service by one Njau Njuguna Martin where he deposes that he served the Notice of 3rd July 2018 at the Appellant’s offices. The Appellant has not addressed itself to the said Affidavit of service, particularly on whether it disputes the averments made therein. Am satisfied that the statutory Notice was duly served.

Whether the subject motor vehicle was insured by the Appellant.

21. “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 existence of facts which he asserts must prove 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.

Section 108 of the same Act states: Incidence of burden

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.

Section 109: Proof of particular fact

The burden of proof as to any particular fact lies in the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of fact shall lie on any particular person.”

22. I will proceed to consider the issue with the above burden placed on the respondent by the *Evidence Act*.

23. The testimony of PW3 is relevant in regard to particulars of insurance. He was not the investigation officer, but he told the court that the details of certificate of insurance was entered on the police abstract. However, he did not have the certificate. He told the court that the certificate was in another court as an exhibit in a traffic case arising from the same accident. What is curious however is that he told the court that the Motor vehicle was registration Number KCE xxx E with certificate No. 86xxxxx. According to the respondent and indeed as pleaded under paragraph 4 of the plaint the subject vehicle registration Number was KCE xxx E. The police abstract produced by the respondent concedes with the respondent’s pleadings. It is therefore apparent that PW3 evidence was in respect of a different vehicle.

24. Further the respondent decided to sneak in the subject certificate by attaching it to the submissions. I have read the judgment and noted that the trial court made reference to it in arriving at her findings . this was erroneous. However this piece of evidence was still not helpful to the respondent as it shows the registration number of the vehicle as KCE xxx E.

25. Am alive to the varied opinions as to whether a certificate of insurance or police abstract should be conclusive proof of insurance particulars of a vehicle. However, I need not go into that debate as it is clearly evident that PW3’s testimony was in respect of a different vehicle and not the one which caused the accident. Further if that was the same certificate that was used to enter the details in the police abstract , the contradictions on the particulars of the two documents discredits the police abstract as



a basis of the trial court's finding on the liability of the Appellant to satisfy the judgment. Thus at the end of the day , the respondent failed to prove that Motor vehicle registration No. xxx E was insured by the Appellant. It lends credence to the Appellant's submissions that it never insured the vehicle which forms the subject matter of the suit.

26. I reject the argument that the Appellant and the police are custodians of certificates of insurance and in the event of a dispute the insurer bears the burden of proving the non- existence of such a certificate or policy document. Once an insurer states that it never insured such a vehicle then it follows that records of such vehicle do not exist in their records. They cannot be asked to produce that which does not exist. By the time the traffic police conclude that a particular a vehicle is insured by a particular insurer, it is their duty to make sure that they have records which support their findings.
27. In conclusion , it is my finding that the respondent failed to discharge the burden of proof, namely that Motor vehicle registration No. KCE xxxE was insured by the Appellant . Consequently, the declaration by the trial court was erroneous.
28. The Appeal succeeds. The judgment of the trial court is hereby set aside and is substituted with an order that the plaintiff suit is dismissed. The Appellant shall have the costs of the Appeal

DATED, SIGNED AND DELIVERED VIRTUALLY, AT ISIOLO ,THIS 29TH DAY OF APRIL , 2025.

S. CHIRCHIR

JUDGE.

In the presence of :

Godwin Luyundi- court Assistant

Ms. Shibanda for the Respondent

