CIC General Insurance Co Ltd v Ondego aka Ondeko (Civil Appeal E040B of 2021) [2024] KEHC 873 (KLR) (Civ) (31 January 2024) (Judgment)

Neutral citation: [2024] KEHC 873 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E040B OF 2021

CW MEOLI, J

JANUARY 31, 2024

BETWEEN

CIC GENERAL INSURANCE CO LTD .... APPELLANT

AND

WALLUS OBERI ONDEGO AKA ONDEKO .... RESPONDENT

(Being an appeal from the judgment of Kivuti, D.M, SRM. delivered on 4th December 2020 in Nairobi CMCC No. 10641 of 2018)

JUDGMENT

1. This appeal emanates from the judgment delivered on December 4, 2020 in Nairobi CMCC No. 10641 of 2018 (hereafter the declaratory suit). The events leading up to the said judgment are that Wallus Oberi Ondego aka Ondeko (hereafter the Respondent) filed the declaratory suit in the lower court against CIC General Insurance Co. Ltd (hereafter the Appellant) by way of the plaint dated 20th August, 2018 seeking payment of a sum of Kshs 651,758/-, being the decretal sum awarded in Nairobi CMCC No. 4402 of 2014 (*Wallus Oberi Ondego aka Ondeko v Lyu Lipeni & Sun Sailing International Trading Ltd*) (hereafter the primary suit).

2. The respondent averred in the declaratory suit that the appellant had at all material times insured the motor vehicle registration number KBT 146Q (the subject motor vehicle) under Policy Number 012/070/1/11xxx/2013/08 claim No. 012/0xx/9/0xxx/2014/02 Certificate No. C10xxx (hereafter the policy) and that on 11th November, 2015 judgment was entered in the primary suit, in favour of the Respondent and against the Appellant's insured, in the sum of Kes 1,015,234/- plus costs and interest amounting to Kes 1,265,537.03 and a decree issued. The respondent averred that under the provisions of the *Insurance (Motor Vehicle Third Party Risks) Act* (cap 405) Laws of Kenya, the appellant is duly bound to satisfy the decree in the primary suit.

3. The appellant upon entering appearance, filed a statement of defence on March 5, 2019 denying the key averments in the plaint and liability, including service of the statutory notice upon it, relating to its insured. The appellant averred that the persons sued in the primary suit were not its insured and were therefore strangers to the policy, and thus asserted that the respondent had no valid claim against it in the declaratory suit.

4. The suit proceeded to full hearing where the respondent's testimony, and that of the appellant's one (1) witness was taken. Upon close of submissions, the trial court delivered judgment in favour of the Respondent and against the Appellant, as prayed in the plaint.

5. Aggrieved with the outcome, the appellant preferred the present appeal which is based on the following grounds:

    1. "The learned magistrate erred in fact and law in finding the Appellant had insured the defendant in the primary suit in terms of section (10) of the *Insurance (Motor Vehicle Third Party Risks) Act*, chapter 405 Laws of Kenya.

    2. The learned magistrate erred in fact and law in finding there was a judgment against the appellant's insured in the primary suit in terms of section 10 (1) of the *Insurance (Motor Vehicle Third Party Risks) Act*, Chapter 405 Laws of Kenya.

    3. The learned magistrate erred in fact and in law in finding LYU Lipen the driver of the motor vehicle in the primary suit was driving the same as a servant and or agent and or on authority of the appellant's insured Garm Investments Limited.

    4. The learned magistrate erred in fact and law in finding the plaintiff in the primary suit had met the threshold for filing a declaratory suit against the Appellant as provided for under the provisions of the *Insurance (Motor Vehicle Third Party Risks) Act*, chapter 405 Laws of Kenya.

    5. The learned magistrate erred in fact and law in finding the appellant was liable under the provisions of the *Insurance (Motor Vehicle Third Party Risks) Act*, chapter 405 Laws of Kenya, to satisfy the judgment in the primary suit." (sic)

6. The appeal was canvassed by way of written submissions. Counsel for the Appellant anchored his submissions on section 10 (1) of the *Insurance (Motor Vehicle Third Party Risks) Act*, chapter 405 Laws of Kenya (the Act) and section 107 of the *Evidence Act*, to argue that in order for the respondent's claim to succeed, the respondent ought to have proved that judgment in the primary suit was entered against the appellant's insured. The appellant's counsel asserted that the respondent failed to prove that the persons against whom judgment was entered in the primary suit were insured by the appellant. Hence the trial court erred in finding the appellant liable to satisfy the decree. Counsel citing the decision in *Daniel Opar Ouya v First Assurance Company Limited* [2018] eKLR in which the High Court while faced with similar circumstances, upheld the decision by the trial court to dismiss the suit.

7. Counsel further contended that the evidence tendered by the respondent showed that the subject motor vehicle had been insured in favour of one Garm Investment Ltd (the Company) as seen in the policy and which company was not a party to the suit. That no evidence was tendered to show that the defendants in the primary suit were acting on behalf of the Company at any material time and hence no nexus was ever established amongst the said parties in the primary suit, and the insured in order to give rise to a finding of liability against the Appellant on account of its insured. That in the absence of any judgment against the Company, the Appellant could not be held liable to satisfy any sums pursuant to the decree arising out of the primary suit. For the above reasons, the court was urged to allow the appeal accordingly.

8. The respondent naturally supported the trial court's findings. Counsel for the respondent anchored his submissions on the decisions in *Cannon Assurance Company Limited v Caleb Okwako Jogogo & another (Suing as the Administrators of the Estate of Nicholas Osemba Okwako-Deceased)* [2021] eKLR and *Muhambi Koja v Said Mbwana Abdi* [2015] eKLR among others, to submit that the appellant did not tender any evidence to shed light on how the subject motor vehicle came to be owned and/or driven by the defendants in the primary suit, despite being insured in favour of the Company. That, consequently, the trial court acted correctly by finding the appellant liable even though the company as the insured, was not personally sued. Counsel submitted on the possibility that the subject motor vehicle was in the beneficial or possessory ownership of a party other than the Company at all material times. In the premises, the court was urged to dismiss the appeal with costs, and to uphold the decision of the trial court.

9. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. The duty of this court as a first appellate court is to re-evaluate the evidence adduced in the lower court and to draw its own conclusions, but always bearing in mind that it did not have an opportunity to see or hear the witnesses testify. See *Peters v Sunday Post Ltd* [1958] EA 424; *Selle and anor v Associated Motor Boat Co Ltd and others* [1968] EA 123; *William Diamonds Ltd v Brown* [1970] EA 11 and *Ephantus Mwangi and another v Duncan Mwangi Wambugu* [1982] – 88) 1 KAR 278.

10. The Court of Appeal in *Abok James Odera t/a A J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR stated that:

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

11. Upon review of the memorandum of appeal and submissions by the respective parties before this court it is evident that the appeal turns on the question whether the trial court arrived at a correct finding that the appellant was liable to satisfy the outstanding decretal sum in the primary suit.

12. In its judgment, the trial court having summed up the contents of the pleadings and the evidence of the respective parties delivered himself as follows:

> "This is a declaratory suit. The threshold in this matter has now been settled.
>
> ...
>
> In the plaint filed herein, the plaintiff institutes a declaratory suit against the defendant insurance company seeking the insurance company to be compelled to settle Kes 651,758/ =. The defendant defence other than trailing general denial the defendant states that it never insured the defendant in the primary suit.
>
> When the suit came up for hearing each of the parties called one witness in support of their respective cases. The issue arising from the analysis of the pleadings and evidence by the parties are rather straightforward.
>
> The document in support of the plaint consistently allude to the conclusion that the defendant was the insured of the defendants in the primary suit. As to whether they reported the accident, that would not be in the claimant's knowledge. The burden on this score cannot be shifted to him.

I note that the statutory notice under section 10(2) of the *Motor Vehicle Third Party Risks) Act* was effected to the defendant.

The defendant did not obtain (as the law would provide) a declaration to avoid the policy for non-disclosure or misrepresentation.

The above renders my conclusion that the plaintiff's suit succeeds in terms of prayer (a) and (b). That is to say a declaration is hereby issued that the defendant is bound to satisfy the decretal sum in Nairobi CMCC 4402/2014…" (sic)

13. The applicable law as to the burden of proof is set out under sections 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in *Mumbi M'Nabea v David M. Wachira* [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:

> " In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, cap 80 Laws of Kenya provides as follows:
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> > "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." The above provision provides for the legal burden of proof.
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> However, section 109 of the same *Act* provides for the evidentiary burden of proof and states as follows:
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> > "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."
>
> The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & others v Blue Shield Insurance Company Limited* -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:
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> > "Whereas under section 107 of the *Evidence Act*, (which deals with the legal evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."

14. The latter statement alludes to the position that the legal burden of proof, unlike the evidentiary burden of proof, does not shift. In reiterating the standard of proof, the Court of Appeal in *Palace Investment Ltd v Geoffrey Kariuki Mwenda & another* [2015] eKLR held that:

> " Denning J, in *Miller v Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say; -
>
> > "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal

> can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
>
> This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties... are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

15. From the foregoing guiding authorities, it is evident that the duty of proving the averments contained in the plaint lay squarely with the Respondent. In *Karugi & another v Kabiya & 3 others* (1987) KLR 347 the Court of Appeal stated that:

> "The burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. <u>We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...--. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim</u>." (Emphasis added)

16. As earlier noted, the circumstances of the dispute are unique in the sense that the same arose out of the declaratory suit which was preceded by the primary suit.

17. On the one part, the Respondent testifying PW1 produced his list and bundle of documents as P. Exhibits 1-6. In cross-examination, it was his testimony that he was aware of the insurance details pertaining to the subject motor vehicle. It was equally his testimony that one of the defendants in the primary suit relocated to China before the suit commenced and that he managed to receive only a sum of Kes 1,000,000/- out of the decretal amount awarded in the primary suit, from the defendants. During re-examination, the Respondent stated that the Appellant was at all material times made aware of the primary suit.

18. On its part, the Appellant summoned its legal officer, Erastus Mbaka (as DW1). The witness stated that whilst it is true that the subject motor vehicle was insured by the Appellant herein, there was no existing relationship between the defendants in the primary suit and the policy. According to the witness, the defendants are strangers to the policy. In cross-examination, the witness testified that the Company was the insured party and that it did not receive any report regarding any incident. He further testified that under the policy, any agent of the Company was authorized to drive the subject motor vehicle. That a statutory notice was issued to the Appellant by the Respondent. In re-examination, the witness stated that no counterclaim was filed in the primary suit.

19. Upon re-examination of the pleadings and material on the lower court record, it is not in issue that judgment in the primary suit was entered in favour of the Respondent and against the defendants therein. It is also not in issue that the material accident resulting in the primary suit involved the subject motor vehicle, admittedly insured by the Appellant herein, vide the policy. It is further not disputed that the primary suit was brought to the attention of the Appellant by way of a statutory notice tendered as P. Exhibit 2 in the declaratory suit.

20. The key issue in contention therefore was whether in the circumstances of the case, the appellant was liable to satisfy the decretal sum sought by way of the declaratory suit. As earlier noted, the appellant's main argument is that its insured (namely the Company) was not a party to the primary suit, hence the defendants therein are strangers, by virtue of which, it cannot be held liable to satisfy the decretal sum pursuant to the provisions of Section 10 of the *Act*.

21. The above Section stipulates that:

> "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."

22. Section 5(b) mentioned above reads as follows:

> "In order to comply with the requirements of section 4, the policy of insurance must be a policy which—
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> ...
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> (b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road:
>
> ..."

23. The above provisions set out the statutory ingredients necessary for the success of a suit seeking a declaration that an insurer is under an obligation to satisfy a decree arising from a liability covered under a policy of insurance. Essential to the success of the respondent's case was proof that; - (a) he was a claimant within the meaning of section 5(b) of the *Insurance (Motor Vehicle Third party Risks) Act*; (b) that judgment in the primary suit was entered against the appellant's insured; (c) service of the statutory notice was effected upon the appellant and; (d) existence of a valid policy of insurance between the appellant and its insured at the time of the accident. See also the Court of Appeal decision in *Jiji v Gateway Insurance Co. Ltd* (Civil Appeal 126 of 2018) [2022] KECA 368 (KLR).

24. From an examination of the record and in particular the pleadings in respect of the primary suit and constituting P. Exhibit 11 in the declaratory suit, the 1st and 2nd defendants therein were sued in their respective capacities as the driver and owner of the subject motor vehicle. The 1st defendant therein (Lyu Lipeni) was sued as the driver of the subject motor vehicle and the 2nd defendant (Sun Sailing International Trading Ltd) was sued in the capacity of owner of the said vehicle. The Appellant was named as the insurer of the said vehicle, pursuant to the police abstract which was tendered as P. Exhibit 1. It is similarly apparent that an interlocutory judgment was entered in the primary suit and the matter

proceeded for formal proof before final judgment was entered. However, it is apparent that no evidence such as a copy of records was produced to ascertain the ownership details of the subject motor vehicle.

25. Be that as it may, the record shows that the Respondent's advocate and the Appellant were engaged in various correspondences produced as P. Exhibits 3-10, during which the latter communicated to the former that while the subject motor vehicle was insured by itself, the parties sued in the primary suit were strangers to the policy. The Appellant availed a copy of the policy Certificate found on page 47 of the record of appeal.

26. That notwithstanding, under section 10 (*supra*), the onus was on the respondent to either demonstrate that the defendants in the primary suit were either policy holders of the policy, or that they were acting on behalf of the insured in the policy. The respondent's evidence in the declaratory suit neither demonstrated that the 2nd defendant in the primary suit was a policy holder to the policy nor that the 1st defendant in the primary suit was at the material time acting as an agent of the policy holder in respect of the subject motor vehicle. Put another way, there was nothing in the record linking the defendants in the primary suit to the policy. Resultantly, the finding and declaration by the trial court to the contrary had no basis. To use the words of the Court of Appeal when faced with a similar scenario in *Kenindia Assurance Co. Ltd v James Otiende* [1989] 2KLR 162 :-

> " Accordingly, on the plain wording of the sub-section, an essential pre-condition of liability did not exist..."

27. In the absence of proof that a finding of liability was entered in the primary suit against the policy holder/insured of the subject motor vehicle, no liability could arise on the part of the Appellant to satisfy the decretal sum. In the premises, the court is of the view that the trial court erred in finding the Appellant liable to satisfy the decretal sum as sought in the declaratory suit. The finding cannot stand.

28. The upshot is that appeal is allowed. Consequently, the judgment delivered by the trial court on December 4, 2020 is hereby set aside and the court substitutes therefor an order dismissing the respondent's suit namely Nairobi CMCC No. 10641 of 2018 with costs to the appellant. In the circumstances, the Appellant shall also have the costs of the appeal.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 31ST DAY OF JANUARY 2024.

C.MEOLI

....

JUDGE

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

Signed

DEPUTY REGISTRAR

In the presence of:

For the Appellant: N/A

For the Respondent: Mr. Kaburu

C/A: Carol