



REPUBLIC OF KENYA



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**APA Insurance Company Limited v Nyakweba (Civil Appeal E022
(22) of 2022) [2024] KEHC 407 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 407 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E022 (22) OF 2022
PN GICHOHI, J
JANUARY 25, 2024**

BETWEEN

APA INSURANCE COMPANY LIMITED APPELLANT

AND

EUNIA KERUBO NYAKWEBA RESPONDENT

*(Being an Appeal from the judgment and decree of Hon. C.A. Ogwenso (Resident Magistrate)
in Kisii Chief Magistrate's Court Civil Case No. 247 of 2021 delivered on 22/03/2022)*

JUDGMENT

1. The background of this Appeal is that Respondent sued Denis Ouko Ntabo , George Odoyo Aimo and Japan Africa Marketing Co. Ltd in Kisii CMCC No. 238 of 2017 over an accident that occurred on 13th October 2016 when M/Vehicle Reg, No. KBZ 721J Mitsubishi Saloon knocked down the Respondent as she walked off Kisii- Nyanchwa Road and she sustained injuries. That vehicle was said to be insured by the Appellant.
2. Upon hearing the case, judgment was entered in favour of the Respondent against the Defendants therein for a sum of Kshs. 1,392,811/=.
3. The Respondent then sued the Appellant in a declaratory suit dated 22nd January 2021 being Kisii CMCC NO. 247 of 2021 Eunias Kerubo Nyakweba vs. APA Insurance Company Limited praying for a declaration that the Appellant was bound to pay the decretal sum in Kisii CMCC No. 238 of 2017 of Kshs. 1,392,811.00 together with all accrued interest to the date of final payment, costs of the suit and interest.
4. In its judgment dated 22/03/2022, the trial court found that the suit was merited. Thus, it made a declaration that the Appellant was bound to pay the decretal sum of Kshs. 1,392,811.00 in Kisii CMCC No. 238 of 2017 together with all accrued interest from the date of judgment in the primary



suit being 03/07/2019 to the date of final payment. The court further awarded the Respondent costs and interest on the decretal sum and costs at court rates.

5. The Appellant was dissatisfied with the decision of the trial court hence this Appeal. On 11/04/2022 and through the firm of L.G. Menezes & Co. Advocates, the Appellant filed its Memorandum of Appeal dated 07/04/2022 raising eight (8) grounds impugning the decision of the trial court. Those grounds can be summarised as follows:-
 1. The trial court treated the evidence and submissions superficially as well as ignored the principles applicable hence arrived at an erroneous conclusion on liability and quantum.
 2. The trial court wrongly shifted the burden of proof to the Appellant yet the burden always squarely lay with the Respondent.
 3. It was improper for the trial court to rely solely on the information contained in the police abstract despite concrete evidence that the suit vehicle was not insured by the Appellant.
6. In the circumstances, the Appellant prayed that the Appeal be allowed by setting aside the judgment of the trial court with costs.

Submissions

7. Parties agreed that the Appeal be canvassed by way of written submissions and on 31/01/2023, the Appellant filed its written submissions dated 13/01/2022. On liability, the Appellant submitted that the burden of proof as required under Section 107 (1) of the *Evidence Act* lay absolutely with the Respondent. but that burden was not discharged. The Appellant reiterated the submissions filed before the trial court and contained in the Record of Appeal.
8. Further, the Appellant invited this court to consider the Appellant's witness evidence that when the Appellant was served with a notice of entry of judgment in respect to Kisii CMCC No. 238 of 2017, the Appellant responded vide its letter dated 07/08/2020 informing the Respondent's Counsel that it had never entered into any policy of insurance with the insured in respect to the motor suit vehicle (Registration No. KBZ 721J). For that reason, the Appellant opined that the notice under Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act was of no legal effect to the Appellant.
9. Citing High Court decision in Philip Kimani Gikonyo V Gateway Insurance Company Limited [2007] eKLR, Occidental Insurance Limited vs. Joel Masita Ogetonto [2019] eKLR and Richard Makau Ngumbi & another vs. Cannon Assurance Limited [2016] eKLR, the Appellant maintained that the Respondent failed to adduce evidence to demonstrate whether judgment- debtor in the primary suit were persons insured under the Policy of Insurance so as to compel the Appellant to settle the decretal sum.
10. Further, the Appellant submitted that the commencement date of the insurance policy was not demonstrated. That it was improper for the trial court to rely on the police abstract in finding in favour of the Respondent yet no certificate of insurance or other policy documents were furnished before the trial court to prove that there was a valid Insurance Policy. It was submitted that in the premised circumstances, the Appeal was merited and ought to be allowed with costs.
11. The Respondent on the other hand opposed the Appeal. Through the firm of C.R. Sagwa & Co. Advocates, the Respondent filed her written submissions on 21/12/2022 based on two issues. On the issue as to whether the requisite notice under Section 10 of the Insurance (Motor Vehicle Third



Party Risks) Act was issued, the Respondent referred this Court to the Appellant's witness statement acknowledging receipt of the Notice of Institution of the suit but only denying that the Notice was of any legal consequences. The Respondent therefore submitted that the Appellant

could not repudiate the contract as it was bound by the provisions of Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act.

12. On the issue as to whether the Appellant was bound to settle the decretal sum in Kisii CMCC No. 238 of 2017, the Respondent submitted that according to the Police Abstract, the accident occurred on 13/10/2016 during the period of the Policy cover that expired on 22/08/2017. Relying on the case of APA Insurance Company Limited v George Masele [2014] eKLR, the Respondent submitted that the police abstract sufficiently proved her case on a balance of probability. In light of the foregoing, the Respondent urged this court to dismiss the Appeal with costs.

Analysis And Disposition

13. This being a first appeal, this Court is obligated to re-evaluate and re-appraise the evidence adduced in the trial court in order to arrive at its own independent conclusion taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. [Selle v Associated Motor Boat Company Ltd [1968] EA 123.
14. The Respondent (Eunia Kerubo Nyakweba), was the sole witness for her case and adopted the witness statement dated 22/01/2021 which she filed with the plaint on 29/01/2021. It was her evidence that at the material time to the suit, motor vehicle registration number KBZ 721J Mitsubishi Saloon was insured by the Appellant vide policy number NK/700/0047524. She sought that Appellant pays her the sum Kshs. 1,392,811/= together with interest and costs of the suit.
15. In her plaint, she pleaded that the said Insurance Policy covered such persons or classes in respect to any injuries or death caused by or arising out of the use of the said vehicle within the meaning of Section 5 (b) of the Insurance (Motor Vehicle Third Party Risks) Act. She also pleaded that Notice under Section 10 Cap 405 Laws of Kenya was given to the Appellant.
16. In support of her case, the Respondent produced the Decree in CMCC No. 238 of 2017 dated 09/11/2020 (PEXh.1), the Notice of Institution of Suit dated 11/10/2018 in respect to Kisii CMCC No. 238 of 2017 and stamp received by the Appellant on 17/10/2018 (PEXh.2), the Notice of Entry of Judgment dated 21/07/2020 in respect to Kisii CMCC No. 238 of 2017 and stamp received by the Appellant on 22/07/2020 (PEXh.3), the Demand Notice dated 11/11/2020 and stamp received by the Appellant on 13/01/2021 (PEXh.4) and the Police Abstract (PEXh.5).
17. During cross-examination by Mr. Oduor for Appellant, the Respondent maintained that the accident motor vehicle was covered by the Appellant but she did not produce the Certificate of Insurance before the court. She acknowledged that from the Police Abstract, the date of commencement of the policy was not revealed and it showed that it expired on 22/08/2017.
18. Ruth Mbalelo (DW1) testified as the Appellant's legal officer and relied on her Witness Statement dated 28/01/2022. In that statement, she maintained that the Appellant did not issue any Policy of Insurance with reference to the suit vehicle namely motor vehicle registration number KBZ 721J Mitsubishi Saloon covering the period within which the alleged accident occurred, being 13th October 2016. For that reason, the Appellant was not liable for the accident.
19. In the same statement, she acknowledged that the Appellant was served with a Notice of Entry of Judgment on 22/07/2020 and while acting on her employer's instructions, she wrote a letter dated 07/08/2020 (DEXh.2) informing M/s C.R Sagwa & Company Advocates advising them that the



Appellant has never entered into any policy of insurance with the Defendants in the primary suit Kisii CMCC No. 238 of 2017 with respect to motor vehicle registration number KBZ 721J Mitsubishi Saloon at any time. She advised them to deal with the insured directly. This information was further relayed in their email dated 04/03/2021 marked DExh.1.

20. She stated that in the circumstances, the notice under Section 10 of the Act and any other notice issued to the Appellant had no legal effect since the Appellant neither insured nor issued the Policy Number NK/700/0047524.
21. Further, she observed that the Respondent failed to produce the Certificate of Insurance issued by the Appellant but only placed reliance on the Police Abstract. She therefore prayed that the suit be dismissed with costs.
22. During cross examination by Ms Sagwa, she denied that the Appellant ever received Notice of Institution of the suit dated 11/10/2021 and maintained that the Appellant only received the entry of Notice of Judgment. She told the court that the Appellant had all records of vehicles it insured at the time of the said Policy though she had not produced them. She accused the Policy Holder of authoring a false document but the Appellant did not investigate the matter. She maintained that she was under no obligation to produce such records due to policies between the Appellant and its insureds.
23. In its judgment, the trial court framed two issues for determination being:-
 1. Whether the Appellant was duly notified pursuant to Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act.
 2. Whether the Appellant was duty bound to settle the decretal sum in Kisii CMCC No. 238 of 2017.
24. On the first issue, the trial court analyzed the evidence before it and the submissions by parties and held:-

“It is ascertained from the letter dated 7th August 2020 (Dexh. 2) that the Defendant acknowledged receiving the notice of entry of judgment dated 21st July 2020. Although the court did not observe the same, the defendant’s legal officer admitted during the cross examination that her witness statement adopted in court made reference to the notice of institution of the suit dated 11th October 2018. I also note from the email communication (Dexh. 1) that the defendant was aware of the institution of the primary suit. The issue is therefore proven by plaintiff on a balance of probability.”

25. On the second issue, and being satisfied that the Appellant did not contest the contents of the police abstract produced by the Respondent, the trial court relied on the case of Judith Anyango versus Invesco Assurance Limited [2021]eKLR, Section 10 (1) of the *Insurance Act* Cap 405 and the case of APA Insurance Co. Ltd vs Gorge Masele [2014] eKLR and held:-

“The plaintiff produced the police abstract showing that the subject motor vehicle had been insured by APA Insurance vide policy number NK/700/0047524 which was expiring on 22nd August 2017. This accident occurred on 13th October 2016. It goes without saying that the motor vehicle was duly covered at the time of the accident.

It was the duty of the Defendant to present evidence to contradict the information on the police abstract...the policy document and certificate of Insurance in the custody of the insurer and the insured will not easily be accessible by a plaintiff in a declaratory suit. Only the defendant herein being privy to the insurance contract between it and the defendants



in the primary suit ought to have produced evidence in court to refute that it did not have a valid insurance policy with the said defendant.”

26. There is no doubt from the material presented before the trial court that an accident did occur as stated in the primary suit. The occurrence was proved by the evidence adduced and the police abstract. That police abstract was not contested save that the Appellant’s witness claimed that the Policy of Insurance was false.
27. If indeed the Appellant believed the Policy of Insurance was a false document authored by the insured, and that the accident motor vehicle was not insured by them, then its recourse lay under Sec. 10 (4) of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405 Laws of Kenya to avoid the claim in that suit.
28. Further, the Respondent was not the owner of the said accident motor vehicle and was not the insured either. She was not therefore expected to have the Policy or the Insurance Certificate for the accident motor vehicle in the circumstances. In absence of any other evidence to the contrary, the contents of the said Police Abstract produced as evidence by the Respondent remained as unchallenged that the accident motor vehicle was insured by the Appellant as at the time of the accident.
29. Indeed, in *APA Insurance Co. Ltd v George Masele* [2014] eKLR Mabeja J held that a Police Abstract was enough evidence that there was a Policy of Insurance in force; that it is unreasonable to expect the injured victim to produce a certificate of insurance, given that he was not privy to the contract between the insured and the insurer; and that the details, as captured in the police abstract, are from the Certificate of Insurance affixed to a motor vehicle or supplied by the insured.
30. Further and while agreeing with the decision in *APA Insurance Co. Ltd* (supra), Musoka J held in *Judith Anyango versus Invesco Assurance Limited* [2021]eKLR:- “ The trial court need not have looked further from the Police Abstract. The Appellant had established on a balance, from the police abstract , that there was a valid insurance policy in force., and the burden shifted to the respondent to prove otherwise.”
31. Further, the Court of Appeal in *Mbuthia Macharia vs. Annah Mutua & Another* [2017] eKLR had this to say in regard to evidential burden of proof :-

“(16) 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.”

32. Lastly, the shifting of the evidential burden of proof was settled by the Supreme Court in *Raila Amolo Odinga & Another v IEBC & 2 Others* [2017] eKLR that:-

“(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the Plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

(133) It follows therefore that once the Court is satisfied that the Petitioner has adduced sufficient evidence to warrant impugning an election, if not



controverted, then the evidentiary burden shifts to the Respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the Petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behooves the Respondent to adduce evidence to prove compliance with the law...”

33. In the circumstances herein, judgment having been entered in favour of the Respondent herein both in the primary and declaratory suit, then Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act came into play on the Appellant’s obligation to settle the claim and the section provides:-
1. 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.
 2. No sum shall be payable by an insurer under the foregoing provisions of this section— (a) in respect of any judgment, unless before or within fourteen days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings;”
34. From the exhibits produced before the trial court, there is no doubt that there was compliance with Section 10 (2) above in regard to giving of statutory notice and the format does not matter. The Appellant produced Dexh. 1 being an email dated 4/03/2021 showing communication of institution of the primary suit. In Philip Kimani Gikonyo case (supra) which the Appellant relied on, Alnashir Visram J (as he then was), held:-
- “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.”
35. This Court is therefore satisfied that despite the Appellant’s lamentation that the trial court ignored the principles applicable hence arrived at an erroneous conclusion on liability and quantum, this Court’s own analysis reveals that the trial court was properly guided by the law and principles in arriving at its conclusion on both issues. There is no error in the findings therein.
36. In the upshot, this Appeal is devoid of merit and as a consequence, it is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KISII (VIRTUALLY) THIS 25TH DAY JANUARY, 2024.



PATRICIA GICHOHI

JUDGE

In the presence of:

N/A for Appellant

N/A for Respondent

Laureen Njiru/ Aphline , Court Assistant

