



**Occidental Insurance Ltd v Ibrahim (Civil Appeal E018 of 2022)
[2023] KEHC 20696 (KLR) (10 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20696 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E018 OF 2022
TM MATHEKA, J
JULY 10, 2023**

BETWEEN

OCCIDENTAL INSURANCE LTD APPELLANT

AND

ABDULLAHI HASSAN IBRAHIM RESPONDENT

RULING

1. The petitioner in Kilungu PMCC E54/2020 , Occidental Insurance Company Ltd (the appellant herein) filed suit on October 23, 2020, seeking orders against the Defendant Abalullahi Hassan Ibrahim.
2. The Plaintiff sought declaratory orders to the effect that the Plaintiff was entitled to repudiate the Insurance Policy No. Comp 11/03785/0 issued by itself to the defendant and that in the event of any claim against the defendant arising from any accident, the plaintiff was entitled to repudiate and be free from any liability to indemnify the defendant.
3. According to the record, the Defendant was served but never entered appearance nor filed any defence.
4. The matter proceeded by way of formal proof and vide a judgment dated 18th March 2021, the Plaintiff's claim was dismissed.
5. Aggrieved by that dismissal the Plaintiff filed this appeal.
6. According to the Plaintiff the defendant had taken out a policy for motor vehicle Registration No. KCL227 T under certificate no. 49317060 issued on 11th June 2018 to expire on 10th June 2019. The terms of the insurance policy contract were within the knowledge of the defendant - that inter alia - the Plaintiff would indemnify the defendant against all 3rd party claims arising out from the said motor vehicle KCL 227T.



7. That the Plaintiff came to learn that the said motor vehicle was involved in an Road Traffic Accident on 23rd May 2019 at 1950 hrs along MSA/NBI Highway at Kima and consequently claims had been filed in Kilungu PMCC No. 250/2019 Nicholas Ngethi Mukangi v BOG Kavuko Primary School & Alex Ngala ; Kilungu PMCC 252/2019 Hassan Mustafa v BOG Kavuko Primary School & Another; Kilungu PMCC 253/2019 Mustafa Emani Mohammed v BOG Kavuko Primary School & another .
8. That the defendant was in breach of the insurance contract for not disclosing the road traffic accident, failing to give the Plaintiff the opportunity to access, investigate, and or repair the insured motor vehicle as per the contract of insurance that the defendant went ahead to repair the motor vehicle , with the aim of defeating the Plaintiff and the utmost good faith principle of insurance, that defendant also allowed a 3rd party an unauthorised driver to take control of the said motor vehicle leading to the accident .
9. In support of its case the Plaintiff called one witness - Mathew Okiring the claim manager who relied on his witness statement dated October 8, 2020 which reiterated the contents of the plaint. He produced documents which were marked as PEx1 to 6. However the record does not say what these documents are. I went through the witness statement that the witness adopted as his evidence and even there was no mention of the alleged documents or what they were about. The witness had not set out or named the documents or what it is that the court was expected to find in them that supported the plaintiff's claim or why indeed the plaintiff was producing them and what they explain.
11. The Plaintiff filed the appeal on the following grounds:-That the learned trial magistrate arrived at the decision contrary to law, facts/evidence before the trial court; that she erred in dismissing the suit on account of sub judice and that she failed to apply precedent law therefore bringing disrepute to judicial precedent.
12. In its submission the appellant relied on section 10(1) (4) of the *Insurance Motor Vehicle Third party Risks Act* cap 405 of the Laws of Kenya, *Jason Nyawira Kagu & Another vs Intra Africa Assurance Co. Ltd* [2014] eKLR *Charles Makenzi Wambua vs Africa Merchant Assurance Company Ltd & Another* [2014] eKLR on the proposition that failure to file such a declaratory suit denies the plaintiff a defence under section 10(4) of the Act.
13. Counsel submitted that the Plaintiff had produced the policy, the assessor's report , police abstract and the notice served on the defendant with respect to the repudiation .Counsel further submitted that this court should be guided by the citation by Onguto J. of Lord Mansfield in *Carter v Boehm* 97 ALL ER 1162 - in *Kenya Orient Insurance Ltd Vs Kelvin Macharia Karanja* [2017] eKLR.
14. I have carefully considered the submissions and the evidence presented before the learned trial magistrate.
15. The duty of this court is to re-evaluate the evidence and draw my own conclusions.
16. From the police abstract provided there was an accident that involved the insured motor vehicle and another motor vehicle KCE 545 D. The results of the investigation shows that KCE 545D was to blame. Then there is a list of passengers who sustained slight injuries and it is not indicated in which of the two motor vehicles these passengers were travelling.
16. Other than the annexed document which is said to have been an investigation conducted months after the alleged accident there is nothing in the evidence to show other than the drivers, that the three people who sustained injuries were passengers in KCL 227T or KCE 545D. More importantly, no evidence of any communication between the Plaintiff and the insured was produced to demonstrate indeed the insured had not informed the appellant of the alleged accident. The appellant alleged that it came to



learn about the road traffic accident from 3rd parties. This was not supported by any evidence. It was also alleged that the respondent proceeded to repair the motor vehicle without informing the appellant, but again that evidence was not placed before the court. The document purporting to establish this was not produced in court in a manner that would explain this allegation. From the record before me it is evident that appellant did not place sufficient evidence before the trial court to warrant the orders sought. The fact that was for formal proof did not mean that the court had to decipher the evidence for itself. It was upon the appellant to prove its case. The appellate court relies on the record and the evidence that is placed before the subordinate court. Where the record is short of evidence, then what is the appellate court supposed to re-evaluate, re-analyse to draw its own conclusions?

17. The appellant made very specific allegations against the Respondent but the record does not bear the evidence to support those allegations.
18. On that basis, I find reason upon which to disturb the finding of the subordinate court.
19. Ultimately, I find that the appeal is not merited and the same is dismissed.

DATED, SIGNED AND DELIVERED THIS 10TH JULY 2023

.....

MUMBUA T MATHEKA

JUDGE

Ojienda & Co Advocates for the appellant

Court Assistant: Mwiwa

