



**Mang'eng'e & 2 others v Monarch Insurance Company Limited (Civil Appeal
E289 of 2023) [2025] KEHC 14414 (KLR) (29 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 14414 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E289 OF 2023**

NIO ADAGI, J

JULY 29, 2025

BETWEEN

JACKSON MUEMA MANG'ENG'E 1ST APPELLANT

SCHOLASTICA MUENI MAWEU 2ND APPELLANT

JOSEPH CHARLES MBOKO 3RD APPELLANT

AND

MONARCH INSURANCE COMPANY LIMITED RESPONDENT

JUDGMENT

Background

1. On 18.08.2003 the Appellants (plaintiffs then) were lawfully travelling as passengers along Mombasa-Nairobi Road in motor vehicle registration Number KAE 663 F when the driver of the said motor vehicle allowed it to collide with Motor Vehicle Registration Number KAE 836Y F whereof the Appellants herein were injured. They filed suits being Machakos CMCC No. 360 of 2019, CMCC No. 27 of 2018 and CMCC No. 28 of 2018 and decree thereof issued in favour of the Appellants.
2. The Respondent (Defendant then) failed to settle the decretal sums forcing the Appellants to file a declaratory suit against the insurer of the Motor Vehicle Registration No KAE 836Y.
3. The Appellant therefore sought for the following orders before the trial court:
 - a. A declaration that the defendant is bound to satisfy the total decretal sum in Machakos CMCC No. 360 OF 2019 CMCC No. 27 OF 2018 and CMCC No. 28 OF 2018
 - b. Costs and interest thereon at court rates.
4. The Respondent entered appearance and disputed the particulars of the Plaint. The Respondent denied entry of judgment, denied ever insuring the suit motor vehicle herein and further denied



existence of a statutory notice sent to it by the Respondents and contended that they were not aware of Machakos CMCC No. 360 OF 2018. The Respondent also denied ever being issued with a demand letter therein.

5. The Appellants testified and reiterated the contents of the plaint and further produced the following documents in support of the case:
 - a. Certified copies of the judgments
 - b. Certified copies of the decrees
 - c. Letter to the Respondent (Defendants) forwarding the decrees and judgments and Police abstracts;
 - d. Statutory notice;
 - e. Notice to file declaratory suit;
6. The Appellants therefore sought judgment in terms of the claim in the plaint.
7. The Respondent did not call any witness to testify and similarly closed its case upon the Appellants having closed their case whereof parties filed their respective submissions.
8. The Appellants submitted that indeed there was a judgment vide the said decree and the Respondent was the insurer of the suit motor vehicle therein and that before the institution of the said suit, the Respondent was duly served and received the statutory notice and despite there being judgements in favour of the Appellants the Respondent had not satisfied the same. The Appellants in a nutshell have urged this Court to grant the prayers sought in the Plaint in the declaratory suit.
9. The Respondent submitted that the Appellants had not discharged the burden of proof as they had not produced in pleadings in the parent suit for this court to appreciate the circumstances of the suit. The Respondent further argued that they are not the insurer to the suit motor vehicle herein. The Respondent further reiterated that indeed the statutory notice was not served upon them and that they should not be burdened with settlement of unproven claim.
10. The Respondent thus urged the trial Magistrate to dismiss the instant suit with costs for having not been proved to the required standards.
11. The court determined whether the Respondent is liable to satisfy the judgment and/or decree entered in Machakos CMCC No.360 of 2019, CMCC27 of 2018, CMCC 28 of 2018. The trial Magistrate placed reliance on the Insurance (Motor vehicles Third Party Risks), Chapter 405 Laws of Kenya. and the Evidence Act.
12. The trial court observed that the basis for the legal burden of proof is provided in Section. 107 of the Evidence Act, Cap. 80 of the Laws of Kenya. The said section states as follows:
 1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence 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. "
13. The trial Magistrate further observed that the onus was therefore upon Appellants who seeks the Respondent to make good the policy by paying the decretal sums and therefore must adduce cogent and credible evidence to prove those grounds to the satisfaction of the court. That is fixed at the onset of the trial and unless circumstances change, it remains unchanged.



14. As to whether the Respondent was the insurer of the Motor Vehicle Registration No KAG 663 the trial Magistrate noted that the Appellants herein never produced a copy of the Police Abstract or insurance sticker to clearly illustrate to the court the contractual nexus between themselves and the insurance or that the aforesaid motor Vehicle was indeed insured by the Respondent herein and the policy number was valid. The trial Magistrate stated that she did find the Appellants did not sufficiently prove that indeed the Respondent was the insurer of the aforesaid motor vehicle.
15. The trial Magistrate also considered whether or not a statutory notice was served upon the Respondent pursuant to Section 10 (2) of the Act and/or whether the Respondent was aware of the said accident. The Magistrate noted that the Appellant produced a statutory notice dated 22.02.2002 which was indeed received by the Respondent's insurance company on 24.02.2002. The said statutory notice was duly stamped by the Respondent and it's quite clear that the demand and statutory notice were given in compliance with Section 10(2) of the Act by the firm of Z. Gathara & Co Advocates on behalf of the Appellants. The trial Magistrate thus stated that she was convinced on a balance of probabilities that indeed the Respondent herein was issued with a statutory notice therefore he was made aware of the disputed accident.
16. The trial Magistrate then went on to state that, having made the aforesaid finding on the statutory notice, the failure to produce proof of contract with the Respondent was fatal to the Appellant's case. That she was not satisfied that the Appellants have proved their case on a balance of probabilities, that the Respondent was the insurer of the disputed motor vehicle and thus the trial Magistrate found no basis to order the Respondent to honour the judgments in the parent suits. She found no merit in the prayers sought and dismissed the suit with costs to the Respondent.

The Appeal

17. Being dissatisfied with the trial court's judgment, the Appellants filed the Memorandum of Appeal dated 9th November 2023 being the appeal herein raising nine (9) grounds of appeal basically challenging the entire judgment.
18. The Respondent did not participate in the appeal despite proof that they were always notified every time the appeal came up in court.
19. Directions were given for disposal of the appeal through written submissions. The Appellants filed their submissions dated 27th February 2025.

Appellants' submissions

20. The Appellants have submitted that they seek to appeal the judgement of Hon. M.A Otindo (PM) delivered on 11th October, 2023 in CMCC No. 123 of 2022 on the grounds that:
 - a. Mandatory Legal Notices of intended suit under Section 10 of the [*Insurance \(Motor Vehicles Third Party Risks\) Act*](#), Cap 405 Laws of Kenya had been physically served and received by the Respondent.
 - b. CMCC No. 123 of 2022 was a declaratory suit seeking for orders that the Respondent be ordered to satisfy the judgements entered on 7th August, 2019 and Decrees issued between 9th and 10th September, 2021 in Machakos CMCC NO. 360 of 2019, CMCC NO. 27 of 2018 and CMCC NO. 28 of 2018 where the Appellants herein were Plaintiffs.



- c. The above-mentioned suits were already heard on merit, wherein the Respondent was proved to be the Insurer by the production of police abstract forms in the above-mentioned individual files and Judgement was entered in favour of the Appellants.
 - d. The Respondent had in its possession the Police Abstract forms which formed part of the Bundle of Documents in CMCC NO. 360 of 2019, CMCC NO. 27 of 2018 and CMCC NO. 28 of 2018 as well the Judgements and decrees issued in the above-mentioned cases, all in respect of the Appellants herein.
 - e. The Honourable Magistrate failed to take judicial notice of the Judgements issued by the Trial Court in Machakos CMCC NO. 360 of 2019, CMCC NO. 27 of 2018 and CMCC NO. 28 of 2018 despite the fact that the Declaratory Suit was neither an appeal nor a review of the lower court files.
21. The Appellants have invited this court to consider whether the Respondent is obligated to pay the awards of damages in the judgements and decrees granted by Court in Machakos CMCC NO. 360 of 2019, CMCC NO. 27 of 2018 and CMCC NO. 28 of 2018 in their respect and whether this Appeal should be allowed.
 22. The Appellants have further submitted that the Respondent is obligated to pay the awards of damages in the judgements and decrees granted by Court in Machakos CMCC NO. 360 of 2019, CMCC NO. 27 of 2018 and CMCC No. 28 of 2018 and places reliance in Kenya Orient Insurance Limited vs. Otieno (Civil Appeal E166 of 2023) [20241 KEHC 7637 (KLR) (25 June 2024) (Judgment) where the Court on the issue of declaratory suits stated as follows:
 23. What then is a declaratory suit? Relevant to this case, a declaratory suit is one that seeks to compel a judgement debtor's insurer to settle the decree passed against the insured. "
 24. The court further went ahead and made reference to the statutory law that enables a successful Plaintiff to obtain the said Judgement from the Insurer as:

"Section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act*, Cap 405 Laws of Kenya states that an Insurer shall pay the persons entitled to the benefit of the Judgement any sum payable thereunder in respect of liability, costs and interest as long as the Insurer had notice of the institution of proceeding. "
 25. The Appellants submitted that as acknowledged in the trial court's judgement, the Statutory Notices to sue under Cap 405 Laws of Kenya dated 22nd February, 2002 and 8th January, 2004 were indeed served upon and duly received by Monarch Insurance Company Limited, the Respondent herein.
 26. That it is quite clear from the aforementioned that the issue of providing a police abstract or insurance sticker to clearly illustrate to the trial court the contractual nexus between the Appellants/Plaintiffs and the insurer/Respondent] should not and cannot arise. They argue that the trial Magistrate did misdirect herself on law and fact in that regard and by doing so, therefore erroneously denied the Appellants the right to be properly compensated as per the judgements and decrees in Machakos CMCC NO. 360 of 2019, CMCC NO. 27 of 2018 and CMCC NO. 28 of 2018.
 27. The Appellants submit that as the trial Magistrate sat to draw the dismissal Judgement, she had or ought to have perused the said three cases where all the three (3) Police Abstract forms had comprised part of the Bundle of Documents in the Appellants' cases and in possession therefore of the Respondent.



28. The Appellants cited Section 60 of the Evidence Act states that facts of which the court should take judicial notice to include:
- all written laws, and all laws, rules and principles, written or unwritten, having the force of law, whether in force or having such force as aforesaid before, at or after the commencement of this Act, in any part of Kenya'
29. The Appellants submit that the trial Magistrate ought to have taken judicial notice of the judgements and decrees in Machakos CMCC NO. 360 of 2019, CMCC NO. 27 of 2018 and CMCC NO. 28 of 2018, whose bundle of documents contained all three Police Abstract forms, as a verifiable account of the events that led to the institution of the above-mentioned suits and the subsequent declaratory suit. This is due to the fact that case law form part and parcel of written rules and principles having the force of law.
30. The Appellants urged this court to compel the Respondent to pay them the entire sums payable as ordered in the aforementioned judgements & decrees.
31. On whether this Appeal should be allowed, the Appellants referred to the case of Abok James Odera T/A A. J Odera & Associates vs. John Patrick Machira T/ A Machira & Co. Advocates [2013] eKLR, the court stated as follows:
- This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse 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".
32. The Appellants submitted that this court should take into account the bundle of documents/ evidence adduced and the judgements and decrees issued in Machakos CMCC NO. 360 of 2019, CMCC NO. 27 of 2018 and CMCC NO. 28 of 2018 while making a final decision on whether to grant the appeal or not. These Bundle of Documents contained the three (3) Police Abstract forms which must be adduced as the principle documentary evidence in all accident cases. That with tremendous respect, the trial Magistrate could well be accused of indolence by failing to peruse the three cases' bundle of documents which prominently contained all the three (3) Police Abstract forms.
33. Further, the Appellants submitted that the trial Magistrate did indeed misdirect herself in law and fact as enumerated above and therefore the Appellants' appeal should be successful in that regard. The Appellants therefore pray for judgement to be entered against the Respondent in the global sum of Kshs.7,296,675.95 with interest thereon at 14% p.a as awarded in CMCC NO. 360 of 2019, CMCC NO. 27 of 2018 and CMCC NO. 28 of 2018 respectively.

Analysis and determination

34. This being a first appeal, I am reminded of the primary role as a first appellate court namely, to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd.& others* and in *Peters v Sunday Post Limited* (1968) E.A 123. (1958) E.A Page 424.



35. In the case of Mursal & another v Manese (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022), the court held that: -

A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.

36. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:“

...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

37. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of Civil Procedure Act, a court of first appeal can appreciate the entire evidence and come to a different conclusion
38. I have perused the Record of Appeal particularly the judgement and considered the Appellants' submissions in the absence of the Respondent's submissions. The issue I form for determination is whether the trial court erred in law and in fact in dismissing the Declaratory suit filed by the Appellants.
39. What then is a declaratory suit? Relevant to this case, a declaratory suit is one that seeks to compel a judgement debtor's insurer to settle the decree passed against the insured.
40. The subject matter of the suit herein is a declaratory suit, brought under the provisions of the Insurance (Motor Vehicles Third Party Risks) Act, seeking to have the Defendant, an insurance company settle the decree. The Appellants indicate that the decrees are for an award of damages of Kshs.7,296,675.95 with interest thereon at 14% p.a as awarded in CMCC NO. 360 of 2019, CMCC NO. 27 of 2018 and CMCC NO. 28 of 2018 respectively entered against the Defendant insured by the Respondent herein.
41. The Court considers that Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act provides for the duty of an insurer to settle a decretal amount as follows:-

10. Duty of insurer to satisfy judgments against persons insured

- (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. 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.

42. Upon entry of judgment in such accident claims where the Defendant was insured, the above provisions require the insurer to settle the decretal amount as awarded and in accordance with the provisions of the Act. It is however not always the case that the insurers willingly settle the claim and this necessitates the filing of a declaratory suit to compel the insurer to settle the decree. Ordinarily, such declaratory suits may be filed by the Defendant and/or Judgment Debtor in the primary suit.

43. Section 10(2) of the Insurance (Motor Third Party Risks) Act, Cap 405 provides:

10(2). No sum shall be payable by an insurer under the foregoing provisions of the section.

- a. in respect of any judgment, unless before or within 14 days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings.....”

44. I understand the import of the above provision of the law to be that for liability to accrue under Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405, there is a 4-fold test to be met. Firstly, that the motor vehicle in question was insured by the Respondent; Secondly, that the Appellant has a judgment in his favour against the insured; Thirdly, that statutory notice was issued to the insurer within 30 days of filing the suit where judgment has been obtained and finally the Appellant was a person covered by the insurance policy.

45. In my view, the purpose of the above provisions and the Insurance (Motor Vehicle Third Party Risks) Act Cap. 405 was to ensure that a third party who suffered injury or loss due to acts or omission on the part of an insured motor vehicle would be assured of compensation for their injury, loss or inconvenience in circumstances where the owner or driver of the insured motor vehicle has no means to settle the claim.

46. This view is supported by Sir Clement De Lestang, J.A. in *New Great Insurance Co. of India Ltd – Vs - Lilian Everlyne Cross & Another* (1966) EA, 90 at page 104 thus:

Generally speaking the Act seeks to achieve that object (of making provision against third party risks arising out of the use of motor vehicle on the roads) not by placing the whole burden of compensating third parties injured in accidents on the insurers but by combination of two means namely:

1. by making it obligatory, on pain of punishment, for any person who uses or causes or permits any other person to use a motor vehicle on the road, to have in relation to the user of the vehicle a policy of insurance which satisfies the requirements of the Act, and
2. restricting the right of insurers to avoid liability to third parties.”

47. On my perusal of the record of appeal, I note that that Appellants did what they were supposed to do. They proved that there was a valid third party insurance policy No. P/NO.200.080.005740 that covered third parties such as the Appellants and that the Appellants were involved in an accident while travelling as passengers in motor vehicle registration No. KAE 836Y owned by PAJU INVEST which



- was insured by the Respondent. The Respondent did not dispute the insurance policy number shown in the police abstracts that were adduced in evidence before the trial court and in the declaratory suit.
48. The Respondent had the duty to show by way of evidence that the insurance policies in the Police Abstracts did not either emanate from them, were not genuine or did not cover the Appellants. This is because the policy contained in the Police Abstract as produced supported the Appellants' case. The initial burden of proof lies on the Appellants, but the same may shift to the Respondent, depending on the circumstances of the case.
49. When a matter of fact is alleged with divers' circumstances, it shall not be sufficient to deny it as alleged along those circumstances, but fair and substantial answer must be given. First of all, a mere denial is not a sufficient defence in this type of case there must be some reason why the Respondent does not want to settle the claims. Either there was no insurance policy or it did not cover the Appellants. It could also be that the same is not genuine. It is not sufficient therefore simply to deny liability without some reason given.
50. The evidential burden of proof is captured in Sections 109 and 112 of the same Act as follows:
109. 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.
112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."
51. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in *William Kabogo Gitau vs. George Thuo & 2 Others* [2010] 1 KLR 526 as follows: -
- In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."
52. In *Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another* (2015) eKLR, the judges of appeal held that:
- Denning J. in *Miller Vs 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 the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a 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 loose, because the requisite standard will not have been attained."
53. I therefore find and hold that the Respondent did not provide evidence that could rebut the Appellants' overwhelming evidence that the Respondent covered motor vehicle registration number KAE 836Y via Policy number P/NO.200.080.005740 that covered third parties such as the Appellants.



There was no basis for the trial Magistrate to find that the Appellants had not proved that the Respondent was the insurer of the disputed motor vehicle.

54. Before I pen off, I wish to point out that in her judgement, the trial Magistrate referred to motor vehicles registration numbers KAE 663F, KXH 092 and KAG 663F and even determined whether the Respondent was the insurer of motor vehicle registration number KAG 663. A perusal at the Plaint dated 18th January 2022 filed by the Appellants in the declaratory suit, the Appellants' witness statements, the Police Abstracts, the demand notices, the statutory notices and the judgements in the primary suits, all referred to motor vehicles registration numbers KAE 663F and KAG 663F and nowhere was motor vehicle registration number KAG 663 referred to in the judgement mentioned. Therefore, there is no way the Appellants would have been expected to produce either a police abstract or insurance sticker for the said strange motor vehicle.
- 55.. Based on the foregoing, I must interfere with the finding of the trial court and find that the trial court erred in law and in fact in introducing and referring strange motor vehicles in the judgement thereby wrongly dismissing the Declaratory suit filed by the Appellants. The appeal is accordingly allowed.
56. The upshot of the foregoing is that I find that the Appellant's appeal merited and is accordingly allowed with costs

It is so ordered.

JUDGMENT WRITTEN, DATED & SIGNED AT MACHAKOS THIS 29TH JULY 2025

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 30TH JULY 2025

In the presence of:

Ms. Irura for Mr. Gathaara for Appellants

N/A.... for Respondent

Milly..... Court Assistant

