



**Xplico Insurance Company Limited v Maosa (Civil Appeal  
E008 of 2021) [2024] KEHC 9398 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9398 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
CIVIL APPEAL E008 OF 2021**

**F GIKONYO, J  
JULY 31, 2024**

**BETWEEN**

**XPLICO INSURANCE COMPANY LIMITED ..... APPELLANT**

**AND**

**LILIAN NYANCHOMA MAOSA ..... RESPONDENT**

*(Being an appeal from the ruling of Hon. G.N. Wakabiu (C.M.)  
in Narok CMCC No. 158 of 2019 delivered on 19/05/2021)*

**JUDGMENT**

**Limit of insurer's liability**

1. This appeal challenges the ruling of the Chief Magistrate's Court at Narok in Civil Suit No. 158 of 2019 delivered on 19/05/2021 in which the trial court ordered as follows;
  - a. That the defendant is liable to satisfy the judgment in Narok Civil Suit No. 117 of 2015 and Civil Suit No. 21 of 2018, plus the costs of the suit
  - b. That since the suit is consolidated with CMCC NO. 4 of 2020, it can only be treated as a single suit, and costs are awarded as costs for a single suit.
2. The memorandum of appeal dated 10/06/2021 cited 4 grounds of appeal as follows;
  - i. That the learned trial magistrate erred in law and fact in making a finding that the Respondent had proved her case against the Appellant thereby entering judgment against her as pleaded in the plaint.
  - ii. That the learned trial magistrate erred in law and fact by failing to give due regard to the Appellant's pleadings and submissions placed on record and thereby arriving at an erroneous decision.



- iii. That the learned trial magistrate erred in law and fact in making a finding that the Appellant had an obligation under section 10 of the Insurance (Motor Vehicles Third Party Risks) Act, Cap 405 to satisfy the decretal sums Kshs 15,776,370 in Narok CMCC no. 117 of 2015.
  - iv. That the learned trial magistrate erred in law and fact by entering judgment against the appellant for a sum in excess of Kshs 3,000,000 being the statutory maximum recoverable from an insurer as prescribed in section 5(b)(iv) of the *Insurance (Motor Vehicles Third Party Risks) Act*.
3. In the end, the appellant urged this court to allow the appeal with costs.

### **Background**

4. In a declaratory suit, Narok CMCC 158 of 2019, the Respondent sought a declaration that the Appellant is liable to settle the decretal sum in Narok CMCC No. 117 of 2015.

### **Directions of the court.**

5. The appeal was canvassed by way of written submissions.

### **Appellant's Submissions**

6. The appellant submitted that the Appellant herein was never served with a statutory notice in accordance with the law before or after the institution of the proceedings in Narok Civil Suit No. 117 of 2015. The appellant contends that the Respondent herein indicated that she was aware that Statutory Notice was served upon the insurance but did not indicate in her statement the mode of service used. There is no proof that the same was delivered to the recipient. There is no evidence that the notice complied with the legal requirements of Section 3(d) Insurance (Motor Vehicles Third Party Risks) (Amendment) Act of 2013 or that it was served in accordance with Order 5 Rule 3 of Civil Procedure Rules. The appellant relied on Multiscope Consulting Engineers V University of Nairobi & Another [2014] eKLR, Miriam Njeri Njau V Attorney General [2016] eKLR and Kenya Orient Insurance Limited v Cargo Stars Limited & 2 Others [2017] eKLR.
7. The appellant also submitted that the Respondent herein did not prove the existence of the policy. The Appellant sought to rely on the Police abstract dated 26/03/2015 which contained details of the policy. The Respondent in her statement sought to rely on hearsay evidence as she was not on her own capable of establishing the contents of the police records from which the particulars in the police abstract were drawn. The appellant relied on Richard Makau Ngumbi & Another-vs-Cannon Assurance Co. Ltd. [2016] eKLR, and Kenya Orient Insurance Co.Ltd v Farida Hemed [2015] eKLR.
8. The appellant submitted that the appellant is not obligated by the provisions of CAP 405 and /or any other law to satisfy a judgment of decree arising from a suit in the nature of the one alluded to in the plaint in excess of Kshs. 3,000,000/=. The appellant relied on Section 5 (b)(iv) of the *Insurance (Motor Vehicles Third Party Risks) Act*, Cap 405, and Patricia Mona Antony & another v Africa Merchant Assurance Company Limited [2019] eKLR.
9. In the end, the appellant submitted that the respondent did not prove her case as pleaded in the trial court pleadings and did not establish the basic elements of a declaratory suit brought under the *Insurance (Motor Vehicles Third Party Risks) Act* and Section 3(d) Insurance (Motor Vehicles Third Party Risks) (Amendment) Act of 2013.



## The Respondent's Submissions

10. The respondent submitted that The Appellant was served with a notice of intention to sue which was dated 27th May, 2015 and they did receive the same notice. There is a stamp by the Respondent acknowledging receipt of the notice before the institution of Narok CMCC 117OF 2015. Further, the defendant defended the said suit to the end and was represented by Mose, Mose & Millimo Advocates appointed by the Appellant Insurance Company. The respondent contends that the notices meet the test of a statutory notice and were issued within 14 days to the filing of the primary suit and within 30 days of the filing of the declaratory suit. The respondent relied on Philip Kimani Gikonyo V Gateway Insurance Company Limited /2007/ eKLR.
11. The respondent submitted that a certificate of insurance is issued by an insurer to its insured and a victim of a road traffic accident would ordinarily not have access to it. The victim only gets information of the accident, including information on the insurer, upon the police having investigated the matter. The respondent relied on APA Insurance Co. Ltd v George Masele [2014] eKLR and Bernard Mutisya Wambuav Kenya Orient Insurance Company Ltd [2020/ eKLR.
12. The respondent submitted that the fact that the Respondent was forced to sue for the amount which the Appellant was aware was statutorily payable, renders it impossible for the Appellant to escape liability for payment of interest and costs on that amount from the date of the award. The respondent relied on Gateway Insurance Co Ltd v Jamila Suleiman & another [2018] eKLR, Kiamuko & another (Suing as *Administrators of the Estate of the Late Evans Kvalo Maundu - Deceased*) v ICEA Lion General Insurance Co. Limited (Civil Suit 26 of 2018) [2022] KEHC 11682 (KLR) (1 July 2022)(Judgment) and Peter Gichihi Njuguna vs. Jubilee Insurance Co. Ltd [2016] eKLR.
13. In the end, the respondent submitted that the Respondent having proved her case on the required standards of proof, the respondent prays for a judgment against the appellant and a declaration that the appellant is bound to pay the decretal amount as per the law.

## Analysis And Determination

### Duty of court

14. This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyze the same, and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify a benefit this court lacks. See *Gitobu Manyara & 2 others v Attorney General* [2016] eKLR.

### Issues

15. This court has considered the record of appeal, and the appellant and respondent's submissions.
16. Issues for determination are:
  - i. Whether the appellant was served with a statutory notice under section 10(2)(a) of the Insurance (Motor Vehicle Third Party Risks) Act CAP 40.
  - ii. Whether the Appellant is liable beyond the statutory limit of Kshs 3,000,000/-



**I. Whether the appellant was served with a statutory notice under section 10(2)(a) of the Insurance (Motor Vehicle Third Party Risks) Act CAP 40.**

17. It is the duty of the insurer to satisfy judgment against persons insured as per Section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act*, Chapter 405 of the Laws of Kenya.
18. Nevertheless, for liability to attach under section 10 of the Insurance (Motor Vehicle Third Party Risks) Act CAP 405, a four-fold test must be satisfied: -
  - i. Firstly, the motor vehicle in question was insured by the appellant.
  - ii. Secondly, the Respondent has a judgment in his/her favour against the insured;
  - iii. Thirdly, that statutory notice was issued to the insurer either at least 14 days before the filing of the suit wherein judgment has been obtained or within 30 days of filing the suit where judgment has been obtained; and
  - iv. Finally, the Respondent was a person covered by the insurance policy.
19. The Appellant claims that the Respondent did not serve the statutory Notice and she did not indicate the mode of service used, hence no proof that it was delivered.
20. The evidence show that, the Appellant was served with a notice of intention to sue which was dated 27<sup>th</sup> May, 2015 and they did receive the notice. The said notice is stamped by the appellant acknowledging receipt of the notice before institution of Narok CMCC 117 of 2015. Further, the defendant defended the said suit to the end through Mose, Mose & Millimo Advocates, legal counsel appointed by the Appellant Insurance Company.
21. It is also evident from the court's record in CMCC 117 of 2015 that the appellant Insurance Company herein had notice of the suit and the judgment of the trial court against its insured defendant.
22. Therefore, the relevant statutory notices were issued and served; within 14 days before the filing of the primary suit; and within 30 days of the filing of the declaratory suit on 10<sup>th</sup> July 2019. The notices are dated 24<sup>th</sup> May 2017 and 9<sup>th</sup> July 2019.
23. This court finds that the appellant was served with the statutory notices required in law and was at all material times aware of the existence of the primary suit.
24. The Appellant claims that the Respondent did not prove the existence of the policy and only relied on the police abstract. A certificate of insurance is issued by an insurer to its insured and a victim of a road traffic accident would ordinarily not have access to it. It is a document in the special knowledge and possession of the insurer and the insured. The victim only gets information of the accident, including information on the insurer and details of the policy of insurance, from the police following investigation on the accident. Details of the policy of insurance are provided by the police through the police abstract.
25. The respondent produced the police abstract with the details of the policy of insurance.
26. Therefore, liability upon the appellant insurance company under section 10 of the Act was duly proved on a balance of probabilities and attaches accordingly.



## II. Whether the Appellant is liable beyond the statutory limit of Kshs 3,000,000/-

27. The Appellant's position is that by virtue of section 5(b)(iv) of cap 405 Laws of Kenya, the amount payable by the insurer is limited to Kshs.3,000,000/-. Any other amount in excess of three million is payable by, and the third party should pursue the insured for payment thereof.

28. Section 5 (b) of the Insurance (Motor Vehicle Third Party Risks), Cap 405 states that;

“In order to comply with the requirements of section 4, the policy of insurance must be a policy which—

(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:

Provided that a policy in terms of this section shall not be required to cover—

- I. Liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or
- ii. except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arose; or
- iii. any contractual liability;
- iv. liability of any sum in excess of three million shillings, arising out of a claim by one person.”

29. Therefore, Section 5 (b) of the Insurance (Motor Vehicle Third Party Risks), Cap 405 sets out the scope of liability of the insurer arising out of a claim by one person, which is also entrenched in section 10 of the same Act in hemming the duty of an insurer to satisfy a judgment against an insured person by stating thus;

“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.”



30. The Court of Appeal in *CIC General Insurance Group Ltd v Gerald Ochoki* [2020] eKLR also affirmed the limitation of insurer's liability in accordance with the terms of the policy in stating that: -

“Section 5(b)(iv) sets the maximum liability of the insurer at Kshs.3,000,000. We are therefore of the considered view that the judge was correct in coming to that conclusion. Further, in this court's decision of *Justus Mutiga & Others v Law Society of Kenya & another* CA No. 141 of 2016, it was held:

We do not understand the schedule to curtail the court's duty and mandate to assess the evidence before it and award whatever amount of damages which in the court's view suffices to compensate the victim of the accident. What in our considered view is anticipated by the amendment is to put a ceiling or cap to the amount recoverable from the insurance company, but it does not fetter the court from awarding more than Ksh.3 million. What this would mean is that any compensation awarded by the court in excess of Ksh.3 million would be recoverable from the insured and not from the insurance company. To that extent, this would not amount to usurpation of the court's judicial independence, authority and discretion.

We consequently agree with the learned Judge on that point and uphold his finding that section 5(b) of the Act is not unconstitutional. We too are of the same considered position. A court is not estopped from awarding a litigant a sum in excess of what is provided in the Act. As stated, any sum in excess of Kshs 3,000,000.00 is recoverable from an insured. It is on account of this conclusion that we find no merit in the appeal and the cross-appeal.”

31. Except, section 5(b)(iv) provides;

Provided that a policy in terms of this section shall not be required to cover-

v. liability of any sum in excess of three million shillings, arising out of a claim by one person'.  
[underlining mine for emphasis]

32. The words 'arising out of a claim by one person' used in section 5(b)(iv) of the Insurance (Motor Vehicle Third Party Risks), Cap 405, should be understood within the purpose of the Act;

'An Act of Parliament to make provision against third party risks arising out of the use of motor vehicles';

Which runs throughout the entire Act including section 4, 5 and 10.

33. Thus, not objectionable to couch orders in the rendition provided in section 5(b)(iv) of Cap 405.

34. Given the foregoing analysis and circumstances of the case, the appeal succeeds in the manner contained and to the extent expressed in the following specific orders:

i. A declaration is hereby issued that the appellant's liability is limited to a sum of three million shillings (Kshs. 3,000,000/-), arising out of a claim by one person in respect of the accident covered under the policy in question.

ii. A declaration is also hereby issued that, liability of any sum in excess of three million shillings (Kshs. 3,000,000/-), arising out of a claim by one person, is the responsibility of, and should be recovered from the insured, Nyanchoka Jane and Cyrus Nyamweya Machogu, in respect of the relevant accident involving the insured motor vehicle registration number KAN O30Q.



iii. In the circumstances of this case, a fair order on, is each party to bear their respective costs on the appeal.

35. Orders accordingly.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 31ST DAY OF JULY, 2024.**

.....

**HON. F. GIKONYO M**

**JUDGE**

In the Presence of:

C/A: Otolu

Ms. Nyambaka for Githinji for Appellant

Ms. Chelagat holding brief for Ms. Muthoni for Respondents – Present

