



Saham Insurance Co. Ltd v Muriithi (Suing as the Legal Representative of the Estate of Godfrey Mbuthia Kigera - DCD) & another (Civil Appeal E004 of 2024) [2024] KEHC 14980 (KLR) (27 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14980 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E004 OF 2024
LM NJUGUNA, J
NOVEMBER 27, 2024**

BETWEEN

SAHAM INSURANCE CO. LTD APPELLANT

AND

NANCY KIRIMI MURIITHI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF GODFREY MBUTHIA KIGERA - DCD) 1ST RESPONDENT

ERASTUS NJERI RUTERE 2ND RESPONDENT

(Appeal arising from the decision of Hon. J.A. Otieno in Embu CMCC no. E084 of 2021 delivered on 11th December 2023)

JUDGMENT

1. The appellant filed a memorandum of appeal dated 22nd January 2024 seeking the following orders:
 1. That the appeal be allowed with costs;
 2. That the judgment of the trial court on both liability and quantum be set aside;
 3. That this court does its own fresh assessment of the evidence presented before the trial court on liability and quantum and make a fresh apportionment of liability between the appellant and the respondents;
 4. That the 1st respondent's suit against the appellant be dismissed with costs; and
 5. Such other orders as the honourable court will deem fit and just.
2. The appeal was premised on the following grounds:



1. That the learned trial magistrate erred in law and fact in failing to find that it was unlawful and unprocedural to retain the appellant in the proceedings before liability had been established between the plaintiff and the defendant;
 2. That the learned trial magistrate erred in law and fact in failing to find that the 1st respondent had no viable cause of action against the appellant before judgment was entered against the latter;
 3. That the learned trial magistrate erred in law and fact in misapprehending and misapplying the provisions of section 10 of the Insurance (Motor Vehicle Third Party Risks) Act;
 4. That the learned trial magistrate erred in law and fact in holding that the appellant was liable to indemnify the 2nd respondent in total disregard of the provisions of insurance policy;
 5. That the learned trial magistrate erred in law and fact in failing to appreciate that the 1st respondent's case against the 2nd respondent or the 2nd respondent's case against the 3rd party arose from separate causes of action hence could not be determined in the same proceedings;
 6. That the learned trial magistrate erred in law and fact in awarding the 1st respondent the sum of Kshs.2,159,552/= which is excessive and manifestly high in the circumstances and considering the evidence adduced;
 7. That the learned trial magistrate erred in law and fact in wholly disregarding the evidence adduced on behalf of the appellant and displaying open bias against the appellant during hearing; and
 8. That the learned trial magistrate's judgment was arrived at in a cursory and perfunctory manner without properly analyzing evidence presented in the suit on quantum and the entire award against the appellant is unjustified, excessive and oppressive.
3. The appellant also filed a second memorandum of appeal dated 24th May 2024 challenging the trial court's ruling delivered on 16th May 2024, seeking the following orders:
1. That the appeal be allowed with costs;
 2. That the ruling and subsequent orders of the trial court be set aside and the appellant be allowed to deposit in court an insurance bond or bank guarantee as security for due performance of the decree as a condition for stay of execution pending hearing and determination of the appellant's appeal, or deposit the entire decretal sum in a joint account;
 3. That in the alternative, the appellant be ordered to deposit the entire decretal amount into a joint interest earning account in the names of the appellant and the respondents' advocates or to court as a condition for stay of execution pending hearing and determination of the appellant's appeal;
 4. That the costs of this appeal be awarded to the appellant.
4. This second appeal is premised on the grounds that the learned trial magistrate erred in law and fact:
1. By condemning the appellant to pay half of the decretal sum to the 1st respondent within 7 days of the ruling as a condition to granting stay of execution pending hearing and determination of the appellant's appeal herein, in which the appellant is challenging its enjoinder in the suit;
 2. By failing to appreciate that by ordering the appellant to pay half of the decretal sum to the 1st respondent, she determines the pending appeal;



3. By failing to appreciate that the appellant's appeal is not against quantum or liability but it is against enjoinder in the primary suit;
 4. By condemning the appellant to pay half of the decretal amount to the 1st respondent who has not demonstrated her ability to refund the same if the appeal succeeds, thus the condition is punitive; and
 5. By failing to consider the appellant's prayer to deposit an insurance bond or bank guarantee as security for due performance of the decretal amount as a condition for stay of execution pending hearing and determination of the appellant's appeal, or deposit the entire decretal sum in a joint account, as a condition for granting stay of execution pending hearing and determination of the appellant's appeal, thereby exercising her discretion injudiciously.
5. The court admitted the main appeal and gave its directions to the effect that the same be canvassed by way of written submissions. The second appeal was not prosecuted, and, in any event, the orders sought through it have been overtaken by events. In essence, the decision of the court in this judgment will focus on the main appeal.
6. At the trial court, the 1st respondent sued the 2nd respondent seeking judgment against him for special damages of Kshs.244,800/= and general damages. It was the 1st respondent's averment that on or about 26th August 2020, the deceased was lawfully travelling as a passenger in motor vehicle registration number KAQ 438M along Mini-inn bypass Embu road when at Ndumaini area the 2nd respondent drove motor vehicle registration number KAQ 438M so carelessly and recklessly that he lost control and crushed into a culvert causing the deceased to suffer serious injuries resulting in his death after a few hours of pain and agony. The plaint contained particulars of negligence and those of expenses incurred following the death of the deceased.
7. The 2nd respondent filed a statement of defense stating that his motor vehicle was insured by the appellant and a third-party notice had been issued to it. He denied the averments made in the plaint. The appellant was enjoined in the suit as the 2nd respondent's insurer and it filed a statement of defense denying the claim that it had insured the 2nd respondent's motor vehicle. It argued that it had been wrongly enjoined in the suit and sought orders to be removed from the suit through chamber summons dated 14th September 2022, which orders were denied. The 2nd respondent filed a reply to the appellant's defense, stating that the appellant even compensated him for the loss of his motor vehicle and that it is his insurer for sure. The 1st respondent also filed her reply to the appellant's defence asserting that the deceased as a passenger in the 2nd respondent's motor vehicle was duly insured by the appellant and it was liable to pay.
8. The matter went to full hearing where PW1 was the 1st respondent who testified that at the time of the accident, her husband was a passenger in the 2nd respondent's motor vehicle and he died as a result of the accident. That the deceased died at Tenri Hospital while receiving treatment shortly after the accident and he was buried on 05th September 2020. The funeral expenses were a total of Kshs.219,800/=. That the deceased was survived by her and 2 children who are aged 12 and 6 years old.
9. That the deceased was a foreman in the field of construction and he used to earn Kshs.3,000/= daily which translates to Kshs.75,000/= every month. She stated that on average, the deceased spent Kshs.60,000/= on his family every month towards school fees and household expenses. That the deceased was the sole breadwinner of the family and he died at the young age of 35 years. She produced a marriage certificate and other documentary evidence in support of her case.



10. DW1 was the 2nd respondent who stated that his motor vehicle was comprehensively insured by the appellant. He stated that while driving, an oncoming motor vehicle flashed lights, causing him to lose control of the motor vehicle thus causing the accident. That the appellant compensated him for the loss of the motor vehicle. He produced police abstract as evidence. On cross-examination, he stated that the deceased was his friend and he had given him a lift home when the accident occurred. That the deceased was the only passenger in the vehicle and the insurance policy covered 2 passengers which means the deceased was covered.
11. The trial court awarded general damages as follows: Kshs.30,000/= for pain and suffering, Kshs.50,000/= for loss of expectation of life, Kshs.1,834,752/= using a multiplicand of Kshs.19,112.05/= being the applicable minimum wage, a multiplier of 12 years and a dependency ratio of $\frac{2}{3}$. The court also awarded Kshs.244,800/= as special damages and apportioned liability at 100% against the 2nd respondent. The appellant was held liable for payment of the decretal amount to the 1st respondent.
12. This appeal was canvassed by way of written submissions.
13. The appellant submitted that no cause of action was disclosed against it and no evidence was led to prove its liability. It relied on section 10 of the Insurance (Motor Vehicle Third Party Risks) Act and argued that no liability should be found against the insurer before a declaratory suit against it can be instituted. It relied on the cases of Idris Faridi & 2 Others v. Karithi Peter Murungi (2018) eKLR and Laichard Shah & Another v. Kenindia Insurance Co. Ltd (2005) eKLR.
14. It stated that the suit between the respondents should have been determined first before the insurance company is called upon to settle the decree in that suit. That the 1st respondent is a third party to the insurance contract, who can only benefit from the insurer through a declaratory suit. Further reliance was placed on the case of Ribiru v Ndung'u (Suing on Behalf of the Estate of the Late Joram Ndung'u Mwaniki) & 2 others [2024] KEHC 339 (KLR). It was its argument that liability cannot be entered against the insurer since it is not related to the cause of action. That this point of law was raised through cross examination and submissions but the trial court failed to consider it. That it was not properly enjoined in the proceedings and urged the court to allow the appeal.
15. The 1st respondent submitted that the appellant moved the trial court through an application dated 14th September 2022 seeking to have its name struck out from the proceedings. The said application was dismissed and the appellant did not appeal against it. That the trial magistrate proceeded to set the matter for hearing and the appellant participated in the hearing, thus the trial court did not err. That the 2nd respondent demonstrated that he was insured and he issued a third-party notice to the appellant who filed its defense, albeit one that merely denies liability.
16. She relied on the case of Peter Ngigi Kuria & another (Suing as the legal representatives of the Estate of Joan Wambui Ngigi) v. Thomas Ondili Oduol & another [2019] eKLR and stated that the evidence adduced was uncontroverted by the appellant. She urged that the findings of the trial court on quantum should be upheld and she relied on the case of Gitobu Imanyara & 2 others v Attorney General [2016] eKLR. She stated that the appellant did not make any submissions on quantum, thus the findings should not be revised.
17. The 2nd respondent relied on Order 1 Rule 15 of the Civil Procedure Rules and submitted that he was at liberty to seek indemnity from his insurer through the suit. That the appellant's application to be removed from the proceedings was dismissed and it did not appeal against the said decision. That the appellant filed submissions before the trial court but it did not contest the issue of its joinder in the suit and that the same coming as a ground herein is an afterthought. That the issue of joinder



of the appellant as a party was already determined through the trial court's ruling delivered on 29th March 2023 and it remains valid. Additionally, he argued that the fact that the appellant is contesting excessiveness of the damages awarded, is a sign that it has abandoned its argument that it was wrongly enjoined in the suit. He argued that the award of damages by the trial court is inordinately low and it should be enhanced.

18. The issues for determination are as follows:

1. Whether the trial court erred in ordering the appellant to settle the decretal sum awarded to the 1st respondent;
2. Whether the findings of the trial court on liability and quantum should be set aside.

19. As a first appellate court, it is this court's duty to re-examine the evidence adduced before the trial court. In the case of *Williamson Diamonds Ltd and another v Brown* [1970] EA 1, the court held that:

“The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion.”

20. The first contentious issue is that the appellant does not think that it should have been enjoined in the trial court proceedings as a third party. When the 1st respondent sued the 2nd respondent, the 2nd respondent told the court that he had a comprehensive insurance cover on his motor vehicle and he issued a third-party notice to the appellant as his insurer. The appellant went on record and filed its defense and participated in the proceedings. At some point, it moved the court seeking that its name be struck out from the proceedings since it was wrongly enjoined. The court considered the application, dismissed it, and the hearing continued.

21. The appellant did not testify neither did it file any documents nor did it call any witnesses. The 2nd respondent testified that his motor vehicle's comprehensive insurance covered 2 passengers, evidence that the appellant did not controvert. The court found that the 2nd respondent was 100% liable for the accident and that he is entitled to full indemnification by the appellant, his insurer.

22. Order 1 Rule 15 of the Civil Procedure Rules provides for third-party proceedings and the circumstances under which a third party can be enjoined in the suit. It is under this provision that the 2nd respondent reeled in his insurer as a third party in the suit. Through its submissions, the appellant raised issues of the insurance contract existing between itself and the 2nd respondent. It argued that the insurance cover was one that is commercial in nature and it did not include any passengers.

23. This argument was raised at the trial court and through a ruling, the trial court dismissed the application. The cause of action between the 2 respondents was tortious in nature. That means that the findings on liability and quantum were determined as between the respondents and a decree was issued to that effect.

24. However, the cause of action between the 2nd respondent and his insurer in a case like this, only arises after the decree has been issued against the 2nd respondent. He should then sue his insurer through a declaratory suit for settlement of the decree. That is to say that the cause of action against the insurer only crystallizes when a decree has already been issued against the insured and not before. In the case



of Kenya Orient Insurance Limited v Otieno [2024] KEHC 7637 (KLR) the court explained this as follows:

“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. However, that can only happen if there is jurisdiction conferred on the court to hear such claims albeit they are claims arising from or as a consequence of a judgment and in effect, to give effect to a judgment or decree in those specific cases. 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.”

25. In this case, the insurer was wrongfully enjoined as a third party in the suit since its liability under Section 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act arises through a separate cause of action namely a declaratory suit. In other words, the appellant should not have been retained in the main suit as a third party but it should have been sued by its insured after he becomes a judgment-creditor.

26. Therefore, I find that the appeal succeeds with orders as follows:

1. The trial court order that the 3rd party (appellant) indemnifies the 2nd respondent/defendant for the damages arising from the suit is hereby set aside and substituted with a finding that ‘the 2nd respondent/defendant is liable to pay the 1st respondent/plaintiff the damages arising from the suit’;
2. Liability is upheld at 100% against the 2nd respondent/defendant;
3. The trial court’s findings on quantum are hereby upheld since the same were not challenged by the 2nd respondent/defendant.
4. The 2nd respondent/defendant is ordered to pay costs of the trial court suit to the 1st respondent/plaintiff and the appellant.
5. The appellant is also awarded the costs of the appeal. The same to be paid by the 2nd respondent.

27. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF NOVEMBER, 2024.

L. NJUGUNA

JUDGE

..... for the Appellant

..... for the 1st Respondent

..... for the 2nd Respondent

