



Sanlam Insurance Company Limited v Mutuku & another (Both suing as administrators of the Estate of the Late Peter Matheka Mutuku) (Civil Appeal E121 of 2022) [2024] KEHC 16749 (KLR) (27 November 2024) (Judgment)

Neutral citation: [2024] KEHC 16749 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E121 OF 2022
NIO ADAGI, J
NOVEMBER 27, 2024**

BETWEEN

SANLAM INSURANCE COMPANY LIMITED APPELLANT

AND

BENDETTAR KALONDU MUTUKU 1ST RESPONDENT

ANGELINA MUTHEU MUTUKU 2ND RESPONDENT

**BOTH SUING AS ADMINISTRATORS OF THE ESTATE OF THE LATE PETER
MATHEKA MUTUKU**

*(Being an Appeal from the Judgment of Hon. E. Keago (PM)
in Machakos CMCC. No. 600 of 2019 delivered on 21/7/2022)*

JUDGMENT

Background

1. The Plaintiff/Respondent sued the Defendant/Appellant vide a Plaint dated 25/9/2019 seeking for :-
 - a. A declaration that the Defendant is liable to satisfy the full decretal sum in Machakos High Court Civil Suit No. 33 of 2015 and interest accruing thereon since the date of the judgment.
 - b. An order directing the Defendant to pay the balance of the Decretal sum in s are bound to satisfy the full decretal sum in High Court of Kenya at Machakos Civil suit No. 33 of 2015 and interest accruing thereon since the date of the judgment.
 - c. Costs of the suit and interest at court rate from the time of filing suit.
2. The Defendant was served with the summons to enter appearance and did file its defence dated the 14/12/2019.



3. The matter after compliance with order 11 was set down for hearing.
4. The Plaintiff Benedetta Kalondu testified on 25/11/2021 and adopted her statement recorded and dated on 25/9/2019 as evidence in chief. She also produced her claim supporting documents as PEX1-PEX6 in the matter. She produced the further list of documents as PEX.7 to PEX.8. She identified the last document as MFI-9. The Plaintiff stated that she was paid a sum of Kshs.3,000,000/= and that there was a balance of Kshs.5,000,000/=. She admitted that the victims of the accident were many. She identified the Policy Number as 021/070/1/233503/2014/07. She therefore sought to be paid the balance of Kshs.5,000,000/=.
5. On cross-examination, she stated that the judgment was for Kshs.8,000,000/= and the insurance had paid Kshs.3,000,000/=. She admitted that the insured had not paid her any monies and she had not moved to execute against him. She stated that in the parent suit they had issued Statutory Notices to the Defendant. That marked the close of the Plaintiff's case.
6. The defence called one witness Sharon Mubisi, a legal officer with the Defendant Company. She adopted her statement dated 20/07/2020 as her evidence in chief. She stated that they did settle the Plaintiff's claim at Kshs.3,000,000/= as per the statutory limit. She stated that there was a balance of Kshs.5,500,468/= which they had no obligation to pay. She stated that they have a contract with the insured to settle the claims up to Kshs.3 million. She stated that the balance was to be settled by the insured Patrick Mutunga Mwikya who she stated was fully aware of the Policy conditions.
7. On cross-examination, she stated that this matter is part of a series of Five (5) individuals. She stated that there are other cases but she didn't have the details. She stated that in a series of claims they can pay up to the limit of Kshs.20,000,000/=. She stated that she had not tabulated the payments but they had already paid the claims. She stated that Kshs.20,000,000/=is inclusive of costs. She admitted that she had not produced any documents for settlement. She confirmed that Patrick Mutunga Mwikya was the registered owner of the accident Motor Vehicle registration No. KBH 194Y and also the insured.
8. On re-exam, she stated that the Policy does not allow payment beyond Kshs.3 million as any payment will contravene the limit of Kshs.20,000,000/= inclusive of costs. She admitted that the Policy was for the period between 9/7/2014 to 8/7/2015.She stated that the Policy was based on the statutory provisions and agreement between the parties. That marked the close of the defence case.
9. The matter was set down for submissions.
10. The Plaintiff submitted that she has been able to prove that the Defendant was the insurer of the subject accident Motor Vehicle and therefore liable to settle and satisfy the judgment in the parent suit being Machakos HCCC No. 33 of 2015. They relied on the provisions of Section 10 of the Insurance Motor Vehicle Third Party (Risks) Cap 405 Laws of Kenya where the insurance is bound to satisfy the judgment as obtained by the Plaintiff where it had issued the Policy.

Section 10 (1) states as follows:

“If, after a policy of insurance has been affected judgment in respect of any such liability as 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 canceled, 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



costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

11. The Plaintiff submitted that the above provisions obligate the Defendant to satisfy their insured claim. In this matter, the insured was duly insured by the present Defendant hence entitled to satisfy the claim.
12. The Plaintiff submitted that the Defendant herein was served with the statutory notice and demand letter which evidence has not been challenged by the Defendant. The plaintiff relied on the case of Justus Mutiga & 3 Others -vs- Law Society Of Kenya & Anor (2018) Eklr And Monarch Insurance Co. Ltd V Moses Caleb Ochango & Anor (2019) eKLR.
13. The Defendant on the other hand did file submissions and urged the Court to find in their favour. From its submissions, the Defendant raised one issue majorly to be determined that's whether the Defendant is liable to settle judgment award beyond his statutory limits of Kshs.3,000,000/=. It was submitted that under Section 5 of Cap 405 Insurance (Motor vehicle Third Party Risks) Act, the insurer of motor vehicle against third party risks is not legally bound to pay any amount in excess of Kshs. 3,000,000/= in respect of a single third-party claim.
14. The Defendant relied on the finding of Odunga J in Gateway Insurance Co Ltd-vs-jamila Sulemman And Another [2018] eKLR where he stated that:

“My understanding of the said section is that in respect of a claim by one person the insurer's liability ought not to exceed Kshs. Three Million. In other words, the Court may only enter judgment against the insurer up to a maximum of Kshs. Three Million. That however does not mean that a person who is entitled to file a declaratory suit against the insurer but to whom an award has been given exceeding Kshs. Three Million is thereby prevented from filing a suit against the insurer. He can do so but his entitlement as against the insurer cannot exceed Kshs.3,000,000.00.
15. The defence then urged the court to find that the Defendant was not liable to settle any amount over the statutory limit of Kshs.3 million. The Defendant had cited case law in support of that position and urged the court to find that they have already settled their bit.
16. Upon considering the parties' submissions, the Learned Trial Magistrate delivered his judgment on 21/7/2022 in which he observed that the evidence by the Plaintiff in the matter had not been rebutted by any other evidence. The evidence of the Policy Number was contained in the police abstract. There is no other evidence that was led to show that the policy was not issued by the present Defendant. In any event, the standard of proof is on a balance of probabilities. There is equally no evidence that the Defendant had repudiated liability in the matters arising from the accident in question. The Judgment which was obtained has not been set aside by the Defendant nor has it been settled fully by the insured and/ or the present Defendant.
17. The Learned Magistrate was of the view that the only issue for consideration was whether the Defendant is not obligated to settle the excess of Ksh.3,000,000/= as set by the statute. He observed that the issue of limitation on the settlement of award was first attacked by way of a Constitutional Petition in Petition No. 148 of 2014 where the provision of Section 5 of Cap 405 was declared unconstitutional. As submitted by the Plaintiff, the matter was settled in the Court of Appeal at Nairobi Civil Appeal No. 141 of 2016 Justus Mutiga & Another vs The Law Society of Kenya & Another, where the court of Appeal held that:-

“In addition, those limitations go against the objectives of compulsory third-party motor vehicle insurance. Historically, the Principal Act was enacted in 1945 as the Motor Vehicle



Insurance. (Third Party Risks). Ordinate No. 12 of 1945, however, unlike the present system Section 10 of the Ordinance imposed a duty to the insurer to compensate fully an insurance claim as raised by the injured third party and as sanctioned by the courts. Where the amount was higher than what was covered by the insurance policy taken the insured was still obliged to fully compensate the injured third party but subsequently recover the excess from the insured. This is colloquially referred to as the Principle of excess in insurance in Kenya. That provision in our view managed to protect the injured third party while also protecting the interests of the insurer by allowing the Insurer to recover from the insured any excess amount without capping the amount which the insurer could pay as compensation.

Unfortunately, under the current system, the third party has been left under the mercy of not just the percentages imposed under the schedule but should there be any excess recoverable, he must contend with pursuing the insured personally. For example, in the case of Georgina Wangari Mwangi versus David Mwangi Muteti High court of Kenya Civil case no 40 of 2013, it was held that the insurance company is to pay a maximum of Kshs.3,000,000/=with any excess being payable by the insured party. The plaintiff in that court was awarded damages of Kshs.14,612,540.20 out of which only Kshs.3,000,000/= was payable by the Insurer, with the rest being recoverable from the insured.

Though the appellant contends that the limitations are justified no evidence was adduced to prove that justification. If anything, limiting the compensation payable by the underwriter who has received premiums, particularly in the face of an innocent third party who is armed with a court judgment is unjustifiable. It offends the very essence of insurance which is to ensure mitigation against risks that result in loss. In particular, it defeats the very objective of compulsory third-party insurance cover if an innocent victim is left to recover the bulk of his claim against the insured personally (See also the case of Monarch Insurance Company Limited v Moses Caleb Ochango & another [2019]eKLR

18. The Learned Magistrate in the end observed that, in the instant case, the defence was relying on the provisions of the law which have been declared unconstitutional and was further relying on a Contract premised on unconstitutional provisions. Hence their argument would not see the light of the day. He therefore found that the Plaintiff had proved her case and ordered that the Defendant was obligated to settle the balance of the decretal sum plus all the accrued interest from the date of the decree until payment in full, hence the Defendant was bound to satisfy and or honour the balance of the judgment entered in Machakos HCCC No.33 of 2015 together with costs and interest.
19. Being aggrieved by the trial court's judgment above, the Defendant/Appellant lodged this appeal vide a Memorandum of Appeal dated 19/8/2022 raising 3 grounds of appeal as follows:-
 1. The learned Chief Magistrate erred in Law and in fact by making a declaration that the insurance company limited should pay the plaintiffs Kshs.5,500,468/- in spite of the fact that the appellant had already settled Kshs.3,000,000/-, which was the statutory limit as well as contractual.
 2. The learned trial magistrate erred in law and fact by declaring that section 10 of the Insurance Motor Vehicle Third Party (Risks) Cap 405 laws of Kenya as unconstitutional yet such a determination was not within the jurisdiction and the court.
 3. The learned chief magistrate erred in law and in fact by deciding that the appellant should pay the respondent the balance of the decretal sum which is in excess of Kshs.3,000,000/-as this is illegal.



20. The Appellant prays that the lower court judgment delivered on 21/7/2022 be set aside or the suit for the claim of Kshs.5,500,468 which is the sum above the contractual and statutory limit provided by the law.
21. Parties were directed to canvas the appeal by way of written submissions. The Appellant's submissions are dated 22/1/2024 whereas the Respondents submissions are dated 16/11/2023.
22. This being the first appellate court, it is my duty under Section 78 of the Civil Procedure Act to subject the whole evidence to a fresh and exhaustive scrutiny and make my own conclusions about it bearing in mind that I did not have the opportunity of seeing and hearing the witness first hand. (See *Seascapes Ltd v. Development Finance Company of Kenya Ltd* [2009] KLR, 384)
23. I have carefully considered the record of appeal, the rival submissions by parties' counsel, the authorities cited by each counsel and the applicable law. The grounds of appeal can be collapsed into two major issues for determination by this court:-
 - i. Whether the Learned Magistrate erred in law and fact by declaring that Section 10 of the Insurance Motor Vehicle Third Party (Risks) Cap 405 laws of Kenya as unconstitutional yet such a determination was not within the jurisdiction and the court.
 - ii. Whether the Appellant should pay the Respondents Kshs.5,500,468/- in spite of the fact that the Appellant has already settled Kshs.3,000,000/-

Whether the Learned Magistrate erred in law and fact by declaring that Section 10 of the Insurance Motor Vehicle Third Party (Risks) Cap 405 laws of Kenya as unconstitutional yet such a determination was not within the jurisdiction and the court.

24. Having carefully perused the judgment of the trial court, I have not come across anywhere the Learned Magistrate is alleged to have declared Section 10 of the Insurance Motor Vehicle Third Party (Risks) Cap 405 laws of Kenya as unconstitutional. In his judgment the Learned Magistrate only observed that the defence had relied on the provisions of the law which have been declared unconstitutional and were further relying on a contract premised on unconstitutional provisions. He never made any declaration on unconstitutionality of any provision of the law. This ground of appeal is therefore misplaced and baseless. In the circumstances the jurisdiction of the Learned Magistrate in that regard cannot be challenged on this appeal and the same is without merit.

Whether the Appellant should pay the Respondents Kshs.5,500,468/- in spite of the fact that the Appellant has already settled Kshs.3,000,000/-

25. Section 4 of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 provides that all motor vehicles are to be insured against third party risks other than those owned by government or ordinarily used for agricultural activities. Then Section 5 stipulates requirements in respect of insurance policies. The Section is reproduced here for clarity-

Requirements in respect of insurance policies:

In order to comply with the requirements of Section 4, the policy of insurance must be a policy which :-

- a. is issued by a Company which is required under the Insurance Act, 1984 (Cap. 487) to carry on motor vehicle insurance business; and
- (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.

26. Section 5 (b) (iv) clearly stipulates that insurance companies shall not be required to cover liability of any sum in excess of Three Million Shillings, arising out of a claim by one person.
27. An insurance cover is a contract between two parties. Under the freedom to contract, Insurance Companies can cover any extent of liability subject to the minimum liability as above, as long as the insured is willing to pay the premium.
28. A copy of the policy of insurance No. 021/070/1/233503/2014/07 between the Appellant and the Insured (Defendant in the primary suit one Patrick Mutunga) is on record. I have had the opportunity to look at the said policy and under the clause for Limits of liability and the following is what is captured: -
 - A. In respect of any person (other than a passenger being carried by reason of or pursuance to a contract of employment)
being carried in or upon entering or getting onto or alighting from the motor vehicle
 - i. in respect of death of/or bodily injury to any person...Kes.3,000,000
 - ii. in respect of a series of claims arising out of one event Kes.20,000,000
29. The Respondents state that the court in Machakos High Court Civil Suit No. 33 of 2015 delivered judgment in their favour in the sum of Kshs.8,005,468/ = however the Appellant only paid a sum of Kshs.3,000,000 and have since failed to settle the balance of Kshs.5,005,468/=. The Respondents invite this court to take judicial notice that of the fact that this matter is not a single claim as there were other matters arising from the same accident which occurred on 10/7/2014 these being Machakos CMCC 803 OF 2014 David Mutinda Al Giza Automobiles & Anor and Machakos CMCC No. 112 of 2015 Joshua Maingi Munyoki v Al Giza Automobiles & Anor and copies of a judgment and decree respectively are on record. That in all the above matters, the total decretal amount is approximately Ksh.10,77,478/= which is nowhere near the Kshs.20,000,000/- and that in the circumstances, the Appellant has to fulfil its contractual obligation in terms of paying up to Kshs.20,000,000/= in respect of a series of claims arising from one event. Therefore, the Appellant ought to settle the decretal balance of Ksh.5,005,468/ =.
30. On the other hand, the Appellant maintains that the Respondents have already been paid Kshs.3,000,000/= and should not be paid any amount above that pursuant to the provisions of Section 5 (b) (iv) of Cap 405.



31. In determining this second issue, I have read through the Policy Cover herein and the proceedings before the trial court. In cross-examination, the Appellant's witness confirmed that the matter herein is part of a series of Five (5) individuals. She confirmed that there are other cases but she didn't have the details. She stated that in a series of claims they can pay up to the limit of Kshs.20,000,000/=. She stated that she had not tabulated the payments but they had already paid the claims. She stated that Kshs.20,000,000/=is inclusive of costs. She admitted that she had not produced any documents for settlement. She confirmed that Patrick Mutunga Mwikya was the registered owner of the accident Motor Vehicle registration No. KBH 194Y and also the insured.
32. I note that in the Appellant's submissions before this court at page 4 paragraph 1, the Appellant submits and agrees that the Policy clearly shows that in the circumstances one is to pay Ksh.3 million for a single event and for a series of events for one motor vehicle should not exceed Kshs.20,000,000/=.
33. In this court's view, the Policy of Insurance Cover herein did not limit the insurer's liability to Kshs.3,000,000/=. They had contracted to cover a higher liability of up to Kshs.20,000,000/= in respect of a series of claims arising out of one event and that is exactly what happened in the instant matter.
34. The issue of payable insurance limit was considered in the case of Law Society of Kenya v Attorney General & 3 Others (2016) eKLR where the court held as follows:-
- “...I am of the view that, the judgments being rendered by the court are not in any way being legislated by section 5(b) (iv) of the Principal Act. 73. What the Principal Act has done is cap the amount of money that the insurer pays to the injured person. Nothing in the Principal Act stops a litigant or the injured person from pursuing a claim against the insured individual where an award in excess of the amount recoverable from the insurer is made.
74. I hasten to add that the provision as to the mandatory insurance cover of the amount of Kshs. 3,000 ,000/= does not in any way prohibit any insured who may be minded to source and seek a higher cover from agreeing with the insurer on such cover, subject of course to a higher premium and other agreement on the terms of the policy.
75. I consequently find nothing unconstitutional with the provisions of Section 5(b) of the *Insurance (Motor Vehicles Third Party Risks) Act*(Cap 405).”
112. From the above decision it is clear the issue raised herein was subject of Court's decision and the provision was found not to be unconstitutional and further it was held nothing precludes an insured from seeking for a high cover from the Insurer who equally has a right to charge higher premiums.
35. There is no dispute as to the existence of the Policy of Insurance herein whose terms are binding to the Parties therein. The Appellant is bound to comply with the terms of the said policy. I am in agreement with the decisions in Eslon Plastics (K) Limited v National Water Conservation & Pipeline Corporation [2014] eKLR; Gatobu M'Ibuutu Karatho v Christopher Muriithi Kubai [2014] eKLR and National Bank of Kenya Ltd V Pipe Plastic Samkolit (K) Ltd and another (2002) EA 503 that a court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. This does not however take away the duty of a party that alleges to prove.



36. The Appellant had a duty to prove that the instant matter which falls amongst other series of matters as identified hereinabove is exempted from being paid in line with the provisions of Clause A (ii)- of the policy of insurance in respect of a series of claims arising out of one event Kes.20,000,000.
37. Accordingly, this court finds that the Appellant is obligated to pay the decretal balance of Kshs.5,000,468 to the Respondent.
38. The appeal is therefore dismissed with costs.

JUDGMENT WRITTEN, DATED & SIGNED AT MACHAKOS THIS 27TH NOVEMBER 2024

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 27TH NOVEMBER 2024

