



REPUBLIC OF KENYA



**Directline Assurance Co Ltd v Mwangi (Civil Appeal 527 of 2018)
[2023] KEHC 21875 (KLR) (Civ) (16 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21875 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 527 OF 2018

AN ONGERI, J

AUGUST 16, 2023

BETWEEN

DIRECTLINE ASSURANCE CO LTD APPELLANT

AND

GEOFFREY NJOGU MWANGI RESPONDENT

*(Being an appeal from the judgment and decree of Hon. P. Muboli
(SRM) in Milimani CMCC no. 6604 of 2015 delivered on 3/10/2018)*

JUDGMENT

1. The respondent in this appeal, Geoffrey Njogu Mwangi (hereafter referred to as the respondent) filed a declaratory suit against the appellant Directline Assurance Co Ltd (hereafter referred to as the appellant only) seeking a declaration that the appellant was liable to pay the respondent general damages, special damages and loss of earnings as a result of serious injuries the respondent sustained on August 31, 2008 while aboard motor vehicle registration no KAP 568P which was insured by the appellant.
2. The respondent obtained a judgment against the appellant's insured in Milimani CMCC no 6 of 2012 as follows;

General damages -2,000,000

Special damages - 133,710

Future medical expenses - 600,000

Loss of earnings - 22,500



Total - 3,071,248.80

3. The respondent filed the declaratory suit after judgment was entered in CMCC no 6 of 2012 against the appellant's insured.
4. The applicant filed this appeal on the following grounds;
 - i. That the learned magistrate erred in law and in fact in holding that the appellant is liable to pay a decretal sum of ksh 4,686,775/= in relation to a claim of third party injury yet Section 5(b) (iv) of the *Insurance (Motor Vehicle Third Party Risks) Act* (Cap 405 Laws of Kenya) limits any judgment for such a claim against an insurer to ksh 3,000,000/=.
 - ii. That the learned magistrate erred in law and in fact when he held that Section 5(b) (iv) of the *Insurance (Motor Vehicle Third Party Risks) Act* (Cap 405 Laws of Kenya) was enacted in 2013 and was therefore inapplicable in the suit before him yet the said provision of law came into force in January 1, 2007 after being enacted under the provisions of section 34 of the Finance Act 2006 (Act no 10 of 2006) and as such the learned magistrate arrived at the wrong conclusion in law.
 - iii. That further, the learned magistrate erred in law and in fact when he purported to avoid the mandatory statutory provisions of section 5(b) (vi) of the *Insurance (Motor Vehicle Third Party Risks) Act* by applying a retrospective interpretation of the said statute in violation of sections 13 and 19 of the *Interpretation and General Provisions Act* (Cap 13 Laws of Kenya) which required the learned magistrate to apply the statute as currently enacted by parliament.
 - iv. That the learned magistrate erred in law and in fact by admitting hearsay evidence from the respondent to counter primary evidence from the appellant which proved that the respondent – through his advocates – had been paid kshs 3,000,000/= in full and final settlement of the claim that was the subject of the declaratory suit before the learned magistrate.
 - v. That the learned magistrate erred in law and in fact and further misdirected himself in failing to appreciate that under sections 107 and 109 of the *Evidence Act* (Cap 80 Laws of Kenya), the incidence of proof had shifted to the respondent when it was demonstrated by the appellant that the respondent advocates had been paid kshs 3,000,000/= and as such, the learned magistrate erroneously failed to hold that the respondent failed to discharge the burden of proof required to reach a conclusion that no moneys had been paid by the appellant to the respondent.
 - vi. That the learned magistrate erred in law and in fact by making a finding that was completely at variance with the weight of the evidence adduced.
 - vii. That the learned magistrate erred in law in disregarding the appellant's submissions and the numerous binding authorities cited by the appellant and in doing so, failed to observe the doctrine of stare decisis thereby basing his judgment on erroneous principles of law.
5. The parties filed written submissions as follows; the appellant submitted that Section 5 (b) (iv) of the *Insurance (Motor Vehicle Third Party Risk) Act* limits the sums that can be recovered from a single person to 3 million. The origin of the limitation was stated in the *Law Society of Kenya v Attorney General & 3 Others* [2016] eKLR as follows

“Section 5(b)(iv) of the *Insurance (Motor Vehicles Third Party Risks) Act* (Cap 405) Laws of Kenya provides that the policy of insurance under the Act need not be a policy of which liability is in excess of the sum of Kenya shillings Three Million , arising out of a claim by



one person. This particular proviso was enacted through the Finance Act, 2006 and came into operation on January 1, 2007 as provided under section 1 of the Finance Act, 2006.”

6. It was therefore the appellants submission that the learned magistrate in her finding made a declaration that the defendant is liable to pay the decretal amount of Kshs. 3,071,248 plus costs and interest at court rates is contrary to section 5 (iv) (b) of the *Insurance (Motor Vehicle Third Party Risk) Act*.
7. This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether or not to support the findings of the trial court.
8. The appellants further submitted that it was the respondent’s case that the defendant did not pay any money, despite the calling DW2 who testified in support of their case and adduced documents in support of the same. It then followed that the burden of proof had shifted to then to prove that they had not done so. The advocate for the respondent herein failed to produce any account statement to confirm that the funds did not reach his advocates since the burden of proof had shifted. The respondent testified on hearsay evidence which the court adopted and the trial court held that payment to the respondent’s counsel of Kshs 50,000 was made however payment of Kshs 2,949,144 was not made yet both payments were made to the same account.
9. The appellant submitted that the trial court therefore erred in failing to hold that the burden of proof had shifted to the respondent to prove that the account paid into, which bears their advocates name had not received the funds stated by DW2 and a mere denial did not satisfy the burden placed upon them to prove.
10. The respondent submitted that trial court did not err in its interpretation and application of Sections 5 (b) and (10) of *Cap 405* Laws of Kenya. The respondent argued that judgment in the substantive suit vide Nairobi HCC no 6 of 2012 was entered on April 24, 2015 for the sum of Kshs 2,756, 210/= plus costs and interest which was within the provisions of Section 5 (b)'s of Cap 405 capping at Kshs 3 Million. That it is as a result of the appellant's refusal to honor their statutory obligations under Section 10 of *Cap 405* that the decretal amount awarded by the court as April 24, 2015, accrued and continues to accrue interest.
11. The respondent submitted on the issue as to whether payment was made to the respondents advocates that the maxim of who alleges must prove applied.
12. The respondent submitted that from the pleading, affidavits and evidence the appellant presented inconclusive, evasive and contradictory evidence before the trial court on the issue of the alleged payment and failed to discharge the burden of proof. The appellant ought to have shown how they obtained the plaintiff’s advocate’s bank account and produce bank statements to confirm the alleged payment and it failed to do so. The trial magistrate therefore applied the correct principle in holding that the appellant had failed to discharge the burden of proof on payment of Ksh 3,000, 000/= to the Respondent’s advocates.
13. The issues for determination in this appeal are as follows;
 - i. Whether the judgment of the trial court offends Section 5(b) (iv) of the *Insurance (Motor Vehicle 3rd Party Risks) Act* Cap 405 Laws of Kenya.
 - ii. Whether the respondent had been paid kshs.3000,000 in full and final settlement of the claim.
 - iii. Whether the trial magistrates judgment was based on wrong principles.



14. On the issue as to whether the judgment offends mandatory provisions of law, I find the mount of judgment was not less than the Kshs 3,000,000 capping when the judgment was entered after the cause of action arose. Section 5 (b) (iv) of the *Insurance (Motor Vehicle Third Party Risk) Act* commenced on 1/1/2007.
15. I find that the judgment in the substantive suit vide Nairobi HCC no 6 of 2012 was entered on April 24, 2015 for the sum of Kshs 2,756, 210/= plus costs and interest which was within the provisions of Section 5 (b)'s of *Cap 405* capping at Kshs 3 Million.
16. Further, it is also not in dispute that as a result of the appellant's refusal to honor their statutory obligations under Section 10 of *Cap 405* that the decretal amount awarded by the court as April 24, 2015, accrued and continues to accrue interest.
17. On the issue as to whether the respondent was paid kshs 3,000,000 in full at final settlement it was the duty of the appellant to prove and he did not do so.
18. Section 107 of *Evidence Act* provides that;
 - “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove 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.”
19. The same was enunciated by Justice Majanja in *Evans Otieno Nyakwana v Cleophas Bwana Ongaro* [2015]eKLR where he said as follows;

“...As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107 (1) of the *Evidence Act* (Chapter 80 of the Law of Kenya)”
20. On the issue as to whether the trial court's judgment and decree was based on wrong principles, again I find that it was a declaratory suit and the said issues were not raised in the primary suit.
21. I find that the appeal herein lacks in merit and I dismiss it with costs to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 16TH DAY OF AUGUST, 2023.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

