Britam General Insurance Company (K) Limited v Nyangau & another (Suing as the legal representative of the Estate of Wycliffe Osinyo Sagini (Deceased)) (Civil Case 220 of 2019) [2022] KEHC 13313 (KLR) (20 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13313 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE 220 OF 2019

OA SEWE, J

SEPTEMBER 20, 2022

BETWEEN

BRITAM GENERAL INSURANCE COMPANY (K) LIMITED .... APPELLANT

AND

EUNICE NYABOKE SAGINI .... 1ST RESPONDENT

LAZARUS SAGINI NYANGAU .... 2ND RESPONDENT

SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF WYCLIFFE OSINYO SAGINI (DECEASED)

RULING

1. Before the court for determination is the notice of motion dated November 24, 2021. It was brought by the respondents under section 3 and 3A of the *Civil Procedure Act*, chapter 21 of the Laws of Kenya and order 45 of the Civil Procedure Rules, for orders that:

    a. The court be pleased to review its judgment delivered on the September 28, 2021 and determine the issue of costs and interest payable on the principal sum of Kshs 3,000,000/= which the court determined as the sum payable;

    b. The court do order the appellant to pay the costs and interest as prayed for in the plaint, as decreed by the subordinate court on November 25, 2019; and,

    c. That the appellant do pay the costs of the application.

2. The application was premised on the grounds that the lower court awarded the respondents costs and interest in its decree of November 25, 2021; and that the issue of costs and interest was neither part of the appeal, nor was it determined by the court. Thus, the respondents contended that, since the

judgment of the court is silent on the issue of costs and interest, that ambiguity is an error on the face of the record which should be clarified by way of review.

3. The application was supported by the affidavit of the 1st respondent, Lazarus Sagini Nyangau, sworn on November 24, 2021, to which he annexed copies of the judgment and decree of the lower court; copies of the judgment and decree of the court (Hon Chepkwony, J), as well as a copy of the letter by which the decretal sums were placed in a joint interest earning account. The 1st respondent further averred that unless the judgment is reviewed, the estate of the deceased will be unfairly denied funds that are truly and justly due to it as the successful litigants.

4. In response to the application, the appellant filed the following grounds of opposition through the law firm of CB Gor & Gor Advocates:

   a. That the application lacks merit, is an abuse of the process of the court and is clearly an afterthought;

   b. That the respondents are misleading the court since the appeal was not solely on the issue of repudiation of the policy but also challenged the ruling of the learned Senior Principal Magistrate for having struck out the appellant's defence on the ground that it did not raise any triable issues;

   c. That it is evident from the judgment delivered on September 28, 2021 by this court (Hon Chepkwony, J) that the issue of costs was addressed at paragraph 30 of the judgment;

   d. That it is evident that the application is an abuse of the court process as it seeks to challenge the merits of the judgment delivered by this court on September 28, 2021 on the aspect of award of costs and interest which can only be done by way of appeal and not under the guise of a review application;

   e. That the application is clearly an abuse of the court process since the respondents seek to recover more than Kshs 3,000,000/= yet the law is clear that the appellant as an insurer is not obliged to pay any amount above Kshs 3,000,000/= nor can the respondents who were decree-holders recover more than that since their claim was brought pursuant to the *Insurance (Motor Vehicles Third Party Risks) Act*, cap 405 of the Laws of Kenya;

   f. That the respondents have not demonstrated to this court that there was some mistake or error apparent on the face of the judgment on the part of the court to warrant the review orders being sought since the issue of costs and interest are discretionary awards and the court gave reasons why it capped the award at the sum of Kshs 3,000,000/= in the judgment dated September 28, 2021;

   g. That the respondents have not established a case to warrant the orders sought;

   h. That the application is misconceived, incompetent and devoid of all material facts.

5. Directions were given on March 16, 2022 that the application be canvassed by way of written submissions. Although Mr Adede, learned counsel for the appellant complied and filed his written submissions on June 5, 2022, Mr Nyabena for the respondents appears not to have complied as there appear to be no such submissions on the file. Mr Adede proposed the following issues for determination:

   a. Whether there has been inordinate delay in bringing the application dated November 24, 2021;

   b. Whether the respondents have met the threshold for granting the orders sought;

c. Whether the application dated November 24, 2021 is an abuse of the court process;

d. Whether any prejudice will be suffered by the parties herein.

6. Mr Adede took issue with the fact that the instant application was filed two months after the impugned judgment, and served three months later on January 26, 2022. Counsel therefore submitted that, since the respondents have not handled this matter with the necessary alacrity, they are not entitled to the orders sought. He relied on *Lawi Kiplagat v National Housing Corporation [2017] eKLR* for the proposition that even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter.

7. On whether the respondents have met the threshold for review for purposes of section 80 of the *Civil Procedure Act* and order 45 of the *Civil Procedure Rules*, Mr Adede submitted that, since the court dealt with the issue of costs and interest at paragraph 30 of the judgment, the same cannot be treated as an error apparent on the face of the record in so far as it was a conscious exercise of discretion on the part of the court. He relied on *National Bank of Kenya Ltd v Ndungu Njau [1997] eKLR* and *Moses Kipkolum Kogo v Nyamogo & Nyamogo Advocates [2004] eKLR* as to what amounts to an error apparent on the face of the record. Mr Adede reiterated the appellant's stance that it was not obliged to pay anything more than the statutory limit Kshs 3,000,000/=; and in support of that assertion, counsel relied on *Africa Merchant Assurance Company Ltd v William Muriithi Kimaru [2016] eKLR* and *Kenya Orient Insurance Limited v Zachary Nyambane Omagwa [2021] eKLR*.

8. Thus, it was the submission of Mr Adede that the only avenue open for the respondents was to appeal the judgment of the court on the aspect of interest and costs; and therefore that the instant application is akin to an invitation to the court to sit on appeal in respect of its own judgment. He added that litigation ultimately has to come to an end and that it is unjustifiable to drag this matter further. He consequently prayed for the dismissal of this appeal with costs to the appellant.

9. I have given due consideration to the application, the affidavits filed in respect thereof, as well as the written submissions filed on behalf of the appellant. The background facts were well set out in the judgment of the court dated September 28, 2021 and need no reiteration; save to say that the appellant's appeal was dismissed with costs to the respondent. Hence, what is in issue in the instant application is the question whether the respondents are entitled to interest and costs incurred before the subordinate court.

10. Section 26(1) of the *Civil Procedure Act*, is explicit that:

"Where and in so far as a decree is for payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of payment or to such earlier date as the court thinks fit."

11. It was in the light of the above provision that the lower court awarded the respondents the principal sum of Kshs 6,339,895/= as well as costs and interest as prayed in their plaint. In their plaint dated January 25, 2019, the respondents had prayed for interest at 14% per annum from October 31, 2018 until payment in full. They had similarly prayed for costs and interest on costs.

12. Needless to say that the rationale for an award of interest on the principal sum is to compensate a plaintiff for the deprivation of any money that is rightfully due to it through the wrong act of a

defendant. Thus, in *Highway Furniture Mart Ltd v Permanent Secretary Office of the President & Another [2006] eKLR* the point was made thus:

"The justification for an award of interest on the principal sum is to compensate a plaintiff for the deprivation of any money, or specific goods though the wrong act of a defendant."

13. Likewise, in *Lata v Mbiyu* [1965] EA 392 it was held that:

The award of interest on a decree for payment of money for a period from the date of the suit to the date of the decree is a matter entirely within the court's discretion, by section 26 of the *Civil Procedure Act* but such discretion must, of course, be judicially exercised...It is clearly right that in cases where the successful party was deprived of the use of goods or money by reason of a wrongful act on the part of the defendant, the party who has been deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest."

14. And, in connection with the aforestated provision, the Court of Appeal had occasion to express itself thus in *Ajay Indravadan Shah v Guilders International Bank Ltd [2003] eKLR*:

This section, in our understanding, confers upon the court the discretion to award and fix the rate of interest to cover three stages, namely:

1. the period before the suit is filed;
2. the period from the date the suit is filed to the date when the court gives its judgment, and
3. from the date of judgment to the date of payment of the sum adjudged due or such earlier date as the court may, in its discretion, fix.

"We further understand these provisions to be applicable only where the parties to a dispute have not, by their agreement, fixed the rate of interest payable. If by their agreement the parties have fixed the rate of interest payable, then the court has no discretion in the matter and must enforce the agreed rate unless it be shown in the usual way either that the agreed rate is illegal or unconscionable, or fraudulent."

15. The appellant appears to have no quarrel with the fact that the respondents were awarded interest and costs. Its argument was however premised on the fact that section 5(b)(iv) of the *Insurance (Motor Vehicles Third Party Risks) Act* caps compensation by insurers at Kshs 3,000,000/= . That provision states as follows:

5. 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 harm 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 requires to cover—

...

iv. liability of any sum in excess of three million shilling arising out of a claim by one person..."

16. The court agreed with the appellant's posturing and ordered thus at paragraph 30 of the judgment dated September 28, 2021:

> The upshot is that the appeal is dismissed with costs to the respondent. The court proceeds to decline the application to set aside the decision of the order striking out the appellant's amended statement of defence. However, the appellant is directed not to pay Kshs 6,339,895/= as directed by the trial court since section 5(b)(iv) of the *Insurance (Motor Vehicles Third Party Risks) Act* sets the limit that an insurer can only pay a maximum of three million (3,000,000/=) of a decretal amount in an order directing settlement to one person..."

17. Hence, the issue arising for determination is whether, as posited by the respondents, a justifiable case has been made for review under order 45 rule 1 of the *Civil Procedure Rules*.

    That provision states:

    1. any person considering himself aggrieved-

        a. by a decree or order from which an appeal is allowed but from which no appeal has been preferred, or

        b. by a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

18. Thus, from the aforesaid provision, it is plain that a party seeking review is under obligation to demonstrate that:

    a. there has been discovery of new and important matter or evidence which after due diligence, was not within the applicant's knowledge or could not be produced at the material time; or

    b. that there is some mistake or error apparent on the face of the record; or

    c. that there was any other sufficient reason;

19. The respondents took the view that there is an error apparent on the face of the record with reference to the court's judgment, in that it did not provide for the payment of interest and costs of the lower court suit. Hence, the question to pose is whether this amounts to an error on the face of the record. What amounts to an error on the face of the record was discussed thus by the Court of Appeal in *Nyamogo & Nyamogo Advocates v Kago [2001] 1 EA 173*:

> "An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible

one, it cannot be an error apparent on the face of the record, though another view was also possible. Mere error or wrong view is certainly no ground for review although it may be for an appeal..."

20. Similarly, in *National Bank of Kenya Limited v Ndungu Njau (supra)*, the Court of Appeal had the following to say:

> "A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be ground for review."

21. In this instance, since the court awarded the respondents their costs of the appeal, it is plain that the omission to explicitly provide for costs of the lower court, which were awarded to the respondent is an error apparent on the record. That error, in my careful consideration has nothing to do with section 5(b)(iv) of the *Insurance (Motor Vehicle Third Party Risks) Act* for the simple reason that interest and costs do not constitute the principal sum. This was well articulated by Hon. Mulwa, J. in *Peter Gichihi Njuguna v Jubilee Insurance Co Ltd [2016] eKLR* as follows:

> The defendant submits that under the proviso (iv) of section 5(b), the total amount that the defendant ought to pay in an all inclusive sum should not exceed Kshs 3,000,000/= including costs and interest. This court begs to differ with the above submission. The defendant had failed to honour its obligations placed on it by the above section. The plaintiff has spent money and time to pursue the payment by filing of this declaratory suit the defendant at all times knew or ought to have known that it was its obligation to settle the judgment of the primary suit – even the capped limit. Indeed it made an offer to pay which offer was accepted but did not pay and no explanation was tendered for the failure to pay. The suit had to proceed to full hearing. I have carefully read the section under review. The drafters of the said Act No 10 of 2006 in my considered view, did not envisage a situation, where the Insurance Company would fail to pay the claim if all conditions are met as is the case in this present case. To that extent, if by its failure, costs are incurred in pursuance of payment, the defendant ought to be penalised and condemned to pay costs to the plaintiff. Costs ordered by the court in its discretion cannot be construed to include the principle sum, in this case the capped sum of Kshs 3,000,000/=. It is trite that costs follow the event, unless otherwise ordered by the court. Section 27 of the *Civil Procedure Act* states:
>
> > "--- the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court shall have full power to determine by whom-–– such costs shall be paid ---- provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order."

22. In *Kiamuko & another (Suing as Administrators of the Estate of the Late Evans Kyalo Maundu - Deceased) v ICEA Lion General Insurance Co Limited [2022] KEHC 11682 (KLR)*, Hon Odunga, J (as he then was) took the same approach and held that:

> According to section 10 of the *act*, after a policy of insurance has been effected the insurer is liable to pay to the persons entitled to the benefit of a judgment any sum payable, 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. The section expressly states that the insurer is under an obligation to pay the sum under paragraph (b) of section 5 of the *act* 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. In our case the enactment relating to interest on judgements is section 27 of the *Civil Procedure Act*.

41. The respondent seems to be of the view that the statutory limit of Kshs 3,000,000.00 includes costs and interests and that where the award exceeds that amount then the insurer is not obligated to settle any amount over and above the same including costs and interests. With due respect, I beg to differ. Section 5 aforesaid only deals with liability in respect of the principal award. It does not contemplate interest or costs which follow the event. Accordingly, where the insurer, knowing well that it is liable to pay the said sum fails to do so and proposes to do so in a manner that does not satisfy the decree in question, as a result of which the offer is rejected, then he cannot escape payment of costs and interests. I therefore associate myself with Mulwa, J in *Peter Gichihi Njuguna v Jubilee Insurance Co Ltd [2016] eKLR*."

23. In the same vein, in *Law Society of Kenya v Attorney General & 3 others [2016] eKLR* it was made clear that the law does not prohibit an award in excess of Kshs. 3,000,000/= if that is what the justice of the case demands. The court observed that:

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...It only limits who pays how much by apportioning a maximum of Kshs. 3,000,000/= to be paid by the insurer and the additional if any by the insured."

24. Accordingly, the omission to provide for costs of the lower court suit as well as interest amounts, in my view, to an error on the face of the record that warrants correction under section 80 of the *Civil Procedure Act* and order 45 rule 1 of the *Civil Procedure Rules*. It is accordingly ordered that:

a. The application dated November 24, 2021 be and is hereby allowed with costs.

b. The judgment delivered herein on the September 28, 2021 be and is hereby reviewed and corrected to include an order that the appellant do pay the costs and interest as prayed for in the plaint and as decreed by the subordinate court on November 25, 2019;

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20TH DAY OF SEPTEMBER, 2022

OLGA SEWE

JUDGE