



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**CIVIL APPEAL NO.19 OF 2019**

**KENYA ORIENT INSURANCE LIMITED.....APPELLANT**

**- V E R S U S -**

**ZACHARY NYAMBANE OMAGWA.....RESPONDENT**

***(Being an Appeal from the Ruling and Order of Hon. G. O. KIMANGA***

***(SRM) delivered on 13/6/2019 in Kericho CMCC No.436 of 2018))***

**JUDGMENT**

1. In a Ruling delivered on 13/6/2019, the Trial Court struck out the Appellant's Defence and entered Summary Judgment in a declaratory suit for a liquidated sum of Kshs.5,066,825/= being a decretal sum in CMCC No.3 of 2017 together with costs and interest from 25/7/2018 being the date the Judgment was delivered.

2. The Respondent was awarded a sum of Kshs.5,066,825/= in CMCC No.3 of 2017 being the Primary suit which was filed against the Appellant's Insured.

3. The sum was in respect of injuries sustained in a Road Traffic Accident involving Motor Vehicle Registration No. KAN 601 X which was insured by the Appellant in which the Respondent sustained serious injuries.

4. The Appellant has appealed to this Court against the said Summary Judgment on the following grounds.

***(i) THAT the Application dated 25/1/2019 was allowed without any lawful justification and that the same did not meet the threshold of order 2 Rule 15 of the Civil Procedure Rules.***

***(ii) THAT the Defence filed by the Appellant raised triable issues.***

***(iii) THAT the sum of kshs.5,066,825/= is beyond the maximum statutory cap of Kshs.3 Million under Section 5(b)(iv) of the Insurance risks (Motor Vehicle 3<sup>rd</sup> party RISKS) Act Cap 405 laws of Kenya.***

***(iv) THAT the Trial Court erred in law and fact in holding that a Police Abstract is sufficient proof of the existence of the Insurance Policy of Motor Vehicle Registration No. KAN 601 X.***

***(v) THAT the Trial Court erred in failing to consider that whether requisite notices as required under section 10 (2) (a) of CAP 405 were properly served upon the Appellant by the Respondent.***

***(vi) THAT the Trial Court failed to rely on the submissions and authorities by the Appellant while over relying on the Respondent's submissions.***

5. The parties filed written submissions in the Appeal. The Appellant submitted that Section 5 (b) (iv) of the Insurance (Motor Vehicle 3<sup>rd</sup> Party Risks) Act provides that a policy in terms of this Section shall not be required to cover liability of any sum in excess of Three Million Shillings arising out of a claim.

6. The Appellant also submitted that Section 10 (1) of CAP 405 was also amended on 23<sup>rd</sup> January, 2014 to include the provision limiting liability to 3 Million and the Appellant is not obligated to pay more than the Three Million which has already been paid.

7. The Appellant submitted that the Trial Court relied on the Police Abstract and further hat there was no evidence adduced to prove that the

Appellant was the Insurer of Motor Vehicle Registration No.KAN 601 X via Police No.HGS/101/09745/2008/comp and further that the Police Abstract produced was a photo copy and no original was produced.

8. It was also submitted by the appellant that they were not aware of the Original Suit Kericho CMCC No.3 of 2017 until the declaratory suit was filed which is contrary to the statutory requirement that a notice be served upon the Appellant before filing suit as required by Section 10 (2)(a) of Cap 405.

9. The Appellant also submitted that the Defence raised triable issues and it ought not to have been struck out and further that no pleadings should be struck out as the power to strike out a pleading is discretionary and should be exercised with the greatest care and caution.

10. The Respondent opposed the Appeal on the following grounds:-

***(i) THAT it was filed without leave of the Court.***

***(ii) THAT part payment of the decretal sum is admission of liability and further that parties are bound by their pleadings.***

11. The Respondent submitted that the Appeal was filed without leave of the Court and the same is incompetent.

12. The Respondent further submitted that the Appellant has already made partial payment of the decretal sum and therefore the Appellant has admitted the claim under order 13 of the Civil Procedure Rules and further that the said limitation was not pleaded.

13. The Respondent urged the Court to dismiss the appeal and direct the Appellant to pay the balance of the decretal sum.

14. The issues for determination in this Appeal are as follows:-

***(i) Whether the Appeal herein is competent.***

***(ii) Whether the Summary Judgment should be set aside.***

***(iii) Who pays the costs of this Appeal?***

15. On the issue as to whether the Appeal is competent, the Respondent submitted that no leave was sought prior to the filing of the Appeal. I find that the Respondent raised a preliminary objection which was not allowed. The Appeal is competent.

16. On the issue as to whether the Summary Judgment should be dismissed, the Appellant submitted that the Insurance (Motor Vehicle 3<sup>rd</sup> Party Risks) Act Caps liability at 3 Million and further that the Respondent did not prove that the Appellant is the Insurer of Motor Vehicle Registration No.KAN 601 X and further that no Statutory Notice was served upon the Appellant as required by Law.

17. I find that the Appellant has already paid 3 Million and they have no basis for denying the claim.

18. I however agree with the Appellants that the amount of Kshs.3, 000, 000, paid is the maximum amount payable by the insurer under the Insurance (Motor Vehicle 3<sup>rd</sup> Party Risks) Act and the Respondent cannot compel the Appellant to pay more than the prescribed amount under the Act.

19. In **Civil Appeal no. 34 of 2016**, Justice Majanja held as follows; ***“The insurer is not obliged to pay any amount above Kshs. 3,000,000.00 nor can the decree-holder recover more than that. and they have no basis for denying the claim.”***

20. If there is any additional amount to be paid, then the same should be recovered from the insured. In **Law Society of Kenya v Attorney NBI Petition No. 148 of 2014 [2016]eKLR**, Justice Onguto held that

***“ In the end, I hold that the Principal Act does not exclude compensation to affect proprietary rights. 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 sum if any by the insured.”***

21. The court of Appeal in Civil Appeal 141 of 2016 further stated that ***“Unfortunately, under the current system, the third party has been left at 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 v. 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 Ksh.3, 000, 000 with any excess being payable by the insured party. The plaintiff in that case 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.”***

22. I find that the Appellant has already paid the three million and therefore this Appeal lacks in merit and I accordingly dismiss it with costs to the Respondent.

**Delivered, signed and dated at Kericho this 29th day of January, 2021.**

**A. N. ONGERI**

**JUDGE**