



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO. E192 OF 2020

DIRECTLINE ASSURANCE COMPANY LTD...APPELLANT

-VERSUS-

WILSON WANYOIKE NJOROGE.....RESPONDENT

(An appeal from the judgment and decree of the Chief Magistrates Court at Nairobi, Hon. D. O. Mbeja (Mr.) dated the 14th August 2020 in CMCC no. 4923 of 2018)

JUDGMENT

1. Wilson Wanyoike Njoroge, the respondent herein, filed an action before the Chief Magistrate's Court against the Directline Assurance Co. Ltd, the appellant herein whereof he sought for the following reliefs;

a. A declaration that the provisions of the Insurance (Motor Vehicle Third Party Risk) Amendment Act no. 50 f 2013, particularly Section 5(b) of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 Laws of Kenya which only came into force in 2014 cannot apply retrospectively to an accident that occurred on 7th September 2011.

b. A declaration that the defendant by virtue of being the insurer of motor vehicle KAZ 683F owned by the plaintiff, and by their conduct of even conceding and not questioning the issue of liability are under a duty to satisfy the whole judgment amount resulting from a third party claim in NAIROBI HCCC NO. 193 of 2016 Esther Mwele (Deceased) vs Wilson Wanyoike Njoroge and 2 others.

c. A mandatory injunction does issue compelling the defendant to settle the entire judgment amount in NAIROBI HCCC NO. 193 of 2015 Esther Mbite Mwele (Deceased) vs Wilson Wanyoike Njoroge and 2 others for kshs.4,025,600/= being 40% of the entire judgment sum based on the conceded liability by the defendant.

d. Any other relief that this court may deem fit to grant in the circumstance.

e. The costs of this suit.

2. It was the respondent's case that he had a valid insurance policy with the appellant over motor vehicle registration number KAZ 683F against third party risks. The aforesaid motor vehicle was involved in a road traffic accident on 7th September 2011 with motor vehicle registration no. KBA 677H/ZC which had stalled on the road.

3. A passenger in the respondent's motor vehicle registration no. KAZ 683F, one Esther Mbithi Mwele (deceased) was fatally injured in the accident and their legal representatives filed a compensatory suit against the respondent and two other vide **Nairobi H.C.C.C. no. 193 of 2016 Esther Mbithi Mwele (deceased) vs= Wilson Wanyoike Njoroge and 2 others**. Parties recorded a consent on liability with the respondent agreeing to shoulder 40% liability.

4. This court (Mboghohi J, as he then was) made an award of ksh.8,714,000/= representing both general and special damages plus interest and costs. In the end, the plaintiff in the High Court case (H.C.C.C. no. 193 of 2016) was entitled to be paid kshs.4,025,600/= being 40% of the entire judgment sum.

5. The appellant proceeded to pay the plaintiff a sum of ksh.3,000,000/= under Section 5(b) (iv) of the Insurance (Motor Vehicle Third Party Risks) Act leaving a sum of ksh.1,025,600/= as the outstanding judgment sum.

6. The respondent was prompted to file a declaratory suit against the appellant to compel it to settle the outstanding balance of the judgment sum. The appellant defended the declaratory suit. Hon. D. O. Mbeja (Mr.), learned Senior Resident Magistrate heard the suit and in the end he entered judgment in favour of the respondent vide his judgment delivered on 14th August 2020.
7. Being dissatisfied with the aforesaid decision, the appellant preferred this appeal and put forward the following grounds of appeal;
- a. **THAT the learned trial magistrate erred in law by holding that the appellant is liable to satisfy the entire decretal sum of kshs.4,025,600/= in relation to a claim for third party injury and death yet Section 5(b) (iv) of the Insurance (Motor Vehicle Third party Risks) Act (Chapter 405 Laws of Kenya) limits a judgment or such a claim against an insurer to kshs.3,000,000/=.**
 - b. **THAT the learned trial magistrate erred in law by issuing a mandatory injunction compelling the appellant to settle the entire decretal sum of ksh.4,025,600/= by refunding the respondent ksh.1,025,600/= which holding is contrary to the mandatory provisions of Section 5(b) (iv) of the Insurance (Motor Vehicle Third Party Risks) Act.**
 - c. **THAT the learned trial magistrate erred in law by holding that the respondent had failed to prove his case on a balance of probabilities but then went ahead to allow the respondent's case on a balance of convenience which standard is applied to rulings on interlocutory injunctions not judgments on main suits and in doing so arrived at the wrong conclusion in law.**
 - d. **THAT the learned trial magistrate erred in law and in fact by failing to make a finding on the motor vehicle policy insurance between the appellant and the respondent whose terms clearly defined the limit of the policy as kshs.3,000,000/= per claim by one person and in failing to do so arrived at the wrong conclusion.**
 - e. **THAT the learned trial judge erred in law and in fact by completely disregarding the appellant's statement of defence, the appellant's witness statement, evidenced adduced during trial and the appellant's submissions and the numerous binding authorities cited by the appellant thereby basing his judgment on erroneous principles of law.**
8. When the appeal came up for hearing, learned counsels appearing in this matter recorded a consent order to have the appeal disposed of by written submissions.
9. I have re-evaluated the case that was before the trial court. I have further considered the rival written submissions plus the authorities cited. Though the appellant put forward five grounds of appeal, I think the main issue which disposes of the whole appeal is whether Section 5(b) (iv) of the **Insurance (Motor Vehicle Third Party Risks) Act** is applicable to the instant claim against the respondent.
10. It is the submission of the appellant that the trial magistrate erred when he held that the appellant was liable to satisfy the entire decretal sum of ksh.4,025,600/= yet the respondent had failed to establish that his claim was not governed by Section 5(b) (iv) of the Insurance (Motor Vehicle Third Party Risks) Act. The appellant urged this court to hold that the aforesaid section could not apply retrospectively.
11. The respondent on the other hand has urged this court not to disturb the trial court's decision. The respondent argued that the trial court was correct in holding that the appellant is liable to settle the decretal sum of ksh.4,025,600/= and in compelling the appellant to refund ksh.1,025,600/= because the then applicable law being Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act before the amendment introducing Section 5(b) (iv).
12. It is also argued that the appellant made concessions in the suit without involving the respondent to settle the claim.
13. Having considered the rival arguments, it is not disputed that the Insurance (Motor Vehicle Third Party Risks) Act under Section 5(b) (iv) provides that a policy of insurance shall not be required to cover liability of any sum in excess of three million shillings arising out of a claim by a third party.
14. It is also not in dispute that the respondent had a third party insurance policy with the appellant covering the period of the accident.
15. It is further not in dispute that the Insurance (Motor Vehicle Third party Risks) Act was amended to introduce Section 5(b) iv) in which a claim by a single third party was capped at ksh.3,000,000/=.
16. The aforesaid section i.e Section 5(b) (iv) would come into effect as of January 2014. The cause of action arose on 7th September 2011, therefore the insurer's (appellant's) obligation to the respondent in the primary suit was guided by Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act, since the cause of action arose prior to the amendment of the Act.
17. With respect, the amendment cannot be applied retrospectively to cover the respondent's claim against the appellant. In sum, the insurer was under a mandatory statutory liability to first settle the judgment sum to the person entitled to the benefit of the judgment.
18. In the end, the learned Senior Resident Magistrate correctly entered judgment in favour of the respondent, therefore he cannot be faulted. Consequently, this appeal is found to be without merits, the same is dismissed with costs being awarded to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS

30TH DAY OF DECEMBER, 2021

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent