



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 35 OF 2016

PATRICIA MONA ANTONY & JOHN DENNIS

ANTONY MUSYOKA (*Suing as personal representatives*

***of the Estate of ANTONY MUSYOKA Deceased*).....PLAINTIFFS**

VERSUS

AFRICA MERCHANT ASSURANCE COMPANY LIMITED....DEFENDANT

JUDGMENT

1. In their plaint dated 12th February 2016, *Patricia Mona Antony* and *John Dennis Antony Musyoka* instituted a declaratory suit against the defendant *Africa Merchant Assurance Company Limited* seeking to have the defendant compelled to settle the decretal sum of KShs.6,122,379 decreed in favour of the plaintiffs against the defendant in HCCC No. 574 of 2010.
2. In the primary suit, the plaintiffs being personal representatives to the Estate of late *Antony Musyoka* had sued *Samuel Opot Omondi* as the 1st defendant and the *National Environment Management Authority* as the 2nd defendant claiming damages under the *Fatal Accidents Act (Chapter 31 of the Laws of Kenya)* and the *Law Reform Act (Chapter 26 of the Laws of Kenya)* following a road traffic accident on 14th May 2010 in which the deceased lost his life. They alleged that at the time of the accident, the deceased was lawfully travelling in motor vehicle registration number KBC 290L when it collided with motor vehicle registration number KAN 684U owing to the negligence of the drivers of both vehicles. After a full trial, judgment was entered for the plaintiffs against the 1st defendant in the sum of KShs.5,979,204 together with costs of the suit and interest from the date of judgment until payment in full.
3. When the 1st defendant failed or neglected to settle the decretal amount, the plaintiffs filed the current suit seeking relief under the *Insurance (Motor Vehicle Third Party Risks Act)*. They sought for a declaration that under *Section 10 (1) of the Insurance (Motor Vehicle Third Party Risks Act)* (hereinafter the Act), the defendant was liable to satisfy the decree issued in the primary suit. They also prayed for costs of the suit and interest.
4. In its statement of defence which was amended on 15th June 2016, other than making general denials, the defendant admitted that the 1st defendant in the primary suit was its insured and averred that it was ready and willing to partly satisfy the decretal amount by paying the plaintiff KShs.3,000,000 which was the maximum amount covered in the policy of insurance taken out by the 1st defendant.
5. When the suit came up for hearing, each of the parties called one witness in support of their respective cases. In her evidence, the 1st plaintiff fully adopted the witness statement she recorded and filed in court on 12th February 2016 as her evidence in chief which was a duplication of the averments made in the plaint. She was not cross examined by the defendant.
6. The defendant's witness Mr. *Oliver Kipchuma Mutai* who was its legal officer also adopted his brief witness statement which was filed together with the amended defence. The statement reiterated the defendant's claim that as per the third party insurance cover taken out by its insured, it was only liable to satisfy the decree issued in the primary suit upto a maximum of KShs.3,000,000 and nothing more. He produced the proposal form completed on behalf of the insured and the policy document as D Exhibits 1 & 2.
7. At the close of the hearing, learned counsel for the parties filed written final submissions which I have carefully considered alongside the pleadings and the evidence tendered by each party.
8. As can be seen from the summary of the pleadings and evidence adduced by the parties as stated above, the facts in this case are simple, straightforward and largely undisputed. Since the defendant has already admitted that at the time of the fatal accident involving the deceased

it had insured the 1st defendant in the primary suit against third party risks as required under *Section 4 (1) of the Act*, I find that the only issue for my determination in this case is whether under *Section 10 of the Act*, the defendant is liable to satisfy the decretal amount awarded to the plaintiff in full as contended by the plaintiffs or partly to a limit of KShs.3,000,000 as claimed by the defendant.

9. I have distilled the above issue as the only issue for my determination bearing in mind that the defendant having admitted liability to pay KShs.3,000,000 as per the insured's policy has by implication admitted that it was served with the appropriate statutory notice under *Section 10 (2) of the Act* and that prior to or within three months of the commencement of the primary suit, it had not obtained a declaration from the High Court to the effect that it was entitled to avoid the policy for non-disclosure or misrepresentation of material facts. I have also noted that none of the parties has alleged that the trial court's judgment was challenged on appeal.

10. Turning now to a consideration of the above issue, I wish to begin by observing that though the intention of Parliament in enacting the Act was to protect the interests of third parties injured in road accidents or their beneficiaries in the case of fatal injuries by providing a legal framework which guaranteed their compensation if they successfully prosecuted their claims against the tortfeasors, this objective has not been fully realized owing to the fact that *Section 4 (1)* which makes it compulsory for owners of motor vehicles to take third party insurance cover is made subject to *Section 5 of the Act* which *inter alia* imposes a statutory limitation on the amount an insurance company is liable to pay as compensation in respect of a claim by one person.

11. *Section 5 of the Act* in so far as is relevant to the present case provides as follows:

“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)

ii)

iii)

iv) liability of any sum in excess of three million shillings, arising out of a claim by one person.”

12. Given the foregoing provision, it is clear that insurers of motor vehicles against third party risks are not legally obliged to pay any amount in excess of KShs.3,000,000 in respect of a single third party claim such as the one that was made by the plaintiffs against the defendant's insured. I therefore find that the plaintiffs claim that the defendant is liable to settle the entire decretal amount obtained against its insured in the primary suit is not supported by the law and cannot be sustained.

13. The plaintiffs appear to have based their argument on the law as it existed under the old regime of compulsory third party insurance as enacted under the *Motor Vehicles Insurance (third Party Risks) Ordinance, No. 12 of 1945* which required insurers to fully satisfy a decree issued by the court in favour of an injured third party against their insured. Where the amount awarded exceeded what was covered by the insured's third party insurance policy, the insurance company was allowed to recover the excess amount from the insured. This position has since changed since as stated earlier, the current law imposes a limitation on the maximum compensation an injured third party can recover from an insurer on the basis of an insured's third party insurance cover.

14. I therefore wholly concur with the defendant's argument that it is only obliged to satisfy the decree by paying the plaintiffs the amount limited by the law in the sum of KShs.3,000,000. This does not however mean that the plaintiffs cannot recover the full decretal amount. They have the option of pursuing the defendant's insured for recovery of the amount in excess of the KShs.3,000,000 they are entitled to receive from the defendant- See the Court of Appeal decision in *Justus Mutiga & 2 Others V Law Society of Kenya & Another, (2018) eKLR*.

15. For the foregoing reasons, I am satisfied that the plaintiffs' case is partly merited and it is hereby allowed to the extent specified above. I consequently enter judgment for the plaintiffs against the defendant and hereby issue a declaration that under *Section 10 (1) of the Act*, the defendant is liable to pay the plaintiffs a sum of KShs.3,000,000 being part payment of the decree issued in favour of the plaintiffs in HCC No. 574 of 2010. The amount shall attract interest at court rates from today's date until full payment.

16. As costs follow the event, the plaintiffs are awarded costs of the suit.

It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI this 24th day of January, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Ms Owino holding brief for Mr. Okello for the plaintiffs

No appearance for the defendant

Mr. Salach: Court Assistant