REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM BEFORE: HON. LADY JUSTICE C. MEOLI (J)

CIVIL APPEAL NO. 15 OF 2014

CANNON ASSURANCE CO. LIMITED......................APPELLANTS

-VS-

SAMUEL MWANGI NGATIA...............................1ST RESPONDENT

JAMES OKOTH..2ND RESPONDENT

ABEL MALALA KHAMALA................................3RD RESPONDENT

CIVIL APPEAL NO. 31 OF 2015

CANNON ASSURANCE CO. LIMITED........................APPELLANTS

-VS-

CATHERINE NEKESA BARASA............................1ST RESPONDENT

SAMWEL MWANGI NGATIA................................2ND RESPONDENT

JAMES OKOTH...3RD RESPONDENT

CIVIL APPEAL NO. 72 OF 2015

CANNON ASSURANCE CO. LIMITED........................APPELLANTS

-VS-

ELVIS MUSINA NDALU..1ST RESPONDENT

SAMWEL MWANGI NGATIA..................................2ND RESPONDENT

JAMES OKOTH...3RD RESPONDENT

CIVIL APPEAL NO. 73 OF 2015

CANNON ASSURANCE CO. LIMITED............................APPELLANTS

-VS-

SARAH SHIKHULE ANDIKA.....................................1ST RESPONDENT

SAMWEL MWANGI NGATIA.....................................2ND RESPONDENT

JAMES OKOTH..3RD RESPONDENT

CIVIL APPEAL NO. 74 OF 2015

CANNON ASSURANCE CO. LIMITED............................APPELLANTS

-VS-

DORAH OKAYA OMBASO...1ST RESPONDENT

SAMWEL MWANGI NGATIA......................................2ND RESPONDENT

JAMES OKOTH..3RD RESPONDENT

CIVIL APPEAL NO. 75 OF 2015

CANNON ASSURANCE CO. LIMITED............................APPELLANTS

-VS-

WILSON MAMBUYU CHANGENDA.........................1ST RESPONDENT

SAMWEL MWANGI NGATIA.....................................2ND RESPONDENT

JAMES OKOTH ....3RD RESPONDENT

CONSOLIDATED JUDGMENT

1. The above appeals emanate **from Naivasha Chief Magistrate's Civil Cases No. 577 of 2010, 490 of 2010, 488 of 2010, 489 of 2010, 486 of 2010** and **491 of 2010**, respectively. On 16th October 2017, the court ordered that the appeals be consolidated and the lead file to be **HCCA No. 74 of 2015**. The lower court suits arose from the same accident but were never formally consolidated, although at some point, the trial court had appeared to bring together the suits no. **488, 489, 491** under the suit no. **486 of 2010** described as the lead file. Similarly, a suit no. **477 of 2010** referred to in the judgments in respect of suits no. **489,486**and **491** as a sort of test suit is not among the series of suits herein.

2. The Plaintiffs in the series of six suits related to these appeals had sued **James Okoth** (the 3rd Respondent) and **Samuel Mwangi Ngatia** (2nd Respondent) to recover damages in respect of injuries they sustained on 9th May, 2010 when the vehicle **KAR 283N**, owned by the 3rd Respondent and driven by the 2nd Respondent, allegedly in a negligent manner, knocked down and injured the Plaintiffs.

3. The Plaintiffs' evidence in the lower court is that they were adherents of the Salvation Army. On the material date, they were in a religious procession and marching along **Kariuki Chotara Road**. That the 2nd Respondent while driving the 3rd Respondent's vehicle **KAR 283N**, emerged from a minor road called **Biashara Road** and proceeded onto **Kariuki Chotara Road** without giving way, and ploughed into the procession, colliding into the Plaintiffs who sustained injuries.

4. The 2nd and 3rd Respondents had in their defence statement denied liability. They subsequently successfully applied to enjoin **Cannon Assurance Company Ltd,** the Appellants herein, as a Third Party. The Third Party eventually filed a defence, denying liability for the accident and asserting their right to repudiate liability due to alleged breach on the part of their insured, the vehicle owner. The Respondents adduced evidence at the trial but the Appellants did not. Judgment was eventually entered in favour of all the Plaintiffs against the Respondents. The Appellants were found liable to indemnify the 2nd and 3rd Respondents as they had insured the accident motor vehicle.

5. In **CMCC 577 of 2010**, the Plaintiff, **Abel Malala Khamala** was awarded Shs 130,000/= as general damages and Shs 4,120/= as special damages. He is the 1st Respondent in **HCCA 15 of 2014**. **Catherine Nekesa Barasa** was the Plaintiff in **CMCC 490 of 2010**. She was awarded general damages in the sum of Shs 130,000/= and special damages amounting to Shs 5,600/=. She is the 1st Respondent in **HCCA 31 of 2015**. The Plaintiff in **CMCC 488 of 2010** is **Elvis Musina Ndalu.** He was awarded general damages of Shs 130,000/= and special damages amounting to Shs 3,200/=. He is the 1st Respondent in **HCCA 72 of 2015.** The Plaintiff in **CMCC 489 of 2010** is **Sarah Shikhule Andika**. She was awarded general damages in the sum of Shs 150,000/= and special damages of Shs 3,200/=. She is the 1st Respondent in **HCCA 73 of 2015**. **Dorah Okaya Ombasa** was the Plaintiff in **CMCC 486 of 2010**. She was awarded Shs 140,000/= in general damages and Shs 3,200/= in specials. She is the 1st Respondent in **HCCA 74 of 2015**. The Plaintiff in **CMCC 491 of 2010 is Wilson Mambuyu Changenda.** He was awarded general damages in the sum of Kshs 130,000/= and specials to the tune of

Shs 3,200/=. **Wilson Changenda** is the first Respondent in **HCCA 75 of 2015**.

6. The Appellants were aggrieved with this outcome and filed the respective appeals which raise the different grounds. In **HCCA 74 of 2015** grounds in the memorandum of appeal are that, the trial magistrate:-

1. erred both in law and in fact by finding that the Appellants, an insurance company was properly joined as a Third Party before the insured had been found liable.

2. erred in law and fact by holding the Appellants liable without any evidence at all.

3. erred in law and fact by holding the Appellants responsible for the payment of the decretal sum contrary to the provisions of Section 5 (2) and 10 (1) of the Insurance (Motor Vehicles Third Party Risks) Act.

4. erred in law and fact by shifting the burden of proof to the Appellants.

5. Erred by failing to consider the Appellants written submissions.

Similar grounds are repeated in **HCCA 72 of 2015, HCCA 75 of 2015and HCCA 73 of 2015.**

7. In **HCCA 31 of 2015** the Appellants raises the following grounds:-

"1. The trial magistrate erred in law and fact by finding the Appellants liable contrary to the evidence.

2. The trial magistrate erred in law and fact by shifting the burden of proof to the Appellants.

3. The learned trial magistrate erred in both law and fact by failing to consider the fact that the Appellants had not been served with the statutory notice and that the second Respondent had failed to report the occurrence of the accident.

4. The trial magistrate erred in law and fact by awarding the first Respondent a sum of Shs 130,000/= in general damages which sum was excessive."

8. The grounds raised in the memorandum of appeal in **HCCA 15 of 2014 and HCCA 31 of 2015** repeat grounds **2, 3** and **4** of **HCCA 74 of 2015** and in addition, attack the award of Shs 130,000/= to the Plaintiffs therein as excessive. Thus, it can be safely stated that while the Appellants have challenged the trial court's finding in respect of their liability in all the appeals, the grounds in **HCCA 15 of 2014** and **HCCA 31 of 2015** include the question of quantum.

9. Submissions by the Appellants relating to the question of the Appellants' liability are found in **HCCA 74 of 2015** and apply to all the appeals. The Appellants submit that a fundamental step, required to be taken by the Defendant in the court below, under Order 1 Rule 22 of the Civil Procedure Rules was not taken, and therefore no directions were taken as to the manner by which the liability between the Third Party and Defendants was to be tried. The Appellants submit that the failure by the Defendants to apply for directions was fatal to the Third Party proceedings. Moreover, the Appellants submit that at the directions stage the trial court directs whether or not such a trial should be held, and the extent , to which a third party may participate in the trial in respect of the liability between the Plaintiff and Defendant.

10. The Appellants argue that ordinarily, the latter trial ought to precede the trial of liability between the Defendant and the Third Party as the two causes are distinct. The Appellants invoke the decision in **Pan African Insurance Company Limited & 2 Others v Clarkson & Southern Ltd [2008] eKLR** in support of their submissions. They assert that in light of the stated omissions, the Third Party proceedings in the court below were incompetent and further, that the trial court erred in holding the Appellants liable without evidence.

11. Secondly, the Appellants take issue with the decision by the trial court in dismissing the Appellants' application to stay the proceedings and refer the dispute to arbitration, in terms of the arbitration clause in the contract between the Appellants and their insured, the 3rd Respondent. Their view is that the dismissal was wrongful. The Appellants filed submissions relating to quantum in all the appeals. However, as earlier indicated, it was only in two of the six appeals that the grounds of appeal contain a challenge to quantum, namely, **HCCA 31 of 2015** and **HCCA 15 of 2014**.

12. In attacking quantum in **HCCA 31 of 2015**, the Appellants highlight the injuries sustained by the 1st Respondent therein, and the applicable principles in the assessment of general damages as stated in **Kipsang Koech & Another v Titus Osule Osore [2013] eKLR** and **Julius Mbogo Mugi & 3 Others [2013] eKLR**. They proposed, taking into consideration the fact that the 1st Respondents' injuries healed without disability, an award of Shs 50,000/=. In support of this proposal, the Appellants relied on the case of **Mary Wambui Njoroge v. John Warui Wanyoike HCCC 392 of 1997 (NRB)** as cited in **Kamau & 2 Others v Mugamangi & Another [2004] eKLR**. The Appellants' submissions on quantum in **HCCA 15** of **2014** largely repeat the above submissions and urge an award of Shs 50,000/= to the 1st Respondent therein as general damages for pain and suffering.

13. The 1st Respondents in **HCCA 31 of 2015**, **72 of 2015, 73 of 2015, 74 of 2014** and **75 of 2015** made common submissions. Reiterating events surrounding the joinder of the Third Party (the Appellants), and the decision of **Githinji CM** (as he then was) in that regard, the said 1st Respondents asserted that they had proved their claim against the 2nd and 3rd Respondents. And that, the Appellants had a contractual obligation to indemnify the said Respondents in accordance with the terms of the policy of insurance. In defending the decision of **Githinji CM,** (as he then was) they argued that the Appellants' appeal thereon having been withdrawn, the matter of the Appellants' eligibility as a

Third Party cannot be re-opened on this appeal.

14. Regarding general damages, the said 1st Respondents cited the decision in **Kemfro Africa Ltd t/a Meru Express Services v Lubia & Another (No. 2) 187 KLR 30** concerning the principles that guide the appellate court in deciding whether it is justified to disturb the quantum of damages awarded at the trial. In the Respondents' view, the Appellants have not brought their appeal on quantum within the said principles.

15. The 1st Respondent in **HCCA 15 of 2014** referring to the two applications by the Third Party dismissed by the trial court asserted that, the issues between the Appellants and the 2nd & 3rd Respondent were settled in the trial court's judgment, following a full trial in which the Appellants participated without raising the question of directions. That liability having been established against the Appellants' insured the Appellants were liable to indemnify them there being no evidence that the Appellants ever repudiated liability. On the question of quantum of damages, the said 1st Respondent asserts that the award in the case was consistent with similar awards for similar injuries, and in light of the 1st Respondent's proven injuries, was not excessive.

16. On their part, the 2nd and 3rd Respondents defended the decision of the lower court regarding liability and quantum as between themselves and the Plaintiffs in these matters. Regarding the competence of the Third Party Proceedings, the 2nd and 3rd Respondents emphasise the relationship between them and the Appellants as insurers of the accident vehicle; that the Appellants having neglected to defend the claim against them, the 2nd and 3rd Respondents defended themselves and enjoined the Appellants as a Third Party; that the application by the Appellants to have the Third Party notice struck out was rejected and an appeal taken thereon by the Appellants was withdrawn. The 2nd and 3rd Respondents take the view that the ruling of **Githinji CM** (as he then was) constituted adequate third party directions. They point out the Appellants' own failure to seek directions during the trial and that in any event, the omission in respect of directions is not fatal.

17. Moreover, with regard to whether the dispute between them and the Appellants ought to have been referred to arbitration, they reiterate the ruling on that question and assert that the decision was not appealed and cannot be challenged on this appeal. They urge the court to dismiss the appeals herein.

18. The court has considered the material canvassed in respect of the appeals, the proceedings and the evidence at the trial. The duty of this court as a first appellate court is to re-evaluate the evidence and draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. See **Peters v Sunday Post Limited [1958] EA 424; Selle and Another v Associated Motor Boat Co. Limited & Others [1968] EA 123; Williams Diamond Limited v Brown [1970] EA 1**.

19. The Court of Appeal in **Ephantus Mwangi & Another -Vs- Duncan Mwangi Wambugu [1982 – 88] 1 KAR 278**, held that:-

> **"A court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did"**

20. The main issues arising from these appeals are:

a) Whether the Appellants were eligible and proper Third Party to the suits in the lower court.

b) Whether the dispute between the Appellants and the 2nd and 3rd Respondents should have been referred to arbitration.

c) Whether the findings of liability against the Appellants were well founded.

d) Whether damages awarded to the 1st Respondents in **HCCA 15 of 2014** and **HCCA 31 of 2015** were excessive.

21. Before this court can embark on the examination of the first and second issues above, it is necessary to consider the objection raised by all the Respondents to the propriety of the Appellants canvassing of the said issues on this appeal. The said Respondents appear to take the view that the two rulings by the trial courts on said questions settled the matter.

22. By their submissions, the Appellants do not appear to address this question; they seem to raise the issues objected to as a matter of right on this appeal. The Respondents' objection is that the Appellants having withdrawn the appeal in respect of **Githinji CM's** ruling of 3rd July 2012, and having not preferred an appeal regarding the decision of **Boke PM**, delivered on 19th December, 2012, the Appellants cannot challenge the said decisions on this appeal. No legal provision or authority was cited in support of this submission. Having considered these submissions, I take the following view.

23. These appeals essentially relate to the decrees of the trial court in the six suits. Section 2 of the Civil Procedure Act defines "decree" to mean:-

> **"……the formal expression of an adjudication which, so far as regards the court expressing it, it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be preliminary or final, it includes the striking out of a plaint and …….but does not include-**
>
> **a) any adjudication from which an appeal lies as an appeal from an order.**

b) any order of dismissal for default:

Provided that, for the purposes of appeal, "decree" includes judgment, and a judgment shall be appealable not withstanding……

Explanation - A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be preliminary and partly final."

24. On the other hand, the section states that:-

" "Order" means the formal expression of any decision of a court which is not a decree……."

Under Section 68 of the Civil Procedure Act, a party aggrieved by, but who does not appeal from a preliminary decree is precluded from disputing its correctness in any appeal which may be preferred against the final decree.

25. The appeal filed by the Appellants in respect of the decision by **Githinji CM** (as he then was) and later withdrawn was clearly not an appeal from a preliminary decree but from an order. Thus, Section 68 would not apply in this instance. Equally the decision by **Boke (PM)** was an order and not a preliminary decree as envisaged under Section 2 of the Civil Procedure Act. The two decisions resulted in orders as defined in the Section. The Appellants could have appealed as of right from the order of **Boke (PM**)- regarding referral to arbitration- by dint of the provisions of Section 75 (1) (d) , but did not. The appeal filed in respect of the order by **Githinji CM** (as he then was) is among those allowed as of right under Order 43 Rule 1 (a) and (b) of the Civil Procedure Rules. The said appeal had not been heard at the time of this court's directions in respect of these series of appeals.

26. A copy of the memorandum of appeal in the said appeal being **Nakuru HCCA No. 137 of 2012 l**ater **Naivasha HCCA 74 of 2016**, is annexed as annexture **JOII** to the Replying affidavit of the 3rd Respondent filed on 29th August, 2012 in opposition to the application for stay which was filed in **CMCC 491 of 2010**. Grounds 1 and 3 therein state that the trial magistrate erred in law and fact:

a) by finding that the Appellants had lawfully been joined as a Third Party to the proceedings while the subject matter between the Appellants and Respondent (insured) was different from the original cause of action.

b) by failing to hold that there was no cause of action against the Appellants by the Respondents.

27. Albeit differently presented, these same grounds are repeated in the grounds of appeal contained in the memorandum of appeal in the present appeal nos. **HCCA 74 of 2015, HCCA 72 of 2015, HCCA 73 of 2015 and HCCA 75 of 2015.** The withdrawal of **HCCA 74 of 2016 (formerly Nakuru HCCA 137 of 2012)** was allowed on 16th October 2017, which is subsequent to the filing of the present appeals, as confirmed in the 2nd and 3rd Respondents submissions. Thus despite the withdrawal of the interlocutory appeal, grounds 1 and 3 therein survived and are subsumed in this present appeal and the objections taken thereto have no merit.

28. Concerning the orders by Boke PM, the position is none too clear. With regard to orders, there is no provision in the Civil Procedure Act, equivalent to Section 68 of the Civil Procedure Acts precluding an appellant in the main appeal, from disputing an order from which an appeal is allowed but where no interlocutory appeal was filed. Is the position of such an appellant the same as applies in Section 76 (1) of the Civil Procedure Act regarding orders for which **no** appeal is allowed? In such as case, it is provided that:-

"where a decree is appealed from, any error, defect or irregularity in any order affecting the decision of the case may be set forth as a ground of objection in memorandum of appeal."

29. Section76 (2) of the Civil Procedure Acts however proceeds to provide that:-

"Notwithstanding anything contained in subsection (1), where any party aggrieved by an order of remand from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness."

Yet an order of remand made under Order 42 Rule 24 of the Civil Procedure Rules is not appealable as of right. One may be tempted to conclude that, except for the situations expressly provided for, the failure by a party to appeal an order at interlocutory stage does not necessarily extinguish the party's right to challenge the correctness of the order on the main appeal, and more so where it has a bearing on the final judgment of the court. This court is inclined to lean, in the interest of justice, towards considering, for whatever it is worth, the Appellants' objection relating to the ruling by **Boke PM**, rejecting the application to stay the suit and to refer the dispute between the Appellants and the 2nd and 3rd Respondents to arbitration.

30. This is a convenient stage, in my view, to deal with the question whether the suit in the lower court should have been stayed and the dispute between the Appellants and the 2nd and 3rd Respondents referred to arbitration. Having reviewed the material canvassed in respect of the Appellants' application before **Boke PM,** this court notes that there was no dispute that the Appellants had insured the accident vehicle against third party risks in the period material to the accident. The Appellants had however purported to repudiate liability citing the alleged failure by its insured (3rd Respondent) to notify them of the occurrence of the accident. Two key reasons contained in the trial court's ruling as to why the motion failed firstly, are that the application was brought outside the period stipulated under Section 6 of the Arbitration Act i.e. at the time of entering appearance. But the more solid reason in my view was that the document **(marked as annexure MM2)** exhibited in the supporting affidavit filed by the Appellants in proof of the arbitration clause, was found to be merely a specimen, an unexecuted contract.

31. For my part, having perused the said annexure, I agree with the trial court. The document **MM2** bears stamping on every page that read **"SPECIMEN".** It is not executed by any party. The arbitration clause therein could not be applied in the circumstances, to this case. The Appellants' motion was properly rejected therefore, and the grounds relating thereto have no merit. Moreover, the ruling by **Boke PM** only applied to **CMCC 491 of 2010**, **577 of 2010 and 486 of 2010**. Thus, so far as this court is concerned, it is only in the respective appeals, namely **HCCA 15 of 2014, HCCA 75 of 2015, HCCA 74 of 2015** that the grounds relating to the ruling of **Boke PM** could properly have been considered.

32. I turn now to the first stated issue of this appeal, namely, whether Appellants were an eligible and proper Third Party to the suits in the lower court. This is the question raised by the Appellants in the various memoranda of appeal before this court and in the withdrawn interlocutory Civil Appeal number 74 of 2016. Nothing in the grounds related to this question can be stretched so as to cover the general competence of the Third Party proceedings as urged on this appeal by the Appellants. Indeed, the Appellants' submissions on this appeal have primarily dwelt on the failure by the trial court to give directions under Order 1 Rule 22 of the Civil Procedure Rules. Yet, in the various memoranda of appeal herein, the Appellants' repeated ground of appeal is that the trial court *erred in law and fact by finding that the Appellants were properly joined as a Third Party before the insured had been found liable.* With respect, that ground cannot be redacted, expanded or adjusted to represent a complaint that the magistrate erred by failing to give directions as to the question of and trial regarding the liability between the Appellants and the 2nd and 3rd Respondents.

33. Notwithstanding the foregoing, this court has considered the Appellants' complaint on this score. The Appellants filed a defence on 7th January 2013, subsequent to the ruling of **Boke PM**. Therein, they denied liability on account of alleged breach of the terms of the insurance contract by the 3rd Respondent. The breach was stated to be the failure by the said insured to report the accident, arising from which the Appellants were allegedly entitled to repudiate the policy. The Appellants also disputed that there was a reasonable cause of action against them. The entire proceedings record the involvement of the Appellants at every stage since entering appearance. They were represented during the trial and their counsel cross-examined the witnesses and also filed submissions.

34. The Appellants' assertion that no directions were given in the matters as required by the rules is accurate. No directions were given after the two rulings in the causes, or at any time prior to the trials. **Order 1 Rule 22** of the Civil Procedure Rules provides that:

"If a third party enters an appearance pursuant to the third-party notice, the defendant giving the notice may apply to the court by summons in chambers for directions, and the court upon the hearing of such application may, if satisfied that there is a proper question to be tried as to the liability of the third party, order the question of such liability as between the third party and the defendant giving the notice, to be tried in such manner, at or after the trial of the suit, as the court may direct; and, if not so satisfied, may order such judgment as the nature of the case may require to be entered in favour of the defendant giving the notice against the third party."

35. The rule is couched in permissive terms, but the purpose of the directions is clearly stated in the rule. As observed in the **Pan Africa Insurance** case the over-arching purpose of third party proceedings is

"Firstly, to prevent multiplicity of actions and to enable the court to settle the disputes between all parties in one action, and, secondly, to prevent the same question from being tried twice with possibly different results."

36**.** The court further stated that the judge has very wide and flexible powers under the rule. The **Pan Africa Insurance** Case did not deal with a situation as here, where directions were not given, and /or the effect of such default. In the instant case, despite the lack of explicit directions, the parties proceeded with the trial as if the question of liability between the Appellants and the 2nd and 3rd Respondent on one hand, and that between the 2nd and 3rd Respondents and the 1st Respondents on the other, were to be tried simultaneously. This is what appears from a perusal of the proceedings. The Appellants did not seek directions at the trial to have the questions determined separately or sequentially. They have not indicated what prejudice was suffered by them as a result of omission by the trial court to give directions. I find no merit in their complaint regarding the said omission.

37. It is evident from the Appellants' submissions that they have abandoned the substantive issue of the propriety of the Appellants' joinder as raised severally in the memoranda of appeal. That is well advised in my view. **Order 1 Rule 15 (1) of the Civil Procedure Rules** provides that:-

"1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party) —

(a) that he is entitled to contribution or indemnity; or

(b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or

(c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers *ex parte* supported by

affidavit.”

38. There is no requirement that the liability of the Defendant be first established before the said Third Party can be enjoined. That would defeat the over-arching purpose of Third Party proceedings. In addition, Order 1 Rule 9 of the Civil Procedure Rules provides that:

> **“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it”.**

39. The Appellants did not dispute that they had insured the accident vehicle at the material time. The 3rd Respondent gave evidence at the hearing concerning the insurance contract between him and the Appellants. He confirmed that he had reported the accident to the Appellants through Messrs. **Great Five Insurance Brokers**. The Appellants’ defence was that the 3rd Respondent did not report the accident to them and that they only learned about it from a third party. The Appellants did not adduce evidence at the trial in support of this defence.

40. Significantly, the insurance policy document was not produced at the trial. As such the precise terms of the contract, beyond what is admitted by the parties were not established. What the Appellants failed to furnish by way of evidence, they attempted to make up for by way of submissions. The 3rd Respondent had established the fact that his vehicle was insured by the Appellants against third party risks. That he obtained the cover through the same brokerage firm by which he sent the notice of the occurrence of the accident. In their defence the Appellants admitted issuing a policy cover to the 3rd Respondent, stating at paragraph 4 that:

> **“The Third Party further avers that the Defendant failed to report the accident subject matter hereof as requested by the terms and conditions of the Insurance Policy in place and that the Third Party is entitled to repudiate the police issued to the Defendant herein.”**

41. The duty imposed on an insurer under Section 10(1) of the Insurance (Motor Vehicles Third Party Risks) Act regarding the satisfaction of judgments obtained by third parties against their insured is construed against insurers in a strict manner by courts. The insurer is under a statutory duty to satisfy the judgment obtained by third parties unless the insurer has avoided liability under the policy in compliance with Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act. The underlying rationale being that the whole object of ensuring compensation to third parties injured in motor vehicle accidents, through the compulsory requirement for motor vehicle insurance against third party risks, would otherwise be defeated. Thus, liability by the insurer of a motor vehicle is not to be avoided in a casual manner by the insurer.

42. In this case, the Appellants did not attempt to bring their case under the exemptions to liability in Section 10 (1) to (7) of the Insurance (Motor Vehicles Third Party Risks) Act or demonstrate to the court that they were entitled to avoid the policy on the basis of a provision contained in the policy. The trial court did consider the evidence tendered at the trial and even though the judgment does not expressly refer to the submissions of the Third Party, it is evident that the trial court addressed its mind to thereto, by stating inter alia that:-

> **“The relationship between the insurer and insured is a special one and operates under the principle of utmost good faith – *uberrimae fidei*……. the insurer has an obligation under law to indemnify the insured in the event of loss………. There are however exceptions to that rule where the insurer can repudiate liability. One such instances is when the accident is not reported to the insurer in good time.” (See judgment in CMCC 577 of 2010).**

43. The Appellants having eschewed the opportunity to establish that they were entitled under the provisions of the policy document to repudiate liability could not escape liability in this case. The foregoing resolves in the affirmative the issues whether the Appellants were an eligible and proper third party to the suits in the lower court, and whether the findings of liability against the Appellants were well found. The foregoing findings apply to the question of liability in all the appeals.

44. On the question of quantum, there can be no dispute that the assessment of damages is a matter of discretion and the appellate court is not justified to substitute a different award for the one awarded in the court below for the sole reason that it would have awarded a different sum had it tried the case.

45. In the **Kemfro Africa Limited t/a Meru Express Services (1976) & Another -Vs- Lubia & Anor. (No. 2) [1985] eKLR**, the Court of Appeal stated that:

> **“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. *See Ilanga -Vs- Manyoka, [1961] EA 705, 709, 713 (CA-T); Lukenya Ranching and Farming Co-operative Society Ltd -Vs- Kavoloto,* [1979] EA 414, 418, 419 (CA-K). This Court follows the same principles.”**

46. As earlier noted, the Appellants only appealed against quantum in **HCCA 31 of 2015** in respect **of CMCC 490 of 2010** and in **HCCA 15 of 2014** in respect of **CMCC 577 of 2010.** The Plaintiff **Catherine Nekesa Barasa** in the former suit sustained soft tissue injuries on the left arm and on the chest. She was treated and discharged on the same day. She suffered no adverse sequela. The authority cited in the Plaintiff’s submissions - **Joseph Otiende v Hayer Bishan Singh & Sons HCCC 972 of 1977** is an old one. Besides, only a sketchy summary in what appears to be a case digest was availed to the trial court. From that summary, the Plaintiff in that case sustained injury to the hand and back, the latter which left the Plaintiff, an old man, with severe backache that could not be alleviated by surgery. Obviously this case was not on all fours with the instant case.

47. On this appeal, the Appellants have urged an award of Shs 50,000/= based on a decision not submitted to the trial court alongside submissions for that court's consideration. This is not the proper proceeding for argumentation on quantum which the Appellants avoided in the lower court. An appeal is essentially a review of the trial court's assessment based on material placed before it. In my own view however the award of Shs 130,000/= to the instant Plaintiff cannot be said to be so inordinately high as to represent an erroneous estimate of damages. The award is therefore upheld.

48. Concerning the award of Shs 130,000/= as general damages to **Abel Malala Khamala** (Plaintiff in **CMCC No. 577 of 2010** and **HCCA No. 15 of 2014**), a medical report by **Dr. Omuyoma** produced at the trial as **Exhibit 4a** indicates that he sustained soft tissue injury to back and to the right leg. He recovered with a positive prognosis, having been treated and discharged on the same day. He did not substantiate his claims at the trial that three years since the accident, he was still receiving treatment for his injuries.

49. In submissions, his counsels had urged an award of Shs 150,000/= in general damages citing two decisions. **Comply Industries Ltd v Francis Mwania [2013] eKLR** and **Philip Musyoka Mutua v Stephen Kioko Musa [2014]**. The Plaintiff in the first authority apparently suffered soft tissue injuries to the hip and possibly the back. The court upheld an award of Shs 140,000/= in damages. The Plaintiff in the second authority sustained soft tissue injuries to the face, neck, throat and chest. His award of Shs 180,000/= in the lower court in general damages was reduced to Shs 100,000/= on appeal. The Appellants and 2nd and 3rd Respondents herein did not submit on quantum before the lower court. In my view, the award of Shs 130,000/= as general damages in **CMCC 577 of 2010** cannot be said to be so excessive as to represent an erroneous estimate. The award is therefore upheld.

50. In the result, the appeals herein challenging both liability and quantum of general damages have failed and are dismissed with costs to the Respondents. A copy of this decision is to be placed in each of the appeal files. Finally, I regret that this decision has been delayed for some considerable time. This delay was occasioned by the work pressure in my current duty station.

Dated and signed at Kiambu this 22nd day of May, 2019.

C. MEOLI

JUDGE

Delivered and signed at Naivasha this 29th day of May, 2019.

R. MWONGO

JUDGE

In the presence of:-

1. No Representation for the Appellants.

2. Kakinga holding brief for Mboga G.G for the 1st Respondent in HCCA 15 of 2014.

Odoyo holding brief for Owuor for the 1st Respondent in HCCA 31/15, HCCA 72/15, HCCA 73/15, HCCA 74/15 and HCCA 75/15

3. Mbanya holding brief for Okello for the 2nd and 3rd Respondents

4. Court Clerk - Quinter Ogutu