



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NUMBER 594 OF 2012**

**APA INSURANCE COMPANY.....APPELLANT**

**VERSUS**

**SAMUEL NJOGU KIMITA.....RESPONDENT**

*(Appeal from the Ruling of the Principal Magistrate's at Milimani by Hon. D. Ole Keiwua (Mr) dated the 26<sup>th</sup> day of October 2012 in CMCC No. 4069 of 2008)*

**J U D G M E N T**

1. APA Insurance Ltd, the Appellant herein filed an action against Samuel Njogu Kimita, the Respondent before the Chief Magistrate's Court, Nairobi in which it sought for inter alia, a declaration that the Appellant was entitled to avoid the policy of Insurance No. P/10/2007/0801/1978 taken out by the Respondent over Motor Vehicle Registration No. KAN 405K.
2. The Respondent filed a defence and a counter-claim against the Appellant.
3. Hon. Daniel Ole Keiwua, Learned Principal Magistrate heard the suit and in the end he dismissed the Appellant's suit and entered judgment in favour of the Respondent and against the Appellant in the counterclaim.
4. The Respondent thereafter extracted the decree and commenced execution process prompting the Appellant to file the application dated 16<sup>th</sup> July, 2012.
5. In the aforesaid application, the Appellant sought for two main prayers namely: -
  - **Stay of execution pending appeal and**
  - **An order for review.**
6. Hon. D. Ole Keiwua, heard and dismissed the application.
7. The Appellant being dissatisfied, preferred this appeal and put forward the following grounds: -
  - i) That the learned magistrate erred in fact and law when he failed, as he did, to order a stay of execution of the Ruling of 26<sup>th</sup> October, 2012.*
  - ii) That the learned magistrate erred in fact and law when he failed to find that the Appellant's application dated 16<sup>th</sup> July, 2012 was not without merit.*
  - iii) That the learned magistrate erred in fact and law by failing, as he did, to exercise his discretion in favour of the Appellant and thereby resulting in potential injustice to the Appellant in the circumstance.*
  - iv) That the learned magistrate erred in fact and law by when he arrived at the decision to dismiss the Appellant's application dated 16<sup>th</sup> July, 2012 when relying on irrelevant and/or non-existent evidence and disregarding the relevant facts and evidence on record and thereby misdirecting himself and arriving as an erroneous decision.*
8. When the appeal came up for hearing, learned counsels 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 also considered the rival written submissions. It is apparent from the record that the learned Principal magistrate had entered judgment in favour of the Respondent by directing the Appellant to settle the insured sum of Ksh.450,000/- being the estimated pre-accident value of motor vehicle registration No. KAN 405K.

10. In the application dated 16<sup>th</sup> July, 2012, the Appellant sought for the aforesaid judgment to be set aside by way of review and be substituted with the following awards: -

**a) Pre-accident value Kshs.100,000/-**

**(i) Excess due Kshs. 30,000/-**

**(ii) Salvage Value Kshs. 70,000/-**

**Net Value – NIL**

11. The Respondent opposed the motion arguing inter alia that the same did not merit to be treated as an application for review.

12. After hearing the application, the learned Principal Magistrate came to the following conclusions. First, that the calculations proposed in respect of excess is a new matter, which ought to have been canvassed during the trial. Secondly, that the application is more of an appeal than an application for review. Thirdly, that the application was filed after an inordinate delay.

13. On appeal, this court has been urged to reverse the dismissal order. It is pointed out that the only issue for determination is on the discharge and satisfaction of the judgment.

14. The Appellant argued that since the judgment did not specify the judgment sum, it meant that the Appellant was to calculate and quantify the judgment amount.

15. The Appellant further argued that in calculating the amount the indemnity principle require that where it is a write off the excess and salvage value must be taken into account.

16. The Appellant submitted that there was ample evidence on record to show not only the insured value for the motor but also the pre-accident value, the excess amount chargeable and salvage value.

17. The Respondent is of the submission that the appeal is fatally defective in that the decree sought to be reviewed was never extracted and annexed to the affidavit filed in support of the aforesaid application.

18. It was also argued that the application was properly dismissed since it did not possess the conditions necessary to qualify as an application for review.

19. I have already set out the grounds the learned principal magistrate considered before dismissing the application for review.

20. It is not in dispute that the Respondent took out a comprehensive insurance cover in respect of Motor Vehicle Registration No.KAN 405K for Kshs.450,000/-. It is also not in dispute that the motor vehicle was not valued but nevertheless the Appellant accepted premiums paid by the Respondent and issued an annual insurance cover on the basis of the estimates provided by the Respondent. It is also not in dispute that the risk insured attached barely a month after the insurance cover was issued.

21. The Appellant has argued that there was need to calculate the judgment sum because the trial court did not give specific figures and that necessitated the filing of an application for review.

22. With respect, I agree with the submissions of the Appellant that the learned Principal Magistrate erred by dismissing the Appellant's application for review. Though the application was filed about five months from the date of judgment the delay was explained and is excusable.

23. The gist of the application is that there was need to have the judgment sum ascertained so that the discharge and satisfaction of the decree is done. The trial court did not attempt to calculate the amount of compensation due to the Respondent as per the insurance contract.

24. In my view, the failure to ascertain the sum payable was a sufficient reason to have the decree reviewed. Having due regard to the indemnity principle the court will be able to make an award that compensates the insured for the loss he actually suffered as a result of the accident and no more.

25. The Appellant has attempted to suggest that the pre-accident value should be used as the basis for compensation.

26. In my view, the proposal is not plausible. It is clear from the contract of insurance that the insured value is Ksh.450,000/-. The parties cannot run away from the contract they executed. It is not disputed that the excess amount due is Kshs.30,000/- and the salvage value is Ksh.70,000/-. The aforesaid amounts should be deducted from the insured sum.

27. In the end, I find the appeal to be meritorious hence it is allowed.

28. Consequently, the order dismissing the motion dated 16<sup>th</sup> July, 2012 is set aside and is substituted with an order allowing the same. Therefore the judgment of the trial court is review on appeal as follows: -

<b>i) Insured Value</b>	<b>Kshs.450,000/-</b>
<b>Less</b>	
<b>a) Excess of</b>	<b>Kshs.30,000/-</b>
<b>b) Salvage Value</b>	<b>Kshs.70,000/- (<del>Kshs.100,000/-</del>)</b>
<b>Net Amount</b>	<b>Kshs.350,000/-</b>
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**i) Costs of the suit.**

**ii) Each party to bear its own costs of the appeal**

**Dated, signed and delivered at Nairobi this 29<sup>th</sup> day of November, 2019.**

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**J K SERGON**

**JUDGE**

**In the presence of**

..... *for the Appellant*

..... *for the Respondent*