



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NUMBER 57 OF 2013

PETER GICHIHI NJUGUNAPLAINTIFF

VERSUS

JUBILEE INSURANCE CO. LTD.....DEFENDANT

JUDGMENT

1. The plaintiff was a fare paying passenger in motor vehicle Registration number KUK 544 travelling from Naivasha to Nairobi on the 25th December 1997. The vehicle was involved in an accident with another vehicle registration KZW 478 - the property of the Defendant whereof the plaintiff sustained serious injuries. He filed a suit being **Nakuru HCCC No. 405 of 2000** and sought general and special damages against the owner and driver of the said motor vehicle Registration Number KZW 478.

Upon full hearing of the case, the court found in his favour and awarded him Kshs.6,833,751/= in general and special damages plus costs and interest on the 20th March 2013 and costs thereafter taxed in the sum of Kshs.338,861/=.

The defendant failed to pay the above sum forcing the plaintiff to file the present declaratory suit against the insurer of the motor vehicle, Jubilee Insurance Company Limited, the Defendant herein.

2. The plaintiff sought a declaration that the defendant is bound to satisfy the total decretal sum in **Nakuru HCCC No. 405 of 2000** and in the alternative, judgment be entered as prayed for in the plaint, in the sum of Kshs.9,235,785/= plus costs and interest.

The defendant in its defence dated 12th July 2013 denied liability and further stated that the requisite statutory notice of institution of the suit which is a pre-condition for filing a declaratory suit was not served as provided under **Section 10 of the Insurance Third party Risks, Chapter 405 Laws of Kenya.**

3. The Plaintiff's case

The plaintiff testified that before institution of the primary case, a demand and statutory notice dated 29th February 2000 was served upon Jubilee Insurance Company. The said letter was produced as PEx 2 but the defendant did not respond. He further stated that he thereafter filed the suit and upon service, the defendant filed its defence and thereafter an amended defence. He produced a copy of judgment where he was awarded a sum of Kshs.6,833,751/= plus costs and interest on the 11th April 2013. Thereafter, a certificate of costs was issued on the 21st May 2015 in the sum of Kshs.338,861/= making a total of Kshs.9,235,785/=.

It was his testimony that a demand notice for payment was sent to the defendant through Nation Courier

Services to the Claims Manager but again no response was received. Later, he testified that by a letter dated 6th January 2014 his Advocates, Juma & Company Advocates, wrote to the defendant seeking payment after an offer to settle the claim at Kshs.3,000,000/= when sent by the defendant but the defendant failed to pay.

The plaintiff therefore sought judgment in terms of the claim in the plaint.

4 The defendant's case

The defendant's case was urged by its legal manager, Mr. Nyaema. He confirmed that the subject motor vehicle Registration Number KZW 478 was insured through Jubilee Insurance Company Limited. He also admitted that judgment was entered against Akamba Public Bus Service its insured, as stated in the plaint. He however denied receipt of the statutory notice by the company. On Plaintiff exhibit 2, the statutory notice, he confirmed that it had a stamp of the company but denied having been received, claiming the said stamp did not originate from the defendant's office. He further testified that the defendant can only be paid a sum of Kshs.3,000,000/= as the limit under Chapter 405. It was his evidence that should the court find the Defendant liable, the limit should be capped at Kshs. 3,000,000/= all inclusive under **Act No. 10 of 2006**.

He further confirmed that the defendant made an offer to pay the sum of Kshs. 3,000,000/= that was accepted by the plaintiff but the company did not pay. No explanation was tendered for the failure to pay.

5. From the above evidence by both the plaintiff and the defendant, it is not in dispute that motor vehicle Registration Number KZW 478 was insured by the defendant, and that there was a valid judgment against its insured, Akamba Public Bus Services Limited in the sum of Kshs.6,833,751/= plus costs and interest entered in the sum of Kshs.9,235,785/=.

6. Issue For Determination

The issue that this court is called upon to determine is whether the Defendant is liable to satisfy the judgment against its insured and if so, to what extent.

7. The Applicable Law

The relevant law applicable is the **Insurance (Motor vehicles Third Party Risks), Chapter 405 Laws of Kenya**.

Section 4 of the said Act requires a policy of Insurance to be taken in respect of third party risks before a vehicle is permitted to operate. Motor vehicle registration number KZM 478 had a valid policy as confirmed by the claims manager of the defendant. **Under Section 10(2) (c)**, it is provided that:

“No sum shall be payable by an insurer under the foregoing provision of this Section (a) in respect of any judgment unless before or within fourteen days after the commencement of the proceedings in which the judgment was given, the insurer had notice to the bringing of the proceedings.”

Section 5(b) Proviso(iv) was introduced into the Act by **Act No.10 of 2006**. It provides:

“---provided that a policy in terms of this Section shall not be required to cover.

(iv) Liability of any sum in excess of three Million Shillings, arising out of a claim by one person”

8. The first limb of the issue as framed is whether or not a statutory notice was served upon the defendant pursuant to **Section 10(2)** of the Act.

The plaintiff produced Exhibit No. 2, a letter dated 29th February 2000 addressed to the claims manager-legal Jubilee Insurance Company Limited. It is a demand and statutory notice and given in compliance with Section 10(2) of the Act by the firm of Gacau Kariuki and Company Advocates on behalf of the plaintiff. The said letter on the reverse, is indicated as received, stamped and dated 29th February 2000 and signed for, Jubilee Insurance Company, Legal Department.

The Defendant's legal managers stated that the letter was not received at its offices upon which it is was submission that the company is not liable to settle the judgment. He stated that he was not working for the defendant in the year 2000, and denies that the said letter was ever received as the company did not have it in its records. On being asked on what basis, he stated that the stamp did not originate from its offices. That allegation was not substantiated. The court has taken the liberty to look at the PExt 2, the demand and statutory notice dated the 29th February 2000. It is not a photocopy. It bears an original stamp at the reverse. On the stamp, it is dated and signed. The court finds that a valid statutory notice as envisaged under **Section 10(2) of Chapter 405 Laws of Kenya** was duly served and received by the defendant, long before the plaintiff's statement of claim was filed on the 7th October 2002.

9. Having made a finding that the defendant was served with the statutory notice and therefore under an obligation to settle the plaintiff's claim, the second limb is to what extent should the judgment be settled by the defendant.

10. As stated above, **Section 5(b) Proviso (iv) of the Act** puts a limit to what an insurance company may settle out of a claim by one person. This is Kshs. 3,000,000/=. This is the submission by the defendant. On its part, the plaintiff submits that since the exceptions and limits were enacted in 2006, and the case was filed in 2002, then the proviso(iv) ought not be applied retrospectively, to cover a policy that was issued in 1997.

The court notes that judgment in the primary case **HCCC No. 405 of 2000** was delivered on the 12th July 2013, after the enactment of the limiting **Section 5(b) (iv) of Chapter 405**.

It is my considered view that an act and or law cannot have a retrospective effect unless it is clearly indicated so I do not agree with the plaintiff's submission that the policy having been given for the subject vehicle in 1997, then, the insurance company is bound to satisfy any judgment for any amount, as was the case before the **Act No. 10 of 2006** came into force. Judgment was delivered when the **Act No.10 of 2006** was in force.

11. When does liability arise for purposes of **Section 5 (b) proviso(iv)** or in any other matter, where the liability is denied, and the court is called upon to determine whether a party is liable or not?

The court holds the view that it is only after a court has heard and determined the issue and a Judgment is pronounced. In this, case liability against the defendant was determined on the 12th July 2013 when Judgment was pronounced. Before then, liability was subject for determination as between the plaintiff and the defendant.

It follows therefore that the defendant is obligated to settle the plaintiff's claim upto Kshs.3,000,000/= as damages for bodily injury.

As to the balance of the decretal sum, the plaintiff is not barred by any statute from pursuing payment from the defendant's insured, the defendant in the primary suit.

12. In a **Constitutional and Human Rights Petition No. 148 of 2014** filed by the Law Society Kenya(LSK) against the Attorney General, the LSK sought an interpretation of the constitutionality of **Section 5 (b) (iv) of the Insurance (Motor Vehicles Third Party Risks) Act, Chapter 405**. After very spirited arguments by the parties and other stake holders in the Insurance Industry, the court determined that **Section 5(b)(iv)** was not unconstitutional and in particular did not interfere with Judicial independence and authority of the courts and that the courts are at liberty to award damages over and

above the limit of Kshs.3,000,000/= when circumstances demand.

13. The defendant submits that under the **proviso(iv) of Section 5(b)**, the total amount that the defendant ought to pay in an all inclusive sum should not exceed Kshs.3,000,000/= including costs and interest.

This court begs to differ with the above submission. The Defendant had failed to honour its obligations placed on it by the above section. The plaintiff has spent money and time to pursue the payment by filing of this declaratory suit the defendant at all times knew or ought to have known that it was its obligation to settle the judgment of the primary suit – even the capped limit. Indeed it made an offer to pay which offer was accepted but did not pay and no explanation was tendered for the failure to pay. The suit had to proceed to full hearing. I have carefully read the section under review.

14. The drafters of the said **Act No. 10 of 2006** in my considered view, did not envisage a situation, where the Insurance Company would fail to pay the claim if all conditions are met as is the case in this present case. To that extent, if by its failure, costs are incurred in pursuance of payment, the defendant ought to be penalised and condemned to pay costs to the plaintiff. Costs ordered by the court in its discretion cannot be construed to include the principle sum, in this case the capped sum of Kshs.3,000,000/=. It is trite that costs follow the event, unless otherwise ordered by the court. **Section 27 of the Civil Procedure Act** states:

“--- the costs of and incidental to all suits shall be in the discretion of the court or Judge, and the court shall have full power to determine by whom--- such costs shall be paid ---- provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

15. In **High Court Election Petition No. 6 of 2013 – party of Independent Candidate of Kenya and Another -vs- Mutula Kilonzo & Others.**

It was stated that the Principle underlying the award of costs is two fold-

- 1. The award of costs is a matter of discretion of the court that ought to be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at.***
- 2. The general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.***

The defendant had not shown good reasons or at all why the court should depart from the above principles – and deny the plaintiff costs incurred in the prosecution of the case. Had the Defendant paid, the Kshs.3,000,000/= may be, the court would have had no reason to offer and or penalise it for the expenses, inconvenience, costs and interest occasioned by the filing and prosecution of this court.

16. Consequently, judgment is entered for the plaintiff against the defendant as prayed in the plaint as follows:

- (a) A declaration is issued that the defendant is bound to satisfy the decretal sum in Nakuru HCCC No. 405 of 2000 in the sum of Kshs.3,000,000/=.***
- (b) That the defendant shall pay interest at court rates on the said sum of Kshs.3,000,000/= from the 20th March 2013 when judgment was delivered in Nakuru HCCC No. 405 of 2013.***
- (c) That costs of this suit shall be borne by the defendant.***

Dated, signed and delivered in open court this 28th day of April 2016.

JANET MULWA

JUDGE