



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAKURU**

**Civil Suit 431 of 1999**

**RICHARD GICHANGI KIENYERE.....1<sup>ST</sup> PLAINTIFF**  
**KENNEDY KANYERIA KIENYERE.....2<sup>ND</sup> PLAINTIFF**  
**LYDIA WANJIRU KIENYERE.....3<sup>RD</sup> PLAINTIFF**  
**ANN WANJIRU KIENYERE.....4<sup>TH</sup> PLAINTIFF**  
**JOYCE WANGARI KIENYERE.....5<sup>TH</sup> PLAINTIFF**  
**JOSPHAT GATHUE KIENYERE.....6<sup>TH</sup> PLAINTIFF**  
**PAUL GITAHU KIENYERE.....7<sup>TH</sup> PLAINTIFF**

**VERSUS**

**GENERAL ACCIDENT INSURANCE CO. LTD.....DEFENDANT**

**JUDGMENT**

The plaintiffs filed suit against the defendant seeking the following orders of this court;

- (a) A declaration that the defendant herein compromised Nakuru High court Civil Case No. 5 of 1988 and should be condemned to satisfy the same with interest at court rates of 14% from the 6<sup>th</sup> of July 1995 judgment date of this matter or in the alternative judgment be entered against the defendant as per paragraph 3 of the plaint herein with interest at court rates from the 6<sup>th</sup> of July 1999.**
- (b) The defendant be condemned for negligence and to pay the costs of and incidental to this suit.**
- (c) Interests on (a) and (b) above from the date of filing till payment if full.**
- (d) Any other or further award that this Honourable court deems fit to grant in exercise of its inherent power to prevent the ends of justice from being defeated or a miscarriage of justice to occur.**

The paragraph 3 of the plaint referred to in prayer (a) of the claim states as follows;

**“3. The plaintiffs herein were the plaintiffs in Nakuru HCCC No. 5 of 1988 whereby they were awarded Kshs 1,296,900/= general damages under the Fatal Accidents Act, Kshs 11,909/= special**

**damages, and Kshs 60,000/= for general damages under the Law Reform Act for the loss of expectation of life in respect of their deceased father who died on the 2<sup>nd</sup> of May 1985 in a horrible road traffic accident along Thika-Nairobi road.”**

The defendant filed a defence. It denied that it owed the said sum pleaded to the plaintiff. In paragraph 7 and 8 of its defence the defendant stated as follows;

**“7. The defendant shall state that it fully complied with the provisions of Order XXI rule 1 of the Civil Procedure Rules in that it paid the decretal sums in the manner provided by the court. Further the defendant shall contend that it was the plaintiffs’ advocates who proposed Kenya Finance Bank Limited which in the defendant’s view, was a stable bank, hence the defendant’s agreement to the proposal. The collapse of the same bank was therefore unforeseeable and cannot be blamed on any of the parties, least of all the defendants.**

**8. The defendant further denies paragraph 9 and 10 of the plaint and reiterates paragraph 7 herein above and denies that it is liable to make any further payments in satisfaction of the decree in Nakuru 5 (sic) of 1988 or any interest in respect thereof.”**

This case was fixed for hearing on the 1<sup>st</sup> of February 2005. The said hearing date was taken *ex parte* by the plaintiff on the 30<sup>th</sup> of August 2004. The defendant was duly served with the hearing notice. However on the said 1<sup>st</sup> of February 2005 the hearing of this case was adjourned to the 3<sup>rd</sup> of May 2005 by this court. The plaintiff was ordered to serve the defendant. The defendant’s advocates Messrs Mereka & Co. Advocates were served with the hearing notice on the 3<sup>rd</sup> of February 2005. An affidavit of service was filed in court. This court was satisfied that the defendant was properly served and ordered the hearing of the case to proceed in the absence of the defendant notwithstanding.

The plaintiffs called two witnesses. PW1 Miriam Sitienei, a clerk at the High Court Civil Registry Nakuru produced the court file in respect of Nakuru HCCC No. 5 of 1988. She testified that the parties in the said suit were **Wanjira Kienyere Gichangi & others –vs- Ruchu Gaitho**. She testified that the matter had been concluded and judgment had been delivered in favour of the plaintiffs. The court had awarded the plaintiff the sum of Kshs 1,390,809/50. The said court file was produced as *plaintiffs’ exhibit No. 1*.

PW2 Richard Gichangi Kienyere testified that his mother and seven siblings filed Nakuru HCCC No. 5 of 1988 against the owner of a motor vehicle which was insured by the defendant in this case. He testified that his mother was killed by thugs. He obtained letters of administration to administer the estate of his deceased’s mother (*letters of administration produced as plaintiffs’ exhibit No. 2*). He testified that Tunoi J. (*as he was then*) awarded the plaintiffs the sum of Kshs 1,367,909/= as general damages. The award was made on the 6<sup>th</sup> of July 1995. The cause of action in the suit was said to have arisen from an accident involving the vehicle of the deceased father of PW2 and a bus whereby the deceased father of PW2 was fatally injured.

He testified that to date the amount had not been paid. He recalled that the defendant had indicated that they were going to appeal against the said decision of the high court because they were dissatisfied with the said award made by the High court. He recalled that the defendant had offered to pay the plaintiffs half of the decretal sum but the plaintiffs were not willing to accept the offer made by the defendant. Finally, pending the hearing and determination of the appeal filed at the Court of Appeal, the decretal sum was deposited at Kenya Finance Co. Limited (*a copy of the deposit slip was produced as plaintiffs’ exhibit No. 2*). He testified that the firm of Mereka & Co. Advocates had given a professional undertaking on behalf of the defendant. The said letter was addressed to the Association of Kenya Insurers (*letter written on the 30<sup>th</sup> of August 1995 produced as plaintiffs’ exhibit No. 4*). He testified that the defendant did not file an appeal. The notice of appeal was struck out on the 24<sup>th</sup> of February 1999 (*order produced as plaintiffs’ exhibit No. 5*). He testified that no other appeal was filed by the defendant.

He recalled that the decretal sum was deposited at Kenya Finance Bank Limited to protect the interest of the defendant. The said bank collapsed soon thereafter. The plaintiffs were therefore seeking the order of

this court to compel the defendant to pay the said decretal sum plus interest. He recalled that the defendant had compromised the suit and had even instructed its advocates on record to give a professional undertaking. He testified that the decretal amount in the said suit should therefore be satisfied by the defendant because it delayed the payment to the plaintiffs by filing an appeal and therefore when Kenya Finance Bank collapsed it had the responsibility to pay the said decretal sum. He urged this court to grant the prayers sought in the plaintiffs' suit. He also prayed for costs.

I have considered the pleadings which were filed by the plaintiffs and the defendant in this suit. I have also considered the evidence that was adduced by the plaintiffs' witnesses. The issue for determination by this court is whether the plaintiffs' have established their case on a balance of probabilities as to entitle this court to grant them the orders prayed in their plaint. As stated earlier in this judgment the proceedings herein were *ex parte*. The defendant was served to attend court on the hearing date but failed to do so. The court therefore only considered the oral evidence that was adduced by the plaintiffs' witnesses.

In this case, it is not disputed that judgment was entered against the insured of the defendant on the 6<sup>th</sup> of July 1995. The plaintiffs were awarded the sum of Kshs 1,390,809/50 as general damages. The defendant was aggrieved by the said decision of the High Court and duly filed a notice of appeal indicating its intention to appeal against the said decision. The defendant filed the appeal on behalf of its insured. However from the evidence adduced by the plaintiff it is apparent that the said appeal was not successful. It was struck out by the Court of Appeal on the 24<sup>th</sup> of February 1999. The defendant did not attempt to mount another appeal. As it were, the judgment of the high court therefore stood.

What complicated matters in this case are that the defendant had, pending the hearing and determination of the said appeal, deposited the entire decretal amount at Kenya Finance Bank Limited. However by the time the appeal was disposed off, the said bank had collapsed. This court reproduced the relevant averments made by the defendant in its defence where it claimed that it had satisfied the judgment of the court when it deposited the said decretal amount in the said bank which collapsed. The issue for determination by this court is whether the defendant satisfied the judgment of this court by depositing the said decretal amount in the bank which collapsed. The plaintiffs have testified that the said deposit of the decretal amount was made pursuant to an application for stay of execution which had been made by the defendant to protect its interest pending the hearing and determination of the appeal that it had filed. It is the plaintiffs case therefore that when the said bank collapsed, it was holding the said sum on behalf of the defendant and not the plaintiffs. I agree with the interpretation by the plaintiffs as regard the circumstances under which the said amount was deposited at the said bank.

It is clear that if the defendant had not disputed the judgment which was entered by the high court against its insured, the said sum would have been paid to the plaintiffs. The decretal sum was deposited at the collapsed bank at the instance of the defendant. It was because the defendant wanted to protect its interest in the said decretal sum that it sought an order of the court to have the said decretal sum kept in the custody of a third party pending the hearing and determination of the appeal which it had filed at the Court of Appeal. The said decretal sum was not deposited at the collapsed bank for the good of the plaintiffs. They had not received the money. In the circumstances of this case therefore, and in light of the uncontroverted evidence adduced by the plaintiffs, I do hold that the plaintiffs have established their case on a balance of probabilities.

I therefore enter judgment for the plaintiffs against the defendant for the sum of Kshs 1,390,809/50. As the insurers of the motor vehicle which was judged to have caused the accident that led to the death of the deceased's father of the plaintiffs, the defendant is legally liable to settle the said decretal sum. The said amount shall be paid plus costs of the suit in Nakuru HCCC No. 5 of 1988 which shall be agreed or taxed. The said amount shall be paid with interest at 14% per annum from the 6<sup>th</sup> of July 1995 when judgment was entered in favour of the plaintiffs against the insured of the defendant by the high court. The plaintiffs shall have the costs of this suit.

**DATED at NAKURU this 3<sup>rd</sup> day of July 2006.**

**L. KIMARU**

**JUDGE**