Mutua v Geminia Insurance Company Ltd; Mutua (Interested Party) (Civil Case E011 of 2021) [2025] KEHC 3217 (KLR) (21 January 2025) (Judgment)

Neutral citation: [2025] KEHC 3217 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL CASE E011 OF 2021

FR OLEL, J

JANUARY 21, 2025

BETWEEN

ANDREW LINGE MUTUA ..... PLAINTIFF

AND

GEMINIA INSURANCE COMPANY LTD ..... DEFENDANT

AND

ZIPPORAH MWENDE MUTUA ..... INTERESTED PARTY

JUDGMENT

A. Introduction

1. By his plaint dated 2nd June 2021, the plaintiff did fil this claim as against the defendant, seeking judgment to be entered in his favour and the following declarations be made

    a. A declaration that the Defendant is in breach under the Insurance policy.

    b. A Declaration that the Defendant is obliged to indemnify in full pursuant to the terms of the insurance policy, and judgment entered on 4th April 2019, in Machakos Chief Magistrate court civil case Number 312 of 2018 Zipporah Mwende Mutua Vrs Andrew Linge Mutua.

    c. General damages for breach of contract.

    d. Interest on (b) and (c) above from the date of Judgement until payment in full

    e. Cost of this suit and Interest thereon.

2. The plaintiff averred that at the time of filing the primary suit, he was the registered owner of motor vehicle registration Number KAZ XXXXT (hereinafter referred to as the suit motor vehicle) , which

was involved in a road traffic accident along Machakos -Kyumbi road on 25th December 2017, while under the care of his authorized driver.

3. At the time of the said accident, the said suit motor vehicle was insured by the defendant under Insurance policy No PC/01/1778815/1 against all forms of liability including costs and/or expenses which the plaintiff would become liable to pay in respect of death or bodily injuries caused to any third party and which arose directly out of use of the said suit motor vehicle. As a result of the accident, the interested party herein did institute Machakos Chief Magistrate court civil case Number 312 of 2018 Zipporah Mwende Mutua Vrs Andrew Linge Mutua, whereupon the defendant herein appointed the firm of Njogoro & Co Advocates to represent him.

4. The plaintiff further deponed that the said firm did file the appropriate pleadings but without advising him, on 23.11.2028 proceeded to enter into a consent judgement on liability, wherein he was held 100% liable for the accident and the parties advocates further admitted all of the plaintiffs (interested party) claim supporting document's without authenticating the same and/or calling the authors of the said documents. As a result, judgment was entered as against him in the sum of Kshs 3,710,0470/=, out of which the defendant settled Kshs 3,000,000/= and exposed him to pay the balance of Kshs 710,470/ = plus interest thereon.

5. The plaintiff faulted this concession and stated that the consent placing liability on him was unlawful as it contravened Section 10(3A) of the Insurance (Motor vehicle Third party Risks) Act. The defendants was also negligent in paying the interested parties claim without subjecting her to undertake medical examination by a certified medical practitioner, which should have been the case as she had alleged to have suffered 80% disability, which failure resulted in the high award.

6. The plaintiff thus urged this court to hold and declare that, the defendant had breached terms of the insurance policy and was obliged to indemnify him to the full extent against the judgment entered against him in Machakos Chief Magistrate court civil case Number 312 of 2018 Zipporah Mwende Mutua Vrs Andrew Linge Mutua

7. The defendant upon service did enter appearance and filed their statement of defence dated 9th April 2021. They admitted that they had covered the suit motor vehicle but urged court to note that the said policy was subject to a policy limit of, " Kshs 3,000,000/= in respect of death or bodily injury to any one person/claimaant hence they were only entitled to pay the claim up to the said limit.

8. The defendant further averred that the issue of statutory limits and policy limits complained off by the plaintiff had been subject of litigation and was conclusively adjudicated upon in High Court Constitutional Petition No 148 of 20214, Law Society of Kenya Vrs The Attorney General, where the relevant amendment's to the *Insurance Act* particularly Section 5(b) of the Insurance (Motor vehicle Third party Risks) Act, Cap 405 (The principal Act) as well as the amendments made to "The Insurance (Motor vehicle third party Risks) Amendment *Act, No 50 of 2013* "(The Amended Act) where were upheld as valid and they were therefore were not obligated to pay any amount above the agreed principal sum, which had been statutorily set.

9. That upon being notified of the judgment entered against the plaintiff in Machakos CMCC No 312 of 2018, the did make arrangement's and immediately paid the interested party a sum of Kshs 3,000,000/ = in full satisfaction of its policy and statutory obligations and was not under any other contractual obligation to pay more than what was specified in the policy document, which was aligned to the statutory limit.

10. The plaintiff had the opportunity but did not file any Appeal as against the judgment delivered in Machakos CMCC No 312 of 2018 and was therefore estopped from making wild and unsupported

allegations of any failure real or imagined on their part. They further averred that the policy/contract being challenged had an arbitration clause and therefore this claim had been filed prematurely and the court did not have jurisdiction to determine the same.

11. The Interested party too filed their statement of defence dated 15th November 2021 and denied all the averments made by the plaintiff. They affirmed that the defendant exercised their rights under the insurance principal of subrogation to appoint the firm of Njongoro & Co Advocates to represent the plaintiff and if there was any failure the same had to shouldered by the plaintiff for not keenly following up the proceedings of the primary suit.

12. The defendant had partly settled the degree to the tune of Kshs.3,000,000/= and it was upon the plaintiff to settle the balance owned being Kshs.710,000/= plus interest thereon.

13. The interested party furthermdid contend she was not a privy to the contents of the contract between the plaintiff and the defendant and had been wrongly dragged into their dispute. She was in possession of valid judgment, where no Appeal has been proffered and therefore had the right to demand that the said decree be settled by the plaintiff or the defendant.

14. In a rejoinder, the plaintiff did file their reply to defence and joined issue on all averments made by the defendant.

B. Evidence

15. The plaintiff (PW1) testified and confirmed that he owned the suit motor vehicle and further affirmed that it was insured by the defendant. The said motor vehicle was involved in an accident on 25.12.2017 and he reported the same to the defendant who took up the responsibility of defending the various claims filed. Later on, he was surprised to get a letter dated 02.06.2021 (Exhibit 1) from the defendant informing him that judgment had been entered against him and he was required to pay part of the decretal sum totaling to Kshs.710,470/=.

16. He sought legal counsel and reached out to the defendant to find an amicable solution but no progress was made. His grouse was that the defendant's appointed counsel did not keep him in the loop regarding the proceedings which took place in the lower court and thus skipped the opportunity to have his driver testify as to how the accident occurred, which evidence would have been considered by the trial court when it came to the issue of determining liability.

17. The defendant was therefore negligent in the manner in which they handled the claim filed by the interested party and ought to be held liable and directed to settle the entire decretal sum. PW1 did produce the pleadings filed in the primary suit, the judgment and warrant of attachment as Exhibits in support of his case. Under cross examination PW1 confirmed that several suits were filed arising from the accident which occurred and the judgement in Machakos CMCC No 312 of 2018 mentioned that there was a test suit being Machakos CMCC No 314 of 2018, where the issue of liability was determined.

18. PW1 further confirmed that he was not aware whether his driver Joshua Munyoki Kavivu testified in the test suit, and if the said evidence was adopted in Machakos CMCC No 312 of 2018. He was referred to the Insurance policy document (Exhibit D1) and confirmed that as per the said policy document liability for every claim was limited to Kshs.3,000,000/=. The judgment delivered in Machakos CMCC No 312 of 2018 was Kshs.3,710,000/= out of which the defendant had settled Kshs.3,000,000/= but still believed that he had a valid cause of action as the defendant appointed advocate had handled the primary suit in a callous and negligent manner, which was to his detriment .

19. Under further cross examination by the interested parties Advocate, PW1 confirmed he owned the suit motor vehicle, as at the time the said accident and as a result, the interested party had sustained injuries. After reporting the incident to the insurance Company, he did not follow up on the same until he received a letter informing him of the judgment entered as against him. The insurance limit of Kshs 3,000,000/= could not stand as the defendant appointed advocate was negligent. The defendant also ought to have settled the entire decretal sum and demanded a refund of the excess sum from him.

20. DW1 Mr Ondari Erick testified that he was a senior legal officer working for the Defendant insurance company and adopted the witness statement of his colleague Mr. David Nyaundi filed in court on 28.02.2022 and also relied on the document filed in court which were admitted as Exhibit D (1) to (6). He confirmed that the plaintiff was their insured and the said policy had a liability limit per claim to the tune of Kshs 3,000,000/= as categorically stated in paragraph 3(a) of the said policy document.

21. They defended the plaintiff's interest in the primary suit and ultimately judgment was entered in favour of the interest party in the sum of Kshs.3,530,000/=. Costs were assessed at Kshs.180,470/=, which sum totaled to Kshs.3,710,470/=. They had settled this claim to the statutory limit allowed being Kshs.3,000,000/= and could therefore not be faulted for not paying any sum above the contracted sum.

22. DW1 further refuted the plaintiff claim that the advocate hired to defendant the suit was negligent and affirmed that the accident resulted in a series of claims and that Machakos CMCC No 314 of 2018 was selected to be the test suit, where the question of liability was determined. In the said suit the plaintiff driver Joshua Kaviti Munyoki did testify and the eventually , liability as against the plaintiff was determined at 100%, which explains why their counsel adopted the said liability in the primary suit Machakos CMCC No 312 of 2018.

23. The plaintiff claim was therefore misconceived and they urged the court to dismiss the same. It was also to be noted that arising from the different suits filed, they had paid a total of Kshs.10,883,877/= on account of several decretal sums and costs claimed by various plaintiffs. He thus prayed that this suit be dismissed with costs.

24. Under cross examination DW1 reiterated his evidence as regards the findings of the "test suit" and clarified that the "consent judgment on liability" entered in the primary suit herein was based on the finding of the "test suit", where the plaintiff's agent had been found to be 100% liable for the accident which occurred. They also had no control over the court in its determination of quantum awardable and therefore the plaintiff was misguided to blame them or their advocate for the quantum sum arrived at.

25. DW1 also clarified that they had not breached the Insurance contract they entered into with the plaintiff and had settled the sum due from them. Having done so, it was incumbent on the plaintiff to settle the remaining decretal sum of Kshs.710,470/=. He reaffirmed this fact in cross examination by the interest parties counsel and in re -examination by his counsel.

26. Zipporah Mwende Mutua, the Interested party confirmed that she was the plaintiff in the primary suit, Machakos CMCC No 312 of 2018 and had obtained judgment of Kshs.3,710,470/= out of which the insurance company had settled Kshs.3,000,000/=. The balance of Kshs.710,470/= remained unpaid. She had a valid decree and was entitled to this sum plus interest. Under cross examination the interested party confirmed that as a result of the accident, she lost her eye sight and was entitled to be fully indemnified as she had not fully healed. She prayed that this suit be dismissed with costs.

B. Parties Submissions

(i) Plaintiff Submissions

27. The plaintiff filed his submissions dated 19.03.2024, and submitted that it was not in dispute that the he and defendant did enter into a contract, for insurance indemnity and subsequently Policy Number PC/1778817/1 dated 10.05.2017 was issued. The insured motor vehicle was involved in an accident on 25.12. 2017 and he promptly reported the same to the defendant, who subsequently took up the claims under the principle of Subrogation and retained the law firm of Njongoro & Company Advocates to defend his interest.

28. Unfortunately, the said advocate failed to act professionally and proceeded to enter into a consent judgment with the interested parties advocate, placing liability at 100% on him, and further admitted all plaintiff claim supporting documents by consent. The said advocate also failed to refer the interest party to undertake a second medical examination by a certified medical practitioner and this prejudiced him and contravened provisions of Section 10(3A) of the Insurance (Motor vehicle Third Party Risk) Act as read with guideline 6(111) of the Guidelines on claim management for the insurance industry.

29. It was further submitted that duty of care flowed from contractual terms and where there was failure by one party to carry out their mandate under the said contract, the court could intervene and direct the party in default to meet its obligations. Reliance was placed on Civil Appeal No 7 of 2017 Kneya Re-Insurance Corp Ltd Vrs SMK { A minor suing through her mother & next friend TMK) & 2 others {2019} eklr & Rosemary Vassaux Vrs Kenya Power & Lighting Co Ltd {2014} eklr

30. The plaintiff further did submit that the defendant was statutorily bound to indemnify him pursuant to provisions of Section 5(b) and 10(1) of the Insurance (Motor Vehicle Third Party Risk) Act, Cap 405. The plaintiff reiterated that it was defendant agent (advocate) who was at fault and they could not turn the situation around to blame him for not appealing as against the said judgment. Reliance was placed on Civil suit no. E212 of 2019 Hyrdo Water Well (K) Limited v Sechere & 2 others (Sued in their representative capacity as the officers of Chae Kenya Society),Maurice Anekeya Chewa v Erastus M Juma [2022] eKLR.

31. To emphasis the point that they were entitled to the order sought the plaintiff also placed emphasis on Machakos Civil Suit No. 26 of 2018 Kiamuko & another (Suing as Administrators of the Estate of the Late Evans Kyalo Maundu - Deceased) v ICEA Lion General Insurance Co. Limited where Justice J. Odunga stated that

> " According to section 10 of the Act, after a policy of insurance has been elected the Insurer is liable to pay to the persons entitled to the benefit of a judgment any sum payable, in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy. The section expressly states that the insurer is under an obligation to pay the sum under paragraph (b) of section 5 of the Act including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments. In our case the enactment relating to interest on judgements is section 27 of the *Civil Procedure Act*. 41.

32. It was the Plaintiff's humble submissions that he has discharged the burden of proof, on a balance of probability as required by law, in demonstrating that the Defendant breached the terms of the insurance contract and was negligent in the manner in which its agent conducted the primary suit.

33. The plaintiff urged the court to grant the declarations sought, plus costs of the suit.

(ii) Defendant's Submissions

34. The defendant filed their submissions on 20.09.2024 and raised the following issues for the court's determination;

    a. Whether the defendant was negligent and/or in breach of its contractual obligation under the insurance policy.

    b. What amount is the defendant to indemnify in full pursuant to the terms of the Insurance policy.

    c. Whether the defendant has paid the claim upto the specified policy limit/statutory limit.

    d. Whether the defendant is under obligation to pay more than the policy limit/statutory limit out of any award given by a court in judgement.

    e. Whether the defendant professionally defended the law suit alleging liability on the plaintiff.

    f. Whether the defendant was negligent and/or in breach of its contractual obligation.

35. It was the defendant's contention that the plaintiff had an obligation to show that the contract existed and that it was breached by them and as a result the plaintiff suffered damages. Section 4 of the Insurance (Motor vehicle Third Party Risks) Act, Cap 405 required that an insurance policy be taken out against 3rd party risk and it was this policy that brought about the existence of a contractual relationship between the insurer and the insured.

36. It was common ground that policy No PC/01/1778815/1 was issued with respect to the suit motor vehicle, which was subsequently involved in an accident, which occurred on 25.12.2017. As provided for under the said contract, they defended several suits, and in particular, also paid the sum of Kshs 3,000,000/= (on 06.05.2029) to partly settle the decree arising from the decree issued in Machakos CMCC No 312 of 2018 as mandated under Section 5(iv) of the Insurance of Motor Vehicle (Third Party Risk) Act, Cap 405.Reliance was placed on APA Insurance Co ltd Vrs Thuo & Another (Suing as the administrator of the Estate of Micheal Thuo Waitiki), (Civil Appeal E001/2021),(2024) kehc 1450 (klr), African Merchant Assurance Company Ltd vrs William Muriithi Kimaru (2016) eklr,& Gitu Geoffrey & Another vrs Britam General Insurance Co ltd & Another(20200 eklr where the issue of amount payable under a policy had been determined not exceed Kshs 3,000,000/= as was provided for in law.

37. On whether their appointed advocate had acted professionally in defending the claim, the defendant clarified that there was no consent judgment entered and as clearly captured in the plaintiffs bundle of document letter dated 23.11.2018, (Exhibit P3) which captured the terms of the consent to state that, " the finding on liability on the basis of 100% against the defendant in CMCC No 314 of 2018 be adopted in this case and judgment on liability accordingly be entered." It was to be noted that what was being adopted were the findings of the said test suit and that was procedurally proper.

38. A further misrepresentation made by the plaintiff was that they did not contact him or his driver. That allegation was not true as the said driver, Joshua Munyuoki Kaviti attended the defence advocate chambers and recorded his witness statement which was filed in court. The said driver is also said to have attended court and testified in the test suit (Reference was made Exhibit P2, the defence pleadings filed at page 16 to prove that the plaintiff driver had recorded his witness statement).

39. Finally, the defendant also submitted that that the plaintiff had misinterpreted the provisions of Section 10(3A) of the Insurance (Motor vehicle Third Party Risks) Act, Cap 405. The said provision only made it mandatory and or a condition precedent to have the plaintiff reexamined by the medical doctor, if it was requested by the insurance company. However, if the insurer was satisfied with the medical documents presented by the claimant then the issue of mandatory medical reexamination did not arise and would not be a condition precedent to payment of the claim.

40. The defendant thus urged the court to find that they had fulfilled their obligation under the contract, their advocate did not act in a prejudicial manner and therefore prayed that the plaintiff's claim be dismissed due with costs.

(iii) Submissions by the Interested party.

41. The interested party did file their submissions (undated) and stated that a valid judgment was entered as against the plaintiff in Machakos CMCC No 312 of 2018 on 04.04.2019 for the sum of Kshs 3,530,000/= plus costs and interest. The defendant had paid Kshs 3,000,000/= and left an outstanding balance of Kshs 710,470/= plus interest. On 27.05.2021, they took out warrants of execution for the outstanding amount of Ksh 1,060,040/=, which led to the filing of this suit.

42. She had been wrongly dragged into this suit as she was not privy to the contractual obligations arising between the plaintiff and the defendant, but it was her belief that the defendant undertook its obligation under the principle od subrogation to appoint he firm of Njongoro & Co Advocates and it was too late in the day for the plaintiff to try run away from the obligations arising.

43. She thus urged the court to dismiss this suit with costs.

C. Analysis and Determination

44. This court has examined the pleadings filed, the evidence adduced by all the parties herein and also given due consideration to the submissions by the parties' respective Counsel's. It is clear that the central question for determination revolves around two broad questions to wit;

    a. Whether defendant was negligent and/or breached its contractual obligation under the insurance policy?

    b. Whether the defendant is under obligation to pay more that the sum provided for as the policy limit/ statutory limit out of the award / decree issued in Machakos CMCC No 312 of 2017.

    c. Who should pay the costs of this suit.

45. First and foremost, both parties admit and it is common ground that they hand a contractual relationship cemented by Policy Number PC/01/1778815/1, which covered the suit motor vehicle, which unfortunately was involved in an accident on 25.12.2017 and as a result the interested party herein got injured and subsequently filed Machakos CMCC No 312 of 2018 seeking damages for injuries suffered.

46. After trial judgment was entered in favour for the Interested party on 04.04.2019 for the sum of Kshs 3,530,000/= plus cost and interest. The costs were later assessed at Kshs 180,470/= making the total sum due to be Kshs 3,710,470/=. Out of this sum the defendant had paid Kshs 3,000,000/= and the outstanding balance due was Kshs 710,470/=.

i. Whether defendant was negligent and/or breached its contractual obligation under the insurance policy?

47. It was the plaintiff case that the defendant appointed Njongoro & co Advocates, and the said firm handled the primary suit in a callous manner by admitting all the plaintiff's claim supporting document's by consent and/or without calling the authors for cross examination. Further the said advocate did unlawfully enter into a consent judgment placing liability on the plaintiff's door step at 100% without a proper basis for so acting.

48. It was also the plaintiff's contention that the defendants agent/advocate also breached provisions of Section 10(3A) of the Insurance Motor Vehicle (Third Party Risks) Act, Cap 405, by failing to send the interest party to undergo a second medical examination to verify the extent of her injuries. As a result of these breached the plaintiff urged the court to find that they had proved their case on this limb.

49. The evidence on record shows that there was a test suit being, "MACHAKOS CMCC No 314 of 2018", where the issue of liability was tried and judgment on the issue of liability determined at 100% as against the plaintiff. As a matter of procedure and common practice, it is usually standard practice to have the "findings on liability in a test suit adopted in all other matters, where a series of suits have bene filed involving one accident. This is done to avoid duplicity of proceedings, encourage efficient disposal of the business of the court and also to save precious judicial time as envisaged under the, "oxygen rules".

50. Secondly, the defendant had an obligation under the principal of subrogation to appoint an advocate to act for the plaintiff in the primary matter and they did so. While the plaintiff alleges that there was no communication between him and the said advocate, as correctly pointed out by the defendant, the plaintiff annexed the witness statement signed by his own driver, which was filed in the primary suit (Exhibit P2 Statement of Defence and Witness statement dated 29.06.2018 filed in the primary suit).

51. This was proof of fact that the plaintiff agent was in touch with the appointed advocate. The plaintiff also did not disapprove of the fact that the said driver testified in the test suit, where the issue of liability was conclusively determined.

52. Finally I also find that the defendant did not breached provisions of Section 10(3A) of the Insurance Motor Vehicle (Third Party Risks) Act, Cap 405, by failing to send the interest party to undergo a second medical examination to verify the extent of her injuries. The said provision only made it mandatory and or a condition precedent to have the plaintiff be re-examined by the medical doctor, if it was requested by the insurance company. However, if the insurer is satisfied with the medical documents presented by the claimant then the issue of mandatory medical reexamination did not arise and would not be a condition precedent to payment of the subsequent claim arising.

53. Thus, regarding the first issue raised, I find that the defendant did not breach any of its contractual obligations under the Policy Number PC/01/1778815/1 referred to above.

ii. Whether the defendant is obligated to pay more than the sum provided for as the policy limit/ statutory limit out of the award/decree issued in Machakos CMCC No 312 of 2017.

54. Section 5 of the Insurance (Motor Vehicle Third Party Risk) Act, Cap 405 provides that;

> Requirements in respect of insurance policies
>
> 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. liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or

(ii) except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arose; or any

(iii) contractual liability;

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

55. This is further echoed under Section 10 of the same Act which provides for the duty of an insurer to satisfy judgement against an insured person by stating thus;

> " If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments. Provided that the sum payable under a judgment for a liability pursuant to this section shall not exceed the maximum percentage of the sum specified in section 5(b) prescribed in respect thereof in the Schedule.

56. In the Law Society of Kenya versus Attorney General & 3 Others 2016 eKLR the court held that the *Insurance Act* only limits how much an insurer should pay by apportioning a maximum of Kshs. 3 million to be paid by the insurer. A Similar, ratio was upheld in Africa Merchant Assurance Co. Limited versus William Muriithi Kamaru 2016 eKLR.

57. The Court of Appeal in CIC General Insurance Group Ltd v Gerald Ochoki [2020] eKLR also affirmed the above when it stated that;

> " Section 5(b)(iv) sets the maximum liability of the insurer at Kshs.3,000,000. We are therefore of the considered view that the judge was correct in coming to that conclusion. Further, in

this court's decision of Justus Mutiga & Others vs. Law Society of Kenya & another *CA No. 141 of 2016*, it was held:

> "We do not understand the schedule to curtail the court's duty and mandate to assess the evidence before it and award whatever amount of damages which in the court's view suffices to compensate the victim of the accident. What in our considered view is anticipated by the amendment is to put a ceiling or cap to the amount recoverable from the insurance company, but it does not fetter the court from awarding more than Ksh.3 million.What this would mean is that any compensation awarded by the court in excess of Ksh.3 million would be recoverable from the insured and not from the insurance company. To that extent, this would not amount to usurpation of the court's judicial independence, authority, and discretion. We consequently agree with the learned Judge on that point and uphold his finding that section 5(b) of the Act is not unconstitutional."

58. Section 5(b)(iv) of the Insurance (Motor Vehicle Third Party Risk) Act, Cap 405 is clear and bereft of any ambiguityand I do find that there is no statutory obligation to force the defendant herein to pay more than the sum of Kshs 3,000,000/= per claim as is statutorily provided for.

(iv) Costs

59. Section 27 of the *Civil Procedure Act*, provides that costs shall follow the event unless the court or judge shall for good reason otherwise order. The defendant and interested party defended this claim and fully participated in the trial. They must as a matter of cause be awarded costs.

C. Disposition.

60. The plaintiff has failed to prove his claim and the same is hereby dismissed with costs to the Defendant and the Interested party.

61. It is so Ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MARSABIT THIS 21ST DAY OF JANUARY, 2025.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 21ST DAY OF JANUARY 2025.

In the presence of: -

No appearance for Appellant

No appearance for Respondent

I.Jabo Court Assistant