



**Kanyingi & another (Suing as the Legal Representative of the Estate of
Loice Gathoni Mugo - Deceased) v Kenya Orient Insurance Ltd (Civil
Suit E034 of 2022) [2025] KEHC 5580 (KLR) (5 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5580 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL SUIT E034 OF 2022
PN GICHOHI, J
MAY 5, 2025**

BETWEEN

ISAAC KIMANI KANYINGI 1ST PLAINTIFF

CATHERINE NJERI MUGO 2ND PLAINTIFF

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF LOICE
GATHONI MUGO - DECEASED**

AND

KENYA ORIENT INSURANCE LTD DEFENDANT

JUDGMENT

1. The Plaintiffs instituted this declaratory suit vide a Plaint dated 20th December, 2022 and filed on 21st December, 2022 seeking for the following reliefs: -
 - a. A declaration that the defendant is bound to fully satisfy the decretal sum awarded in Nakuru Civil Appeal No. 120 of 2015 as against Hellen Wanjiru Rukanga.
 - b. In the alternative, judgement be entered against the Defendant in the sum of Kshs. 2,898,785.74 being the decretal amount plus costs and interest as awarded in Nakuru Civil Appeal No. 120 of 2015 against Hellen Wanjiru Rukanga.
 - c. Costs of this suit together with interest.
 - d. Any other or further relief that this Honourable court may deem fit and just to grant.
2. The background of the claim is that sometimes on 20th April, 2011, Loice Gathoni Mugo (deceased) was travelling in motor vehicle registration number KYW 722 Isuzu lorry, when the driver of the said



vehicle negligently drove the said vehicle causing it to veer off the road and landed on a ditch, thus occasioning the deceased serious injuries which she succumbed to.

3. At the material time, the subject motor vehicle KYW 722 was insured by the Defendant herein and therefore, a statutory notice was sent to it under section 10(1) of *Insurance (Motor Vehicles Third Party Risks) Act*, Cap 405 since liability arising out of the said accident was covered in their policy within the meaning of section 5(b) of the stated Act and the Defendant was bound to satisfy any damages arising therefrom.
4. Consequently, on 12th June, 2012, the Plaintiffs filed a suit in this Court being, Nakuru High Court Civil Suit No. 205 of 2012 against Hellena Wanjiru Rukanga (the insured). The matter was heard and the Court rendered its judgement on 13th July, 2014 in favour of the plaintiffs against the Respondent for Kshs. 160,231.
5. Aggrieved by this decision, the Plaintiffs lodged an appeal at Nakuru Court of Appeal, being Nakuru Civil Appeal No. 120 of 2015. The Appeal was heard and judgement delivered on 10th July, 2022 in favour of the Plaintiffs (now Appellant) for payment of the sum of Kshs. 2,505,237 upon deduction of 30% contributory negligence. They were also awarded costs and interests on general damages from the date of judgement of the High Court.
6. Following the award by the Court of Appeal, the Plaintiffs and Hellena Wanjiru Rukanga entered into a consent dated 29th November, 2021 to pay the decretal sum in monthly instalments of Kshs. 250,000. Instalments were remitted to them monthly for 10 months beginning October, 2021 till July, 2022, cumulatively getting Kshs. 2,500,000, leaving a balance of Kshs. 2,898,785.74.
7. The Plaintiffs pleaded that the Defendant has now refused to pay the balance of the decretal sum in breach of the judgement of the Court of Appeal and clause 3 of the consent dated 29th November, 2021. Moreover, that the award is one of the liabilities that is covered by the insurance policy and therefore, the Defendant is bound to pay the entire decretal sum.
8. The Defendant entered appearance on 10th January, 2023 and filed a defence to this claim admitting to the events leading to the filling of this suit together with the award granted by the Court of Appeal. However, it claimed that it is bound to only satisfy the decretal sum of Kshs. 3,000,000 as per their policy limit for injury claims and provided for under Section 5 (b) (iv) of the *Insurance (Motor Vehicles Third Party Risks) Act*, cap 405 laws of Kenya.
9. Consequently, it paid the Plaintiffs Kshs. 2,500,000 and the balance due is only Kshs. 500,000 which they were in the process of paying, when this suit was instituted. Further that any amount in excess of Kshs. 3,000,000 is to be paid by the insured, Hellena Wanjiru Rukanga.
10. The Defendant denied being served with demand and notice to sue and thus stated that the Plaintiffs are not entitled to the costs sought.
11. In their reply to defence dated 16th March, 2023, the Plaintiffs reiterated their claim and maintained that the Defendant is bound to pay the decretal sum of Kshs. 2,898,785.74 and that in any event, no explanation is given as to the Defendant's failure to pay the admitted sum of Kshs. 500,000.
12. Catherine Njeri Mugo (PW1) testified on behalf of the Plaintiffs. She adopted her witness statement dated 25/3/2024 and produced the documents in the list dated 20/12/2022 (P Exhibit 1-22 respectively).
13. Narrating the claim as pleaded in the Plaint, she stated that liability was agreed by consent in the High Court case and that the Appeal was on quantum only. It was her case that they were awarded Kshs.



- 2,505,237 with costs and interests which after factoring in the interest and costs, the sum accumulated to Kshs. 5,130,960.
14. Consequently, Hellen Wanjiru Rukanga entered into a consent to pay the decretal sum in instalments of Kshs. 250,000 and paid the Plaintiffs a sum of Kshs. 2,500,000 leaving a balance of Kshs. 2,895, 785 which is outstanding.
 15. She stated that they filed this suit as Hellen Wanjiru was insured by the Defendant herein and indeed, the Defendant has been remitting the monthly instalments.
 16. On cross examination, she testified that she sued the Defendant herein to satisfy the decree against Hellen Wanjiru. Prior to filing the High Court suit, they issued a statutory notice to the Defendant herein but admitted that none was on record. She admitted that they received Kshs. 2,500,000 and that the Defendant had made a proposal to them to pay the balance of Kshs. 500,000 to exhaust their obligation but she did not authorize his advocate to receive the said amount.
 17. In re- examination, she denied having declined payment from the Defendant.
 18. David Kaguru Njoroge (DW1) was the Defendant's Nakuru Branch Manager. While adopting his witness statement dated 18/3/2024, he told this Court that they have since paid Kshs. 2,500,000 leaving a balance of Kshs. 500,000 as their limit as per the policy is Kshs. 3,000,000 for comprehensive cover.
 19. He stated that they tried remitting the balance of Kshs. 500,000 but the Plaintiffs refused to accept the said money. He produced the documents dated 4/7/2023 in support of the defence case and stated that no statutory notice was served on them in the primary suit.
 20. On cross- examination, he told the Court that their insured, Hellen Wanjiru Rukanga, had been sued in the primary suit and that the advocate for the insurance in the current suit is the same advocate for their insured in the primary suit.
 21. He stated that the insurance was aware of the judgement of the Court of Appeal. He maintained that the insurance was willing to clear the balance of Kshs. 500,000 but the Plaintiffs refused to accept that payment. He told the Court that he was not aware that the declaratory suit was instituted when payment was not forthcoming. He reiterated that they can only pay cumulative sum of Kshs. 3,000,000 as per the policy.
 22. In re- examination, he testified that the insurance was not a party to the primary suit and has never recorded any consent with the Plaintiffs herein. He added that the limits of Kshs. 3 Million is set by the Insurance Regulatory Authority.

Plaintiff's Submissions

23. Their submissions were on two issues, that is ; whether the plaintiffs are entitled to the orders sought and who should bear the costs of this Suit.
24. On the first issue, it was submitted that it is not in dispute that the plaintiffs were awarded Kshs. 2,505,237 as general damage in the Court of Appeal together with costs of the suit and interest which are to be paid by the insurance company in line with section 10 (1) and (2) of the *Insurance Act*, Cap 405 Laws of Kenya. They argued that this obligation is statutory and cannot be abrogated by terms of contract of insurance.



25. It was submitted that the obligation only ceases when it has been avoided in accordance with the law and to support that argument, they relied on the case of *Dollk Limited v Invesco Assurance Company Limited & 5 others* [2018] KEHC 3499 (KLR), where the Court held that:-

“Subrogation applies in situations where, by virtue of being an insurer, the insurance company is entitled to be placed in the position of the insured and to succeed to all their rights and remedies against third parties in respect to the subject matter of insurance.”

26. Further, they also relied on the case of *Ogada Odongo v Phoenix of East Africa Insurance* (Kisumu HCC NO. 132 of 2003), where the Court held that:-

“By an insurer issuing a policy of insurance, it automatically assumes the rights of third parties. It simply means, the right/obligation of the insured automatically transferred to the insurer unless it proved otherwise. By covering third party rights, the insurance was in essence performing a statutory duty imposed by an Act of Parliament”.

27. Rejecting the Defendant’s argument that their limit per policy is Kshs. 3,000,000, the Plaintiffs relied on the decision in *Justus Mutiga & 2 Others v Law Society of Kenya & Another* [2018] eKLR where the Court of Appeal held that; -

“In addition, that limitation goes against the objective of compulsory third-party motor vehicle insurance. Historically, the Principal Act was enacted in 1945 as the Motor Vehicles Insurance (Third Party Risks) Ordinance, No 12 of 1945. However, unlike the present system section 10 of the Ordinance imposed a duty on the insurer to compensate fully an insurance claim as raised by the injured third party and as sanctioned by the courts. Where the amount was higher than what was covered by the insurance policy taken by the insured, the insurer was still obliged to fully compensate the injured third party but subsequently recover the excess from the insured. This is what was colloquially referred to as the principle of ‘excess’ in insurance in Kenya. That provision in our view, managed to protect the injured third party while also protecting the interests of the insurer by allowing the insurer to recover from the insured, any excess amount without capping the amount which the insurer could pay as compensation.”

28. They therefore submitted that the Defendant failed to satisfy the judgement for a whole year causing it to accrue interest. Moreover, that the parties entered into a consent that is binding on the parties until the same is set aside or varied. In support of this, reliance was placed on the case of *Samson Ole Tina v Clerk Trans Mara County Council* [2010] eKLR and *Smail Surnderii Hirani v Noorali Esmail Kassam* [1952] 19 EACA 131.

29. On statutory, the Plaintiffs submitted that the issue is neither here nor there as the Defendant did not raise it either in the primary suit or the Court of Appeal. In conclusion, the Plaintiffs urged this Court to award them costs of this suit.

Defendant’s Submissions

30. The Defendant submitted on two issues, that is ; whether the Plaintiffs are entitled to the reliefs sought and who should bear costs of this Suit.

31. On the first issue, it was submitted that the Plaintiffs were indeed awarded general damages of Kshs. 2,505,237 and that an agreement was entered between them and their insured to pay the same in instalments, which they remitted every month cumulatively paying Kshs. 2,500,000.



32. It was argued that as per Section 5 (b) (iv) of the *Insurance (Motor vehicle Third Party Risks) Act*, Cap 405 Laws of Kenya, the Insurer in Public Service Vehicles in respect of third parties, is only liable to pay a maximum sum of Kshs. 3,000,000 per claim, which amount is all inclusive. Therefore, any amount in excess of the above limit is to be paid by the insured. In support of this, he relied on the case of *Justus Mutiga & 2 Others v Law Society of Kenya & Another* [2018] eKLR, where the Court of Appeal held that:-

“Unfortunately, under the current system, the third party has been left at the mercy of not just the percentages imposed under the schedule, but should there be any excess recoverable, he must contend with pursuing the insured personally. For example, in the case of *Georgina Wangari Mwangi v. David Mwangi Muteti*, High Court of Kenya Civil Case No 40 of 2013; it was held that the insurance company is to pay a maximum of Ksh.3, 000, 000 with any excess being payable by the insured party. The plaintiff in that case was awarded damages of Kshs.14,612,540.20 out of which only Kshs. 3,000,000 was payable by the insurer, with the rest being recoverable from the insured.”

33. Further reliance was placed on the case of *Africa Merchant Assurance Company Limited v William Muriithi Kimaru* [2016] eKLR, where the Court held that: -

“For reasons I have stated, I allow the appeal to the extent that the trial magistrate erred by relying on *Law Society of Kenya v Attorney General* (Supra) in declining to review the order striking out the appellant’s statement of defence. Although the appeal has succeeded, I decline to set aside the order striking out the appellant’s defence as the amount the decree-holder can recover from the insurance company is provided for by the Act. The insurer is not obliged to pay any amount above Kshs. 3,000,000.00 nor can the decree-holder recover more than that.”

34. From the foregoing, the Respondent submitted that their remaining obligation is the sum of Kshs. 500,000, which it has been willing to pay but the Plaintiffs refused to record a consent on payment of the same and instead insisted on being paid the entire decretal sum.

35. Further, the Defendant submitted that the consent recorded in the primary suit was between the Plaintiffs herein and their insured Hellen Wanjiru Rukanga. That the Defendant was not party to that suit and the resultant consent and thus, it is not bound by the terms of that consent.

36. Lastly, the Defendant argued that by operation of law, the issue of costs does not arise and that in any case, the case herein was instigated by the Plaintiffs’ failure to accede to reasonable and fair terms proposed by the Defendant to pay them a sum of Kshs. 500,000 in satisfaction of its obligation.

Analysis and Determination

37. After hearing the parties on their pleadings and their rival submissions, the issues for determination are:-

- a. Whether the Defendant is liable to satisfy the balance of the decretal sum of Kshs. 2,898,785.74.
- b. Who should bear costs of this Suit.

38. On the first issue, the Defendant’s argument is that by virtue of section 5 (b) (iv) of *Insurance (Motor vehicle Third Party Risks) Act*, the amount payable by the Insurer is limited to Kshs.3,000,000 and that



any other amount in excess of that limit is payable by the insured and that a third party is entitled to pursue the insured for the balance.

39. Section 5 of the *Insurance (Motor Vehicle Third Party Risks) Act*, Cap 405 states that:-

“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
- iii. Any contractual liability;
- iv. Liability of any sum in excess of three million shillings, arising out of a claim by one person.”

40. It therefore follows that section 5 (b) (iv) above, limits the insurer’s liability to Kshs. 3,000,000 and the Plaintiffs cannot compel the Appellant to pay more than the prescribed amount under the Act. This position was well elaborated by the Court of Appeal in the case of Justus Mutiga case (supra), which both parties have relied on. The Court stated that:-

“...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.”

41. Further, the Court of Appeal in the case of *CIC General Insurance Group Ltd v Gerald Ochoki* [2020] eKLR affirmed this position when it is stated that:-

“Section 5 (b) (iv) sets the maximum liability of the insurer at Kshs.3,000,000.”

42. At paragraph 18 of their plaint, the Plaintiffs pleaded that demand and notice of intention to institute these proceedings were served on the Defendant and the Defendant refused to make good the decretal



sum. Indeed, on record is a demand letter and statutory notice both dated 10th November, 2022. They are all demanding for Kshs. 2,898,785.74 being balance of the decretal sum.

43. However, it is common ground that the Defendant herein had paid the Plaintiffs Kshs. 2,500,000 through monthly instalments of Kshs. 250,000, commencing October, 2021 till July, 2022. The payment of instalment was arrived at through a consent entered on 29th November, 2021 between the Plaintiffs herein and Hellen Wanjiru Rukanga (insured). The Defendant herein was not a party to that consent and therefore cannot be bound by the terms agreed therein.
44. The Defendant maintain that they only owe the plaintiffs Kshs. 500,000 as per the Act and that efforts to settle that amount was futile because the plaintiff refused to accept the amount, instead they demanded for the full decretal sum.
45. Indeed, the demand letter and statutory notice demand for the entire decretal sum, yet, by law, the defendant's obligation is limited to a sum of Kshs. 3,000,000. Consequently, having paid Kshs . 2,500,000 as admitted herein, the Defendant owes the Plaintiffs Kshs. 500,000 only.
46. During cross-examination, PW1 admitted that the Defendant offered to pay them another Kshs. 500,000 to clear its obligation. She also confirmed that she did not authorise their advocate to receive the said money as offered. She affirmed this fact on re-examination though she denied having declined payment.
47. What is clear from the material before Court is that the Defendant has always been willing to exhaust its part of the obligation but the Plaintiffs insisted on the payment of the entire decretal amount.
48. In the circumstances, the Defendant is only bound to clear its remaining obligation of Kshs. 500,000. The Plaintiffs are at liberty to pursue the remainder of the decretal sum from the insured, Hellen Wanjiru Rukanga.
49. In conclusion, the suit is devoid of merit and therefore same is dismissed. Each Party to bear his own costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 5TH DAY OF MAY, 2025.

PATRICIA GICHOHI

JUDGE

Mr. Oyondi for Mrs s Mukira for Plaintiffs

Ms. Chepngetich for Defendant

Ruto, Court Assistant

