Waititu v Britam General Insurance Company; Maseno University (Interested Party) (Civil Appeal E096 of 2024) [2025] KEHC 6295 (KLR) (15 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6295 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL E096 OF 2024

HI ONG'UDI, J

MAY 15, 2025

BETWEEN

TERESIA NJOKI WAITITU ..... APPELLANT

AND

BRITAM GENERAL INSURANCE COMPANY ..... RESPONDENT

AND

MASENO UNIVERSITY ..... INTERESTED PARTY

(Being an appeal from the Judgment and decree of Hon. K. I. Orenge (PM) in Nakuru CMCC No. 742 of 2018, delivered on 25th August 2018)

JUDGMENT

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JUDGMENT

1. The appellant was the plaintiff in the lower court while the respondent was the defendant. The interested party herein was the interested party in the lower court. The appellant vide a plaint dated 11th July 2018 prayed for judgment against the respondent for: -

    i. A declaration that the plaintiff is not bound to pay, settle and/or satisfy any accrued interest or any part of the decretal amount following the judgment entered on 26th April,2017 in Nakuru CMCC NO. 1082 OF 2012 and that the same should be settled by the defendant.

    ii. Costs of this suit.

iii. Interest in (i) and (ii) above.

iv. Any other or further relief that this honourable court may deem fit to grant.

2. The claim was based on the judgment delivered on 24th April, 2017 in favour of the interested party for a sum of kshs. 4,211,478/= plus interest till payment in full. In the plaint the appellant averred that she is the registered owner of motor vehicle registration number KBD 532U which motor vehicle was insured by the respondent. That the said motor vehicle was involved in an accident with motor vehicle registration number KAW 939Z belonging to the interested party whereby the said motor vehicle was extensively damaged.

3. The appellant further stated that that despite knowledge of the said judgment, the defendant failed to settle the decretal amount leading to the same accruing interest up to a sum of Kshs. 7,553,801/= as at 5th February, 2018. Additionally, it demanded that the appellant settles the accrued interest of kshs. 3,344,773/=.

4. The matter was fully heard with both parties adducing evidence and the trial court in its judgment delivered on 25th August 2023 dismissed the appellant's suit with costs.

5. The appellant being aggrieved by the whole judgment lodged this appeal dated 25th April, 2024 setting out the following grounds: -

i. That the learned trial magistrate erred in law and in fact in failing to find that the respondent is under an obligation to pay the decretal sum including any amount payable in respect of costs and any sum payable in respect of interest on that sum.

ii. That the learned trial magistrate erred in law and 'in fact in failing to find that interest on the decretal amount continued to accrue for as long as the decretal amount remained unpaid.

iii. That the learned trial magistrate erred in disregarding the unreasonable delay occasioned by the respondent in settling the decretal amount of Kshs.4,211,478/=.

iv. That the learned trial magistrate erred in fact in failing to find that it is by reason of the said delay that the interests on the decretal sum accrued up to Kshs.3,095,436/=.

v. That the learned trial magistrate erred in fact in failing to find that had the respondent herein paid the decretal amount without any unreasonable delay, any interest that would have been calculated thereon would have been within the policy limit on the policy' between the appellant and the respondent.

vi. That the learned trial magistrate erred in law and in fact in failing to find that it is the respondent who is obligated to pay the accrued interest or any part of the decretal amount.

vii. That the learned trial magistrate erred in law and fact failing to find that the respondent was well aware of the judgment and the terms thereon but failed to pay the same on time.

viii. That the learned trial magistrate erred in law and fact in finding to find that the respondent could not have settled the decretal sum without being served with the decree to that effect.

ix. That the learned trial magistrate erred in law and in fact by failing to consider that the totality of the evidence adduced by the appellant was sufficient to warrant the orders sought.

x. That the learned trial magistrate erred in law and failing to find that the appellant proved her case on a balance of probability.

xi. That the learned magistrate's findings are totally unsupported in law.

6. The Appeal was canvassed through written submissions.

Appellant's submissions

7. These were filed by the firm of Kipruto Gitau & Company Advocates and are dated 28th January, 2025. Counsel gave brief facts of the case and submitted on the grounds of appeal.

8. Regarding grounds 1 and 6 counsel submitted that the limit of kshs. 5,000,000/= deals with liability in respect of the principal award and does not contemplate interest or cost. That interest and costs follow the event so the respondent could not avoid costs and interests. She further submitted that the trial court ought not to have found that the policy limit contemplated the principal award not to be above Kshs.5,000,000.

9. She placed reliance on the decision in Kiamuko & Another suin as Administrators of the Estate of the Late Evans Kalo Maundu (Deceased) v ICEA Lion General Insurance Co. Limited Civil suit 26 of 2018 2022 KEHC 11682 (KLR) (1st July, 2020) where the court held;

> "The respondent seems to be of the view that the statutory limit of kshs 3 000 000.00 includes costs and interests and that where the award exceeds that amount then the insurer is not obligated to settle an amount over and above the same including costs and interests. With due respect, I beg to differ. Section 5 aforesaid only deals with liability in respect of the principal award. It does not contemplate interest or costs which follow the event. Accordingly, where the insurer, knowing well that it is liable to pay the said sum fails to do so and proposes to do so in a manner that does not satisfy the decree in question, as a result of which the offer is rejected, then he cannot escape payment of costs and interests"
>
> See also;
>
> i. Peter Gichihi Njuguna v Jubilee Insurance Co. Ltd 2016 eKLR.

10. On grounds 2, 3, 4, 5, 7 and 8 counsel submitted that there is no provision in law stating that judgment ought not be paid and/or settled until a decree is extracted and served upon a judgment debtor. That once the court has pronounced its judgment, an obligation was created there and then to have the terms therein obeyed. Further, that as long as a party had notice and knowledge of the judgment, then the said knowledge rendered personal service unnecessary. She placed reliance on the decision in Oilfield Movers Limited v Zahara Oil and Gas Limited 2020 eKLR, where the court held as follows;

> "Notwithstanding the position in English Statute. Kenyan Courts have held that personal service of an order is unnecessary where a party had knowledge of it. The local mantra in knowledge is higher than service... The point above is that where a party clearly acts and

shows that he had knowledge of a Court order, the strict requirement that personal service must be proved is rendered unnecessary. That should be the correct legal position and I subscribe to it."

11. Counsel submitted that it was the respondent's deliberate delay in settling the decretal amount for a period of ten (10) months that led to the accrual of the said interest. She placed reliance on the decision in Kenya Power & Lighting Co. Ltd Andy International [2021] eKLR where the court held:

> "...Also, it will be noted that it was directed that the decretal sum would attract interest until payment in full. This reiterates the finding that the respondent is entitled to the interest that accrued from the principal amount it will further be noted that the interest accrued to the said sums by virtue of the late payment of the decretal sum"

12. On grounds 9 and 10 counsel submitted that in spite of the overwhelming evidence adduced by the appellant in support of his claim, the learned trial court erred in law and fact in concluding that the appellant did not discharge the burden of proof and proceeded to dismiss the declaratory suit. He urged the court to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment.

Respondent's submissions

13. These were filed by the firm of G & G Advocates LLP and are dated 13th March, 2025. Counsel identified one main issue for determination which is whether the respondent is under an obligation to exceed policy limit in contravention of the policy and whether it was responsible for the delay in extracting the decree. Counsel submitted that the entire relationship between the appellant and respondent is premised on the insurance policy. The court's attention was drawn to the said insurance policy which was produced in the lower court suit as DEXB1. That under section 11(1) (b) any one claim or series of claims arising out of one event was limited to Kshs. 5,000,000/=.

14. Counsel submitted further that the insurance policy was a contract in which no party can purport to renege once the parties themselves have agreed to the terms executed in the contract. She added that all parties are bound to the contract of insurance and courts are bound to ensure that contractual terms are enforced. In support of her submission counsel placed reliance on the decision in Re Norwich Equitable Fire (1887) 57 LT where the court held as follows;

> "a contract of insurance comes within the word "policy and there is no statutory or formal document necessary to make a contract of insurance: if a contract of insurance is created by any binding means, that is a "policy" to all intents and purposes."
>
> See also:
>
> i. Damondar Jihabhai & Co. Ltd and Another v Eustance Sisal Estates [1967] EA.

15. Counsel also submitted that the respondent met its end of the bargain by fully paying for the decretal sum pursuant to the judgment vide cheques numbers 044799, 044800, 044801, 044802 and 044803. That the principal sum was what the respondent was obligated to pay and it had nothing to do with the delay in the extraction of the decree. Further, that the respondent could only make payment upon issuance the decree and not before since the decree serves as the final adjudication and ascertainment

of the claim by the court. He placed reliance on the decision in Rubo Kimngetich Arap Cheruiyot V Peter Kiprop Rotich [2006] eKLR, where the Court noted that;

> " It is the decree as a legal instrument which Is executable and not the judgment by itself. It is my view that in a suit what is executable is the "Decree" of the Court.....It is trite law that no execution of any decree can take place without such a decree coming into existence i.e. drawn, approved and signed and sealed by the court. It is common that a party or his/her/its Counsel would prepare the initial draft of the decree for the approval of the other party and subsequently the court. Once it is so approved, it is then signed and sealed by the Registrar of the Court."

16. Counsel urged the court not to entertain sustenance of an illegal attempt by the appellant to claim for an award that is not founded on the policy. That the appellant must abide by the terms of the policy and the court. He relied on the decision in National Bank of Kenya Ltd v Wilson Ndolo Ayah [2009] eKLR, where the court held that;

> " It is public policy that citizens obey the law of the land. Likewise, it is good that courts enforce the law and avoid perpetuating acts of illegality. It can only effectively do so if acts done in pursuance of an illegality are deemed as being invalid."

17. In conclusion, counsel urged the Court to find and hold that the respondent is not bound to pay in excess of the policy limit which in this case is the accrued interest of Kshs. 3, 344,773/=. Further, that the delay in extracting the decree could not be visited on the respondent. He further urged the court to dismiss the appeal with costs.

Analysis and determination

18. I have considered the record of appeal, grounds of appeal as well as the submissions and the authorities relied on by the parties. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. In Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, the court stated as follows-

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

19. The law is clear that this court as an appellate court will only interfere with the decision of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in Mkube v Nyamuro [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that as follows;

> " A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

20. The subject matter of the suit herein is a declaratory suit, seeking to have the respondent, an insurance company settle interests and costs.

21. Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act provides for the duty of an insurer to settle a decretal amount as follows: -

10. Duty of insurer to satisfy judgments against persons insured.

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.

22. When judgment is entered in accident claims where the defendant was insured, the above provisions require the insurer to settle the decretal amount as awarded in compliance with the provisions of the Act. However, it is not always the case that the insurer willingly settles the claim and this necessitates the filing of a declaratory suit to compel the insurer to settle the decree.

23. It is not in dispute that judgment was entered against the appellant who was insured by the respondent in Nakuru CMCC No.1082 of 2012 in the sum of Ksh. 4, 211, 478/= plus interest till payment in full. From the lower court record (CMCC No. 742 of 2018) in the declaratory suit, the appellant in her witness statement dated 11th July 2018 stated that she communicated to the respondent to settle the claim, but it failed to pay and so interest continued to accrue.

24. Further, (PW1) testified that the respondent delayed in paying the decretal sum despite having been supplied with the decree (P EXB 5). That it took the respondent months to make the payment, making it liable to pay for the interest accrued since the decretal sum awarded in the judgment was within what was covered. In cross examination, she confirmed that the respondent was to pay a maximum of kshs. 5,000,000/= and that she had no evidence to show that it had a duty to pay more than that.

25. The respondent filed a defence denying the claim. It contended that the maximum recoverable from the insurance policy held by the appellant was Ksh.5,000,000/=. That it had settled the contractual obligation within the stipulated time and was not in breach of the policy. DW1 testified in agreement with the defence filed. He produced documents in support of his testimony DEXB 1 - 7. In cross examination, he confirmed that the appellant had a valid policy and the respondent had an obligation to pay. He stated that the respondent participated in CMCC 1082 of 2012 and was aware of the judgment which was delivered on 24th April 2017 as per the decree. He further stated that the respondent issued cheques for the principal amount before the decree and it could therefore not be blamed for the delay.

26. The trial magistrate in his judgment held that he was unable to make a finding in favour of the appellant for compensation for the interest that accrued beyond the limit by the contract of 5,000,000/=. He stated that the only compensation the appellant was entitled to was the insurable interest for which she paid premiums. He relied on the decision in Crisp v. Security Nat'l Ins. Co, 369 Sw. 2d 326 (1963), the court stated that:

> "Indemnity is the basis and foundation of insurance coverage not to exceed the amount of the policy, the objective being that the insured should neither reap economic gain nor incur a loss is adequately insured....The measure of damage that should be applied in case of destruction of this kind of property is the actual worth of value of the articles to the owner

for use in the condition in which they were at the time of the fire excluding any fanciful or sentimental considerations"

27. The dispute between the appellant and the respondent arose when the respondent was served with plaint dated 11th July 2018 where the appellant demanded that it pays accrued interests. The appellant argues that the respondent should be held liable for the said interest because it delayed in making payments of the decretal amount after the judgment was entered. The appellant does not dispute that the respondent paid the decretal amount amounting to Kshs. 4,211, 478/= despite it having been served late with the decree.

28. In First Assurance Company Ltd v Bekko (Civil Appeal E332 of 2021) [2024] KEHC 1636 (KLR) (Civ) (23 February 2024) (Judgment) the court held as follows;

"

"24. On the issue as to whether the trial court misapprehended the doctrine of indemnity, I find that indemnity has several interlinked meanings in the insurance contract context inherent in the notion that an insurance contract should provide no more and no less than a full indemnity and the goal is to prevent windfalls to either party.

25. This aspect is emphasized in Castellain v Preston. Brett LJ declared as follows;
"The very foundation.....of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, an of indemnity only, and that this contract means the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it.....that proposition must certainly be wrong."

26. Further in the case of Crisp v Security Nat'l Ins. Co, 369 S.W. 2d 326 [1963], the court stated as follows;

"Indemnity is the basis and foundation of insurance coverage not to exceed the amount of the policy, the objective being that the insured should neither reap economic gain or incur a loss is adequately insured.....The measure of damage that should be applied in case of destruction of this kind of property is the actual worth of value of the articles to the owner for use in the condition in which they were at the time of the fire excluding any fanciful or sentimental considerations"

29. Besides stating the position in law there is the element of the calculation of the amount owing which Hon. Orenge the trial Magistrate in the declaratory suit did not address. I have perused the decree drawn by the Court in Nakuru CMCC No. 1082 of 2012 at pg 15 of the Record of Appeal. It clearly shows that Judgment was entered on 24th day of April, 2017. It further shows the award as Ksh 4,211,478/= only with costs and interest on the principal amount at the rate of 14% per annum (not per month) from 21st November, 2017 to the 5th February, 2018 as follows:

Principal amount – shs 4,211,478/=

Interest as above shs 3,095,436/=

Decretal Sum shs 7,306,914/=

30. I find a very serious error in this calculation. From the decree it shows the calculation was for the period 21st November, 2017 to 5th February, 2018. Where did that emanate from?

31. Secondly the interest was to run from the date of the Judgment (24th April, 2017) to the date of the decree (5th February, 2018) which is:

    14% x 9.5 (months) x 4,211,478 = 262,200/=. The big question is where did the sum of Kshs 3,095,436/= come from?

32. The sum of Ksh 4,211,478 + 262, 200/= (interest) + 246,887/= costs = Ksh 4,720,565/=. As at 5th February, 2018 the principal sum plus interest and costs was Ksh 4,720,565/= and not Ksh 7,306,914 + 246,887/= total Ksh 7,553,801/= as purported.

33. As clearly stated by the appellant and respondent, the sum allowed as per the policy was Ksh 5,000,000/=. The decretal sum as stated above including the costs fell within the policy amount. The error that caused all this mess emanated from the Court registry and neither the appellant nor respondent is to blame for all this. Had Hon Orenge paid close attention to this he would not have indicated as he did in his Judgment that he was unable to enter Judgment in favour of the appellant since the interest that accrued was beyond the limit by the contract of Ksh 5,000,000/=.

34. The appellant cannot be made to pay for an error in interest calculation that was occasioned by the court registry and endorsed by the Court. There is no dispute that the respondent once served with the decree paid the principal sum promptly. Had the proper calculation which was less than Ksh 5,000,000/= been served on the respondent in terms of the decree it would have cleared it and the parties would not be here arguing.

35. I therefore find merit in the Appeal which I allow and order as follows:

    a. The Judgment delivered on 25th August, 2023 is hereby set aside.

    b. The decree issued in NAKURU CMCCC No. 1082 of 2012 on 5th February, 2018 is hereby set aside.

    c. A fresh decree to be drawn as per the calculations done at paragraphs 31 and 32 of this Judgment.

    d. The said decree shall be satisfied by the respondent herein as the amount is less than the Ksh 5,000,000/= cap as per the Insurance policy. Further interest will only be calculated on the said decretal sum from today's date if the same is not cleared. It is only at that point that any payment by the appellant may commence.

    e. Costs of the Appeal to the appellant.

36. Orders accordingly

Delivered, virtually dated and signed this 15th day of May, 2025 in open court at Nakuru.

H. I. ONG'UDI

JUDGE