APA Insurance Limited v Waitiki & another (Suing as the Administrator of the Estate of Michael Thuo Waitiki) (Civil Appeal E001 of 2021) [2024] KEHC 1450 (KLR) (14 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1450 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CIVIL APPEAL E001 OF 2021

AK NDUNG'U, J

FEBRUARY 14, 2024

BETWEEN

APA INSURANCE LIMITED .... APPELLANT

AND

NANCY WANGUI WAITIKI .... 1ST RESPONDENT

IRENE WANJIKU THUO .... 2ND RESPONDENT

SUING AS THE ADMINISTRATOR OF THE ESTATE OF MICHAEL THUO WAITIKI

((Appeal from original Decree passed on 08/12/2020 in Nanyuki CM Civil Case No. 22 of 2019-B. Mararo (PM))

JUDGMENT

1. By a plaint dated 22/02/2019, the Respondents instituted a declaratory suit against the Appellant. It was averred that on 31/10/2018, judgment was entered against the Appellant in Mavoko CMCC No. 30 of 2017 for a sum of Kshs.11,653,440/- plus costs and interest and a decree and certificate of costs were issued on 31/01/2019 for a total sum of Kshs.12,431,949/-. That the Appellant paid a total sum of Kshs.3,000,000/- to the Respondents but failed to pay the balance.

2. The Appellant filed a defence statement dated 01/03/2019 and inter alia averred that the statutory liability is only to the extent of the statutory limit of Kshs.3,000,000/- which was already paid to the Respondents. Therefore, the Respondents are barred from making any further claim against the Appellant. The Appellant further filed a notice of motion application dated 06/09/2019 seeking that the Respondents' plaint be struck out and the Respondents responded via grounds of opposition dated 31/10/2019. The Respondents further filed a notice of motion application dated 31/10/2019 seeking for the Appellant's defence to be struck out.

3. Vide a ruling dated 08/12/2020, the Appellant's application seeking to struck out the Respondents' plaint and dated 06/09/2019 was dismissed and the Respondents' notice of motion application seeking for the Appellant's defence to be struck out was allowed. The trial court further held that by virtue of the Court of Appeal decision in *Justus Mutiga & 2 others v Law Society of Kenya & another* [2018] eKLR, the Appellant was entitled to satisfy the entire decretal sum. A decree was thereafter entered against the Appellant for a sum of Kshs.9,431,949/- being the unpaid sum in the primary suit.

4. Being aggrieved by the trial court ruling, the Appellant appealed to this court vide a memorandum of appeal dated 07/01/2021 raising four grounds of appeal challenging the trial magistrate's findings. The appeal was filed on the following grounds;

    i. The learned magistrate erred relying on an obiter dicta of the Court of Appeal in a case that was decided contrary to the finding of the trial magistrate.

    ii. The learned magistrate erred by failing to find that Kshs.3,000,000/- which the Appellant had already paid was the statutory limit of the Respondent's liability.

    iii. The learned magistrate erred by failing to find that the Respondent was fully discharged from any further liability and arrived at erroneous decision by holding against express provision of Cap 405 Laws of Kenya and binding reasoned decisions of superior court.

    iv. The learned magistrate erred by finding that the Appellant is entitled to satisfy the entire decretal sum in the primary suit which was contrary to the express provisions of statute.

5. The appeal was canvassed by way of written submissions. The Appellant's counsel in his brief submissions submitted that the trial magistrate held that the Appellant was liable to satisfy the entire decretal sum and the trial court relied on the obiter dictum by the Court of Appeal in the case of *Justus Mutiga & 2 others vs Law Society of Kenya & another* [2018] eKLR. It is urged that even though the court criticised section 5 (b) (iv) of Cap 405, it held that the said section was not unconstitutional and even affirmed the high court decision holding that the said section was not unconstitutional and the opinion of the Court of Appeal was only an obiter dictum and therefore, not binding on other courts. Reliance was placed on *Patricia Mona Antony & another v Africa Merchant Assurance Company Ltd* (2019)eKLR; Getaway Insurance Co Ltd v Jamila Suleiman & another [2018] eKLR and *Africa Merchant Assurance company Ltd v william Muriithi Kimaru* [2016] eKLR where the above courts held that under section 5 (b)(iv), the insurer's liability does not exceed Kshs.3,000,000/- and the Plaintiff have an option of pursuing the insured for the recovery of the excess decretal sum.

6. That it therefore follows that the law limits the insurer's liability to Kshs.3,000,000/- and having paid the said amount to the Respondents, the Appellant had no further liability and any amount due from the judgment of the court in the primary suit maybe recovered from the insured himself.

7. In rejoinder, the Respondents submitted that the insurer has an obligation to its policy holder to pay the resultant decretal sum; that the obligation of the insurer is to ensure that the insured does not have to bear the entire financial burden resulting from legal claims sought by third parties; that it would be fundamentally unconscionable for an insurer to outrightly refuse the settlement of claims pertaining to 3rd parties affected by accident involving insured vehicles; that such refusal to honour legitimate claim violates social contract between the insurer and society and undermines the very essence of insurance. Reliance was placed on the case of *Justus Mutiga* (supra) in that the court held that;

> " ...if anything limiting the compensation payable by the underwriter who has received premiums; particularly in the face of an innocent third party who is armed with a court judgment, is unjustifiable. It offends the very essence of insurance; which is to ensure

mitigation against risks that result in loss. In particular, it defeats the very objective of compulsory third party insurance cover, if an innocent victim is left to recover the bulk of his claim against the insured personally."

8. That Wakiaga J in The *Monarch Insurance Company v Catherine Earnest Ochango* Civil Appeal 12 of 2018 affirmed the above decision by the Court of Appeal. That in High Court Civil Case 57 of 2013 Nakuru *Peter Gichihi Njuguna v Jubilee Insurance*, the court compelled the insurer to pay an amount excess to Kshs.3,000,000/-.

9. On the argument that the finding in *Mutiga* case (supra) was obiter, they submitted that that was an incorrect interpretation of the said decision. Reliance was placed on the case of *Ekuru Aukot v Independent electoral & Boundaries Commission & 3 others* [2017] eKLR where it was held that;

> "The doctrine of precedent decrees that only the ratio decindi of a judgment, and not obiter dicta, have binding effect. The fact that obiter dicta are not binding does not make it open to courts to free themselves from the shackles of what they consider to be unwelcome authority by artificially characterising as obiter what is otherwise binding precedent. Only that which is truly obiter may not be allowed. But, depending on the source, even obiter dicta maybe of potent persuasive force and only departed from after due and careful consideration."

10. I have considered the written submissions by the parties herein including the cases cited. The only issue for determination is whether the Appellant is liable to satisfy the entire decretal sum of Kshs.12,431,949/-. The Appellant has already paid a sum of Kshs.3,000,000/- being the amount limited by the statute leaving a balance of Kshs.9,431,949/-.

11. The Appellant's position is that by virtue of section 5(b)(iv) of cap 405 Laws of Kenya, the amount payable by the insurer is limited to Kshs.3,000,000/-. Any other amount in excess of three million is payable by the insured and a third party is entitled to pursue the insured for the balance.

12. Section 5 (b) of the *Insurance (Motor Vehicle Third Party Risks)*, Cap 405 states that;

> "In order to comply with the requirements of section 4, the policy of insurance must be a policy which—
>
> (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."

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

1. "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."

13. It therefore follows that section 5 (b) (iv) above, limits the insurer liability to Kshs.3,000,000/-. The trial magistrate while striking out the Appellant's defence relied on the Court of Appeal decision in the case of Justus Mutiga case (supra). Both parties herein have also relied on the said case. The trial magistrate quoted the passage in Mutiga case where the court stated that;

> "...if anything limiting the compensation payable by the underwriter who has received premiums; particularly in the face of an innocent third party who is armed with a court judgment, is unjustifiable. It offends the very essence of insurance; which is to ensure mitigation against risks that result in loss. In particular, it defeats the very objective of compulsory third party insurance cover, if an innocent victim is left to recover the bulk of his claim against the insured personally."

14. The Respondents' argument is also based on the said excerpt of the case. The Appellant on the other hand contends that the said excerpt that the trial court relied on to dismiss its case was an obiter dictum which is not binding to the court. The Appellant further argued that even though the court criticised section 5 (b) (iv) of Cap 405, it further held that the said section was not unconstitutional and even affirmed the high court decision holding that the said section was not unconstitutional.

15. The above case was an appeal from High Court case in *Law Society of Kenya v Attorney General & 3 others* [2016] eKLR where, Onguto J., allowed the petition in part. The learned Judge deemed Sections 3(a), 3(b) and 6 of the Amendment Act unconstitutional. But on the other hand, he found nothing unconstitutional with regards to section 5 (b) of the Principal Act and sections 3(e) and 3(f) of the Amendment Act.

16. On appeal, the court of Appeal in *Justus Mutiga* Case (supra) inter alia held that;

> "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. Nevertheless, the question then arises as to what should happen post judgment. Does the court become functus officio? Who computes the percentages and how; will the costs awarded by the court and the interest be calculated on the basis of the amount awarded by the Court, on the maximum limit of 3 million or on the amount to be based on the schedule? Would it be left to the Registrar of the court to compute?

...Though the appellant contends that the limitation is justified, no evidence was adduced to prove that justification. If anything, limiting the compensation payable by the underwriter who has received premiums; particularly in the face of an innocent third party who is armed with a court judgment, is unjustifiable. It offends the very essence of insurance; which is to ensure mitigation against risks that result in loss. In particular, it defeats the very objective of compulsory third party insurance cover, if an innocent victim is left to recover the bulk of his claim against the insured personally.

On the whole therefore, we find no reason to interfere with the reasoned judgment of the High Court. Our conclusion is that this appeal is devoid of merit, and the same is hereby dismissed with no order as to costs."

17. As submitted by the Appellant, though the Court of Appeal did not see any justification in limiting the compensation payable by the insurer, it did not declare section 5 (b)(iv) of Cap 405 unconstitutional. The appellate court in fact upheld the high court decision.

18. 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.

We too are of the same considered position. A court is not estopped from awarding a litigant a sum in excess of what is provided in the Act. As stated, any sum in excess of Kshs 3,000,000.00 is recoverable from an insured. It is on account of this conclusion that we find no merit in the appeal and the cross-appeal."

19. Muriithi J in *Billow Hussein v Attorney General & 3 others* [2021] eKLR and in a short paragraph puts it clearly that;

> " The petitioner urges this phenomenon as a breach of the right to protection of his consumer rights under section 46 of *the Constitution*. The petitioner seeks to rely on the powerful dicta of the Court of Appeal in Justus Mutiga appeal in which the court faulted the Respondent's submission of justification for the amendment capping the amount recoverable. To be sure, however, although the petitioner's counsel passes off the statement of the court of appeal as ratio decidendi, it was in fact obiter as the court had already upheld the High Court's finding on the constitutionality of section 5 (b) of the Act."

20. Section 5(b)(iv) is clear and bereft of any ambiguity. The courts as seen above have had occasion to interpret the same including interpretation of the constitutionality of the provision. My re- evaluation of the material before the trial court leads me to the inevitable conclusion that the trial magistrate misapprehended the import of the decision in *Justus Mutiga & 2 others vs Law Society of Kenya & another* (supra) and reached an erroneous finding.

21. With the result that the appeal herein is wholly successful. The ruling and orders of the trial court are hereby set aside and substituted thereof with an order striking out the plaint therein with costs to the Appellant. The Appellant shall also have the costs of this appeal.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 14TH DAY OF FEBRUARY 2024

A.K. NDUNG'U

JUDGE