



**Mbugi v Sanlam General Insurance Limited (Formerly Gateway Insurance Company Limited) (Civil Appeal E061 of 2023) [2024] KEHC 4988 (KLR) (15 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4988 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL APPEAL E061 OF 2023  
LM NJUGUNA, J  
MAY 15, 2024**

**BETWEEN**

**SAMUEL KAVINGA MBUGI ..... APPELLANT**

**AND**

**SANLAM GENERAL INSURANCE LIMITED (FORMERLY GATEWAY INSURANCE COMPANY LIMITED) ..... RESPONDENT**

*(Appeal arising from the decision of Hon. D. Endoo in Embu CMCC No. 169 of 2018 delivered on 26th September 2023)*

**JUDGMENT**

1. The appellant has filed memorandum of appeal dated 30<sup>th</sup> October 2023 challenging the decision of the trial court and seeking the following orders:
  - a. That the appellant proved the case against the respondent on a balance of probabilities;
  - b. That judgment be entered for the appellant as prayed in the plaint dated 23<sup>rd</sup> August 2018; and
  - c. That the appellant be awarded costs of this appeal.
2. The appeal was premised on the grounds that:
  - a. The learned magistrate erred in law and fact in failing to find and uphold that since the case was heard *ex parte*, therefore in the absence of sworn testimony by the Respondents witnesses to rebut the appellant sworn testimony, the appellants had successfully proved the case as pleaded against the respondent;
  - b. The learned magistrate erred in law and fact in deeming the respondents pleading to constitute actual evidence adduced against him in rebuttal of the appellant's evidence;



- c. The learned magistrate erred in law and fact in wrongly finding that the appellants claim was for the payment by the respondent pursuant to the provision of Section 10 of the *Insurance Motor Vehicle (Third Party) Risk Act*; yet the appellant’s plant vividly disclosed that the appellant’s cause of action was a refund of Kshs.190,224/= paid to the auctioneers and Kshs.70,000 being the lost anticipated income;
  - d. The learned magistrate erred in law and fact by wrongly finding and holding the appellant had not submitted any evidence to confirm that the respondent had settled the decretal sum of money yet the appellant adduced unrebutted exparte sworn testimony that the respondent paid the said decretal sum of money and duly produced exhibits which are direct and circumstantial Evidence of payment of the said decretal sum of money by the respondent; and
  - e. The learned magistrate erred in law and fact by requiring the appellant at trial to prove the case on a standard of “beyond reasonable doubt” instead of the required standard of “on a balance of probabilities as required in civil cases”.
3. The appellant filed a plaint dated 23<sup>rd</sup> August 2018 seeking judgment against the respondent for Kshs.190,224/= being auctioneer’s fees, Kshs.70,000/= being lost anticipated income and costs of the suit. It was his case that his motor vehicle registration number KAH 551U, which was being used for public transportation services, was insured by the respondent. That the said motor vehicle was involved in an accident following which the appellant sought for damages in Embu CMCC No. 90 of 2003. Through the said suit, judgement was entered against him in the sum of Kshs.1,086,740/= . That the respondent being the insurer, bore the legal obligation under the insurance contract, to pay the amount but it failed to do so within the stipulated time, resulting in the appellant’s motor vehicle registration number KCA 210G being impounded by auctioneers to make good the sum. He stated that the respondent eventually paid the sum before his motor vehicle was auctioned, but by that time, he had ready incurred losses in auctioneers’ fees of Kshs.190,224/= and profits at the rate of Kshs.5,000/= daily for 14 days.
  4. The respondent filed a statement of defense in which it denied having any obligation as pleaded by the appellant. At the hearing, the appellant stated that he is the owner of motor vehicle registration number KAH 551U which was involved in an accident and judgment was entered against him in Embu CMCC No. 90 of 2003. That the respondent delayed in paying the decretal sum therein, causing his motor vehicle registration number KCA 210G to be impounded by auctioneers. That he did not have proof in court to show that he was the owner of the motor vehicle but he produced his returns to show his daily income from the impounded motor vehicle. That he informed the respondent of the auctioneer’s notices but they still delayed in settling the decretal amounts, causing him to pay the auctioneer’s charges.
  5. The respondent did not testify at trial. The trial court found that the respondent did not have an obligation to pay the auctioneer’s fees under Section 10 of the *Insurance Motor Vehicle (Third Party) Risk Act*. The learned magistrate relied on the cases of, *inter alia*, *AIG Insurance Company Limited v Benard Kiprotich Kirui* [2022] eKLR and *Lucena v Crowford* [1806] 2 BOS PNR 269 at 302 and stated that the appellant only had an insurable interest if he could prove that his motor vehicle was insured by the respondent, through an insurance contract. She proceeded to dismiss the appellant’s suit.
  6. In this appeal, the court directed the parties to file their written submissions but only the appellant complied.
  7. The appellant submitted that the respondent closed its case without calling any witnesses to testify, therefore on a balance of probabilities, the appellant proved his case. That the pleadings and evidence



- adduced disclosed a cause of action which the trial court failed to determine and instead, focused on a different matter. That the appellant's oral and documentary evidence was not considered by the trial court.
8. The issue for determination is whether the trial magistrate erred in her judgment delivered on 26<sup>th</sup> September 2023.
  9. In order to determine this issue, it is proper to examine the evidence adduced at trial. (See the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123). The court in Embu CMCC No. 90 of 2003 held the appellant as vicariously liable for the accident therein and entered judgment against him for the sum of Kshs.1,086,740/=. It was the appellant's case at the trial that this decretal amount was to be settled by the respondent who was his insurer. That the insurer took too long to pay and owing to the delay, the plaintiff in Embu CMCC No. 90 of 2003 moved to execute against the appellant herein for the decretal amount through auctioneers who seized his motor vehicle registration number KCA 210G.
  10. That the auctioneer's fees became due as the said motor vehicle remained in their custody. The motor vehicle could have been sold through an auction to redeem the decretal amount but at some point, before such auction, the respondent herein settled the decretal sum. The appellant argued that if the respondent had paid the decretal amount without delay, the auctioneer's fees would not have accrued, neither would he have lost profits on his motor vehicle registration number KCA 210G. He stated that when he approached the respondent about these payments, they declined to pay, resulting in the suit filed at the trial court.
  11. In its defense, the respondent stated that the appellant was a stranger to it and that no decretal amount was paid in Embu CMCC No. 90 of 2003. That there is no contract of insurance between itself and the appellant. The trial magistrate found that in the absence of a policy between the parties, the suit could not succeed as there is no proved legal obligation on the part of the respondent. It also denied being served with warrants of attachments regarding the claim.
  12. This court has taken the liberty of searching for the court record for Embu CMCC No. 90 of 2003 in order to give bearing on this appeal. The judgment in that matter was delivered on 24<sup>th</sup> May 2016 and the same was not challenged on appeal. After this, an application for stay of execution was filed but the same was dismissed through a ruling delivered on 26<sup>th</sup> July 2016.
  13. In as much as the respondent did not testify at trial, the evidence adduced by the appellant is not relevant to determine whether there was a valid contract against which the decretal sum in Embu CMCC No. 90 of 2003 was settled and that makes the respondent liable for the monies sought herein. The standard of proof remains the same in civil cases, on a balance of probabilities but in this case, the same was not attained. The appellant is calling upon this court to speculate since he himself has not shown proof that the respondent, his alleged insurer, settled the decretal sum in Embu CMCC No. 90 of 2003 and that he is the registered owner of motor vehicle registration number KCA 210G which was attached. Therefore, the trial magistrate did not err in her findings since she had limited evidence to subject to the standard of proof.
  14. In the end, I find that the appeal lacks merit and it is hereby dismissed with no orders as to costs.
  15. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 15<sup>TH</sup> DAY OF MAY, 2024.**

**L. NJUGUNA**

**JUDGE**

