



Mwangi & another (Suing on their own behalf and on behalf of the Estate of James Kuria Kariuki) v Sanlam General Insurance Ltd (Civil Appeal E669 of 2022) [2024] KEHC 5416 (KLR) (6 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5416 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E669 OF 2022**

WM MUSYOKA, J

MAY 6, 2024

BETWEEN

NAOMI NJERI MWANGI AND PETER KARIUKI GETHI (SUING ON THEIR OWN BEHALF AND ON BEHALF OF THE ESTATE OF JAMES KURIA KARIUKI) APPELLANT

AND

SANLAM GENERAL INSURANCE LTD RESPONDENT

(An appeal arising from the judgment of Hon. PK Rotich, Senior Principal Magistrate, SPM, delivered on 29th July 2022, in Milimani CMCCC No. 1481 of 2020)

JUDGMENT

1. The suit at the primary court was initiated by the appellants, against the respondent, for a declaratory order that the respondent was bound to settle the decretal sum, awarded in Milimani CMCCC No. 3027 of 2017, and that the respondent be directed to settle that amount. The appellants had alleged that the court, in Milimani CMCCC No. 3027 of 2017, had made an award of Kshs. 11,233,942.82, out of which the respondent paid Kshs. 3,000,000.00, leaving a balance of Kshs. 8,223,942.82. They asserted that, under the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405, Laws of Kenya, the respondent was bound to settle the entire decretal amount, and, therefore, the respondent should be compelled to settle the balance of Kshs. 8,223,942.82. The respondent filed a defence, in which it asserted that the insurance policy limited payment to Kshs. 3,000,000.00, and that it was not bound to pay any amount in excess of that.
2. A trial was conducted, in which both sides presented witnesses. A judgement was delivered on 29th July 2022. The trial court, relying on Julius Mutiga & 2 others vs. Law Society of Kenya [2018] eKLR (Visram, Karanja & Koome, JJA), found and held that the respondent had discharged its obligation,



when it paid the sum of Kshs. 3,000,000.00, and it was its insured, Catherine Nyagah, who was bound to settle the balance of Kshs. 8,223,942.82. The declaratory suit was dismissed.

3. The appellants were aggrieved, hence the instant appeal. The grounds in the memorandum of appeal, dated 22nd August 2022, revolve around the appellants having proved their case to the required standard; the evidence tendered by the appellants and their written submissions being ignored; discretion not being exercised properly; no good reasons being given for dismissal of the suit; considering issues that were not pleaded; the evidence tendered by the respondent being wanting; and the trial court misdirecting itself and proceeding on wrong principles.
4. Directions were given on 8th November 2023, for disposal of the appeal by way of written submissions. There has been compliance. Both sides have filed written submissions.
5. The appellants have framed 2 issues: whether the trial court appreciated the law on the subject-matter, and whether the respondent was bound to settle the decree in full. Regarding the first issue, the appellants concede that section 4(b)(iv), it should actually be section 5(b)(iv), of the Insurance (Motor Vehicle Third Party Risks) Act, does limit cover to a sum of Kshs. 3,000,000.00, arising out of a claim by one person, as held in *Georgina Wangari Mwangi vs. David Mwangi Muteti* [2014] eKLR (Ong’udi, J). They, however, submit that that is no longer the law, following the more recent pronouncements by the courts. They cite the decision of the Court of Appeal, in *Julius Mutiga & 2 others vs. Law Society of Kenya* [2018] eKLR (Visram, Karanja & Koome, JJA), where it was stated that any limitation of cover along such lines went against the very essence of compulsory third motor insurance, and weakened the protection that was sought to be secured. *Monarch Insurance Company Limited vs. Moses Caleb Ochango & another* [2019] eKLR (Wakiaga, J) is cited to demonstrate that *Julius Mutiga & 2 others vs. Law Society of Kenya* [2018] eKLR (Visram, Karanja & Koome, JJA) is being applied by the High Court. *Julius Mutiga & 2 others vs. Law Society of Kenya* [2018] eKLR (Visram, Karanja & Koome, JJA) is also cited as authority in support of the prayer that the respondent ought to settle the total decretal amount in Milimani CMCCC No. 3027 of 2017.
6. The respondent submits that the appellants had misunderstood *Julius Mutiga & 2 others vs. Law Society of Kenya* [2018] eKLR (Visram, Karanja & Koome, JJA), for the same did not declare section 5(b)(iv) of the Insurance (Motor Vehicle Third Party Risks) Act unconstitutional, for it had affirmed the position stated in *Georgina Wangari Mwangi vs. David Mwangi Muteti* [2014] eKLR (Ong’udi, J), that the amount in excess of Kshs. 3,000,000.00 was recoverable from the insured. It is argued that the trial court had properly applied section 5(b)(iv) of the Insurance (Motor Vehicle Third Party Risks) Act. It is submitted that *Monarch Insurance Company Limited vs. Moses Caleb Ochango & another* [2019] eKLR (Wakiaga, J) misconstrued section 5(b)(iv) of the Insurance (Motor Vehicle Third Party Risks) Act and *Julius Mutiga & 2 others vs. Law Society of Kenya* [2018] eKLR (Visram, Karanja & Koome, JJA). The respondent cites *CIC General Insurance Group Limited vs. Gerald Ochoki* [2020] eKLR (Okwengu, Kiage & Sichale, JJA), where *Julius Mutiga & 2 others vs. Law Society of Kenya* [2018] eKLR (Visram, Karanja & Koome, JJA) was referred to, as stating that the court was not estopped from making an award in excess of Kshs. 3,000,000.00, and that any excess was to be settled by the insured. It also cites *African Merchant Assurance Company Limited vs. William Muriithi Kimaru* [2016] eKLR (Majanja, J), where it was said that the amount that a decree-holder can recover from the insurer is set out in the Insurance (Motor Vehicle Third Party Risks) Act, and the insurer is not obliged to pay more than Kshs. 3,000,000.00, and the decree-holder cannot recover more than that from the insurer.
7. This appeal turns on only 1 issue, the interpretation or construction to be given to *Julius Mutiga & 2 others vs. Law Society of Kenya* [2018] eKLR (Visram, Karanja & Koome, JJA). Did that decision declare section 5(b)(iv) of the Insurance (Motor Vehicle Third Party Risks) Act unconstitutional?



Or did it declare that the courts could award compensation in excess of Kshs. 3,000,000.00, and that anything above that amount was recoverable from the insured, and not the insurer?

8. I have very closely read through the judgement in Julius Mutiga & 2 others vs. Law Society of Kenya [2018] eKLR (Visram, Karanja & Koome, JJA). The Court of Appeal upheld the decision of the High Court, where the High Court had declined to declare section 5(b)(iv) of the Insurance (Motor Vehicle Third Party Risks) Act unconstitutional, finding that what was held unconstitutional was sections 3(a)(b) and 6 of the Amendment Act, which did not affect section 5(b)(iv) of the Insurance (Motor Vehicle Third Party Risks) Act. The penultimate paragraph, in Julius Mutiga & 2 others vs. Law Society of Kenya [2018] eKLR (Visram, Karanja & Koome, JJA), does have rather harsh language about the limitation in section 5(b)(iv) of the Insurance (Motor Vehicle Third Party Risks) Act and the schedules introduced by the Amendment Act. However, the remarks, in that paragraph, were made obiter, and were not part of the ratio decidendi. The court suggested that the limitation in section 5(b)(iv) of the Insurance (Motor Vehicle Third Party Risks) Act and the schedules introduced by the Amendment Act were probably not justified, and were unfair to third parties, but it did not strike them down. I agree, with utmost respect, therefore, with the argument that the court, in Monarch Insurance Company Limited vs. Moses Caleb Ochango & another [2019] eKLR (Wakiaga, J), misconstrued Julius Mutiga & 2 others vs. Law Society of Kenya [2018] eKLR (Visram, Karanja & Koome, JJA), and that the proper approach to the issue is that by Georgina Wangari Mwangi vs. David Mwangi Muteti [2014] eKLR (Ong'udi, J), African Merchant Assurance Company Limited vs. William Muriithi Kimaru [2016] eKLR (Majanja, J) and CIC General Insurance Group Limited vs. Gerald Ochoki [2020] eKLR (Okwengu, Kiage & Sichale, JJA). It would follow, therefore, that the trial court properly applied Julius Mutiga & 2 others vs. Law Society of Kenya [2018] eKLR (Visram, Karanja & Koome, JJA), in finding and holding that the respondent was bound to pay no more than Kshs. 3,000,000.00, and that the balance, of Kshs. 8,223,942.82, was not recoverable from it, but from the insured; and in dismissing the suit in Milimani CMCCC No. 3027 of 2017.
9. There is, therefore, no merit in the appeal herein, and I hereby dismiss it, with costs. Orders accordingly.

DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 6TH DAY OF MAY 2024

WM MUSYOKA

JUDGE

Ms. Veronica, Court Assistant, Milimani, Nairobi.

Mr. Arthur Etyang, Court Assistant, Busia.

Advocates

Mr. Omondi, instructed by Gachie Mwanza & Company, Advocates for the appellants.

Mr. A Thuo Kanai, Advocate for the respondent.

2

