



**Gichuru & 2 others v Josphat (Civil Appeal E83 of 2021)  
[2024] KEHC 8941 (KLR) (16 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8941 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL E83 OF 2021  
HI ONG'UDI, J  
JULY 16, 2024**

**BETWEEN**

**MICHEAL GICHURU ..... 1<sup>ST</sup> APPELLANT**

**MICHAEL GICHUKI T/A GICHUKI TRANSPORTERS ..... 2<sup>ND</sup> APPELLANT**

**JAMES MUREITHI GUANDARU ..... 3<sup>RD</sup> APPELLANT**

**AND**

**JOSPHAT MUNGAI GITAU A.K.A JOSPHAT MUIGAI A.K.A JOSPHAT  
MUNGA GICHUKI ..... RESPONDENT**

**RULING**

1. This is the Notice of Motion dated 1/11/2023 where the respondent/applicant seeks the following orders:
  - i. That this honourable Court be pleased to order that the entire monetary security (Principal Sum plus interest thereof) held at The Consolidated Bank, Nakuru Branch, Account number 10161XXXXXXXXX be released to the respondent's advocates herein J.Ndungu Njuguna Advocates.
  - ii. That costs of this application be borne by the Appellants.
2. The same is supported by the grounds of its face. The main issue being that the appellants/respondents' advocates had refused to comply and/or execute the necessary documents to have the monetary security held in parties' advocates joint account released to the respondent/applicant's advocates. Further, that the appellants/respondents' advocates claimed to be entitled to the interest which was contrary to the court's judgment.
3. The appellants/respondents filed a replying affidavit sworn on 22/11/2023 by its insurer's legal officer. She deposed that their insurer had paid the respondent/applicant's advocates the sum of Kshs



- 1,500,000/= and deposited the sum of Kshs 1,500,000/= in the joint account as that was its policy and statutory limit.
4. She deposed further that upon delivery of the judgment they instructed their advocates on record to release the balance of Kshs 1.5 Million deposited in a joint interest account to the respondent/applicant's advocates. However, the respondent/applicant's advocates refused to sign the bank release form insisting that the respondent/applicant was entitled to sums far and above the insurers policy limit. She added that the appellants/respondents' insurer could not be compelled to pay beyond the statutory limit of Kshs 3,000,000/= as it would be breaching the statutory limit. She annexed copies of payment receipts
  5. The application was canvassed by way of written submissions.

### **Applicant's submissions**

6. The applicant's submissions were filed by J. Ndungu & Company advocates and are dated 6<sup>th</sup> February, 2024. Counsel identified one issue for determination which is who between the applicant and the respondents was entitled to the interest earned from monetary security deposited in the joint account. Counsel referred to section 26 (1) of the [Civil Procedure Act](#) and the case of [Peter Baraza Rabado v Nation Newspapers Limited](#) [2017] eKLR.
7. He submitted that the court had wide and unfettered discretion to determine issues in regard to interests. Further, that the appellants/respondents' insurer having deposited the money in a joint account did not entitle it to the interest earned therefrom. He added that the same did not override the courts discretion to deal with the said interest.
8. Counsel submitted further that the appellants/respondents' insurer failed to act accordingly and therefore forcing the applicant to incur extra costs without any proper justification. He cited the case of [Bernard Mutisya Wambua v Kenya Orient Insurance Company Limited](#) [2020] eKLR where the court held that;

“However, I do agree with the plaintiff that the fact that they were forced to sue for that amount which both parties were aware was Statutorily payable, renders it impossible for the defendant to escape liability for payment of interest and costs on that amount from the date of the award. The defendant ought to have paid said amount of Kshs 3,000,000/= upon the award being made. From the foregoing, the upshot is that the plaintiff is awarded the sum of Kshs 3,000,000/= being the amount statutorily payable under Section 5 (iv) of the [Insurance \(Motor Vehicle Third Party Risks\) Act](#), in respect of the judgment debt in HCCC No 28 of 2015. The defendant shall also pay interest on the said amount from the date of judgment in HCCC No 29 of 2015, being 39 November, 2017. The plaintiff shall also have the costs of this suit”.

9. Counsel referred to the following decided cases and the law urging this court to allow the Application with costs to the applicants. These are:
  - i. [Monarch Insurance Company Limited v Moses Caleb Ochnago & another](#) [2019] eKLR.
  - ii. [Margaret Mbua v James Kamau Mbua](#) [2019] eKLR.

### **Respondents' submissions**

10. The said submissions were filed by Matiri Mburu & Chepkemboi Advocates and are dated 22<sup>nd</sup> November, 2023. Counsel identified two issues for determination.



11. The first issue is whether the interest in Consolidated bank Nakuru Branch Account number 10161XXXXXXXXX ought to be released to the respondent/applicant's advocates. Counsel submitted that the appellants/respondents' insurer could not be compelled to pay beyond the statutory limit of Kshs 3,000,000/= as it would be breaching the statutory limit. He placed reliance on section 5 (b) of the *Insurance (Motor Vehicle Third Party Risks)* Cap 405 and the case of *Africa Merchant Assurance Company Limited v William Murithi Kimaru* [2016] eKLR.

12. The court was also referred to the case of *Wangari Mwangi v David Mwangi Muteti* HCCC No 40 of 2013 where the court held as follows:

“the insurance company was to pay a maximum of Kshs 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.

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.

37. 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.”

13. Lastly, on whether the appellants should pay the costs of the application, counsel placed reliance on the Supreme Court's decision in the case of *Jasbir Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR where it was held as follows:

“(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the Defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.

14. He urged the court to dismiss the application with costs to the respondents.

### **Analysis and determination**

15. I have carefully considered the application, response and both submissions and I find the main issue to be whether the application herein is merited.

16. It is not in dispute that this court delivered judgment on the appeal herein on 16<sup>th</sup> March, 2022 and the respondent/applicant was awarded quantum amounting to Kshs 3,209,111/= plus interest at court



rates from the date of the lower court's judgment. In my opinion, the orders sought by the applicant are orders which flow from the decision of this court upon the determination of the appeal. Unless a stay of execution of the said order is sought and granted, this court would have no justification in declining to grant the orders sought in the application herein. The money deposited in the joint account was part of the sum payable to the respondent applicant. It was therefore his money. Any interest earned on it belongs to the respondent/applicant and there is no reason whatsoever to hinder him from receiving the money.

17. Consequently, I find merit in the Notice of Motion dated 1<sup>st</sup> November, 2023 which I hereby allow with no orders as to costs.

**DELIVERED VIRTUALLY DATED AND SIGNED THIS 16<sup>TH</sup> DAY of JULY, 2024 IN OPEN COURT AT NAKURU.**

**H. I. ONG'UDI**

**JUDGE**

