



**Gachamaru & another (Both Suing as Administrators of the Estate of the Late Beatrice Wamaitha Njenga) v Directline Assurance Company Limited (Civil Appeal E430 of 2023) [2024] KEHC 16779 (KLR) (Civ) (1 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 16779 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E430 OF 2023**

**NIO ADAGI, J**

**AUGUST 1, 2024**

**BETWEEN**

**BERNARD NJENGA GACHAMARU ..... 1<sup>ST</sup> APPELLANT**

**CATHERINE MUKAMI NJENGA ..... 2<sup>ND</sup> APPELLANT**

**BOTH SUING AS ADMINISTRATORS OF THE ESTATE OF THE LATE  
BEATRICE WAMAITHA NJENGA**

**AND**

**DIRECTLINE ASSURANCE COMPANY LIMITED ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon. Mr. S. A. Opande (PM) in  
Milimani Court Nairobi in CMCC. No. E1031 of 2021 delivered on 25/4/2023)*

**JUDGMENT**

1. The Plaintiffs/Appellants sued the Defendant/Respondent vide a Complaint dated 1/12/2020. It was the Appellants case that the Respondent was the insurer of the motor vehicle registration number KAZ 654G vide a policy of insurance number 133XXX29.

That the said motor vehicle was involved in a road traffic accident on 1/2/2008 when the said policy was in force and Beatrice Wamaitha Njenga who was a passenger in the said motor vehicle sustained fatal injuries.

2. The Appellants herein sued the owner and the driver of the aforesaid motor vehicle in Nairobi HCCC No. 256 of 2010 between Bernard Njenga Gachamaru & Catherine Mukami Njenga (Both suing as administrators of the Estate of the late Beatrice Wamaitha Njenga) v Mohamed Elias, Samson



Marita & George Moseki Magwambo. The High Court awarded the Estate of the deceased a sum of Kshs.3,788,126/= together with costs and interest.

3. That the Appellants had served the Respondent with the requisite statutory notice under the Insurance (Motor Vehicle Third Party Risks) Act and the Respondent had acknowledged receipt. The Appellants claimed that the Respondent had not satisfied the judgment hence they filed a declaratory suit pursuant to the provisions of Section 10 of the aforesaid Act.
4. The Appellants relied on the witness statement of Bernard Njenga Gachamaru and the list of documents both dated 1/12/2020.
5. The Respondent filed its defence dated 28/4/2021. The Respondent admitted that it was the insurer of the Motor vehicle Registration Number KAZ 654G and that indeed Beatrice Wamaitha lost her life in an accident that occurred on 1/2/2008.
6. The Respondent admitted that on 14/5/2020 the High Court awarded the Appellants a sum of Kshs.3,788,126/= plus costs and interest.
7. The Respondent averred at paragraph 5 and 6 of the Defence that it paid Kshs.3,000,000 as full settlement of the judgment on 21/1/2021 pursuant to section 5(b) (iv) of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 Laws of Kenya which provides that the maximum amount an insurance company should pay per claim by one person is Kshs.3,000,000.
8. The Respondent relied upon the witness statement of Kelvin Ngure dated 2/9/2022 and list of documents dated 3/5/2021.

The case was heard and the trial court dismissed the Appellants' suit on 24/04/2023 holding that the Respondent is not obligated to satisfy any other amount above the statutory limit of Kshs.3,000,000 which was paid on 21/01/2021.

9. Being aggrieved by the said decision, the Appellants filed this appeal raising 5 grounds of appeal.
10. I have perused through the grounds of appeal and the outstanding issue for determination in this appeal is; whether the Respondent is obligated to settle the full amount as awarded in HCCC 256 of 2010.
11. Section 4 of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 provides that all motor vehicles are to be insured against third party risks other than those owned by government or ordinarily used for agricultural activities. Then Section 5 stipulates requirements in respect of insurance policies. The section is reproduced here for clarity-

Requirements in respect of insurance policies:

In order to comply with the requirements of Section 4, the policy of insurance must be a policy which:-

- (a) is issued by a Company which is required under the Insurance Act, 1984 (Cap. 487) to carry on motor vehicle insurance business; and
- (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.

Section 5 (b) (iv) clearly stipulates that insurance companies shall not be required to cover liability of any sum in excess of Three Million Shillings, arising out of a claim by one person.

12. An insurance cover is a contract between two parties. Under the freedom to contract, insurance companies can cover any extent of liability subject to the minimum liability as above, as long as the insured is willing to pay the premium.
13. The Appellants submitted that it would have done the court and all the Parties justice had the Respondent had the forthrightness to bring to court the policy of insurance wherein they would have proved that they had limited their liability to Kshs.3,000,000. That in the absence of such a document, they cannot invite the court to presume that they had limited their liability, when it is possible that they had contracted to cover a higher liability.
14. The Appellants went ahead to cite the provisions of the *Evidence Act*, specifically Sections 107,108 and 109 that a Party making a positive allegation is under a duty to prove it. By claiming that their liability was limited to Kshs.3,000,000, the Respondent was obligated to prove it by tendering the document of policy of insurance for the court to satisfy itself as to the truth of such an averment. That under the present circumstances, the refusal to testify as to the provisions of their insurance policy, whereunder they may or may not have limited their liability, this honourable court must presume that it was against their interest.
15. The Appellants invited this court to be bound by the decision in the Court of Appeal Civil Appeal No 141 of 2016 Thomas Maara Gichuhi (acting on behalf of the Association of Kenya Insurers) vs Law Society of Kenya & Another on the meaning of the limitation available to insurers under Cap 405.
16. This court does not agree with the Appellant's position that the Respondent was obligated to prove the extend of the liability covered by tendering the document of policy of insurance to the court. The Insured too had a duty to prove that he had contracted the Respondent to cover a higher liability above Ksh.3,000,000.
17. On its part, the Respondent submitted that the matter before the court herein is anchored in the *Insurance (Motor Vehicles Third Party Risks) Act*, CAP 405. It is not in contention that the Respondent was the insurer of the subject motor vehicle registration number KAZ 654G at the time of the accident. It is also not in contention to it that following the accident, the deceased's administrators instituted a suit where the Appellants were awarded Kshs.3,788,126 as compensation on 14/05/2020.
18. Thereafter on 22/01/2021, the Respondent settled the claim at the statutory limit of Kshs.3,000,000 and communicated the same to the Appellants. The Appellants thereafter instituted a declaratory suit seeking for the outstanding amount.
19. The Court on 25/04/2024 made a finding that the Respondent had satisfied its obligation by paying Kshs.3,000,000 being the statutory limit for any claim.



The Respondent contents that it is not obligated to pay any amount above the Ksh.3,000,000 and relied on Section 5 (b) (iv) of the *Insurance (Motor Vehicles Third Party Risks) Act*, CAP 405.

The effect of this provision in Cap 405 is capping the limit that any insurance company is liable to pay at Kshs.3,000,000. It does not limit the court or any tribunal to make an award over Kshs.3,000,000 but in effect allows insurance companies to pay up to a maximum of Kshs.3,000,000. In *Jedida Chepkoech Mutai (Suing as the Legal representative of the estate of Julius Kipkorir Mutai (Deceased) v Cheron Beatrice* [2018] eKLR, the Court held that the Appellant was in an unfortunate position where they would have to pursue the insured for any outstanding balance once the insurer pays the statutory limit of Kshs.3,000,000.

20. Further to the above, the court in *Edward Mungai Waweru v Monarch Insurance Company Limited* [2021] eKLR, held that having paid the statutory limit, the insurer is not liable for any interest or costs in the declaratory suit.

21. Similarly, in *Africa Merchant Assurance Co. Limited versus William Muriithi Kamaru* 2016 eKLR, the court also held that the insurer cannot pay any amount above Ksh.3,000,000 and a decree holder could not recover more than the Ksh.3,000,000 limit.

Meaning that liability in relation to the insurer comes to an end once the insurance company honors its part and the insured remains liable to the extent of the balance in excess of Ksh.3,000,000.

22. In the case of *Kenya Orient Insurance Limited v Zachary Nyambane Omagwa* [2021] eKLR the court agreed with the Appellants that the amount of Kshs.3, 000, 000, paid is the maximum amount payable by the insurer under the *Insurance (Motor Vehicle 3<sup>rd</sup> Party Risks) Act* and the Respondent cannot compel the Appellant to pay more than the prescribed amount under the Act.

23. In *Africa Merchant Assurance Company Limited v William Muriithi Kimaru* [2016] eKLR, Justice Majanja held as follows;

“ The insurer is not obliged to pay any amount above Kshs. 3,000,000.00 nor can the decree-holder recover more than that”.

24. If there is any additional amount to be paid, then the same should be recovered from the insured.

25. The Respondent therefore is not liable nor statutorily obligated to make any payment with regard to the matter in question.

26. I find that the Respondent has already paid the Ksh.3,000,000 maximum amount to the Appellants and therefore this appeal lacks in merit and I accordingly dismiss it with no order as to costs.

**DATED, SIGNED & DELIVERED VIRTUALLY AT MACHAKOS THIS 1<sup>ST</sup> DAY OF AUGUST 2024.**

**NOEL I. ADAGI**

**JUDGE**

