



**Jubilee Insurance Company Limited v Owaga & 2 others (Civil Appeal
868 of 2023) [2024] KEHC 16751 (KLR) (Civ) (17 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 16751 (KLR)

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

CIVIL

CIVIL APPEAL 868 OF 2023

NIO ADAGI, J

SEPTEMBER 17, 2024

BETWEEN

JUBILEE INSURANCE COMPANY LIMITED APPELLANT

AND

BEN OTIENO OWAGA 1ST RESPONDENT

NOEL SHEUNDA NYONGESA 2ND RESPONDENT

**BEN OTIENO OWAGA & NOEL SHEUNDA NYONGESA (SUING AS THE
ADMINISTRATORS AD-LITEM OF THE ESTATE OF MICHELLE AITTAH
OWAGA) (DECEASED) 3RD RESPONDENT**

*(Being an appeal from the Ruling of Honourable L. B Koech delivered on 4th
August 2023 in Nairobi Chief Magistrate's Court Civil Case NO. 9296 OF 2018)*

JUDGMENT

Background:

1. The Respondents were victims of a self-involving accident that occurred on 25th April 2010 at Chepsir area along the Kericho-Nakuru highway.
2. The accident vehicle had a foreign registration number UAG 226H.
3. The accident vehicle was insured by Jubilee Insurance Company Limited, the Appellant herein and the policy was valid and current at the material time. This was confirmed by the police abstract.
4. After the accident, the 1st & 2nd Respondents obtained a Limited Grant ad-litem over the Estate of their deceased child, Michelle Aittah Owaga 3rd Respondent who suffered fatal injuries from the accident.



5. Being a foreign registered vehicle, the Respondents vide letters dated 1st November 2011, 19th January 2012, 2nd February 2012 and 20th February 2012 unsuccessfully sought to know from the Appellant the identity of the Appellant's insured to enable them file suit for compensation. The Appellant did not respond to any of these letters despite being personally served therewith.
6. Frustrated by the Appellants lack of co-operation and candour, the Respondents carried out a search at the Uganda Revenue Authority which search disclosed the registered owner of the accident vehicle to be Kapkwata Sawmills Limited.
7. Having thus ascertained the identity of the registered owner of the accident vehicle, the Respondents then served the Appellant with the statutory notice as required by law and then filed the primary suit in Nakuru being Nakuru HCCC No. 340 of 2012 against Eliakim Owalla as the driver of the vehicle and Kapkwata Sawmills Limited as the registered owner thereof.
8. The Respondents obtained leave of court and served the Defendants by advertisement both in Kenya and Uganda. The Defendants did not enter appearance to the suit and the matter was subsequently set down for formal proof hearing after entry of interlocutory judgment on liability in default of appearance.
9. Upon entry of final judgment, the Respondents vide letter dated 13th July 2018 notified the Appellant of the judgment and the Appellant vide their e-mail of 9th August 2018 requested the Respondents to hold the matter in abeyance as they looked into the settlement of the judgment sum.
10. The Appellant did not settle the decretal sum and this forced the Respondents to file a declaratory suit in Nairobi CMCC No. 9296 of 2018. Upon being served with summons to enter appearance to the declaratory suit and upon filing their defence, the Appellant moved by motion dated 1st April 2019 to set aside the judgment obtained in the parent suit.
11. The Appellant's application for setting aside the judgment in the parent suit was dismissed after inter-partes hearing in a ruling dated 4th August 2023.
12. Upon dismissal of their application aforesaid, the Appellant then filed an application in the declaratory suit seeking leave to amend their defence and to now plead that:-
 - a. The defendant in the primary suit i.e. Kapkwata Sawmills Limited was not their insured but Fidelity Timber and Hardware.
 - b. That because Fidelity Timber and Hardware, their insured was not sued in the primary suit, they are not obliged to satisfy the decretal sum since there is no judgment against their insured.
13. Despite opposition by the Respondents, the trial court granted the Appellant leave to amend its defence and to plead as explained in paragraph 12 above.
14. The Respondents were dissatisfied with the order granting the Appellant's leave to amend their defence and successfully appealed to the High Court against the said order in Nairobi HCCA No. E319 of 2020. This was, by its nature, an interlocutory appeal.
15. Once the Appellant's motion to amend their statement of defence was dismissed by the High Court on appeal as aforesaid, the Respondents vide a motion dated 16th March 2020 successfully moved the court in the declaratory suit to strike out the Appellant's statement of defence and consequently obtained entry of declaratory judgment against the Appellant.
16. Being dissatisfied with the order dated 4th August 2020 striking out their defence, the Appellant preferred this appeal and sought stay of execution. Stay of execution was initially granted on condition



that the Appellant deposit Kshs.5,500,000/= of the decretal sum as security. This amount was subsequently revised to Kshs.3,000,000/= which the appellant conceded they were liable to pay. This money was by consent of Parties paid out to the Respondents.

17. There has therefore been a partial settlement of the decretal sum leaving a balance of Kshs.1,116,000/= of the principal amount and all accrued interest from the date of judgment. The Appellant had also paid costs of the primary suit in the sum of Kshs.347,519/=.
18. The Appellant's appeal herein raises 7 grounds as follows:-
 - i. That the learned trial Magistrate erred in law and fact by striking out the Appellant's Statement of Defence and thus denying the Appellant a chance to canvass their Defence which raised triable issues on full trial.
 - ii. That the learned trial Magistrate erred in law and fact by striking out the Appellant's Statement of Defence when the same was not vexatious, scandalous and raised triable issues in law.
 - iii. That the learned trial Magistrate erred in law and fact in failing to consider and appreciate the grounds as highlighted in the Appellant's Replying Affidavit in response to the Respondent's Application to strike out the Defence.
 - iv. That the learned trial Magistrate erred in law and fact in taking a draconian measure by striking out the Appellant's Statement of Defence when the circumstances did not call for such a measure.
 - v. That the learned trial Magistrate overlooked the Appellant's Replying Affidavit and misconstrued the legal principles for striking out pleadings, thereby taking an improper course of striking out the Appellant's Statement of Defence in the presence of triable issues and analysing the merits of the case without first hearing the parties and taking the parties evidence thereto.
 - vi. That the learned trial Magistrate erred on fact and in law in by failing to consider and/or take judicial notice that the Defendant is only liable to the tune of Kshs.3,000,000/=pursuant to the provision of Section 33 of the Finance Act, 2006 as read together with Section 5(b) (iv) of the *Insurance (Motor Vehicles Third Party Risks) Act*
 - vii. That the learned trial Magistrate erred in law and in fact in failing to appreciate or take into consideration the Appellant's submissions and therefore striking out the Defence.
19. The Appellant in the appeal prays that:
 - a) the Appeal be allowed with costs.
 - b) the ruling and order dated 4th August 2023 and consequent orders made be set aside.
 - c) the Appellant's Statement of Defence dated 14th November 2018 be reinstated and the Defendant allowed to defend the suit.
 - d) the lower court file to be placed before a different Magistrate vested with jurisdiction for further directions and disposal of the suit at the earliest opportunity.
 - e) in the alternative the ruling and order dated 4th August 2023 and consequent orders made be set aside and be substituted with an order that the Defendant's liability to satisfy the Decree in Nakuru HCCC 340 of 2012 be limited to the tune of Kshs.3,000,000/=pursuant to the provision Section 5(b)(iv) of the *Insurance (Motor Vehicles Third Party Risks) Act*



20. The Appellant proposed to argue the grounds of appeal together in its submissions dated 22/5/2024.
21. The Respondents have also filed submissions dated 21/5/2024 to the appeal.
22. The duty of this court as the first appellate court is to reconsider the evidence, assess it and make own conclusions on the evidence, subject to the cardinal fact that the court did not have the advantage singularly enjoyed by the trial magistrate, of seeing and hearing witnesses and leave room for that (See *Seascapes Ltd v. Development Finance Company of Kenya Ltd* [2009] KLR, 384).
23. I have carefully considered the Record of Appeal, re-analysed the evidence and the grounds in the Memorandum of Appeal, the Parties' rival submissions on the appeal together with the legal decisions they have cited.
24. From the detailed historical background above, it is now trite that the Appellant's liability is not in issue. What is a major issue is the quantum or extent of that liability in monetary terms and that is what this court has to determine. The court will not hesitate later on in this judgment to determine the grounds touching on the setting aside of the summary judgment and the Appellant's opportunity to defend the suit for completeness.
25. Before I deal with the issues under paragraph 24 above, allow me to address an issue that the Respondents have raised in their submissions. The Respondents content that the appeal herein is otherwise fatally and irredeemably incompetent and should be dismissed in its entirety for want of compliance with the mandatory provisions of Section 65(1) (b) of the Civil Procedure Rules which provides that:-

Sec. 65. Appeal from other courts

- (1) Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court—
 - (a) Deleted by [Act No. 10 of 1969](#), Sch.;
 - (b) from any original decree or part of a decree of a subordinate court, other than a magistrate's court of the third class, on a question of law or fact;
 - (c) from a decree or part of a decree of a Kadhi's Court, and on such an appeal the Chief Kadhi or two other Kadhis shall sit as assessor or assessors.
26. The provision provides that an appeal from a decree of part of a decree of a subordinate court shall lie to the High Court.
27. Section 2 of the Act defines a decree as:

“decree” means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within Section 34 or section 91, but does not include—

 - a. any adjudication from which an appeal lies as an appeal from an order; or
 - b. any order of dismissal for default:



Provided that, for the purposes of appeal, "decree" includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;

28. It is quite evident from the proviso to definition of decree that it includes a judgment. The proviso goes on to provide that a judgment shall be appealable regardless of whether a decree has been drawn up, or is capable of being drawn up or not.
29. Order 42 Rule 13 stipulates the documents that must be on record before an appeal is admitted to hearing. Rule (13)(f) provides:

“ Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—(f)the judgment, order OR decree appealed from, and, where appropriate, the order (if any) giving leave to appeal.
30. An appellant is required to include in the record of appeal, the judgment, order or decree appealed from. The use of the word “or” is indicative of a disjunctive intent of the requirement. Accordingly, for purposes of an appeal, the filing of the judgment, ruling, order or decree is sufficient.
31. Further where an Appellant may not have filed a decree or order appealed against with the memorandum of appeal, the law gives such an Appellant the leeway to do so as soon as possible or within the time allowed by the Court. Order 42 Rule (2) provides:

“ Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under Section 79B of the Act until such certified copy is filed.
32. Failure to file a certified order or decree appealed against is a technicality which can be corrected pursuant to Order 42 Rule (2) of the Civil Procedure Rules. The provision accords with the Constitutional imperative in Article 159(2)(d) of *the Constitution*, that justice shall be administered without undue regard to procedural technicalities. Prescriptions of procedure and form should therefore not trump over the primary object of dispensing substantive justice. This also goes to protecting the right to a fair trial as guaranteed under Article 50 of *the Constitution*.
33. A look at the record herein will show that the record of appeal does not contain the decree. However, a certified copy of the ruling appealed against is attached to the Supplementary Record of Appeal dated 26/3/2024.
34. Does the omission of the decree render the record of appeal incompetent as argued by the Respondents?
35. The omission of a decree from the record of appeal has been the subject of many a judicial decision. In the case of Emmanuel Ngade Nyoka v Kitheka Mutisya Ngata [2017] eKLR, the Court of Appeal considered the issued and stated:-

“ Starting with the first issue, it is true that the record of appeal before the first appellate court at the time of filing did not contain the decree appealed from. This omission brought into focus the provisions of Order 42 rule 2 of the Civil Procedure Rules which provides interlia :



“Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the act until such certified copy is filed.”

36. Duly guided by the holding of the Court of Appeal in the cited decision, I find and hold that the omission of the decree in the record of appeal herein is not fatal and the certified copy of ruling is adequate for the purpose of the appeal. Further the said omission will occasion the Respondent no prejudice at all.

The quantum or extent of that liability in monetary terms

37. Section 5(b)(iv) of the [Insurance \(Motor Vehicles Third Party Risks\) Act](#) provide thus:

“In order to comply with the requirement of section 4, the policy must be a policy which-

- (a). -
- (b). -Insures such person, persons or classes of persons as maybe specified in the policy in respect of any liability which may be insured by him or them in respect of death of or bodily injury to, any person caused by or arising out of the use of the vehicle on the road:

Provided that a policy in terms of this section shall not be required to cover-

- (i). -
- (ii). -
- (iii). -
- (iv). - liability of any sum in excess of three million, arising out of a claim by one person.” (Emphasis added)

38. The Act limits liability of an insurer (such as the Appellant herein) in respect of a claim by any one person to a maximum of Kshs.3,000,000 and that any amount in excess of the said Kshs.3,000,000 is to be recovered directly from the judgment debtor/insured.

39. The Respondents herein were the claimants in the primary suit being Nakuru HCCC No. 340 of 2012. By the decree on record for the ruling on the application for review, the court entered judgment for the three (3) Claimants as follows:

1st Plaintiff Kshs.1,701,500/=

2nd Plaintiff Kshs.1,501,500/=

Estate of Michelle Aitta Owaga Kshs. 750,0001=

Special damages Kshs. 163,000/=

Total Kshs. 4,116,000/=

40. Costs & interest at court rates from the date of judgment were also awarded.

41. It is clear from the above that the awards to the individual Claimants fell far below the statutory limit of Kshs.3,000,000/= for any one of the Claimants. The Appellant is therefore liable to settle the award



of damages to each Claimant pursuant to the provisions of Section 5(b)(iv) in Cap 405 of the Laws of Kenya.

42. It is worth to note that the effect of Section 5(b)(iv) 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 Cherono 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.
43. 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.
44. 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.
45. 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 3rd Party Risks) Act and the Respondent cannot compel the Appellant to pay more than the prescribed amount under the Act.
46. 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”.
47. If there is any additional amount to be paid, then the same should be recovered from the insured.
48. The Appellant therefore is not liable nor statutorily obligated to make any payment above Kshs.3,000,000 for each of the Respondents with regard to the matter in question.
49. Section 26 (2) of the *Civil Procedure Act* gives the court jurisdiction and discretion to order for payment of interest on a money decree. In the instant suit, the court upon application for review ordered that interest be paid at court rates from the date of judgment. The basis of awarding interest on general damages from the date of judgment is premised on the ground that a Plaintiff will not have been kept away from his monies because none would have been ascertainable at the time of institution of the suit. Interest on special damages would, however, accrue from date of filing suit as a Plaintiff will have incurred expenses from the date suit is filed and he will have been kept away from his monies until judgment is delivered.
50. In the Decree that was reviewed pursuant to an order of the court dated 14/2/2019 and issued on 19/3/2019 the court awarded interest at court rates from the date of the judgment until payment in full.
51. Section 27 (1) of the *Civil Procedure Act* provides that costs shall ordinarily follow the even unless the court shall for good reasons or otherwise decline to order such costs. The Respondents having succeeded on their claim, they were rightly entitled to costs.



52. I notice from the Memorandum of Appeal that the Appellant does not contest the issue of interest or costs as awarded to the Respondents.

Setting aside of the Summary judgment and the Appellant's opportunity to defend the suit.

53. I will now turn to determine whether the declaratory summary judgment ought to be set aside and whether the Appellant ought to be allowed to defend the suit

54. The court has unlimited discretion to set aside or vary a judgment upon terms that are justified in light of all facts and circumstances both prior to and subsequent, and upon merits- See *Kimani v Connel* (1966) EA 547, and *Philip Keipto Chemwolo & another v Augustine Kubende* [1986] eKLR.

55. The Law on striking out of pleadings is now well settled. The same has been stated by courts at all Levels. In *D.T.Dobie & Company vs. Muchina* (1982) KLR 1 the Court of Appeal stated that:

“No suit is to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment”

56. In *Kivanga Estates Limited vs. National Bank of Kenya Limited* (2017) eKLR, the Court of Appeal reiterated the position thus:

“...striking out a pleading is a draconian act which may only be resorted to in plain cases. Whether or not a case is plain is a matter of fact... a court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment”

57. By the Statement of Defence on record, the Appellant plead in material part that:

At paragraph 3:

(i) The Defendant denies having issued insurance cover for the suit motor vehicle registration No. UAG 226H Toyota Surf under policy No. NRB /2010 / 2009 / 38530 and insurance certificate number C.6179107

At paragraphs 4 & 5:

(ii) The Defendant denies that the suit motor vehicle registration No. UAG 226H was registered in the Republic of Uganda in the name of Kapkwata Sawmills Ltd a Company incorporated in Uganda.

(iii) The Defendant further denies knowledge of the accident the subject of these proceedings.

(iv) The Defendant further denies knowledge of the parent suit in Nakuru or pending application for review

(v) The Defendant further pleads that neither their insured nor themselves were served with summons to enter appearance in the primary suit.

At Paragraph 6

This is a general denial of paragraphs 5, 6, 7 & 8 of the plaint.

In sum, the Defendant denies the following:

(i) Service of statutory notice



- (ii) Service of the decree issued in the primary suit
- (iii) Their own e-mail dated 9th August 2018
- (iv) Their promises to the Plaintiff that they were going to settle the decretal sum.

58. Having perused through the record of appeal, I must say I have had the opportunity to read through the pleadings re-evaluated and re-analysed the evidence. The Police Abstract No. 0192337 at page 15 of the record of appeal shows that the motor vehicle Registration No. UAG 226H Toyota Surf was at the time of the accident insured by Jubilee Insurance Company under Certificate No. C6179107 and Policy No. P/NRB/2010/2009/38530 commencing on 14/8/2009 and expiring on 13/8/2010. The driver was one Eliakim Owala. In addition, the Respondents herein are indicated as the persons injured in the accident.
59. Ownership of the stated motor vehicle was established after the Respondent's counsel conducted a motor vehicle search through the Uganda Revenue Authority that revealed the details of the vehicle and the owner being Kakwata Sawmills Ltd, the Defendant who was sued in the primary suit.
60. I note that the Appellant has never filed proceedings to repudiate the policy as required under Section 10(4) of the (Insurance Third Party Motor Vehicle Risk) Act.
61. The occurrence of the accident was an issue in the primary suit where it was actually proved.
62. That the suit motor vehicle was registered in Uganda is vindicated by its very registration number as captured in the police abstract and the search undertaken in the Republic of Uganda all of which were proved in the primary suit.
63. The fact of the accident was communicated to the Appellant vide Statutory notice dated 9th May 2010 and by letter requesting for particulars of the Appellant's insured dated 1st November 2011 all of which were duly received by the Appellant.
64. That the Appellant was therefore aware of the primary suit before the filing of the declaratory suit and their statement of defence is beyond doubt.
65. Proof of service of summons on the Appellant's insured was done in the primary suit and is not and indeed cannot be an issue in the declaratory suit
66. In *Kivanga Estates Limited vs. National Bank of Kenya Limited* (2017) eKLR already cited above, the Court of Appeal stated thus:
- “A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bonafides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety trouble or expenses...”
67. The Court of Appeal additionally and aptly observed thus:
- “There is no greater duty for the court than to ensure that it maintains the integrity of the system of administration of justice and to ensure that justice is not only done but is seen to be done by, amongst other measures, stopping litigation brought for ulterior and extraneous considerations. The courts, litigants, and counsel are enjoined by both *the constitution* and the law to assist the court further the overriding objective for the just determination of the proceedings... at a cost affordable to the parties.”



68. The Defences put forth by the Appellant are therefore without any basis and lack bonafides issues to be taken through a hearing. All the issues raised in the Appellant's Statement of Defence were raised by this very Appellant in the primary suit when it unsuccessfully sought to set aside the judgment and were expressly and positively determined by the superior court in a detailed ruling dated 12th March 2020 by Hon. J.N. Mulwa, J.

By this ruling the superior court found that:

- i. The Defendants in the primary suit were duly served with summons to enter appearance.
- ii. That the insurance company (Appellant herein) failed to co-operate with the Respondents advocates who prior to the filing application for leave of court had sought their assistance by several letters as to the identity of their insured who was a non-Kenyan, the vehicle having foreign registration, including assistance from the Law Society of Kenya to intervene on their behalf.
- iii. That statutory notice was served.
- iv. That the insurance company (Appellant) knew of the existence of the suit.
- v. That the Appellant herein was the real applicant in the application seeking to set aside judgment in the primary suit and had moved the court in bad faith.

69. The above decision has never been challenged.

70. On the foregoing, this court finds that it cannot re-open and Parties are barred from re-litigating on issues that have been finally determined by a competent superior court of equal status and whose decision has not been challenged.

71. In the result, the appeal succeeds partly to the extend that:

- a. The ruling and order dated 4th August 2023 and consequent orders made be set aside and be substituted with an order that the Appellant's liability to satisfy the Decree in Nakuru HCCC 340 of 2012 be limited to the tune of Kshs.3,000,000/= per claim by one person pursuant to the provision Section 5(b)(iv) of the Insurance (Motor Vehicles Third Party Risks) Act is allowed as sought under prayer (e) in the Memorandum of appeal.
- b. Prayers (b) (c) and (d) sought in the Memorandum of appeal are disallowed.
- c. The Appellant shall have half the costs of the appeal.

DATED, SIGNED & DELIVERED VIRTUALLY AT MACHAKOS THIS 17TH DAY OF SEPTEMBER 2024

NOEL I. ADAGI

JUDGE

