



**Nganga v Occidental Insurance Company Limited (Civil Case
E031 of 2024) [2024] KEHC 13019 (KLR) (25 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13019 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL CASE E031 OF 2024
RN NYAKUNDI, J
OCTOBER 25, 2024**

BETWEEN

JOHN KAGENYI NGANGA PLAINTIFF

AND

OCCIDENTAL INSURANCE COMPANY LIMITED RESPONDENT

JUDGMENT

1. The background facts to this case are fairly straightforward. The Plaintiff averred that at all material times relevant to this suit for a period, 14th June 2020 and 13th July 2020, he had a valid insurance cover for the subject motor vehicle registration number KBB 006G Mitsubishi FH with the Defendant vide policy number TP/08/81427/07(TPO) as his insurers within the meaning of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 Laws of Kenya.
2. The Plaintiff averred that he had insured the subject motor vehicle vide policy number TP/08/81427/07(TPO) covering such persons or classes of persons specified in respect of any injuries or death caused by or arising out of the use of the insured subject motor vehicle.
3. The Plaintiff moreover stated that on and/or about 27th June 2020 during the pendency of the said insurance policy, the subject motor vehicle was involved in an accident with one Jackline Chepkoech Kipruto and Joyce Chemtai Korir. Furthermore, the said injured party Jackline Chepkoech Kipruto and Joyce Chemtai Korir instituted civil suits being Eldoret Cmcc No. 203 Of 2021 & Eldoret CMCC NO. 251 OF 2020 against the Plaintiff as a result of the accident that occurred on 27th June 2020 claiming for damages in respect of the personal injuries suffered and obtained judgements on 22nd March 2024.
4. The Plaintiff stated that the decretal amount outstanding as at the date of filing this suit in Eldoret CMCC NO. 203 OF 2021 & Eldoret CMCC NO. 251 OF 2020 is Kshs. 547,810/= and Kshs.



549,326/= respectively as per the warrants of attachment dated 25th June 2024 and 28th June 2024 respectively and the same continues to accrue interest at court rates.

5. The Plaintiff also averred that at all material times the defendant was notified of the filing of Eldoret CMCC NO. 203 OF 2021 & Eldoret CMCC NO. 251 OF 2020 and the requisite notices under section 10 of CAP 405 Laws of Kenya were given to the defendant but they have willingly and deliberately failed to satisfy the judgement thereby exposing the Plaintiff to execution and at a risk of losing his property and to this extent, the Plaintiff contends that the defendant is in breach of both contractual and statutory obligations.
6. The Plaintiff vide a Plaint dated 8th July 2024, sought judgment against the defendant for:
 - a. A declaration that the defendant is and has at all material times been liable under a statutory obligation under the policy to satisfy the judgements and decrees and all consequential orders that have arisen in Eldoret CMCC NO. 203 OF 2021 & Eldoret CMCC NO. 251 OF 2020 made in favour of the decree holders together with the auctioneer's costs.
 - b. Loss of user at Kshs. 2,000/= per day for a period the court deems fit and just to grant.
 - c. Costs and incidental to this suit.
 - d. Any other relief that the Honourable Court may deem fit and just to grant.
7. The Defendant did not file any response to the Plaint nor was there any appearance for the Defendant. This matter proceeded for formal proof and hearing.

Plaintiff's Case Summary

8. In support of the Plaintiff's case, evidence was adduced by the Plaintiff John Kagenyi Nganga (PW1), in line with the witness statement dated 12th October 2024 and the List and Bundles of Documents dated 8th July 2024, (marked PExh. 1-14).
9. PW1 testified that at all material times relevant to this suit for a period, 14th June 2020 and 13th July 2020, he had a valid insurance cover for the subject motor vehicle registration number KBB 006G Mitsubishi FH with the Defendant vide policy number TP/08/81427/07(TPO) as his insurers within the meaning of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 Laws of Kenya.
10. PW1 testified that he had insured the subject motor vehicle vide policy number TP/08/81427/07(TPO) covering such persons or classes of persons specified in respect of any injuries or death caused by or arising out of the use of the insured subject motor vehicle.
11. PW1 testified that on and/or about 27th June 2020 during the pendency of the said insurance policy, the subject motor vehicle was involved in an accident with one Jackline Chepkoech Kipruto and Joyce Chemtai Korir.
12. PW1 testified that the said injured party Jackline Chepkoech Kipruto and Joyce Chemtai Korir instituted civil suits being Eldoret CMCC NO. 203 OF 2021 & Eldoret CMCC NO. 251 OF 2020 against the Plaintiff as a result of the accident that occurred on 27th June 2020 claiming for damages in respect of the personal injuries suffered and obtained judgements on 22nd March 2024.
13. PW1 testified that the decretal amount outstanding as at the date of filing this suit in Eldoret CMCC NO. 203 OF 2021 & Eldoret CMCC NO. 251 OF 2020 is Kshs. 547,810/= and Kshs. 549,326/= respectively as per the warrants of attachment dated 25th June 2024 and 28th June 2024 respectively and the same continues to accrue interest at court rates.



14. PW1 also testified that the said judgements and decrees are in respect of a liability covered by the said policy and has been obtained against him and therefore the Defendant is bound to pay under section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act* Cap 405 Laws of Kenya.
15. PW1 further testified that at all material times the defendant was notified of the filing of Eldoret CMCC NO. 203 OF 2021 & Eldoret CMCC NO. 251 OF 2020 and the requisite notices under section 10 of CAP 405 Laws of Kenya were given to the defendant but they have willingly and deliberately failed to satisfy the judgement thereby exposing the Plaintiff to execution and at a risk of losing his property and to this extent, the Plaintiff contends that the defendant is in breach of both contractual and statutory obligations.
16. PW1 moreover testified that motor vehicle registration number KBB OO6G Mitsubishi FH was being used for transportation purposes since he engages in transportation business thus pay for loss of user for a reasonable period.

Defendants Case Summary

17. There was no appearance for the Defendant during the formal proof and hearing of this matter before me.

Analysis and determination

18. I have given careful thought to the averments set out by the plaintiff in his Plaint as well as the evidence adduced herein in support and the written submissions filed by learned counsel and the key issue for consideration is whether there was a valid insurance contract between the plaintiff and the defendant as at the time of the subject accident; and if so, whether the plaintiff is entitled to the reliefs sought;

On whether there was a valid contract of insurance:

19. The Plaintiff averred that at all material times relevant to this suit for a period, 14th June 2020 and 13th July 2020, he had a valid insurance cover for the subject motor vehicle registration number KBB 006G Mitsubishi FH with the Defendant vide policy number TP/08/81427/07(TPO) as his insurers within the meaning of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 Laws of Kenya.
20. Moreover, the Plaintiff averred that he had insured the subject motor vehicle vide policy number TP/08/81427/07(TPO) covering such persons or classes of persons specified in respect of any injuries or death caused by or arising out of the use of the insured subject motor vehicle.
21. The Plaintiff moreover stated that on and/or about 27th June 2020 during the pendency of the said insurance policy, the subject motor vehicle was involved in an accident with one Jackline Chepkoech Kipruto and Joyce Chemtai Korir. Furthermore, the said injured party Jackline Chepkoech Kipruto and Joyce Chemtai Korir instituted civil suits being Eldoret CMCC NO. 203 OF 2021 & Eldoret CMCC NO. 251 OF 2020 against the Plaintiff as a result of the accident that occurred on 27th June 2020 claiming for damages in respect of the personal injuries suffered and obtained judgements on 22nd March 2024.
22. In the premises, it is plain that the defendant is under obligation to indemnify the plaintiff in so far as there is no dispute that the accident occurred within the validity period of the insurance policy.



23. In this regard, Section 10(1) of the *Insurance (Motor Vehicles Third Party Risks) Act*, Chapter 405 of the Laws of Kenya is explicit that:

“If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.”

24. The essence of Section 10(1) of the Act was aptly captured by Hon. Gikonyo, J. in the case of *Joseph Mwangi Gitundu v Gateway Insurance Co Ltd* [2015] eKLR, thus:

“...under section 10(1) of Cap 405 Laws of Kenya, the insurer has a statutory obligation to pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments. The obligation is statutory and a strict one; it cannot be shifted or abrogated by a term in the contract of insurance or in the manner proposed by the Defendant, lest the noble intention of the Act to guarantee compensation of third parties who suffer injuries arising from the use of the insured motor vehicle on the road should be lost. Similarly, if the statutory obligation placed by law on the insurer was to be shifted to the insured as proposed by the Defendant, the purpose for taking out an insurance policy and the compulsion by the Act for such insurance cover to be taken out on vehicles to be used on the roads to cover third party risks under Cap 405 Laws of Kenya will also be defeated. The only legal way liability and obligation to pay third party claims may be avoided, is by strictly following the prescriptions provided for under section 10 of Cap 405.”

25. I am therefore satisfied that the plaintiff has proved that there was a valid contract of insurance between him and the defendant as at 27th June 2020 when his Motor Vehicle Registration No. KBB 006G Mitsubishi FH was involved in a road traffic accident.

On whether the plaintiff is entitled to the reliefs sought:

26. The legal framework in Sections 107, 108 and 109 of the *Evidence Act* obligates the plaintiff to place before this court evidence that would constitute proof on the balance of probabilities. On this count, the decision in *Kirugi and Another Vs Kabiya & 3 others* (1987) KLR 347 is significant, where the Court of Appeal held as follows:

“The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof”. Likewise, failure by the Defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard.”

27. I am satisfied that the plaintiff, having proved that there was a valid contract of insurance in force as at 27th June 2020 when the subject accident occurred, is entitled to a declaratory order against the defendant as prayed for in Prayer [a] of the Plaint.



28. Secondly, and more importantly, no evidence was presented by the plaintiff as to the nature of the awards, if any, and the quantum thereof. This is pertinent, because Section 5(b)(iv) of the *Insurance (Motor Vehicles Third Party Risks) Act* caps compensation by insurers at Kshs. 3,000,000/= . That provision states as follows:

“In order to comply with the requirements of section 4, the policy of insurance must be a policy which-(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 harm 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 —...(iv)liability of any sum in excess of three million shilling arising out of a claim by one person...”

29. Hence, to make a declaratory order in the nature and manner sought by the plaintiff in the absence of proof as to the exact amount awarded against him would be in disregard of the clear provisions of the law that repose the ultimate liability on the plaintiff to pay the decretal sums adjudged as due against over and above what the insurance company may be liable to pay.

30. Hence, in *Law Society of Kenya v Attorney General & 3 others* [2016] eKLR it was emphasized that:

“What the Principal Act has done is cap the amount of money that the insurer pays to the injured person. Nothing in the Principal Act stops a litigant or the injured person from pursuing a claim against the insured individual where an award in excess of the amount recoverable from the insurer is made...It only limits who pays how much by apportioning a maximum of Kshs. 3,000,000/= to be paid by the insurer and the additional if any by the insured.”

31. Consequently, the claim which remains unchallenged succeeds in the following terms:

- a. A declaration that the defendant is and has at all material times been liable under a statutory obligation under the policy to satisfy the judgements and decrees and all consequential orders that have arisen in Eldoret CMCC NO. 203 OF 2021 & Eldoret CMCC NO. 251 OF 2020 made in favour of the decree holders together with the auctioneer’s costs.
- b. Loss of user at Kshs. 2,000/= per day for a period of six months
- c. Costs of this suit be borne by the Defendant.

DATED AND SIGNED AT ELDORET THIS 25TH DAY OF OCTOBER, 202

R. NYAKUNDI

JUDGE

