



**Obachi v Xplico Insurance Co Ltd; Saina & another (Interested Parties) (Suing as the Legal/
Personal Representatives and Administrators of the Estate of the Late Francis Kimurgor
Kemboi) (Civil Case E003 of 2021) [2023] KEHC 17912 (KLR) (18 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 17912 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL CASE E003 OF 2021
F GIKONYO, J
APRIL 18, 2023**

BETWEEN

LABAN NYANGARORA OBACHI PLAINTIFF

AND

XPLICO INSURANCE CO LTD DEFENDANT

AND

HELLEN CHERUTO SAINA INTERESTED PARTY

KIPKEMBOI SAINA INTERESTED PARTY

**SUING AS THE LEGAL/PERSONAL REPRESENTATIVES AND
ADMINISTRATORS OF THE ESTATE OF THE LATE FRANCIS KIMURGOR
KEMBOI**

JUDGMENT

1. The plaintiff filed a plaint dated May 5, 2021 seeking the following orders;
 - a. A declaration that the defendant is bound to honour and satisfy the court decree issued in Narok CMCC No 148 of 2019; Hellen Cheruto Saina and Kipkemboi Saina (suing on their own behalf and as the administrators of the Estate of the late Francis Kimurgor Kemboi v Laban Nyangarora Obachi.
 - b. Judgement against the defendant for Kshs 2,718,535 plus interest from the date of the judgment until payment in full; and
 - c. Costs and interest from the date of filing this suit



Brief facts

2. As at April 7, 2019, the plaintiff, as the registered and / or beneficial owner of matatu registration number KCH 778P insured the said vehicle with the defendant through policy of insurance number XPI/0021828.
3. The plaintiff asserted that pursuant to that policy of insurance, the defendant expressly undertook inter alia to indemnify the plaintiff against third party claims occasioned by accident or collision or overturning of the plaintiff's motor vehicle, details of which are within the defendant's knowledge.
4. The plaintiff stated that on April 7, 2019, his driver and/or agent was lawfully driving the said matatu when it was involved in an accident at Silanka area long the Mulot-Narok road. As a result of the accident, Francis Kimurgor Kemboi was fatally injured.
5. In accordance with the terms of the insurance policy, on August 7, 2019 the plaintiff duly completed a motor accident claim form and lodged it with the defendant alongside a police abstract which was issued in respect of the accident. The legal administrators of the estate of Francis Kimurgor Kemboi subsequently filed suit for damages at the Narok chief magistrate courts to wit, Narok CMCC No 148 of 2019; Hellen Cheruto Saina and Kipkemboi Saina(suing on their own behalf and as the administrators of the estate of the late Francis Kimurgor Kemboi v Laban Nyangarora Obachi.
6. Upon receiving the summons to enter appearance in respect of the interested parties' suit, the plaintiff immediately transmitted them to the defendant who appointed an advocate to represent the plaintiff. The interested parties' suit proceeded to trial and the chief magistrate court at Narok rendered judgment against the plaintiff for a total of Kshs 2,515,210.
7. The plaintiff stated that in blatant breach of the express terms of the plaintiff's insurance policy, the defendant neglected, failed and/or declined to settle the decretal sum. The plaintiff's claim against the defendant therefore is Kshs 2,515,210 being the decretal sum plus costs and interest as assessed in Narok CMCC No 148 of 2019.
8. The defendant was served with summons to enter appearance, plaint and all accompanying documents on July 26, 2021. the defendant was notified of all subsequent court dates. The defendant neither entered appearance nor filed a statement of defence. Upon the plaintiff's request, interlocutory judgement was entered against the defendant.
9. Interlocutory judgement was entered on June 16, 2022. And, the case proceeded to formal proof.
10. At the trial of this suit, only the plaintiff testified. The defendant had been duly notified of the court date but it did not participate in the proceedings.

Evidence

11. The plaintiff called one witness in support of his case.
12. PW1- Laban Nyangarora Obachi, the plaintiff herein. He relied on his statement in the affidavit dated May 5, 2021 as his evidence in chief. He also relied on the bundle of documents he filed which he tendered as p exh1 as a bundle. He prayed that this court orders the defendant to compensate interested parties for damages in Narok CMCC No 148 of 2019. He also prayed for costs of this suit.



Plaintiff's Submissions

13. The plaintiff urged this court to find that as at April 29, 2019, there subsisted an insurance policy between the defendant and the plaintiff in respect of the matatu registration number KCH 778 P. paragraph 1 of the police abstract report describe the plaintiff as the owner of the matatu registration number KCH 778P. The entry also shows that the matatu was insured with the defendant herein. The motor accident claim form was lodged in respect of matatu registration number KCH 778P. it was received by the defendant on August 17, 2019. the defendant's letter dated October 14, 2019 at 2nd paragraph , the defendant's officer requests the firm of Joe Ngigi & company advocates to enter appearance for the defendant therein whom she describes as the defendant's insured.
14. The plaintiff submitted that the police abstract report was issued in respect of an accident involving matatu registration number KCH 778P. the plaintiff was sued by the administrators of the estate of Francis Kimurgor Kemboi.
15. The plaintiff submitted that the defendant was obligated to settle the decree arising from the suit instituted by the administrators of the estate of Francis Kimurgor Kemboi. The defendant did not tender any evidence controverting the plaintiff's assertion. He therefore urges this court to find that the insurance policy between the defendant and the plaintiff obligated the defendant to settle the decretal sum arising from a suit for an accident involving the matatu.
16. The plaintiff in his submission conceded that in the circumstances, he is not entitled to the prayer for judgment against the defendant for Kshs 2,515,210 plus costs and interests from the date of the judgment until payment in full.
17. The plaintiff urged this court to allow the plaintiff's suit by issuing a declaration that the defendant is bound to honour and satisfy the court decree issued in Narok CMCC No 148 of 2019. he also urged this court to award costs of the suit to the plaintiff.

Analysis And Determination

18. From the pleadings filed herein, the evidence and the plaintiff's submissions, the overarching issue for determination in this suit is;
 - i. Whether the defendant being the insurer is liable to pay third party judgment in CMCC No 148 of 2019 which was in respect of injuries sustained by the third party in an accident covered under the policy of insurance/contract issued to the plaintiff- the insured by the defendant.

Burden and standard of proof.

19. Although this suit proceeded *ex parte*, the onus of proof rests with the plaintiff. The proof has to be on a balance of probabilities. See section 107 and 109 of the [Evidence Act](#) as well as case law.

Covered at the time of the accident?

20. In these type of cases, the plaintiff must prove that he had a valid insurance cover on the motor vehicle in question at the time of the accident.
21. According to the affidavit by PW1, motor vehicle KCH 778P was insured by the defendant under policy number XPI/0021828. As per the attached police abstract dated April 7, 2019, the said policy was to expire on April 14, 2019. The plaintiff's insured motor vehicle registration No KCH 778P was involved in an accident on April 7, 2019- during the subsistence of the policy. Claim forms submitted support these facts.



22. Nothing controverts these facts as laid before the court by the plaintiff.
23. But before I conclude on this aspect, I should note that the submission by the plaintiff was misleading in that it stated that they had proved that there was a valid cover as at April 29, 2019. I do not understand the relevance of the date stated in the submission. It is for these reason and others which I will point out at the appropriate time, that I reproduced those submissions in ex tenso.
24. In light of the evidence adduced in court, the plaintiff has proved on a balance of probabilities that he had a valid insurance cover on the insured motor vehicle at the time of the accident, that is, April 7, 2019.

Insurers duty

25. I have found that at the material time, there was a valid insurance cover on the insured motor vehicle registration number KCH 778 P.
26. From the evidence and documents filed in court, the plaintiff was the owner. The motor accident claim form was lodged with the insurance in respect of matatu registration number KCH 778P. It was received by the defendant on August 17, 2019.
27. In the letter dated October 14, 2019 at 2nd paragraph, the defendant's officer requests the firm of Joe Ngigi & company advocates to enter appearance for the defendant therein whom she describes as the defendant's insured.
28. The suit was filed by the administrators of the estate of Francis Kimurgor Kemboi- a third party who was fatally injured in the accident of April 7, 2019 involving the insured motor vehicle. The suit was heard and judgment entered against the plaintiff.
29. The plaintiff submitted that the plaintiff submitted that the defendant is obligated in law to settle the decree arising from the said suit.
30. I do note that the defendant did not tender any evidence to controvert the plaintiff's assertion.
31. What does the law say?
32. Under section 10 of the *Insurance (Motor Vehicle Third Party Risks) Act*, the insurer bears a statutory duty to satisfy judgments by third parties against persons insured under a policy of insurance. The Act constitutes exception to privity of contract and serves to provide compensation under the policy for third parties who are injured by the use of a vehicle on the road.
33. The plaintiff has proved that decree was issued against him being an award of damages in the sum of Kshs 2,515,210/=. It emanates from a judgment against the plaintiff for injuries sustained in the road traffic accident in issue- the insured event.
34. It bears repeating that, I have already found that the plaintiff and the defendant had a valid insurance policy/contract when the accident occurred on April 7, 2019, That the policy covered the material risk that occurred on April 7, 2019. There is nothing to show that the said policy had been cancelled or lawfully avoided by the insurance.
35. Therefore, the defendant is required by law obligated to settle claims arising from accidents under section 10(1) of the *Motor Vehicles Third Party Risks) cap 405 Laws of Kenya*.
36. In such circumstances, the insured is liable. See the case of *Kenindia Assurance Co Ltd v James Otiende* [1987]2 KAR 162 and *Kasereka v Gateway Insurance Co Ltd* (2003) 2 EA 502 as well as *Philip Kimani Gikonyo v Gateway Insurance Co Ltd* HCCA 746/2002 Nairobi



37. I find and hold that the plaintiff has proved his case against the defendant on a balance of probabilities.
38. But, before I close, I repay my debt. I do note that the plaintiff made very startling submission to the effect that the plaintiff conceded that in the circumstances, he is not entitled to the prayer for judgment against the defendant for Kshs 2,515,210 plus costs and interests from the date of the judgment until payment in full.
39. But when I proceeded further down, I note that the plaintiff submitted that the plaintiff is entitled to judgment as per plaint. This is clearly an amusing although pardonable mistake which should be avoided lest it costs an otherwise good case.

Orders

40. Be that as it may, I issue a declaration that, the defendant being the insurer of the vehicle which was involved in the accident in question during the pendency of the insurance cover shall pay to the third party the judgment sum together with costs and interest ordered thereto under section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act*.
41. More specifically, the defendant shall pay the third party a sum of Kshs 2,515,210 being payment of the decree issued in favour of the interested parties in Narok CMCC No 48 of 2019. The amount shall attract interest at court rates from the date of the decree until payment in full.
42. Costs of this suit are awarded to the plaintiff.
43. The defendant shall also pay proclamation fees of Kshs 203,325/=
44. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 18TH DAY OF APRIL 2023.

F. GIKONYO M

JUDGE

In the presence of:

Njoroge for plaintiff

No appearance for defendant

Court Assistant – Mr. Kasaso

