



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Karega v Kennindia Assurance Co Ltd (Civil Case 88 of 2014)
[2023] KEHC 18799 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18799 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL CASE 88 OF 2014
HK CHEMITEI, J
JUNE 15, 2023**

BETWEEN

NGURE EDWARD KAREGA PLAINTIFF

AND

KENNINDIA ASSURANCE CO LTD DEFENDANT

JUDGMENT

1. The plaintiff was involved in a road traffic accident on November 15, 2010 and he filed suit no. Nakuru HCCC 157 of 2012 against one Yusuf Doran Nassir for damages as a result of the said accident. On May 16, 2014 Justice H Omondi (as she then was) found in favour of the plaintiff and awarded him a sum of kshs 25,327,114 less contributory negligence of 10% leaving him with a balance of kshs 22,795,000.
2. The plaintiff's efforts to recover from the defendant were fruitless and this led to the filing of this declaratory suit against the insured in the primary suit for the recovery of the said amount. The defendant filed its defence denying the claim and stated inter alia that the defendant sued a dead person and it was therefore not feasible that it should shoulder the responsibility as the suit was a non-starter.
3. The parties proceeded to call give oral evidence. The plaintiff testified and he did not call any witness. The defendant as well called one witness and closed its case. The court directed the parties to file their written submissions which they did.
4. Before looking at the merits or otherwise of the case it is necessary to summarise the evidence as presented by the parties.
5. PW1 the plaintiff narrated how the accident occurred and went ahead to produce the exhibits which he relied on. Part of the exhibits included a copy of the burial permit of one Doran Yusuf who was allegedly the defendant in the primary suit. According to him the person he sued was Yusuf Doran Nassir.



6. He said that at the time of the accident the insurance cover was still subsisting and he believed he sued the correct person. He said that as a result of the accident he was rendered incapacitated and was now using a wheel chair permanently. He prayed that the defendant who was the insurer be compelled to settle the claim.
7. DW1 Joseph Kamau the deputy head of legal affairs of the defendant testified on its behalf. His testimony basically did not deny the fact that the accident occurred and that at the time of the said accident it had insured one Doran Yusuf who had apparently died before the accident. He therefore argued that since he had died, the plaintiff had sued a dead person and his claim should fail.
8. He went ahead and relied on the burial permit which he produced indicating the death of the said insured. He prayed that the suit be dismissed.
9. On cross examination he did not deny that other claimants in the same accident had been paid by the defendant and the plaintiff in this case was the only one remaining.
10. As indicated above the parties filed their written submissions which the court has had time to peruse together with the authorities cited.
11. The plaintiff submitted that the judgement in the primary suit has never been set aside and that if the defendant was serious that the same was a non-starter then it ought to have moved the court and have it set aside.
12. He went on to submit that the said burial permit was not a death certificate and it could not be relied on by the court. The plaintiff wondered why the defendant settle the other claims and not this one yet it did not apply to set aside the same as well.
13. On the allegation that the defendant ought to pay only a sum of kshs 3million maximally the plaintiff submitted that the defendant did not comply with Section 10(4) of Cap 405 and it ought therefore to settle the entire amount.
14. The plaintiff therefore prayed that the defendants defence ought to be dismissed and be compelled to pay the damages and not to frustrate the plaintiff who was now incapacitated.
15. In its written submissions the defendant reiterated the evidence tendered by its witness that there was no suit properly so called since the defendant or their insured had died before the accident. They relied among others in the case of Equity Bank Ltd v Capital Construction Limited & 3 Others (2011) eKLR.
16. The defendant further submitted that it cannot in any case satisfy the entire decree as it has a cap limit of kshs3 million as per Section 5 of Cap 405.
17. On the question of why the other claimants were paid and not the plaintiff the defendant submitted that at the time of settling those claims it had not been discovered that the insured had already died. It submitted that the insurance cover the said insured took was automatically renewed and that is why it was subsisting despite the fact that the insured had died. The defendant prayed for the plaintiff suit to be dismissed with costs.

Analysis And Determination

18. There main issues herein for determination is whether the insured who was the defendant in the primary suit had died at the time of filing the suit and thus rendering the same a non-starter as submitted by the defendant.



19. The defendant did produce in support of the assertion a burial permit dated October 20, 2006 in respect to one Dorah Yusuf. It alleged that the said person was the defendant in the primary suit.
20. In the primary suit No 157 of 2012 the defendant is one Yusuf Doran Nassir. The two names are obviously distinct and separate. The burial permit does not concern Yusuf Doran Nassir who was the defendant's insured. In any case and as rightly submitted by the plaintiff there was no death certificate to establish that indeed he was buried.
21. In the normal happenings the burial permit is issued by the local provincial administration under which the deceased was so as to allow his remains to be interred. Subsequently and for purposes of official purposes a death certificate is issued by the Registrar of Births and Deaths. The burial permit in my view is simply a supporting document indicating that the deceased passed on and cannot be used in official engagements.
22. A classic example is in succession proceedings under the *Succession Act*. The primary document which must be presented is the certificate of death and not a burial permit for one to seek letters of administration over a deceased estate.
23. While at it, it is inappropriate for the defendant to argue at this level that their insured had died before the suit was filed. That line of argument ought to have been raised at the trial in the primary suit. At the same time the burial permit would have been subjected to the usual riggers of cross examination as well as the maker called to produce. Otherwise in such a suit the same is not necessarily available for consideration as the issue is whether the decree in the primary suit ought to be settled.
24. The issue of whether the primary suit was a nullity or not ought to have been raised in that suit. As it is now, all that this court needs to find out is whether in light of the available evidence the plaintiff's suit against the defendant ought to succeed.
25. It is also worthy to note that the reasons given by the defendant are to say the least spurious. How do its field officers as was submitted by the defence unable to advise the central office or headquarters concerning the death of the insured if indeed it occurred.? And how was that the responsibility of the plaintiff.?
26. Contrary to the defendant's submissions it was the responsibility of the defendant to prove that their insured had died and therefore the case was a nullity. To suggest that the plaintiff ought to have established it is to shift the burden.
27. In light of the above observations and in the absence of any other oral or documentary evidence hold that the burial permit produced does not belong to the defendant's insured, that is Yusuf Doran Nassir and this court rejects it.
28. It is also evident that the defendant settled some other claims which resulted from the same accident. This include civil case No 894 of 2012 among others as it appeared during the hearing. If that was the case, why did it not settled the plaintiff's case.?
29. Further, there is no evidence to suggest that owing to the discoveries made afterwards the defendant applied to set aside the judgement in the primary suit. Such action and acquiescence clearly points out to the fact that there were no tangible reasons or at all.
30. I think the plain reason why the defendant does not want to honour the decree is simply that the amount is too large and way beyond the kshs 3 million caped by the Act. This can be deduced from the submissions on record and which goes to support the reasons why it settled the other claims which it considered were within the acceptable limit.



31. If that was the reasoning by the defendant, then as matter of principle it ought to have settled the kshs 3 million it seems to be comfortable with at the minimum.
32. That brings me to the provisions of Section 10(4) of *Cap 405*. The same states as hereunder;
- ‘No sum shall be payable by an insurer under the foregoing provisions of this section if in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it.’
33. Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto”.
34. The above portions of the law obligate the insurer to repudiate liability within three months after the commencement of the proceedings. Ochieng J (as he then was) stated so in *Gateway Insurance Co Ltd v Thomas Njenga Gitau & Another* (2014) eKLR, thus;
- “In my understanding of that provision, an insurer would be entitled to avoid its obligation to make payment under a contract of insurance if it had commenced proceedings either before a case had been filed against its insured or within 3 months of the case being instituted against its insured. The claim by the insurer would need to be one in which the insurer sought and obtained a declaration that it was entitled to avoid its obligations under the contract of insurance. And the grounds upon which the insurer obtained that declaration would need to have been of material non-disclosure or of false representation of material particulars.”
35. To the extent therefore that there is a valid judgement like the case at hand it is the responsibility of the defendant to settle the same.
36. In the premises, and for the above reasons this court finds that the plaintiff has established his case against the defendant and the same is hereby allowed as prayed in the plaint together with costs.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 15TH DAY OF JUNE 2023.

H. K. CHEMITEI

JUDGE

