



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 265 OF 2018

EDWARD MUNGAI WAWERU.....PLAINTIFF

-VERSUS-

MONARCH INSURANCE COMPANY LIMITED.....DEFENDANT

JUDGMENT

1. By way of the plaint dated 5th November, 2018 Edward Mungai Waweru, who is the plaintiff in this instance, instituted the present declaratory suit against the defendant herein and sought an order to the effect that the defendant be bound to settle the decree in High Court Civil Suit No. 22 of 2011 (“the primary suit”) plus interest thereon, together with costs of both the primary suit and the declaratory suit.
2. In the primary suit which was filed against Kimani Mary (“the insured”) and Samson Ochieng Kagunda, the plaintiff sought general and special damages arising out of a road traffic accident which occurred on 23rd February, 2010 along Gitaara Road and involving the motor vehicle registration number KBA 252P (“the subject motor vehicle”) belonging to the insured, as a result of which the plaintiff sustained severe injuries. It was also alleged in the primary suit that, the defendant herein had insured the subject motor vehicle vide a Policy of Insurance Number 2009/082/001009. The suit against Samson Ochieng Kagunda was subsequently withdrawn.
3. After a full trial, the court in the primary suit delivered its judgment on 7th March, 2017 in favour of the plaintiff and against the insured in the sum of Kshs.9,900,965/= together with costs and interest thereon.
4. Upon failure to settle the aforementioned decretal sum, the plaintiff has now filed the instant suit under Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act, Cap. 405 Laws of Kenya (“the Act”).
5. Going by the record, the defendant was served with a statutory notice of intention to sue and summons but failed to enter appearance and/or file a statement of defence. Consequently, the matter proceeded for formal proof.
6. The plaintiff chose to rely on his signed witness statement and his list and bundle of documents dated 20th May, 2019 and marked as P. Exhibits 1-19 as his evidence.
7. Upon close of the formal proof trial, the plaintiff filed written submissions dated 6th November, 2020.
8. I have considered the evidence adduced at the trial as well as the filed submissions and cited authorities. In the absence of contrary evidence, and going by the pleadings and judgment in the primary suit, which were produced as exhibits, I am satisfied that at the time of the material accident, the defendant herein had insured the subject motor vehicle.
9. From the record, it is apparent that the judgment entered in the primary suit has not been set aside or challenged on appeal. It is also apparent from the record that the defendant has since satisfied the decretal sum to the limit of Kshs.3,000,000/= which is essentially an admission of liability. The sole issue for determination therefore is whether the defendant is liable to satisfy the remaining balance of the decretal sum.
10. The plaintiff states in his evidence that the court ruled that the primary suit does not fall within the ambit of the Insurance Motor Vehicle Third Party Risks (Amendment) Act, 2013 which imposed a ceiling to the amount payable by insurance companies as Kshs.3,000,000/= . According to the plaintiff, since the primary suit was lodged before the amendment came into force, the law cannot apply retroactively and hence the defendant is liable to satisfy the entire decretal sum, with reliance on the case of **Monarch Insurance Company Limited v Moses Caleb Ochnago & another [2019] eKLR** in which the court upheld the decision of the trial court ordering the appellant in a declaratory suit to settle the decretal sum in the primary suit, amounting to Kshs. 4,320,498/=.

11. Section 5 of the Act which is of relevance to the subject at hand stipulates as follows:

“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)

ii)

iii)

iv) liability of any sum in excess of three million shillings, arising out of a claim by one person.”

12. Upon perusal of the ruling delivered by the court on 17th May, 2018 in the primary suit and referenced by the plaintiff, I observed that what was before the court at the time was an application filed by the insured seeking to set aside, review or vary the orders issued on 6th October 2017. Contrary to the averments made by the plaintiff, there is nothing on the record of the said ruling to indicate that the court had made a determination that the primary suit did not fall within the ambit of the Insurance Motor Vehicle Third Party Risks (Amendment) Act, 2013.

13. It is clear that the plaintiff’s argument is largely based on the old regime which required insurers to satisfy in full the decretal sums awarded to third parties and against their insured persons, and to recover any excess sums from their insured. However, it is evident that the legal position has since changed and that there exists a cap on the sums recoverable from insurance companies.

14. I draw guidance from the case of **Patricia Mona Antony & another v Africa Merchant Assurance Company Limited [2019] eKLR** in which the court found an insurer liable to pay the statutory sum of Kshs.3,000,000/= out of the decretal amount. A similar finding was arrived at by the court in the case of **Bernard Mutisya Wambua v Kenya Orient Insurance Company Ltd [2020] eKLR**.

15. As earlier noted, the plaintiff admits that the defendant has since paid the sum of Kshs.3,000,000/=. Suffice it to say that there is nothing precluding the plaintiff from seeking to recover the balance of the decretal sum from the insured.

16. For all the foregoing reasons, I hereby enter judgment in favour of the plaintiff and against the defendant in the limited sum of Kshs.3,000,000/ out of the entire decretal sum of Kshs.9,900,965/ in High Court Civil Suit No. 22 of 2011, which sum I note has already been satisfied and shall therefore attract no interest. The plaintiff is at liberty to pursue Kimani Mary, the insured, for the outstanding balance of the decretal sum. The plaintiff is awarded costs of the primary suit as against the defendant but not in the declaratory suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF MAY, 2021.

A. MBOGHOLI MSAGHA

JUDGE

In the presence of:

Ms. Nyokabi Waiganjo for the Plaintiff

No appearance for the Defendant