



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 699 OF 2019

GATEWAY INSURANCE COMPANY LTD.....APPELLANT

VERSUS

JANET GAWDENSIA ATIONO AKEYO DAVID AJOWI AKEYO

(Both suing as the administrators of the estate of

WALTER AKEYO AJOWI (DECEASED).....1ST RESPONDENT

DICKSON EVANS ONCHIRI.....2ND RESPONDENT

DIADEM LIMITED.....3RD RESPONDENT

RULING

1) Janet Gawdensia Atieno Akeyo and David Ajowi Akeyo (herein after referred to as the 1st respondent) in their capacity as the joint administrators of the estate of Walter Akeyo Ajowi, deceased, filed a compensatory suit against Dickson Evans Onchiri and Diadem Ltd, being the 2nd and 3rd respondents respectively before the Chief Magistrate's court for the fatal injuries the deceased sustained in a road traffic accident while travelling along Voi-Taveta road aboard motor vehicle registration n. KAZ 167U Toyota Station Wagon owned by the 3rd respondent while being driven by the 2nd respondent at all material times.

2) The 2nd and 3rd respondents denied the 1st respondent's claim.

3) The 2nd and 3rd respondents successfully obtained leave to enjoin Gateway Insurance Co. Ltd, the appellant herein as a third party to the suit vide an application dated 12th February 2013. The appellant entered appearance and filed a defence denying the 2nd and 3rd respondents' claim.

4) Hon. Nyaloti, learned chief magistrate heard the suit and delivered judgment on 27.3.2018 in favour of the 1st respondent and against appellant (3rd Party) the 2nd and 3rd respondents in the sum of ksh.5,750,000/=.

5) The appellant took out the motion dated 21st August 2019 whereof it sought for an order for stay of the decree and for the warrants of attachment to be revoked. The appellant further argued before the trial court that it has fully settled the claim by paying ksh. 3 million as per the policy limit and urged the court

to make a pronouncement to that effect.

6) Hon. P. Gesora, learned Chief Magistrate heard and dismissed the application vide the ruling he delivered on 14th November 2019. Being aggrieved by the aforesaid ruling, the appellant preferred this appeal and put forward the following grounds:

- i. THAT the learned Chief Magistrate erred in law and in fact in dismissing the appellant's application dated 21st August 2019 thereby ordering the appellant to settle the balance of the decretal amount contrary to the existing statutory and policy limit of ksh.3,000,000/=.***
- ii. THAT the learned Chief Magistrate erred in law and in fact by failing to follow the Court of Appeal's reasoning with reference to the application of Section 5 of the Insurance (Motor Vehicles Third Party Risks) Act.***
- iii. THAT the learned Chief Magistrate erred in law and in fact by holding that the appellant ought to settle the decretal amount beyond the statutory and policy limit which order amounts to re-writing of the Contract of Insurance between the appellant and the respondent, which act is unconscionable.***
- iv. THAT the learned Chief Magistrate erred in law and in fact by failing to observe and uphold the provision of the contract of insurance between the appellant and the 3rd respondent and instead imposing terms and conditions alien to the parties.***
- v. THAT the learned Chief Magistrate erred in law and in fact in failing to be guided by existing decisions of the Court of Appeal on the subject of the Appeal.***
- vi. THAT the learned Chief Magistrate erred in law and in fact by failing to observe and apply Section 5 of the Insurance (Motor Vehicles Third Party Risks) Act in determining the application.***
- vii. THAT the learned Chief Magistrate erred in law and in fact by failing to observe and follow Court of Appeal's reasoning that compensation awarded by the court in excess of ksh.3 million would be recoverable from the insured and not from the insurance company.***

7) When the appeal came up for hearing learned counsels recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the arguments put forward before the trial court over the application dated 21st August 2019. I have also considered the submissions together with the authorities cited.

8) Though the appellant put forward a total of seven (7) grounds of appeal, those grounds may be disposed of by one main ground which is to the effect that the trial magistrate erred by dismissing the appellant's application dated 21st August 2019 yet the appellant had presented sufficient facts and law in support of the application. It is the submission of the appellant that the insurance contract (policy) it had with the 3rd respondent had a statutory limit of ksh.3,000,000/=.

9) The appellant further pointed out that the aforesaid amount was paid to the 1st respondent thus discharging it from any liability arising from the insured risk.

10) This court was beseeched to find and hold that the appellant had fully discharged its statutory obligation by paying kshs.3,000,000/= being part of the decretal sum.

11) It is the submission of the 1st respondent that the learned Chief Magistrate did not err in dismissing the appellant's application since the appellant had failed to lay a basis of the application. The 1st respondent argued that the insurance cover between the 3rd respondent and the appellant was above the

policy limit of Ksh.3,000,000/=. It was pointed out that clause A(ii) of the Third Party Policy by Sanlam General Insurance Ltd provides for payment of ksh.20,000,000/= arising from a series of claims in one accident which the 1st respondent's claim falls under.

12) Having considered the material and the rival submissions presented before him, the learned Chief Magistrate dismissed the appellant's application dated 21.8.2019 stating that the underwriter did not justify the policy limit and therefore the decree holder was justified in executing the resultant decree and warrant to the full satisfaction of the decree.

13) It is apparent from the record that the appellant and 3rd respondent had an insurance contract over motor vehicle registration no. KAZ 167U. The question which needs to be answered is whether the insurance contract had a statutory limit of ksh.3,000,000/=.

14) It is clear that on 2nd November 2010, Gateway insurance Co. Ltd (now Sanlam General Insurance Co. Ltd) issued to Diadem Ltd, (the 3rd respondent) with a policy cover. The record also shows that the appellant paid a sum of ksh.3,000,000/= on 22nd June 2018 vide cheque nos. 103211, 103208, 103209 and 103210. The policy limits the amount payable to ksh.3,000,000/= in a single claim.

15) The other question is whether the appellant having settled the amount limited by the policy and statute should be compelled to settle the balance now demanded by the 1st respondent on behalf of the 3rd respondent, the appellant's insured.

16) Under Section 5(b) (iv) of the Insurance (Motor Vehicle Third Party Risks) Act, the sum payable to a claimant in a single claim is limited to ksh.3,000,000/=. In the case of **Justus Mutiga & 2 others vs= Law Society of Kenya & Anor. (2018) e KLR** the Court of Appeal stated inter alia as follows:

“What this would mean is that any compensation awarded by the court in excess of ksh.3 million would be recoverable from the insured and not from the insurance company.....”

17) The record shows that the appellant has paid a sum of ksh.3 million which is the amount limited by the policy and statute. This court takes the view that insurance company has no obligation to settle any amount over and above the amount limited by the policy and the statute. The insured is obliged to settle the amount in excess of the insured amount.

18) It is therefore clear that the learned Chief Magistrate fell into error by dismissing the appellant's application.

19) In the end, the appeal is found to be meritorious. Consequently, the order dismissing the motion dated 21st August 2019 is set aside and is substituted with an order allowing the motion thus giving rise to issuance of the following orders:

i. The ruling and order made on 14.11.2019 in favour of the respondents is set aside and is substituted with an order allowing the motion dated 21st August 2019.

ii. The court holds and finds that the appellant has settled the statutory and policy limit therefore the warrants of attachment and sale issued against the appellant (Third Party) is hereby ordered revoked.

iii. The appellant (Third Party) is not liable to compensate the 1st respondent any amount over and above the statutory and policy limit of ksh.3,000,000/=.

iv. Each party to meet their own costs of the appeal.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 17th day of September,

2021.

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J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent