



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION CASE NO. 27 OF 2019

IN THE MATTER OF

ALLEGED UNCONSTITUTIONALITY OF SECTION 5 OF

THE INSURANCE (MOTOR VEHICLES THIRD PARTY RISKS)

ACT CAP 405 OF LAWS OF KENYA

BETWEEN

JOB MURITHI KOBIA.....PETITIONER

VS.

HONOURABLE ATTORNEY GENERAL..... 1ST RESPONDENT

CIC GENERAL INSURANCE LIMITED.....2ND RESPONDENT

NANCY WAMBUI ITOTIA (*sued as the guardian Ad Litem of*

JOSEPH ITOTIA MBUGUA).....3rd RESPONDENT

JUDGMENT

1. This petition stems from the judgment delivered by Senior Principal Magistrate at Limuru in Civil Case No. 223 of 2017. In that case, the petitioner, **JOB MURITHI KOBIA**, was sued by **JOSEPH ITOTIA MBUGUA**, suing through his guardian Ad Litem, **NANCY WAMBUI ITOTIA**, the 3rd respondent herein. That claim related to an accident between the petitioner's motor vehicle registration number KAT 808F and the motor cycle registration number KMDC 729F of **JOSEPH ITOTIA MBUGUA**. The trial court entered judgment for the 3rd respondent against the petitioner, for damages of Kshs.9,378,978.75. **CIC GENERAL INSURANCE LIMITED** the 2nd respondent (hereinafter the Insurance), the insurer of the petitioner, paid Kshs.3million on 9th May, 2019 towards that judgment amount. There remained an unpaid balance of that judgment.

2. The petitioner by this action seeks the following declarations:-

i. A declaration that **Section 5(b)(iv)** of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405 Laws of Kenya is unconstitutional.

ii. In the alternative and without prejudice to prayer (i) herein above, a declaration that the 2nd respondent is legally, rightfully and/or contractually bound to pay the 3rd Respondent all the outstanding monies (including Kshys.6,997,553.10) in Limuru Senior Principal Magistrate Court Case No. 223 of 2017.

iii. An order of permanent injunction restraining the 3rd respondent by herself, her agents, auctioneers, employees, relatives and/or through anybody else whomsoever acting on her behalf from attaching, selling, charging, impounding, alienating, leasing, auctioning and/or otherwise howsoever interfering with the petitioner's goods, utensils and/or any other property.

iv. An order of certiorari quashing the consent on liability entered between the petitioner and the 3rd respondent and/or all the subsequent/consequential orders thereto in Limuru SPMC Case No. 223 of 2017 herein and the 3rd respondent.

3. By this amended petition, the petitioner pleaded that on 11th October, 2015 he was lawfully driving his motor vehicle when he was involved in an accident with the **JOSEPH ITOTIA MBUGUA**. The petitioner stated that the **JOSEPH ITOTIA MBUGUA** was wholly to blame for that accident. The petitioner reported the accident to his insurer, the CIC General Insurance Ltd. The Insurance requested him to inform them if a suit was filed in respect of that accident. The petitioner on being served with the plaint and summons of Limuru SPM Civil Case No. 223 of 2017 forwarded the same to the Insurance. The petitioner stated that he did not hear from the Insurance on the matter of that case and that it was not until 10th July, 2019 that he received a letter from the advocate for the 3rd respondent, as guardian ad litem of **JOSEPH ITOTIA MBUGUA**, demanding from the petitioner payment of Kshs.6,895,003.45 in respect to the Limuru Magistrate's court case.

4. On his inquiry the petitioner found that the Insurance instructed an advocate *S.M. Chege & Company Advocates* to act for him in the civil case filed in Limuru Magistrate's Court. He further found that the Insurance instructed *S.M. Chege & Co. Advocates* to record a consent in that case on Liability of 25% - 75% in favour of the 3rd respondent. The Limuru Magistrate Court entered judgment for the 3rd respondent of which the Insurance paid Kshs.3million leaving a balance of Kshs.6,378,978.75 payable by the petitioner.

5. The petitioner termed the Insurance's refusal to pay the balance of that judgment as illegal, unlawful, unfair, wrongful, unconstitutional and in breach of contract.

6. The petition was opposed by the Insurance. In so opposing, the Insurance acknowledged that the petitioner forwarded to it the plaint and summons. It further stated that the police abstract revealed that the petitioner was wholly blamed for the accident and that he was charged with the offence of careless driving contrary to **Section 49(1)** of the Traffic Act. The Insurance tacitly acknowledged that the petitioner was uninformed of the entry of judgment by consent on liability but stated that the policy of insurance between it and the petitioner provided that in the event of a case being filed following acts of the petitioner the Insurance could act as the petitioner's agent and instruct an advocate to defend the petitioner.

7. The Insurance pleaded in its response that the allegations, in the petition, of violation of the Constitution was mis-interpretation and mis-application of the Articles in the Constitution. The Insurance pleaded that the constitutionality of section 5(b)(iv) of the **Insurance (Motor Vehicle Third Party Risk) Act** (hereinafter, the Insurance Act) was determined by the High Court whose decision was upheld by the Court of Appeal in the case **JUSTUS MUTIGA & 2 OTHERS VS. LAW SOCIETY OF KENYA & ANOTHER (2018) eKLR.**

8. The 3rd respondent, in her written submission supported declarations (i) and (ii) of the petition, reproduced above. The 3rd respondent however submitted that the petitioner had failed to produce evidence showing that there was an agreement between him and the Insurance to the effect that the cap on the payment by the Insurance provided under **Section 5(b)(iv)** of the Insurance Act was extended to cover the amount of the judgment of the Limuru Magistrate's case. The 3rd respondent further stated that the petitioner had not sought to set aside the Limuru Magistrate's court judgment. That the said judgment having been entered by consent was incapable of being set aside other than on grounds which can be considered in varying or rescinding a contract.

ANALYSIS AND DETERMINATION

9. It is not denied that the petitioner had, at the material time, a valid motor vehicle insurance with the Insurance for his subject motor vehicle. The fact the petitioner had an insurance for his vehicle was in-keeping with the requirements of **Section 4(1)** of the Insurance Act. **Section 4(1)** is in the following terms:-

“Subject to this Act, no person shall use, or cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Act.

10. The declarations sought in this petition are based on the provisions of **Section 5(b)(iv)** of the Insurance Act which in the pertinent parts provides:-

“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-

(i) ...

(ii) ...

(iii) ...

iv) liability of any sum in excess of three million shillings arising out of a claim by one person. [Emphasis mine]

11. It is the above stated capping of the amount an insurance company can pay under a policy of Insurance that the petitioner seeks to be declared as unconstitutional. The petitioner submitted that **Section 5(b)(iv)** offends **Article 27** because it discriminates against person injured following motor vehicle accident. This is partly what the petitioner submitted in respect to that article:-

“For instance, estates of young persons tend to be awarded higher damages as opposed to estates of old person. Similarly, the earning capacity of a person plays a great role in determining the amount of damages to be awarded... as the multiplicand is informed by one’s professional earning capacity. Therefore, in light of the restriction/limit imposed by Section 5(b)(iv) there is apparent indirect discrimination based on someone’s age, profession or earning capacity.”

12. I need to admit that I had difficulty following or understanding petitioner’s submission, reproduced above. This is because claims, such as personal injury claims, are intended to address the injury or damage caused by the fault of the defendant and the faults for which the defendant must answer. It is also intended for the redress due for which the defendant’s liability is established which must be as near equivalent as money can be to the plaintiff. It is useful to cite what the learned author *R. Kuloba* stated in the book, **“Measure of Damages for Bodily Injuries”**, thus:-

“The general rule for the measure of damages for personal injury which cannot be calculated in terms of money or money value is that the amount is entirely in the disposition of the trial court subject to the supervision by the superior courts of law.”

13. Since the purpose of awarding damages is to compensate the injured party, that is to award for loss as is the result of the injury complained of, that award must take into account the station in life of the person injured. I fail to appreciate how such consideration can be said to be contrary to **Article 27** of the Constitution, the Article that forbids discriminations on different levels.

14. The petitioner’s submission that **Section 5(b)(iv)** of the Insurance Act contravenes **Article 27** of the Constitution is therefore rejected.

15. The petitioner’s submission that the capping of payment by the Insurance as provided by **Section 5(b)(iv)** violates **Article 40** of the Constitution is also rejected because the same was determined in the case **LAW SOCIETY OF KENYA VS. ATTORNEY GENERAL & 3 OTHERS (2016) eKLR** where the court considered the constitutionality of **Section 5(b)(iv)** of the Insurance Act juxtaposed with Article 40 of the Constitution and stated:-

“Article 40

81. On the issue of right to property, the Constitution under Article 40, makes provision for the protection of right to property. Article 260 of the Constitution defines property to include any vested or contingent right to, or interest in or arising from inter alia money or choses in action. It is not in dispute that choses in action amount to property. However, I disagree with the Petitioner that curtailing the amount payable by the insurers to Kshs. 3,000,000/= under the Principal Act is an infringement of the right to property for reasons that, any award in excess of the amount of Kshs. 3,000,000/= issued by the court in its judgment can be claimed by the injured person directly from the insured. Thus, the argument that the right to property has been infringed fails...

85. In the end, I hold the view that the Principal Act does not exclude compensation to affect proprietary rights. 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.”

16. The above decision was by the High Court. That decision was upheld by the court of appeal in the case **JUSTUS MUTIGA & 2 OTHERS VS. LAW SOCIETY OF KENYA** (supra). It follows that this Court, in view of the *stare decisis* principle, cannot find otherwise but to re-state that the **Section 5(b)(iv)** is not contrary to Article 40.

17. Also, I am persuaded by the holding in the case **LAW SOCIETY OF KENYA VS. ATTORNEY GENERAL** (supra) where the court stated:-

“74. I hasten to add that the provision as to the mandatory insurance cover of the amount of Kshs. 3,000,000/= does not in any way prohibit any insured who may be minded to source and seek a higher cover from agreeing with the insurer on such cover, subject of course to a higher premium and other agreement on the terms of the policy.

75. I consequently find nothing unconstitutional with the provisions of Section 5(b) of the Insurance (Motor Vehicles Third Party Risks) Act (Cap 405).”

18. That holding was again upheld by the Court of Appeal.

19. The petitioner raised issues related to his allegation that he was not consulted when a consent judgment on liability was entered against him. Those issues cannot be entertained in this matter but ought to be considered in the Limuru Magistrate’s case. This is because the Civil Procedure Rules provide safeguards against irregular judgment. It is therefore right that complainants of how that case was handled be addressed under that matter.

20. Having found that the petitioner failed to meet the onus of proof and because most of the issues raised by him were indeed considered by the High Court in the **LAW SOCIETY OF KENYA** case (supra), and were upheld by the Court of Appeal, the declaration sought by the petitioner fails.

DISPOSITION

21. For the reasons set out above, this petition is dismissed with costs. The stay issued by consent in respect to Senior Principal Magistrate's Court, Limuru, Civil Case No. 223 of 2017 is hereby set aside and vacated.

JUDGMENT, SIGNED DATED AND DELIVERED AT KIAMBU THIS 5TH OCTOBER, 2021.

MARY KASANGO

JUDGE

Coram:3

Court Assistant: Ndege

For Petitioner : No appearance

For 1st Respondent : No appearance

For 2nd Respondent : Ms. Serem Holding brief for Kimachia

For 3rd Respondent :Mrs. Muhuhu

COURT

Judgment delivered virtually.

MARY KASANGO

JUDGE