



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 270 OF 2018

GITU GEOFFREY.....1ST PLAINTIFF

SIMON GITU MBIRUA.....2ND PLAINTIFF

VERSUS

BRITAM GENERAL INSURANCE CO.K. LTD..... DEFENDANT

CHARLENE NJERI KURIA.....INTERESTED PARTY

JUDGMENT

1. On 16th October 2012 Simon Gitu Mbirua (hereinafter Simon) was driving his father's motor vehicle registration number KBM 089M (the subject vehicle) along forest Road Nairobi. His father is Gitu Geoffrey (hereinafter Gitu). Simon had a passenger in that car. The passenger was Charlene Njeri Kuria (hereinafter Charlene). Unfortunately, the motor vehicle was on that day involved in a road accident. The accident was self-involving. Charlene was seriously injured. She sued both Gitu and Simon in case No. HCC 295 of 2014 in the Civil Division of the High Court. Gitu was sued as the owner of the subject vehicle and Simon as the driver. By that court's judgment of 30th November 2016 Charlene was awarded total damages of Ksh 34,297,222. On obtaining that judgment Charlene proceeded to execute the same and when Gitu and Simon sought the insurer Britam General Insurance Company Limited (hereinafter Britam) to pay the judgment amount Britam informed them that it had paid Charlene the insurance cover Limit of Ksh 3 million. It is due to that response that this suit was filed by Gitu and Simon.

2. By this suit Gitu and Simon seek judgment against Britam for declaration that Britam by virtue of being the insurers of the subject motor vehicle are under obligation to satisfy the judgment in Case No. HCCC 295 of 2014. They therefore sought an order that the Judgment against Gitu and Simon in Case No. HCCC 295 of 2014, in favour of Charlene, for Ksh 34,297,222 together with costs and interest be enforced against Britam and, for an order that Britam be estopped from refusing and/or failing to pay the entire sum of the Judgment in Case No. HCCC 295 of 2014.

3. Britam contends that there is a statutory limited and a policy limit on its liability to the amount of Ksh 3 million which amounts it paid Charlene. Britam therefore pleaded by its defence that it is under no legal or contractual obligation to pay more than the specified limit or Ksh 3 million.

ANALYSIS

4. There is, in my view, two issues for determination hereof. The first is whether Britam is obligated to pay more than Ksh 3 million toward the judgment in HCCC No. 295 of 2014. The second is who bears the costs.

5. Section 5 (b) (iv) of Insurance Motor Vehicle Third Party Risk Act, Cap 405 was enacted through the Finance Act of 2006 and it came into operation on 1st January 2007. That Section provides:

Section 5(b)(iv) of the Principal Act provides that:

“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 added)

6. Further Section 10 of the foretasted Act also limited the insurance liability. That section provides:

(1) If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

Provided that the sum payable under a judgment for a liability pursuant to this section shall not exceed the maximum percentage of the sum specified in section 5(b) prescribed in respect thereof in the Schedule. (emphasis mine)

7. Section 10 (1) of Cap 405 above was amended on 28th January 2014 to include the proviso Limiting Liability.

8. The above is indeed the position of the law. The Judgment which Gitu and Simon pray that Britam be found liable to pay was delivered on 30th November 2016. Since the enactment of Section 5(b) and the amendment of section 10 of Cap 405 occurred before the judgment in HCCC No. 295 of 2014 there is not basis of stating that that law is not applicable.

9. It therefore follows that Britam policy of insurance which set out the terms of insurance between it and Gitu, the owner of the subject vehicle, simply recognized the law as it then was that is that the liability of Britam was limited by statute to Ksh 3 million.

10. The fact that insurance companies' liability is limited has been recognized in various decisions of the court. A case in point is **George Wangari Mwangi v David Mwangi Muteti (2014) eKLR** where the judge stated:

"21. Counsel for the defendant raised issue with the Insurance (Motor vehicle Third Party Risks) (Amendment) Act 2013 saying it limited the courts from awarding the plaintiff over Shs. 3 million. My understating of these provisions is that the limitation is on the amount the insurance pays in respect of "Third Party Risks". The party who has been sued here is not the Insurance Company but the defendant. Whatever the award will be the Insurance company would only pay upto shs. 3 million. The curb is therefore not on the courts but on the payment by the Insurance company."

11. The provisions of Section 5 (b) of Cap 405 were challenged in a constitutional petition being **Law Society of Kenya v Attorney General & 3 Others (2016) eKLR**. The High Court in that case found that that Section was not unconstitutional and in making that finding the court stated:

"72. I am of the considered view that, where a dispute has been lodged in court, and the facts of the case have been presented before the court, nothing stops the court from coming up with an adequate remedy. In any event, the courts are in the business of dispute resolution. Where the court, awards damages to a party, it is with regards to the facts of a case and what the justice of the case demands. Therefore, I am of the view that, the judgments being rendered by the court are not in any way being legislated by Section 5(b)(iv) of the Principal Act.

73. What the Principal Act has done is cap the amount of money that the insurer pays to the injured person. Nothing in the Principal Act stops a litigant or the injured person from pursuing a claim against the insured individual where an award in excess of the amount recoverable from the insurer is made.

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."

12. That High Court finding in the above case was challenged in the court of Appeal, in the case **Justus Mutiga & 2 others v Law Society of Kenya & another (2018) Eklr**, and that court upheld the finding of the High Court.

13. It follows that Section 5 (b) and the proviso of Section 10 of Cap 405 is the position in law. Insurance Companies are entitled to limit their liability as set out there. It follows that the attempt to rely on doctrine of estoppel by the plaintiffs will not succeed in the light of those statutory provisions. The equitable maxim **"equity follows the law"** will apply. In the case **N-Krypt International Corp. v. LeVasseur, 2018 BCCA 20 (CanLII)** the court stated:

"The relationship between equity and the common law is sometimes described by the maxim "equity follows the law": J. McGhee,

ed., Snell's Equity, 31st ed. (Toronto: Carswell, 2005). The author of Snell's Equity elaborates on the meaning of the maxim at 95:

Where a rule, either of the common or the statute law, is direct, and governs the case with all its circumstances, or the particular point, a court of equity is as much bound by it as a court of law, and can as little justify a departure from it."

14. It is because of the above finding that I respond to the first issue, above, by stating that Britam is not obligated to pay more than Ksh 3 million toward the judgment in HCCC No. 295 of 2014.

15. Costs of the suit follow the event unless the court shall for good reason otherwise order. Parties did not substantially submit on costs and I find no good reason not to order costs to follow the event.

CONCLUSION

16. In the end the judgment of the court is that the plaintiff's suit is dismissed with costs to the defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 1st day of JULY 2020.

MARY KASANGO

JUDGE

Before Justice Mary Kasango

C/A Sophie

For the Plaintiffs:

For the Defendant:

For the Interested Party:a

ORDER

This decision is hereby virtually delivered this 1st day of July, 2020.

MARY KASANGO

JUDGE