



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO 12 OF 2018

THE MONARCH INSURANCE COMPANY LIMITED.....APPELLANT

VERSUS

MOSES CALEB OCHNAGO

CATHERINE ERNEST OCHANGO.....RESPONDENTS

(Being an appeal from the Ruling Decision of the Honourable Resident Magistrate.

Hon. EMILY KIGEN (RM) Dated 2nd day of February ,2018 in the

Chief Magistrate's court Civil Suit No. 986 of 2015

at ELDORET

J U D G E M E N T

BACK GROUND

1. The Respondents **MOSES CALEB OCHANGO** and **CATHERINE ERNEST OCHANGO** as legal representative of the Estate of **STAFFORD OCHANGO** had sued the appellants Insured one **MUSSA OMWAKWE MBALANYA** in **ELDORET CMCC NO 59 OF 2014** as a result of a road traffic accident involving motor vehicle Registration no **KYY 050** insured by the Appellant vide policy no **KSM/0700/00025/212 TPO** wherein judgment was delivered in favour their for a sum of **Kshs. 4,320,498** together with cost and interest.

2. By a Plaintiff dated 8th December, 2015 the Respondent sued the appellant for a declaration to settle the sum of **Kshs. 4,320,498** (four million three hundred and twenty thousand, four hundred and ninety-eight) awarded in the above suit in **CMCC NO 987/2015 Eldoret** for enforcement of the judgement awarded in the primary suit and on 4/12/2016 the Appellant filed its statement of defence in which it denied being the Insurers of the Defendant in the primary suit and made allegations of fraud against the Respondent.

3. By a judgement dated 2/12/2018 the Trial Court found that **Jason Mbulanya** was on an authorized driver of the Appellant Insured within the meaning of the policy and therefore entered judgement in favour of the respondents for a declaratory Order to pay the sum awarded to the Respondents in the primary suit.

4. Being aggrieved by the decision the appellant filed this appeal and raised the following grounds: -

1. The Learned Trial Magistrate erred in Law and Fact in failing to appreciate the reasonable and sufficient evidence tendered in Court when making the declaration compelling the Appellant to settle of an award on damages.

2. The Learned Trial Magistrate erred in Law and Fact in making the declaration of an award on damages that was excessive in the circumstances.

3. The Learned Trial Magistrate erred in Law and fact by failing to read the subject Motor vehicles Insurance Policy and contract as written thereby importing therein her own terms and conditions which guided her judgement in error.

4. The Learned Trial Magistrate erred in granting the Respondents a declaration order directing and compelling the Defendant to pay the plaintiffs the decretal sum of Kenya shillings Four Million, Three hundred and Twenty Thousand, Four hundred and Ninety-

Eight (Kshs. 4,320,498) in satisfaction of the decree in ELDORET which assessment when viewed against the evidence adduced and fatal injury sustained by the Plaintiff is manifestly excessive and inordinately high as to amount to a miscarriage of justice.

5. The Learned Trial Magistrate erred in law and fact by failing to consider that the motor vehicle KYY 050 Mercedes Benz whose policy holder perished in the accident was not a party to the primary suit.

6. The Learned Trial Magistrate erred in law and fact by failing to consider that the Defendant in the primary suit did not have locus before Court as he was not the registered owner of the motor vehicle registration number KYY 050 Mercedes Benz.

7. The Learned Trial Magistrate erred in law and fact by failing to consider that the Estate of Mr. Jason Mbalanya who was the insured and/or owner of motor vehicle registration number KYY 050 Mercedes Benz was not represented in the primary.

8. The Learned Trial Magistrate erred in law and fact by failing to consider that the Respondents did not produce any motor vehicle search document in the primary suit showing MUSA OMWAKWE MBALANYA as the registered owner of motor vehicle registration number KYY 050 Mercedes Benz.

9. The Learned Trial Magistrate erred in law and fact in failing to evaluate the evidence in its totality and in failing to take into consideration submissions and authorities submitted by the Appellant.

10. The said award of damages is out of keep with other Kenyan awards for comparable similar claim.

11. The Learned Trial Magistrate failed to exercise her discretion judiciously in awarding damages and failed to apply the settled principles of law.

12. There was no good or proper basis for the said assessment of damages:

(a) The judgement and Decree of the subordinate court be set aside and substituted with a proper finding by this Honourable court.

(b) The Honourable court be pleased to make any or further orders as may be just and expedient in the circumstances.

(c) Costs of the Appeal be awarded to the appellant.

5. Directions were given that this Appeal be heard by way of written submissions which were duly filed by the parties herein. On behalf of the Appellant it was submitted that the trial court failed to consider the provisions of section 5 (b) (iv) of the Insurance (Motor vehicle third party risk) Act Cap 405 Laws of Kenya and in support thereof the case of GATEWAY INSURANCE COMPANY LIMITED VERSUS JAMILA SULEIMAN AND ANOTHER (2018) eKLR to the effects that award of Kshs. 3,000,000/= was the maximum the appellant could pay. The court was therefore urged to substitute the lower court judgement with the same sum.

6. The Respondent filed a written submission where it was submitted that the Appellant at the initial trial had indicated that it will be settled, any ensuing judgement though stating that he was not their insured.

It was submitted further that the Appellant admitted at the primary suit having insured the registered owner of the subject motor vehicle which was being driven by his insured driver.

In further submissions the respondent submitted that the issue of policy limitation had been settled in court of Appeal Civil Appeal No 141 of 2016 Justus Mutiga and 3 others (2018) eKLR.

7. When an appeal came up for hearing Mr. Chanzu appeared for the Respondent while M/s Opinde appeared on behalf of Ms Bor for the Appellant and highlighted the written submissions.

8. Being a first Appellant Court, the court is under obligation to reassess evidence tendered before the trial court and to come to its conclusion thereon, which I have done. In this appeal from the records it is clear that no appeal was lodged against the original award in CMCC NO 59/2014 Eldoret and therefore the award therein has not been challenged. In CMCC No 986/2015 ELDORET Moses Ochango Ernest testified on behalf of the respondent and produced a copy of the Insurance certificate issued by the Appellant and the judgement against the Insured. On behalf of the appellant OBED KARIUKI IRERI admitted that the appellant was issued with a statutory notice and the policy was in force when the accident occurred.

9. It is clear that the Appellant did not take any steps to repudiate liability and therefore under the Third-party Act, it was under statutory obligation to pay the decretal sum awarded.

The only issue for determination is whether the same was only limited to a sum of Kshs. 3,000,000/=.

10. The issue of limitation on the settlement of a ward was first attacked by way of a constitutional Petition in Petition No 148 of 2014 where the provision of Section 5 of Cap 407 was declared unconstitutional. As submitted by the Respondent, the matter was settled in the Court of Appeal at Nairobi Civil Appeal NO 141 of 2016 Justus Mutiga and Another versus Law Society of Kenya and Another, where the court of Appeal holds this say: -

“35. In addition, that limitations goes against the objectives of compulsory third party motor vehicle insurance. Historically, the Principal Act was enacted in 1945 as the Motor Vehicle Insurance. (Third Party Risks). Ordinate No. 12 of 1945, however, unlike the present system Section 10 of the Ordinance imposed a duty to the insurer to compensate fully an insurance claim as raised by the injured third party and as sanctioned by the courts. Where the amount was higher than what was covered by the insurance policy taken the insured was still obliged to fully compensate the injured third party but subsequently recover the excess from the insured. This is colloquiate referred to as the Principle of excess in insurance in Kenya. That provision in our view managed to protect the injured third party while also protecting the interests of the insurer by allowing the Insurer to recover from the insured any excess amount without capping the amount which the insurer could pay as compensation.

36. Unfortunately, under the current system the third party has been left under the mercy of not just the percentages imposed under the schedule but should there be any excess recoverable, he must contend with pursuing the insured personally. For example in the case of Georgina Wangari Mwangi versus David Mwangi Muteti , High court of Kenya Civil case no 40 of 2013, it was held that the insurance company is to pay a maximum of kshs. 3,000,000/= with any excess being payable by the insured party. The plaintiff in that court was awarded damages of Kshs. 14,612,540.20 out of which only Kshs. 3,000,000/= was payable by the Insurer, with the rest being recoverable from the insured.

Though the appellant contends that the limitations is justified no evidence was adduced to prove that justification. If anything, limiting the compensation payable by the underwriter who has received premiums, particularly in the face of an innocent third party who is armed with a court judgement is unjustifiable. It offends the very essence of insurance which is to ensure mitigation against risks that result in loss. In particular, it defeats the very objective of compulsory third-party insurance cover if an innocent victim is left to recover the bulk of his claim against the insured personally.

37. On the whole therefore, we find no reason to interfere the reasoned judgement of the High Court. Our conclusion is that this appeal is devoid of merit and the same is hereby dismissed with no order as to costs”

11. From the decision of the court of Appeal which this court is bound to follow I find no fault with the trial court determination in entering judgement against the Appellant to settle the entire decretal sum. The issue of policy limitation having been settled and that being the only major ground on the Appeal herein, I find no merit on the Appeal herein which I hereby dismiss with costs.

12. I must thank Ms Opinde for having stood for Ms Bor despite the fact that her instructions were limited and wish to advice Advocates to be more adequately briefed anytime they are requested to hold brief.

Dated, Signed and Delivered at Eldoret this 12th day of September,2019.

J. WAKIAGA

JUDGE