



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI CIVIL COURTS**

**CIVIL SUIT NO. 65 OF 2015**

**ZIPPORAH KARIMI MBIJIWE (*Suing as the Administrator*)**

***Of the Estate of the late Lewis Gichunge***

***Mbijiwe and Martin Kiogora Mbijiwe*) ..... PLAINTIFF**

**VERSUS**

**GENERAL ACCIDENT ASSURANCE ..... DEFENDANT**

**JUDGMENT**

1. Zipporah Karimi Mbijiwe (Plaintiff) in her capacity as the administratrix of the Estates of Lewis Gichunge Mbijiwe and Martin Kiogora Mbijiwe, both deceased, filed an action against the General Accident Assurance (Defendant) vide the plaint dated 16<sup>th</sup> February, 2015. In the foresaid plaint, the Plaintiff sought judgment as follows: -

***(i) A declaration that the Plaintiff is entitled to the decretal sum of Kshs.2,431,000/- with interests and costs arising out of High Court Civil Suit no. 17 of 2007 from the Defendant herein by virtue of the Defendant being the insurer of Motor Vehicle registration number KAQ 466U.***

***(ii) A declaration that the Plaintiff is entitled to the decretal sum of Kshs.3,600,000/- with interests and costs arising out of High Court Civil Suit no. 101 of 2007 from the Defendant herein by virtue of the Defendant being the insurer of Motor Vehicle registration number KAQ 466U.***

***(iii) Costs of this suit and costs in Nairobi HCCC no. 17 of 2007 and Nairobi HCCC No. 101 of 2007.***

***(iv) Interest on 1, 2 and 3 above at court rates.***

***(v) Any other relief that this Honourable Court shall deem fit and just to grant.***

2. The Defendant filed a defence to deny the Plaintiff's claim.

3. When the suit came up for hearing, the Plaintiff (PW 1), was the only witness who testified in support of the Plaintiff's case while the Defendant summoned one Symon K. Lariak (DW 1) to testify in support of the Defendant's defence. At the close of the evidence, learned Advocates appearing in this matter were invited to file and exchange written submissions.

4. I have considered the evidence presented by both sides together with the rival submissions. It is apparent from the material placed before this court that the Plaintiff filed this suit against the Defendant seeking for declaratory orders, which is to the effect that the Defendant has an obligation to settle the decretal sums in Nairobi HCCC no. 17 of 2007 and Nairobi HCCC No. 101 of 2007. Since it was the insurer of motor vehicle registration No. KAQ 466U which stood liable for the accident which occurred on 29<sup>th</sup> October, 2004 along Embu-Runyenjes Road.

5. Zipporah Karimi Mbijiwe (PW 1) told this court that she had obtained judgments in her favour in respect of two cases i.e. Nairobi HCCC No. 17 of 2007 and Nairobi HCCC No. 101 of 2007. PW 1 stated that the third parties in the aforesaid suits namely: Duale Ibrahim being the owner of motor vehicle registration No. KAQ 466U and his driver Farah Said Hassan were found wholly liable. The Plaintiff also stated that motor vehicle registration No. KAQ 466U which was held wholly liable was insured by General Accident Assurance, the Defendant herein, therefore, it is bound to settle the aforesaid claims as the insurer.

6. The Defendant denied the Plaintiff's claim and relied on the evidence of Symon K. Lariak (DW 1). It is the Defendant's contention that the Plaintiff and the Third Party in the original suits failed to issue a notice upon the Defendant as required under Section 10 (2) (a) of the Insurance(Motor Vehicles Third Party Risks) Act, therefore, the Plaintiff is not entitled to the orders sought.

7. Having considered the evidence and the rival written submission, I think one main issue commends itself for consideration that is whether the Defendant is bound to settle the Plaintiff's judgments. I have already set out the arguments put forward by the disputing parties. A careful analysis of the evidence tendered, shows that the Defendant, the insured, was enjoined to the main suit as a Third Party when it turned out that one Harun Muriuki was not insured by the Defendant. It is also clear that the third Party was brought into the aforesaid proceedings at a later stage and after the proceedings had been commenced and the court proceeded with the case as against the Third Party upon being convinced that proper service had been effected upon the Third Party.

8. In the circumstances, I am satisfied that the Plaintiff could not have served the notice envisaged under Section 10(2) (a) of the Insurance (Motor Vehicle Third Party Risks) Act before the commencement of the original suits as it was not foreseen that the Third Party would be enjoined as a party to the suit. I am convinced that the failure to issue the statutory notice in the circumstances is not fatal but excusable.

9. The other important piece of evidence, which were presented to this court, is to the effect that the Defendant was aware of the accident and that it had even settled other claims arising out of the same accident. It is also evident that a Third Party Notice was served by way of a Newspaper Advertisement, a fact admitted by DW 1 while testifying in cross-examination.

10. Having come to the above conclusion, it is clear in my mind that under the Insurance (Motor Vehicles Third Party Risks) Act, the Defendant is bound by law to settle the Plaintiff's claim.

11. In the end the Plaintiff is found to have established her claim against the Defendant on a balance of probabilities. Judgment is entered in favour of the Plaintiff and against the Defendant. Consequently, a declaratory order is made to the effect that the Defendant has an obligation to settle the decretal sums in respect of Nairobi HCCC No.17 of 2007 and Nairobi HCCC No. 101 of 2007 having been the insurer of Motor Vehicle Registration No. KAQ 466U that caused the accident, the subject matter of the proceedings in the aforesaid cases. Costs is awarded to the Plaintiff.

**Dated, Signed and delivered at Nairobi this 13<sup>th</sup> day of July, 2018.**

.....

**J K SERGON**

**JUDGE**

*In the presence of:*

..... *For the Plaintiff*

..... *For the Defendant*