

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. E1382 OF 2023

HILL RENTAL LIMITED.....1ST APPELLANT
DILVIR BAYATI SINGH.....2ND APPELLANT

VERSUS

JUBILEE INSURANCE COMPANY LIMITED.....
RESPONDENT

**(Appeal from judgement and decree, of Hon. Grace Omodho,
Principal Magistrate, PM, of 30th November 2023, in Milimani
CMCCC No. E2891 of 2020)**

JUDGEMENT

1. The claim, at the primary court, was at the instance of the appellants, against the respondent. It sought an award of damages, arising from negligence and breach of contract, with respect to how the respondent, an insurer of vehicles owned by the appellants, about how it had handled a suit filed against the appellants. The amount sought against the respondent was Kshs. 2,223,935.00, being what was paid, by the appellants, on account of the decree obtained against them, by third-party claimants, plus auctioneers' costs.
2. The suit was, resisted by the respondent, who filed a defence, denying being served with the papers, relating to the suit against the appellants by the third-party claimants, but stating that it did instruct Advocates to defend the claim. It further averred that it had paid a sum of Kshs. 2,964,800.00, to the third-party claimants, excluding legal fees of the third-party claimants' Advocates, in settlement of the decree obtained against the appellants. The respondent averred that the Advocates for the third-party claimants acknowledged receipt of the sum of Kshs. 2,964,800.00. the

balance of the decretal amount, of Kshs. 1,925,645.00, was to be recovered from the appellants, who were accordingly notified. It was averred that the liability of the respondent, as insurer, did not exceed kshs. 3,000,000.00.

3. A trial was conducted. The appellants called 2 witnesses, while the respondent called 1. Judgement was pronounced on 30th November 2023, on grounds that the liability of the respondent was limited to Kshs. 3,000,000.00, which limit had been reached, when the respondent settled the decree-holders/the third-party claimants to the tune of Kshs. 2,964,800.00. The suit was dismissed.
4. The appellant, being dissatisfied, filed the instant appeal, on grounds that the respondent did not instruct an Advocate within the timelines required; a lower judgement figure would have been awarded, in the initial suit, if an Advocate had been appointed in good time; the respondent had handled the suit by the third-party claimants negligently; the trial court had wrongly narrowed its judgement to the limit of Kshs. 3,000,000.00 without considering the circumstances under which the appellants paid the amount it was claiming; and the trial court failing to consider that the respondent did not take all reasonable steps to lookout for their interests.
5. Directions were given, on an unknown date in 2024, for disposal of the appeal, by way of written submissions. Unknown, because the Judge, who gave the directions, did not indicate the date when the same were given. I have seen, in the record before me, written submissions filed by both sides.
6. The appellants have framed 2 issues, whether the respondent breached the terms of the contract, by acting negligently, and whether they were entitled to the orders sought in their plaint. It is submitted that the respondent

was properly served, but negligently failed to enter appearance and file defence, setting off a chain of events, which led to the appellants paying the amount, they were claiming, in the suit, the subject of this appeal, being Milimani CMCCC No. E2891 of 2020, of Kshs. 2,223,935.00. They argue that that is their loss, flowing naturally from that negligence. They further submit that they are entitled to general damages, for the inconvenience suffered, in the hands of the third-party claimants, and their auctioneers, who were seeking to recover the decretal amount from them. They have cited numerous judicial decisions to back their case.

7. In rejoinder, the respondent counters by arguing that it had not been proved that it was negligent, for it never was served with pleadings in the primary suit, that is to say Milimani CMCCC No. 5050 of 2017, until after *ex parte* judgement had been entered. It submits that negligence was not proved against it, for mistake of counsel could not be visited on a client. They further submit that they are not obliged to pay anything beyond Kshs. 3,000,000.00, according to the insurance contract, between it and the appellants.
8. I have had the benefit of perusing the original trial records in Milimani CMCCC No. E2891 of 2020, where the judgement and decree appealed against were passed. I have not had the benefit of perusing the court file in the primary suit, Milimani CMCCC No. 5050 of 2017, which gave rise to Milimani CMCCC No. E2891 of 2020, but I have seen a copy of a ruling delivered in that matter, and a copy of an interlocutory application, that had also been filed in that matter.
9. What I gather, from the filings in the original trial court records, is that the appellants had their motor vehicles insured with the respondent. An accident, involving 1 of the

vehicles happened, in which a life was lost. Proceedings were initiated, in Milimani CMCCC No. 5050 of 2017, for recovery of compensation, for the benefit of the persons, who had survived the person who had died in that accident, and his estate. Judgement was entered in favour of the third-party claimants, for Kshs. 4,441,372.00, with interests and costs. The respondent settled Kshs. 2,964,800.00, asserting that it was limited to pay up to Kshs. 3,000,000.00, and left it to the appellants to cover the balance, of Kshs. 1,925,645.00. The appellants paid that balance, plus auctioneer's charges, bringing the total, paid by them, to Kshs. 2,223,935.00.

10. The grievance by the appellants, against the respondent, was and still is, that the suit, in Milimani CMCCC No. 5050 of 2017, was handled negligently, by the respondent, which exposed them to loss. The case by the appellants, as I understand it, is that the summons to enter appearance, in Milimani CMCCC No. 5050 of 2017, was served upon the respondent, who did not act on them, until after judgement had been entered in default, at Kshs. 4,441,372.00. When the respondent sought to have the judgement set aside, and to be given leave to defend, the trial court, in Milimani CMCCC No. 5050 of 2017, declined, on grounds that the respondent had given inconsistent reasons for the failure to act, suggesting some element of not being forthright with the trial court.

11. The appellants held and hold the view that had the respondent acted timeously, and appointed Advocates to act for them, in that suit, which would have allowed them, the appellants, participate in the trial, perhaps the award of compensation would have been lower. They sought general damages, for negligence and breach of contract, and special damages, which naturally flowed from that breach of contract, being the Kshs. 2,223,935.00, that they had paid to

the third-party claimants, in Milimani CMCCC No. 5050 of 2017.

12. The trial court, in Milimani CMCCC No. E2891 of 2020, was of the view that the dispute was on how much the respondent was required to pay, under the insurance contract, out of the decretal sum of Kshs. 4,441,372.00, decreed in Milimani CMCCC No. 5050 of 2017. It took the view that the terms of the policy applied, which capped payment to Kshs. 3,000,000.0, and, therefore, the respondent was entitled to pay the amount that it paid, to the third-party claimants, leaving the balance of the decretal amount to be settled by the appellants. Then, going by that, the appellants had no case against the respondent.
13. Didi the trial court err in doing so? The plaint, in Milimani CMCCC No. E2891 of 2020, was not elegantly crafted. It appears to be founded on both negligence and breach of contract. Negligence is a tort, governed by the law of torts, while breach of contract falls under the law of contracts. In the written submissions, filed in Milimani CMCCC No. E2891 of 2020, the appellants grounded their case on breach of contract, and not tort. Yet, they were not specific on the terms of the contract that were allegedly breached. The relationship between the appellants and the respondent was shaped by the policy of insurance that the appellants placed on record. Yet, they did not identify any particular clause as the foundation of their claim, as carrying the term of that contract that was allegedly breached.
14. The claim by the appellants is founded on the doctrine of subrogation, which requires the insurer to step into the shoes of the insured, and defend claims on behalf of the insured. The specific clause, in the policy, on this was not identified by the appellants, and no submissions were made on the doctrine of subrogation, and on how the same should

have applied in this case. It is not enough to just place a contract document before a court, and expect the court to consume its contents, and at the end of it pick out those that it finds applicable to the facts of the case before it. The suit belongs to the parties. It is the duty of the parties to identify the terms of their contract which they allege have been breached. It should never be the duty of the court to look at contracts, and try to make sense of what the parties are complaining about.

15. In view of the vagueness, that I have discussed hereabove, the trial court cannot be faulted, for not considering the issues around the negligence and breach of contract pleaded, given that the appellants themselves, in their own written submissions, in Milimani CMCCC No. E2891 of 2020, did little to bring out the issues around the alleged negligence or breach of contract.
16. The other thing, that the appellants anchored their case on, was what the trial court, in Milimani CMCCC No. 5050 of 2017, had concluded, that summons to enter appearance had been served on the respondent, who then failed to instruct an Advocate to take up the matter. The material that was placed before the court, in Milimani CMCCC No. E2891 of 2020, departed from what the court, in Milimani CMCCC No. 5050 of 2017, had concluded, that the respondent had been served with papers, and chose to take no action.
17. In Milimani CMCCC No. E2891 of 2020, the appellants presented 2 witnesses. 1 of them was the driver of the accident vehicle, the subject of the suit in Milimani CMCCC No. 5050 of 2017, and was an employee of the 1st appellant, at the material time. That driver, testifying as PW2, stated that the summons to enter appearance, in Milimani CMCCC No. 5050 of 2017, was served on him, and he passed it over to the 1st appellant, who, in turn, gave them to an insurance

broker, who then passed it over to the respondent. That completely contradicted the case by the appellants, that they were not aware of the suit, and were never served with the papers, specifically the summons to enter appearance. That pointed to the appellants coming to court with unclean hands, or deliberately misleading the court, by presenting positions that were mutually inconsistent. No doubt, the filing of the suit, in Milimani CMCCC No. E2891 of 2020, was not well thought out, nor was the suit itself well-conceived.

18. Given such contradictions, the trial court, in Milimani CMCCC No. E2891 of 2020, was entitled to conclude that the real issue was about whether the respondent should have paid the moneys in excess of Kshs. 3,000,000.00. It rightly concluded that the respondent should not have, as the insurance contract limited the amount to what it paid, and the excess amount was to be paid or met by the appellants.

19. On the argument that the trial court, in Milimani CMCCC No. 5050 of 2017, could have awarded a lower amount, if the suit had been properly defended, that, in my view, would be an issue around damages for negligence. I have found and held above, that the appellants, in their written submissions, did not advance that case before the trial court. They anchored their case on breach of contract. There is nothing about that, that is the argument about the trial court making a lower award, if the suit had been properly defended, which could arise from an argument around breach of contract. It could only arise in a case of negligence.

20. The 2 witnesses presented did not attempt to lead evidence around that, that because the respondent did not instruct an Advocate in good time, they lost out on a lower award. No attempt was made to demonstrate why the trial court, in Milimani CMCCC No. 5050 of 2017, would have

awarded a lower amount. That was not advanced in the written submissions either. I see it for the first time in the memorandum of appeal herein, and the written submissions filed in this appeal. It was not a matter before the trial court. It cannot arise at this stage.

21. It could be that the respondent could have done better. However, the suit, as framed or presented, did not establish any claim against the respondent, which could have basis for an order to be made against it, for general damages, for either negligence or breach of contract, and for reimbursement of the sum paid by the appellants, of Kshs. 2,223,935.00.

22. I see no merit in the appeal herein, and I hereby dismiss it. The respondent shall have the costs. This appeal file shall be closed. Orders accordingly.

**DELIVERED, VIA EMAIL, DATED AND SIGNED, IN
CHAMBERS, AT BUSIA, ON THIS 7TH DAY OF OCTOBER 2025.**

**WM MUSYOKA
JUDGE**

Mr. Arthur Etyang, Court Assistant, Busia.

Ms. Carolyn Oyuse, Court Assistant, Milimani, Nairobi.

Advocates

Mr. Orende, instructed by Orende & Associates, Advocates for the appellant.

Ms. Mutonyi, instructed by Walker Contos, Advocates for the respondent.

