Nzau & another (Suing as the Legal Administrators of the Estate of Paul Nzau Nzomo - Deceased) v Monarch Insurance Company Limited (Civil Case E269 of 2023) [2024] KEMC 17 (KLR) (9 September 2024) (Judgment)

Neutral citation: [2024] KEMC 17 (KLR)

REPUBLIC OF KENYA

IN THE MACHAKOS LAW COURTS

CIVIL CASE E269 OF 2023

CN ONDIEKI, PM

SEPTEMBER 9, 2024

BETWEEN

NICHOLAS NZOMO NZAU ..... 1ST PLAINTIFF

SERAH NGINA MUTISYA ..... 2ND PLAINTIFF

SUING AS THE LEGAL ADMINISTRATORS OF THE ESTATE OF PAUL NZAU NZOMO - DECEASED

AND

MONARCH INSURANCE COMPANY LIMITED ..... DEFENDANT

JUDGMENT

PART I: Introduction

1. Once a Judgement has been entered against the insured in respect to a liability covered by a valid and subsisting policy of insurance, then a statutory duty to pay to third parties - specifically persons entitled to benefit from the Judgment - is fastened on the insurer notwithstanding that the insurer may be entitled to avoid or cancel the policy, in the event where liability is covered by the terms of the subject policy. In order to succeed in establishing the liability of the insurer to satisfy a Decree and Certificate of Costs in an action for a declaratory Judgment against the insurer, the insured bears the onus to establish three elements. First, that there was a policy of insurance in force at the material time. Second, that there is a valid Judgment in respect of any such liability as is required to be covered by the policy. Third, that the insurer has not avoided liability.

Part Ii: The Plaintiff's Case

2. Vide a Plaint dated 1st August 2023 and filed on 8th August 2023, the Plaintiffs brought this Declaratory action against the Defendant seeking Judgment for: a declaration that the Defendant is liable to pay

the Plaintiff the Judgment sum in Machakos MCCC No. E219 of 2020 in the sum of Kshs. 3,672,725; and costs of this suit.

3. The Plaintiffs claim that at all material times relevant to this suit, under the *Insurance (Motor Vehicles Third Party Risks) Act*, Chapter 405 of the Laws of Kenya, the Defendant was the insurer of motor vehicle registration number KAL 510X, under policy number HDO/0700/017604/2017. It is averred that the motor vehicle was involved in an accident on 9th June 2018 where the deceased picked fatal injuries. It is averred that a claim was lodged in Machakos Law Courts being Machakos MCCC No. 391 of 2020 (hereinafter "the primary suit") and successfully prosecuted it where the said insured were held 100% liable. The Plaintiffs aver that in its Judgment dated 7th April 2022, the Court awarded damages in the sum of Kshs. 3,672,725, plus costs and interest.

4. At the hearing of the Plaintiffs' case, Nicholas Nzomo Nzau adopted his witness statement dated 1st August 2023 and filed together with the Plaint as his evidence-in-chief. The said witness rehashes the contents of the Plaint.

5. In buttressing this claim, Nicholas Nzomo Nzau exhibited the following documents: (i) a police abstract as the Plaintiffs' Exhibit 1; (ii) a post-mortem report as the Plaintiffs' Exhibit 2; (iii) a death certificate as the Plaintiffs' Exhibit 3; (iv) a copy of the chief's letter as the Plaintiffs' Exhibit 4; (v) a copy of grant of letters of administration as the Plaintiffs' Exhibit 5; (vi) a copy of the Plaintiffs' identity cards as the Plaintiffs' Exhibit 6; (vii) a demand notice as the Plaintiffs' Exhibit 7; (viii) a statutory notice as the Plaintiffs' Exhibit 8; (ix) a receipt for further Court fees as the Plaintiffs' Exhibit 9; (x) a decree and certificate of costs as the Plaintiffs' Exhibit 10; and (xi) the Plaintiffs' Exhibits as the Plaintiffs' Exhibit 11.

6. The Defendant having not attended the hearing hereof, there was no cross-examination.

7. In his written Submissions dated 20th June 2024 and filed on even date, learned Counsel Mr. Abong'o instructed by the Firm of Messieurs Anne M. Kiusya & Company Advocates representing the Plaintiffs submits that sufficient evidence has been adduced by the Plaintiffs to prove liability of the Defendant. It is submitted that the Plaintiffs' evidence was uncontroverted by the Defendant.

8. Reliance is placed on section 10 of the Insurance (Motor Vehicle Third Party Risks) Act; APA Insurance Company Limited vs. George Masele [2014] eKLR; and Bernard Mutisya Wambua vs. Kenya Orient Insurance Company Limited [2020] eKLR.

9. It is finally submitted that the limit of Kshs. 3,000,000 under section 5(b)(iv) of the Insurance (Motor Vehicle Third Party Risks) Act, does not include costs and interest, and since the quantum of damages was Kshs. 2,950,000 and the excess constitute costs and interest, the Defendant should settle the full sum, placing reliance upon Maisha (Suing as administrator and personal representative of the estate of *Said Masha Nyamani) vs. Directline Insurance Company Limited (Civil Appeal 15 of 2022*) [2023] KEHC 25339 (KLR) (7 November 2023) (Judgment).

PART III: The Defendant's Case

10. In its Statement of Defence dated 18th August 2023 and filed on 22nd August 2023, the Defendant denied every material averment in the Plaint and put the Plaintiff to strict proof thereof.

11. In particular, the Defendant denies existence of the named policy of insurance. The Defendant further denies that the said policy was in force at the time of the accident as averred by the Plaintiffs.

12. The Defendant called no evidence in support of the defence.

13. Finally, the Defendant did not file written submissions.

PART IV: Questions For Determination

14. Gleaning from the Plaint; the Statement of Defence; and the Plaintiff's written Submissions, this Court has delineated three questions for determination as follows:

    i. First, whether the Plaintiffs have established the Defendant's liability and statutory duty to satisfy the Judgment in Machakos MCCC Number 391 of 2020 (hereinafter "the primary suit").

    ii. Second, the scope and extent of liability of the Defendant in satisfying the Decree and Certificate of Costs issued in Machakos MCCC Number 391 of 2020.

    iii. Third, who should shoulder costs and interest of this suit?

PART V: Analysis Of The Law; Examination Of Facts; Evaluation Of Evidence And Determination

15. This Court now embarks on analysis, interrogation, assessment, and evaluation of each of the two questions, seriatim.

(i) Whether the Plaintiffs have established the Defendant's liability and statutory duty to satisfy the Judgment in Machakos MCCC Number 391 of 2020 (hereinafter "the primary suit")

16. In Kenya, it is obligatory upon any owner of a motor vehicle to maintain an insurance policy against third party liabilities. In this context, the law criminalizes the use of a motor vehicle (except a motor vehicle owned by the Government or a motor tractor or other motor vehicle used solely or mainly for agricultural purposes) on a road unless it has in force a policy of insurance or such a security in respect of third-party risks. Section 4 of the *Insurance (Motor Vehicles Third Party Risks) Act* provides as follows: "(1) 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. (2) Any person who contravenes subsection (1) shall be guilty of an offence and be liable to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding two years or to both, and such person upon a first conviction for such offence may, and upon a second or subsequent conviction for any such offence shall, unless the Court for special reason thinks fit to order otherwise, be disqualified from holding or obtaining a driving licence or provisional licence under the *Traffic Act* (Cap. 403) for a period of twelve months from the date of such conviction or for such longer period as the Court may think fit. (3) This section shall not apply to any motor vehicle owned by the Government, or to a motor tractor or other motor vehicle used solely or mainly for agricultural purposes, if the use of such motor tractor or other motor vehicle on a road consists only of moving it by road from one part of the land of the owner thereof to another part of the land of such owner."

17. The insurance policy contemplated under section 4 of the *Insurance (Motor Vehicles Third Party Risks) Act*, must be a policy issued by a company which is authorized to carry on motor vehicle insurance business and the policy should cover such persons or classes of persons as specified in the policy in respect of any liability which may be incurred by the insured in respect of the death or bodily injury of any person caused by or arising out of the use of the vehicle on a road. Section 5 of the *Insurance (Motor Vehicles Third Party Risks) Act* provides as follows: "In order to comply with the requirements of section 4, the policy of insurance must be a policy which—(a) is issued by a company which is required under the *Insurance Act*,1984 (Cap. 487) to carry on motor vehicle insurance business; and (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 injury 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) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or (ii) except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arose; or (iii) any contractual liability; (iv) liability of any sum in excess of three million shillings, arising out of a claim by one person."

18. Section 10(1) of the *Insurance (Motor Vehicles Third Party Risks) Act* provides as follows: "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."

19. It can be discerned from section 4 of the *Insurance (Motor Vehicles Third Party Risks) Act* that taking out a policy of insurance against third party risks is obligatory if the owner of a motor vehicle intends to use it on a road. My reading of section 5 of the said Act is that it sets out features of a valid policy of insurance contemplated under section 4 of the Act. First, it must be issued by an Insurance Company which is licenced to issue such Policies. Second, the Policy of Insurance ought to specify the person, persons, or classes of persons in respect of which liability will be incurred by the insurer in respect of death or bodily injury of the specified person, persons or classes of persons arising from use of the vehicle on a road. What emerges from section 10(1) of the *Insurance (Motor Vehicles Third Party Risks) Act* is that if after the policy of insurance contemplated under sections 4 and 5 of the Act is in force and that the liability is covered by the terms of the subject policy and Judgment is obtained against the insured, then a statutory duty to pay third parties (persons entitled to benefit from the Judgment) is fastened to the insurer, notwithstanding that the insurer may be entitled to avoid or cancel the policy.

20. It goes without saying that once Judgement has been rendered against the insured on condition that the subject policy of insurance was in force, it translates that section 10(1) of the Act is whipped into motion. Since section 10(1) of the *Insurance (Motor Vehicles Third Party Risks) Act* houses a statutory duty to pay to third parties (persons entitled to benefit from the Judgment) notwithstanding that the insurer may be entitled to avoid or cancel the policy, where Judgement has been obtained against the insured, in the event where liability is covered by the terms of the subject policy, the determinant question to pose at this stage is whether this liability was covered under the terms of the subject policy.

21. The obligation under section 10(1) of the *Insurance (Motor Vehicles Third Party Risks) Act*, has been construed to so solemn a statutory duty that it is strict and that it cannot be shifted or abrogated by a term in the contract of insurance by for example requiring the insured to pay and seek indemnity later from the insurer, lest the noble intention of the Act to guarantee compensation of third parties who suffer injuries arising from by use of the insured's motor vehicle on the road will be lost. In Joseph Mwangi Gitundu vs. Gateway Insurance Co Ltd [2015] eKLR, F. Gokonyo, J. reasoned as follows: "[19] Therefore, under section 10(1) of Cap 405 Laws of Kenya, the insurer has a statutory obligation to 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. The obligation is statutory and a strict one; it cannot be shifted or abrogated by a term in the contract of insurance or in the manner proposed by the Defendant, lest the noble intention of the Act to guarantee compensation of third parties who suffer injuries arising from by use of the insured motor vehicle on the road should be lost. Similarly, if the statutory obligation placed by law on the insurer was to be shifted to the insured as proposed by the Defendant, the purpose for taking out an insurance policy and the compulsion by the Act for such insurance cover to be taken out on vehicles to be used on the roads to cover third party risks under Cap 405 Laws of Kenya will also be defeated. The only legal way liability and obligation to pay third party claims may be avoided, is by strictly following the prescriptions provided for under section 10 of Cap 405. In this case, the insurer's liability and obligation to pay the Judgment entered against the insured is not in dispute. Whereas, a contract of insurance is one of indemnity, in so far as claims by third parties are concerned, the insurance has a statutory obligation to pay the Judgment of the third parties unless the liability thereof has been avoided in accordance with the law and specifically section 10 of Cap 405. I do not, therefore, agree with the argument by the Defendant that the Plaintiff ought to have paid first in order to save his vehicle then come for reimbursement. This is a statement based on convenience and not the law, and which I find to be quite careless averment to be made by any serious insurance company involved in insuring the general public of Kenya. In any event, the evidence shows that the Plaintiff took all necessary steps to inform the insurer of the cases and Judgments thereto. He also informed them of the attachment and even went back to the auctioneer after three days of the attachment only to find that his vehicle had been sold."

22. In order to succeed in establishing the liability of the insurer to satisfy Judgment in the primary suit in an action for a declaratory Judgment against the insurer, the insured bears the onus to establish three elements: (i) First, that there was a policy of insurance in force at the material time; (ii) Second, that is a valid Judgment in respect of any such liability as is required to be covered by the policy; and (ii) Third, that the insurer has not avoided liability. In Kenya Orient Insurance Co. Ltd vs. Paul Mathenge Gichuki & Another [2017] eKLR, it was rendered that a litigant who is seeking to enforce a Decree against an insurer only needs to prove: "(a) that there was an accident during the currency of insurance cover in respect of the offending motor vehicle; (b) that there was a suit against the insured which suit resulted into a Decree and the Decree remain to be settled; and (c) the Plaintiff has the additional duty to prove that prior to filing the primary suit or within 14 days after the commencement of the suit, he did serve a notice thereon upon the insurer."

23. Except when liability has been avoided by the insurer, in circumstances where there is a valid Judgment against the insured, the insurer is obligated to pay. In Juliet Waringa Wanyondu (Deceased) vs. Lion of Kenya Insurance Company [2017] eKLR, Mumbi Ngugi, J. rendered herself as follows: "23. I note further from the documents annexed to the Plaintiff's Affidavit in support of his Application that a statutory notice under section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act* had been served on the Defendant. A copy of the notice, duly stamped by the Defendant in this case, shows that the notice was served on 18th June 2007. 24. That being the case, can the Defendant be heard to argue that there was no valid Judgment against its insured, and that it had no notice of the filing of the suit? Clearly not... 26... The insurer has a statutory obligation which it can only avoid in the circumstances provided under section 10 as follows: "No sum shall be payable by an insurer under the foregoing provisions of this section if in an action commenced before, or within three months after, the commencement of the proceedings in which the Judgment was given, he has obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it..."

24. In the above connection, the insured has no duty to pay for a liability arising from an insurance policy which is in force, and which has not been avoided and claim later from the insurer. Instead, the insurer has a direct duty to third parties to satisfy the Judgment and Decree thereunder. In Joseph Mwangi Gitundu vs. Gateway Insurance Co Ltd [2015] eKLR, Gikonyo, J. expressed himself as follows with respect to the liability of an insurer to meet third party claims against its insured and I desire to quote his Lordship in extenso: "[18] Duty of insurer to satisfy Judgments against persons insured has been argued here in a profound manner. I appreciate that the issue is not only a subject of paramount importance in the law of insurance but also to this decision. Therefore, I will not deny it a full considered attention. At the risk of monotony, I should state that, the principle of privity of contract has been relaxed under modern statutory law, implied warranty and strict liability cases. Cap 405 of the laws of Kenya is one such law and has provided for a statutory exception to the rule on privity of contract. Third parties for whose benefit the insured takes out a policy of insurance are the direct beneficiaries of the policy of insurance even if they are not parties in the contract of insurance. The duty of insurer to satisfy Judgments against persons insured is provided for under section 10(1) of Cap 405 Laws of Kenya as follows... [19] Therefore, under section 10(1) of Cap 405 Laws of Kenya, the insurer has a statutory obligation to 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. The obligation is statutory and a strict one; it cannot be shifted or abrogated by a term in the contract of insurance or in the manner proposed by the Defendant, lest the noble intention of the Act to guarantee compensation of third parties who suffer injuries arising from by use of the insured motor vehicle on the road should be lost. Similarly, if the statutory obligation placed by law on the insurer was to be shifted to the insured as proposed by the Defendant, the purpose for taking out an insurance policy and the compulsion by the Act for such insurance cover to be taken out on vehicles to be used on the roads to cover third party risks under Cap 405 Laws of Kenya will also be defeated. The only legal way liability and obligation to pay third party claims may be avoided, is by strictly following the prescriptions provided for under section 10 of Cap 405. In this case, the insurer's liability and obligation to pay the Judgment entered against the insured is not in dispute. Whereas, a contract of insurance is one of indemnity, in so far as claims by third parties are concerned, the insurance has a statutory obligation to pay the Judgment of the third parties unless the liability thereof has been avoided in accordance with the law and specifically section 10 of Cap 405. I do not, therefore, agree with the argument by the Defendant that the Plaintiff ought to have paid first in order to save his vehicle then come for reimbursement. This is a statement based on convenience and not the law, and which I find to be quite careless averment to be made by any serious insurance company involved in insuring the general public of Kenya. In any event, the evidence shows that the Plaintiff took all necessary steps to inform the insurer of the cases and Judgments thereto. He also informed them of the attachment and even went back to the auctioneer after three days of the attachment only to find that his vehicle had been sold. [20] From the above and the arguments of parties, I see some offshoot but inextricable ideas or issues. First; this is not a declaratory suit or a claim for payment of a Judgment of the third party per se, or for recovery of loss or damage to property or consequential loss arising out of the accident herein. Therefore, Clause 5 (a) in the General Exceptions of the policy does not apply. The truth of the matter is that, this is a claim for recovery of loss occasioned by the breach of statutory duty by the insurer when it failed to pay a Judgment of a third party as required in law. Thus, arguments which the Defendant offered in defence are not really formidable in this case especially in the face of section 10 of Cap 405, and the evidence that the Defendant breached its statutory obligation thereto. It is worth of note that, when a party approaches the Court for relief, he must do so with clean hands. The contrary is true about the Defendant and its defence."

25. And what are the grounds upon which an insurer can avoid liability? There are three grounds upon which an insurer can refuse to satisfy a Judgment against its insured, either in combination or isolation. First, in circumstances where a notice was not given to the insurer by the third party either before or within 14 days after the commencement of the proceedings in which the Judgment was given. Second, in circumstances where the execution of the Judgment has been stayed because of a pending appeal. Third, in circumstances where the policy had been cancelled by mutual consent before the accident (the event giving rise to the liability, and that the certificate of insurance had been surrendered to the insure or the Registrar of Motor Vehicles and the Commission of Police had been informed of such cancellation or surrender of the policy and certificate of Insurance. In Gitonga Mungania vs. Intra Africa Assurance Co. Ltd [2008] eKLR, A. Emukule, J. had this to say about the grounds upon which an insurer can legally so refuse to satisfy a Judgment and Decree thereunder and I also desire to quote his Lordship in extenso: "Those were the various contentions in the pleadings. The law regarding the liability of an insurer to satisfy any Judgment passed by a competent Court against its insured is set out in section 10(1) and (2) of the Insurance (Motor Vehicle Third Party Risks) (Cap 405, Laws of Kenya) which provides "10 (1) If after a policy of Insurance has been effected Judgment 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 that section, pay to the persons entitled to the benefit of the Judgment any sum payable there-under in respect of the liability, including any amount payable in respect of interest on that sum by virtue of any enactment relating to interest on Judgments. (2) No sum shall be payable by an insurer under the foregoing provisions of this section – (a) in respect of any Judgment, unless before or within fourteen days after the commencement of the proceedings in which the Judgment was given, the insurance had notice of the bringing of the proceedings, or (b) in respect of any Judgment, so long as execution thereof is stayed pending an appeal, or (c) in connexion with any liability if, before the happening of the event which was the cause of the death or bodily injury giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provision contained herein, and either- (i) before the happening of the event the certificate was surrendered to the insurer, or the person to whom the certificate was issued made a statutory declaration stating that the certificate had been lost or destroyed or (ii) after the happening of the event, but before the expiration of fourteen days from the taking effect of the cancellation of policy, the certificate was surrendered to the insurer, or the person to whom the certificate was issued made such a statutory declaration as aforesaid, or (iii) either before or after the happening of the event but within a period of twenty-eight days from the taking effect of the cancellation of the policy, the insurer has notified the Registrar of Motor Vehicles and the Commissioner of Police in writing of the failure to surrender the certificate; 3. It shall be the duty of a person who makes statutory declaration, as provided in subparagraphs (i) and (ii) of paragraph (c) of Subsection (2) to cause such statutory declaration to be delivered to the insurer; 4. If the policy was obtained by non-disclosure of material facts as defined in subsection (6) of the section. 5. If the amount in the Judgment exceeds the amount of liability in the policy and for which the insurer can recover the excess from the insured." In its defence to this suit, the insurer or Defendant claims that it is not liable to satisfy the Judgment in Meru HCCC No. 4 of 1997 because of breaches by their insured as outlined in the introductory paragraphs of this Judgment. In law, the only grounds for an insurer to refuse to honour a Judgment against its insured are those set out in Section 10(2) which may be summarized as follows: - (a) A notice was not given to the insurer by the third party either before or within 14 days after the commencement of the proceedings in which the Judgment was given. (b) Execution of the Judgment is stayed because of a pending appeal. (c) The policy had been cancelled by mutual consent before the accident (the event giving rise to the liability, and that the certificate of insurance had been surrendered to the insure or the Registrar of Motor Vehicles and the Commission

of Police had been informed of such cancellation or surrender of the policy and certificate of Insurance. For the Defendant insurance company to claim that it is not obligated, statutorily or otherwise to pay to the Plaintiff the sum of money claimed in the plaint or any sum at all, it must bring itself within the exemptions prescribed under section 10(2) of the Act. The Defendant cannot rely on the lapses or breaches of its insured as pleaded in paragraphs 4 and 6 of the Defence aforesaid." (Emphasis supplied)

26. First, has the Plaintiff established that there was a valid policy of insurance in force at the material time in respect to motor vehicle registration number KAL 510X, that is to say 9th June 2018? In this regard, a blend of oral and documentary evidence was adduced. In her oral testimony, the Plaintiff testified that there was a valid policy of insurance - Policy Number HDO/0700/017604/2017 – which was in force at the material time between 9th June 2018, and that it was issued by the Defendant.

27. Whereas the Defendants filed a Statement of Defence, the Defendant elected to call no evidence to controvert the Plaintiffs' evidence in this regard.

28. What then is the worth and place of pleadings generally and a Statement of Defence in particular? Is a Statement of Defence adequate to controvert a claim?

29. Pleadings generally, and in this case the Statement of Defence, merely presented averments or facts to be proved by way of evidence. Pleadings, in their inherent nature, set out the framework of facts which will then bind the party throughout the case and the premise on which a party can lawfully so, be allowed to tender evidence. The averments or facts in and by themselves, do not constitute admissible evidence. In fact, the Civil Procedure Rules frown upon a party who pleads evidence. In Kenya Pharmaceutical Association & another vs. Nairobi City County and 46 other County Governments & another [2017] eKLR, the Court expressed the purpose of pleadings in the following statement: "34. The function of a pleading in civil proceedings is to alert the other party to the case they need to meet (and hence satisfy basic requirements of procedural fairness) and further, to define the precise issues for determination so that the Court may conduct a fair trial; The cardinal rule is that a pleading must state all the material facts to establish a reasonable cause of action (or Defence). The expression "material facts" is not synonymous with providing all the circumstances. Material facts are only those relied on to establish the essential elements of the cause of action; a pleading should not be so prolix that the opposite party is unable to ascertain with precision the causes of action and the material facts that are alleged against it." Similarly, in CMC Aviation Ltd. vs. Cruisair Ltd. (No. 1) (1978) KLR 103; (1976-80)1 KLR 835, Madan, J (as he then was) had this to say about the place and worth of pleadings: "Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of "evidence" as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth." Also, in Linus Nganga Kiongo & 3 Others vs. Town Council of Kikuyu (2012) eKLR, Odunga, J. while concurring with the decision in *Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002* where Lesiit, J. echoed the ratio in Autar Singh Bahra and Another vs. Raju Govindji, HCCC No. 548 of 1998 and held as follows: "Pursuant to the foregoing the Plaintiff's averments in light of the letter dated 4th December 2008 placing the value of the suit land at Kshs. 1,100,000.00 remain wholly uncontroverted. What are the consequences of a party failing to adduce evidence? In the case of *Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002* Justice Lesiit, citing the case of Autar Singh Bahra and Another vs. Raju Govindji, HCCC No. 548 of 1998 stated: "Although the Defendant has denied liability in an amended Defence and

counterclaim, no witness was called to give evidence on his behalf. That means that not only does the Defence rendered by the 1st Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail." In the same case (Linus Nganga Kiongo & 3 Others vs. Town Council of Kikuyu) supra, Odunga, J. in addition, echoed the ratio in *Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001* where the Court adopted the ratio in Autar Singh Bahra and Another vs. Raju Govindji, HCCC No. 548 of 1998 in the following words: "...that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged." In Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. while citing in approval the decision in *Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997* stated as follows: "In this matter, apart from filing its statement of Defence the Defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the statement in the Defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence." Further, in the case of Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000, Mbaluto, J. (as he then was) held that where no witness is called on behalf of the Defendant, the evidence tendered on behalf of the Plaintiff stands uncontroverted. The same holding is replicated in Drappery Empire vs. The Attorney General, Nairobi HCCC No. 2666 of 1996, where Rawal, J. (as she then was) held that where the circumstances leading to the deliveries of goods are not challenged and stand uncontroverted due to the failure by the Defendant to adduce evidence, the standard of proof in civil cases (on the balance of probabilities) has been attained by the Plaintiff.

30. What then is the sum effect of failure to call evidence in support of a party's averments? Faced with a situation where the Respondent had failed to file a response to a claim in Juliana Mulikwa Muindi vs. Board of Management Yangua Mixed Secondary School & another [2018] eKLR, C. Kariuki, J. pronounced himself as follows: "... Be that as it may, the Respondents did not bother to canvass their case in accordance with the laid down procedures despite being fully aware of the proceedings. So, what are the consequences of a party failing to adduce any evidence?" The legal position is therefore clear and I fully associate myself with the sentiments of the learned Judges. Failure by the Respondents to file any pleadings and participate actively in the matter irresistibly lead to the conclusion that the appellant's claim was uncontroverted and unchallenged..."

31. In the circumstances, this Court finds that the evidence adduced by the Plaintiffs to the effect that the there was a valid policy of insurance in force at the material time in respect of motor vehicle registration number KAL 510X, uncontroverted by the Defendant. This fact is thus established.

32. Second, the Plaintiff has demonstrated that there is a valid Judgment in respect of the liabilities covered by the said policy by adducing both oral and documentary evidence to the effect that a Judgment in Machakos MCCC Number 391 of 2020, was rendered on 7th April 2022. As already stated, the Defendant filed a Statement of Defence but failed to call evidence of any nature to contradict the Plaintiff's evidence in this regard. On authority, therefore, of Linus Nganga Kiongo & 3 Others vs. Town Council of Kikuyu (2012) eKLR, per Odunga, J.; *Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002*, per Lesiit, J.; Autar Singh Bahra and Another vs. Raju Govindji, HCCC No. 548 of 1998; *Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001*; Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007, per Ali-Aroni, J.;

Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997; Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000, per Mbaluto, J. (as he then was); Drappery Empire vs. The Attorney General, Nairobi HCCC No. 2666 of 1996, per Rawal, J. (as she then was); Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 Others [2012] eKLR; Trust Bank Limited vs. Paramount Universal Bank Limited & 2 others [2009] eKLR, per Lessit, J.; and Gateway Insurance Co Ltd vs. Jamila Suleiman & Another [2018] EKLR, per Odunga, J., this Court finds the evidence adduced by the Plaintiffs to the effect that the there is a valid Judgment, uncontroverted by the Defendant and this Court so concludes.

33. Third and finally, the Plaintiffs have demonstrated that the Defendant has not avoided liability and, in this regard, oral evidence was led and this position was unchallenged.

(ii) The scope and extent of liability of the Defendant in satisfying the Decree and Certificate of Costs issued in Mavoko MCCC Number 391 of 2020

34. It is the Plaintiffs' position that the limit of Kshs. 3,000,000 under section 5(b)(iv) of the Insurance (Motor Vehicle Third Party Risks) Act, does not include costs and interest, and since the quantum of damages was Kshs. 2,950,000 and the excess constitute costs and interest, the Defendant should settle the full sum, placing reliance upon Maisha (Suing as administrator and personal representative of the estate of *Said Masha Nyamani) vs. Directline Insurance Company Limited (Civil Appeal 15 of 2022*) [2023] KEHC 25339 (KLR) (7 November 2023) (Judgment).

35. First things first. What scope of sums fall within the contemplation of section 10(1) of the *Insurance (Motor Vehicles Third Party Risks) Act*? In Joseph Mwangi Gitundu vs. Gateway Insurance Co Ltd [2015] eKLR, Gikonyo, J. expressed himself as follows with respect to the sums contemplated by section 10(1) thereof to be payable to the third party: "[19] Therefore, under section 10(1) of Cap 405 Laws of Kenya, the insurer has a statutory obligation to 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..." See also Blueshield Insurance Co. Ltd vs. Raymond Buuri M'rimberia [1998] eKLR, where Gicheru, Akiwumi and Pall, JJA (as they then were) held as follows: "... Thus once statutory liability under s.5(b) is covered by the terms of the policy, which in the instant case was, and is not denied by the appellant, the insurer is obliged under s.10(1) of the Act to satisfy the Judgment obtained against the insured and pay to the person entitled to the benefit of that Judgment all sums payable thereunder with costs and interest, notwithstanding that the insurer may be entitled to avoid or cancel the policy vis a vis the insured or may have even avoided or cancelled it..."

36. What is the extent of liability of an insurer? Before I determine this issue, I desire to answer this by first putting the issue in perspective by way of history. History is not a burden on the memory but an illumination of the soul.[1] There are many theories and philosophies of history, which attempt to explore the purport of history. The prominent philosophies include the causal, narrative, contextual, chronological, neutral and recurrence theories. Relevant to this discourse is the contextual, causal and recurrence philosophies of history. According to the contextual theory, there are contextual factors which contribute to the course of history and so, history contextualizes issues. According to the causal theory, history is an intersection of actions and sets of actions which bring about larger changes. According to the recurrence theory, history repeats itself. I know no better way to illustrate these philosophies than through lived realities of a few historiographers. As rendered in the contextual theory, history contextualizes the present. According to Carl Sagan, you have to know the past to

[1] Lord John Emerich Edward Dalberg-Acton (1st Baron Acton, 13th Marquess of Groppoli (who lived between 10.1.1834 and 19.6.1902 and who was an English Catholic historian, politician and a writer).

understand the present. According to Pearl Buck, if you want to understand today, you have to search yesterday. And according to George Santayana, to know your future you must know your past. In the words of Norbert Juma, "One is highly likely to repeat a mistake without the benefit of history. An understanding of the successes and failures of the past is important if we are to grow and make progress going forward. If we do not learn from our past mistakes, we are bound to repeat them. Having knowledge of our history allows us to understand where we are coming from, which in turn allows us to understand our present. It not only reveals the past, but it also helps us create a better future." And according to Johan Huizinga, history is the interpretation of the significance that the past has for us. Martin Luther King, Jr., thinks that "We are not makers of history. We are made by history." And Michael Crincton thinks that "If you don't know history, then you don't know anything. You are a leaf that doesn't know it is part of a tree." Finally, Karl Marx, one of the leading proponents of this theory reasoned that "Men make their own history, but they do not make it just as they please; they do not make it under circumstances chosen by themselves, but under given circumstances directly encountered and inherited from the past. The tradition of all the generations of the dead weighs like a nightmare on the brain of the living. And just when they seem involved in revolutionizing themselves and things, in creating something that has never before existed, it is precisely in such periods of revolutionary crisis that they anxiously conjure up the spirits of the past to their service and borrow names, battle cries and costumes from them in order to act out the new scene of world history in this time-honoured disguise and this borrowed language."[2]

37. Until 31st December 2006, section 5(b) of the *Insurance (Motor Vehicles Third Party Risks) Act*, had no paragraph (iv).[3] Until 31st December 2006, therefore, there was no capping of third-party liability of an insurer.[4] It is no small wonder that the principle then asserted that the insurer is liable to satisfy the full amount of damages, costs and interest, no matter the amount. Put differently, before 1st January 2007, the insurer was obligated under section 10(1) of the Act, to satisfy the Judgment obtained against the insured and pay to the person entitled to the benefit of that Judgment all sums payable thereunder with costs and interest, notwithstanding that the insurer may be entitled to avoid or cancel the policy vis a vis the insured or may have even avoided or cancelled it. In other words, there was cap on the liability. In the Court of Appeal decision in Blueshield Insurance Co. Ltd vs. Raymond Buuri M'rimberia [1998] eKLR, Gicheru, Akiwumi and Pall, JJA (as they then were) stated as follows: "... Thus once statutory liability under s.5(b) is covered by the terms of the policy, which in the instant case was, and is not denied by the appellant, the insurer is obliged under s.10(1) of the Act to satisfy the Judgment obtained against the insured and pay to the person entitled to the benefit of that Judgment all sums payable thereunder with costs and interest, notwithstanding that the insurer may be entitled to avoid or cancel the policy vis a vis the insured or may have even avoided or cancelled it. But then the liability under s.10(1) is subject to the following provisions of s.10(4) of the Act which reads:- "(4) No sum shall be payable by an insurer under the foregoing provisions of this section if, in an action commenced before, or within three months after, the commencement of the proceedings in which the Judgment was given, he has obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it: Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any Judgment obtained in proceedings commenced before

2 Karl Marx, The Eighteenth Brumaire of Louis Bonaparte, pages 10-11.

3 See section 34 of the Finance *Act, No. 10 of 2006*.

4 See section 34 of the Finance *Act, No. 10 of 2006*.

the commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the Plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto."

38. However, effective 1st January 2007, vide section 34 of the Finance Act, Number 10 of 2006, the National Assembly inserted a new paragraph (iv) to section 5(b) of the *Insurance (Motor Vehicles Third Party Risks) Act*.[5] The text thereof reads thus: "34. Section 5 of the *Insurance (Motor Vehicles Third Party Risks) Act* is amended in the proviso, by inserting the following new paragraph immediately after paragraph *(iii)* - (iv) liability of any sum in excess of three million shillings, arising out of a claim by one person." And now, section 5(b)(iv) of the *Insurance (Motor Vehicles Third Party Risks) Act* provides as follows: "In order to comply with the requirements of section 4, the policy of insurance must be a policy which—(a)... and (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 injury 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)... or (ii) .... or (iii) ... (iv) liability of any sum in excess of three million shillings, arising out of a claim by one person." (Emphasis supplied)

39. The plain reading of the text of section 5(b)(iv) is that the insurance policy contemplated under section 4 and 10(1) of the *Insurance (Motor Vehicles Third Party Risks) Act* shall not cover liability of any sum in excess of three million shillings, arising out of a claim by one person.

40. But how have superior Courts construed section 5(b)(iv) of the *Insurance (Motor Vehicles Third Party Risks) Act*, Cap 405 of the Laws of Kenya? In order to further illuminate this amendment, I now turn to trace and interrogate the flurry of litigation around it ex post facto. Following the amendment of section 5(b) of the *Insurance (Motor Vehicles Third Party Risks) Act*, by inserting the said paragraph (iv) which capped liability of insurers at Kshs. 3,000,000 per claim by one person, the Constitutionality of this amendment was challenged by the Law Society of Kenya in Law Society of Kenya vs. Attorney General & 3 others [2016] eKLR. The Petitioners reasoned that by capping the amount payable, the legislative fiat paid a blind to unique circumstances of each case and invaded judicial independence and authority to assess the loss and award commensurate damages therefor. In a decision delivered on 5th April 2016, Onguto, J. did not find section 5(b)(iv) unconstitutional reasoning thus: "58. It must be appreciated that motor vehicle third-party insurance has had a checkered history in Kenya especially as regards insurance cover for PSVs. As gleaned from various documents presented by the Respondent to the Court, various insurance companies have faced enormous challenges especially in the underwriting of PSVs. This situation that has been said to threaten the stability of the insurance industry.... 63. In determining the Constitutionality of a statute, the Court in the case of Olum and another v Attorney General [2002] 2 EA held that the Court had to consider the purpose and effect of the impugned statute by *the Constitution*. If the purpose was not to infringe a right guaranteed by *the Constitution*, the Court had to go further and examine the effect of its implementation. If either the purpose or the effect of its implementation infringed a right guaranteed by *the Constitution*, the statute or section in question would be declared unconstitutional. The Court in Olum and another v Attorney General (supra) cited with approval the case of Abuki v Attorney General- Constitutional Petition *2 of 1997* where Oder JSC said that:... 67. The Petitioner contends that the schedule in the Amendment Act contravenes individual's right to access justice as provided under Article 48 and the right to fair hearing as provided under Article 50. Article 48 of *the Constitution* makes provision for access to justice. It states that the State shall ensure access to justice for all persons. Article 50 on the other hand provides for fair hearing. In particular, Article 50(1) provides that, every person has the

[5] See section 34 of the Finance *Act, No. 10 of 2006*.

right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body. 68. The Petitioner contends that the Schedule under the Amendment Act amounts to legislative Judgment. Thus, in essence, it curtails the right to access justice and fair hearing as provided under Article 48 and 50... 70. As stated earlier, Courts are enjoined to administer justice in accordance with the principles laid down under Article 159 of *the Constitution*. When Parliament enacts legislation, it is supposed that such legislation serves the interests of the public and for general order. There is evidence on record that there was elaborate communication between the Insurance regulators and government officials seeking to facilitate efficient regulation of the insurance industry through amendments to the *Insurance Act*. 71. On the issue of access to justice and fair hearing, the State through the Courts has ensured that all persons are able to ventilate their dispute. Fair hearing entails such disputes being determined by an impartial arbiter. 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. 75. I consequently find nothing unconstitutional with the provisions of Section 5(b) of the *Insurance (Motor Vehicles Third Party Risks) Act* (Cap 405)... 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." {Emphasis supplied}

41. The question of constitutionality of the amendment which introduced the capping of liability of insurers under section 5(b)(iv) of the *Insurance (Motor Vehicles Third Party Risks) Act*, Cap 405 of the Laws of Kenya, the matter did not rest with the finding of Onguto, J. in Law Society of Kenya vs. Attorney General & 3 others [2016] eKLR. It rose to the Court of Appeal in Justus Mutiga & 2 others vs. Law Society of Kenya & another [2018] eKLR. In their decision delivered on 20th April 2018 dismissing the appeal, Visram & Koome JA (as they then were); Karanja, JA rendered themselves as follows: "30. We do not understand the schedule to curtail the Court's duty and mandate to assess the evidence before it and award whatever amount of damages which in the Court's view suffices to compensate the victim of the accident. What in our considered view is anticipated by the amendment is to put a ceiling or cap to the amount recoverable from the insurance company, but it does not fetter the Court from awarding more than Ksh. 3 million. What this would mean is that any compensation awarded by the Court in excess of Ksh.3 million would be recoverable from the insured and not from the insurance company. To that extent, this would not amount to usurpation of the Court's judicial independence, authority and discretion. We consequently agree with the learned Judge on that point and uphold his finding that section 5(b) of the Act is not unconstitutional... 34... The contention by the appellant that limiting compensation payable to innocent third parties will resolve all these issues, is a fallacy. This is more so given the lack of evidence supporting such an assertion. 35. In addition, that limitation goes against the objective of compulsory third partymotor vehicle insurance. Historically,the Principal Act was enacted in 1945 as the Motor Vehicles Insurance (Third Party Risks) Ordinance, No 12 of 1945. However, unlike the present system section 10 of the Ordinance imposed

a duty on 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 by the insured, the insurer was still obliged to fully compensate the injured third party but subsequently recover the excess from the insured. This is what was colloquially 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 at 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... Though the appellant contends that the limitation 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 Judgment, 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 with the reasoned Judgment 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." (Emphasis supplied)

42. What then should happen in circumstances where the decretal sum plus costs surpass the Kshs. 3,000,000 mark? In Law Society of Kenya vs. Attorney General & 3 others [2016] eKLR, Onguto, J. held that nothing stops the Plaintiff from claiming the excess of Kshs. from the insured. Similarly, in Justus Mutiga & 2 others vs. Law Society of Kenya & another [2018] eKLR, Visram & Koome JA (as they then were); Karanja, JA were of the mind that the any amount beyond Kshs. 3,000,000 should be recoverable from the insured personally.

43. In Georgina Wangari Mwangi vs. David Mwangi Muteti [2014] eKLR, the Plaintiff in that case was awarded damages of Kshs. 14,612,540.20. The High Court held that the insurer is to pay a maximum of Kshs. 3, 000, 000 with any excess being payable by the insured party. H.I. Ongúndi, J. reasoned as follows: "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."

44. Further, in Africa Merchant Assurance Company Limited vs. William Muriithi Kimaru [2016] eKLR, it was held that an insurer is not obligated to pay any amount above Kshs. 3,000,000.

45. Similarly, in Patricia Mona Antony & Another vs. Africa Merchant Assurance Company Limited [2019] eKLR, C.W. Githua, J. while construing section 5(b)(iv) of the Insurance (Motor Vehicle Third Party Risks) Act held as follows: "Given the foregoing provision, it is clear that insurers of motor vehicles against third party risks are legally obliged to pay any amount in excess of Kshs. 3,000,000 in respect of a single third-party claim such as one that was made by the Plaintiffs against the Defendant insured."

46. Whereas the foregoing position is the norm, to every general rule, there is an exception. In exceptional circumstances, where the insurer dilly-dallies in settling the claim for reasons beyond the control of the insured and arising therefrom, the decretal sum which was below the statutory cap of Kshs. 3,000,000 at Judgment, exponentially explodes on account of interest and surpasses the Kshs. 3,000,000 cap, then the fault should not be visited upon the insured for doing so will be unfair and unconscionable. See

Maisha (Suing as administrator and personal representative of the *Estate of Said Masha Nyamani) vs. Directline Assurance Co Limited (Civil Appeal 15 of 2022*) [2023] KEHC 25339 (KLR) (7 November 2023) (Judgment), where in setting aside the decision which capped the amount payable by the insurer at Kshs. 3,000,000, M. Kizito, J. held and I wish to quote the learned Judge in extenso to amply contextualize the holding: "37. This amount was below the statutory amount of Ksh. 3,000,000/=. This means the Respondent was bound to settle the entire decree, together with costs and interest. The statute did not envisage brief case insurance companies that cannot settle the judgment immediately. The Respondent cannot dilly dally in settling the claim in a way that it attracts interest and then leaves the insured with a huge bill. Interest is not liability under the act but the cost of delaying to pay. They must bear the same. It cannot be that due to either Slovenes, laziness or lack of funds, the amount payable increases while the liability to pay remains stuck at Ksh.3,000,000/=. While the amount payable is capped at Ksh.3,000,000/=, interest thereon is still applicable till payment in full. 38. I cannot imagine a scenario, where two identical judgment, for Ksh. 2,500,000 are ordered. A Sound insurance company pays its share pronto with the insured paying nothing. Some basket case of an insurance waits for 5 years before paying. By that time the amount will be Ksh. 4,250,000. Then the insurance decides to pay only Ksh. 3,000,000/= and leaves Ksh. 1,250,000/= to the insured to pay. It will be unfair and unconscionable both to the insured and the insurance companies that paid diligently. 39. The law was not meant to cushion broke insurance companies but limit claims that can legitimately be paid. Interest is a cost upon the liability and cannot be limited. By section 5 of cap 405. Section 26 of the *civil procedure Act* cannot be amended by implication. The said section provides as doth: -"26.Interests(1)Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the Court thinks fit.(2)Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have ordered interest at 6 per cent per annum" 40. Liability to pay is settled on the date of judgment. Each of the parties proceed with their liability. If the Court enters judgment for 3,200,000/=. The insured will pay the insured sum of Ksh 200,000/= and clear their indebted. If the insurance fails to pay the sum of 3,000,000/=, it will continue attracting interest pursuant to section 26 of the *civil procedure act* till payment in full. It cannot be that if the insurance fails to pay, the insured will foot the bill of such failure. 41. The Court thus erred by capping the interest and only ordering for Ksh. 171,572/=. Since the decree was less than 3,000,000/=, the Respondent was bound to settle the entire amount together with interest that has accrued to date less any payment made, in this case less Kshs. 2,828,428. 42. Costs are the cost of litigation. Parties who are forced to spend money to force people do what which is their duty to carry out, then the most appropriate order is an order for costs. This is not part of the Ksh. 3,000,000/=. It is the costs of the unnecessary suit. I have always wondered why only certain insurance companies are sued while other pay without prompting. There is no prohibition under section 5 of payment of costs. Costs will always follow the event. 43. In the circumstances I hold and find that the insurance companies are bound to settle the entire amounts below Ksh. 3,000,000/= together with costs and interest arising from the primary suit. It is important to reckon that costs do not count when reaching or calculating Ksh. 3,000,000/= principle sum payable. This is because costs are not a liability arising out of the accident. Costs are provided for under section 27 of the *civil procedure act* and not section 5 of cap 405. The costs of a declaratory suit are equally costs of bad manners, failure to pay when it is due. 44. In the circumstances, I set aside the entire judgment of the Court below and order that the respondent is bound to settle the entire judgment sum in the primary suit together with accrued

interest and costs of the primary suit and interest thereon, less any payment made. 45. I further declare that interest and costs do not form part of the cap on the amounts payable but are the costs of litigation and delay in payment of the decretal sum respectively."

47. In this case, the decretal sum was originally Kshs. 2,950,000, well below the statutory cap. On account of interest emanating from dilly-dallying of the Defendant, it now stands at Kshs. 3,672,725. This Court finds that since 7th April 2022, in flagrant breach of its statutory duty, the Defendant unjustifiably dilly-dallied in settling the decretal sum when it was below the statutory cap. Ex turpi causa non oritur actio. No action should arise from an illegal act. A Court should not aid a party to benefit from an illegal conduct. Certainly, it could not have been the intention of the legislature and it will be tantamount to a gross injustice, unfair, inequitable, unconscionable, inconceivable and grossly offensive to public policy, to visit the Defendant's evidently ignominious fault upon the innocent insured. This Court thus holds that the Defendant's liability to the Plaintiffs, shall be the total sum outstanding by the time of payment.

(iii) Who should shoulder the costs and interest of this suit?

48. Upon considering the cause of action and circumstances unique to this case including but not limited to the demand letter (the Plaintiff's Exhibit 7), this Court has found no good cause to depart from the general proposition of the law that costs follow the event and accordingly, this Court exercises its discretion in favour of the Plaintiffs.

49. Regarding interest, the Defendant having failed to promptly settle the claim at the date of the claim or soon thereafter, it translates that the Plaintiffs would have had a capital sum to invest with gains thereon. On this premise, again, I exercise my discretion in favour of the Plaintiffs.

PART VI: Disposition

50. Wherefore this Court:

    i. Declares that the Defendant has a statutory duty to satisfy the Judgment in Machakos MCCC Number 391 of 2020 (the primary suit).

    ii. Declares that the Defendant's liability to the Plaintiffs in the primary suit, shall be the total sum outstanding by the time of payment.

    iii. Orders limited to this suit, the Plaintiff is awarded costs of this suit to be paid by the Defendant, together with interest at Court rates, from the date of this Judgment until payment in full.

51. It is so ordered.

DELIVERED, SIGNED AND DATED IN OPEN COURT AT MACHAKOS LAW COURTS THIS 9TH DAY OF SEPTEMBER, 2024

.....

C.N. ONDIEKI

PRINCIPAL MAGISTRATE

Advocate for the Plaintiffs:.....

Advocate for the Defendant:.....

Court Assistant:.....