

REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL NO. E023 OF 2025

METROPOLITAN CANNON GENERAL INSURANCE1ST
APPELLANT

METROPOLITAN CANNON LIFE INSURANCE..... 2ND
APPELLANT

VERSUS

FRANCIS WAMBURU HURA.....
RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. E.G. Nderitu CM) in Nyeri CMCC No. E049 of 2021 delivered on 19th March, 2025. The appellants were defendants in a declaratory suit. They filed a memorandum of appeal seeking only one determination, that an insurer is not liable to pay for material damages but only personal injuries. In respect thereof, they indicated that the court ignored sections 5(b) and 10 of the Insurance (Motor Vehicles Third Party Risks) Act, Cap. 405 of the Laws of Kenya.

2. There was no pretense of raising any other issue. There is no question whether any notices were issued or whether the appellant was the insurer of the subject motor vehicle. There is equally no denying that the loss occurred. The loss in issue is the accident involving motor vehicles registration numbers KCF 563 X and KAZ 110 J. The plaintiff filed suit in respect of insurance policy No. CO-01/07/14569/15 for the insured vehicle and KAZ 110 J. The defendant in that suit was Martin Rugenyi Warutere, the appellant's insured.
3. The court awarded a paltry sum of Ksh 176,940/= and costs of Ksh. 51,498/=. The appellants were unable or incapable of paying, hence the suit was filed to compel them to pay. They were so compelled that they filed this appeal.
4. They file submissions that the primary suit did not fall within the purview of Insurance (Motor Vehicles Third Party Risks) Act, Cap. 405 of the Laws of Kenya. Reliance was placed on section 4 of the said Act.
5. Further reliance was placed on section 5 of the Act. Section 5 of the Insurance (motor Vehicle Third Party Risks) Act CAP 405 stipulates as follows: -

5. Requirements in respect of insurance policies

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

6. They relied on the case of **David Kinyanjui & 2 others v Meshack Omari Monyori** [1998] eKLR. It was their case that only High Court decisions were relied upon. They sought to quash the said decision.
7. The respondent filed submissions wherein they relied on the case of **Direct Line Assurance Company Ltd vs Mwangi** Civil Appeal E083 of 2023 (2024) KEHC 9887 (KLR) (29 July 2024) where the High Court held the finding of the subordinate court that had entered judgment in favour of the plaintiff in a declaratory suit in a decree obtained in a material damage claim against insurance company under the Insurance (Motor Vehicle Third Party Risks) Act Cap. 405 Laws of Kenya.

Analysis

8. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

9. This was aptly stated in the case of **Peters vs Sunday Post Limited [1958] EA 424** where, the Court of Appeal therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

10. On the other hand turning to the provisions of Section 10 (1) of the Insurance (Motor Third Party Risks) Act, Cap 405, on the statutory notice, the same 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.

11. Section 10(2) of the Insurance (Motor Third Party Risks) Act, Cap 405 provides:

“10(2). No sum shall be payable by an insurer under the foregoing provisions of the section.

(a) in respect of any judgment, unless before or within 14 days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings.....”

12. As was held in **Stephen Kiarie Chege v Insurance Regulatory Authority & Another (2009)e KLR**, the import of the above provision of the law is that for liability to accrue under Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405, there is a 4-fold test to be met. Firstly, that the motor vehicle in question was insured by the Appellant; Secondly, that the Respondent has a judgment in his favour against the insured; Thirdly, that statutory notice was issued to the insurer within 30 days of filing the suit where judgment has been obtained and finally, the Respondent was a person covered by the insurance policy.

13. The purpose of the above provisions and the Insurance (Motor Vehicle Third Party Risks) Act CAP 405 was also to ensure that a third party who suffered injury or loss due to acts or omission on the part of an insured motor vehicle would be assured of compensation for their injury, loss or inconvenience. This view is supported by Sir Clement De Lestang, J.A. in **New Great Insurance Co. of India Ltd - Vs - Lilian Everlyne Cross & Another (1966) EA, 90 at page 104** as doth:

“Generally speaking the Act seeks to achieve that object (of making provision against third party risks arising out of the use of motor vehicle on the roads) not by placing the whole burden of compensating third parties injured in accidents on the insurers but by combination of two means namely:

- 1. by making it obligatory, on pain of punishment, for any person who uses or causes or permits any other person to use a motor vehicle on the road, to have in relation to the user of the vehicle a policy of insurance which satisfies the requirements of the Act, and*
- 2. restricting the right of insurers to avoid liability to third parties.”*

14. Similarly, Lord Denning in **Escoigne Properties Ltd - Vs - I.R. Commissioners (15) [1958] A.C at 565** stated that,

“A statute is not named in a vacuum, but in a framework of circumstances, so as to give a remedy for a known state of affairs. To arrive at its true meaning, you should know the circumstances with reference to which the words were used, and what was the object, appearing from those circumstances, which parliament had in view.”

15. It is not in dispute that the policy was a third-party insurance cover. It is not in dispute that the loss occurred as a result of the risk contemplated under the policy. It is not enough to state that the personal injuries are covered. The appellant must show that the same is expressly excluded. Without such exclusion, the loss is covered. The only difference is that the Act provides for covering third parties. There is no obligation under the Act to cover the owner. Third parties are however covered.
16. The tragic part of this case is that there is no reason for not paying a claim they defended and a loss they insured. The court cannot be used to defend insurances that seek to go around the black letter law of the statute and refuse to pay. I find no merit in the appeal and the same is accordingly dismissed.

17. The next issue is costs. The same are governed by Section 27 of the Civil Procedure Act, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

18. Costs are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of **Farah Awad Gullet v CMC Motors Group Limited** [2018] KECA 158 (KLR) had this to say:

It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

19. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR**, as follows:

18. It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.

22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

20. Costs follow the event. The appeal is dismissed. The respondents are entitled to costs. A sum of Ksh. 85,000/= will suffice.

Determination

21. In the circumstances I make the following orders:

- a) The appeal lacks merit and is accordingly dismissed with costs of Ksh. 85,000/=.
- b) 30 days stay of execution.
- c) 14 days right of appeal.
- d) The file is closed.

DELIVERED, DATED and SIGNED at **NYERI** on this **16th** day of **December, 2025**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE
JUDGE

In the presence of:-

Mr. Mugwe for the Appellants

Mr. Makura for the Respondent

Court Assistant – Michael

ORIGINAL