

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CIVIL APPEAL NO. E048 OF 2023

KENYA ORIENT INSURANCE CO. LTD.....
.....APPELLANT

VERSUS

JECINTA WANJIKU THUKU & MARY NYAMBURA THUKU
(Legal representative of the estate of the late
SAMUEL NDUNG’U THUKU).....RESPONDENT

JUDGMENT

- 1.** The Respondents sued **Harrison Njuguna Munya**, the registered/beneficial/insured owner of motor vehicle Reg. No. KCC 083E which was involved in a road traffic accident on 20th March, 2016 along Olkalou - Gilgil road in which Samuel Ndung’u Thuku died. The claim was for damages under the **Fatal Accidents Act** for and on behalf of the Estate of the Deceased, under the **Land Reform Act** for special damages and costs of the suit as well as interest.
- 2.** Judgment having been entered and the decree remaining unsatisfied, the Respondent brought a suit against the Appellant claiming for the principal sum awarded in the sum of Kshs.4,724,869.54/- plus costs and interest. The allegations were denied. After trial, judgment was entered

against the Appellant as prayed. And, interest was awarded from the date of filing of the suit until payment in full at the court rates.

3. Aggrieved, the Appellant appeals on grounds that;

1) The learned Magistrate erred in law and fact by failing to find that the Plaintiff ought not to have claimed the entire decretal sum of Kshs.3,215,050/-

2) The learned Magistrate erred in law and fact by failing to find that the Plaintiff's suit did not comply with the mandatory requirements of Section 5 and 10 of the Insurance Motor Vehicles Third Party Risks Act, Cap 405 Laws of Kenya.

3) The learned Magistrate erred in law and fact by failing to consider that the Defendant was not liable to pay the entire decretal sum in excess of Kshs.3,000,000/-, which exceeds the statutory and contractual limit under statute, pursuant to Sections 5 and 10 of the Insurance Motor Vehicles Third Party Risks Act, Cap 405 Laws of Kenya.

4) The learned Magistrate erred in law and fact for disregarding the Defendant's evidence on record through the defence.

5) The learned Magistrate erred in law and fact by failing to consider the principles stipulated in the Civil Procedure Rules (2010) in determining declaratory suits.

4. The appeal was canvassed through written submissions. It is urged by the Appellant that the Appellant was only liable to settle the statutory limit of Kshs.3,000,000/- pursuant to **Section 5(b)(iv) of the Insurance Motor Vehicles Third Party Act, Cap 405 Laws of Kenya** as held in **Civil Appeal 126 of 2018 - CIC General Insurance Group Ltd v Gerald Ochoki alias Marube eKLR** by the Court of Appeal. The appellant also relied on **HCCA E008 of 2021 Xplico Insurance Co. Ltd v Lilian Nyanchoma Mause** and **HCCA E369 of 2021 Joseph Ngui Kithuku v APA Insurance Ltd** in that regard.
5. The Respondents submitted that upon judgment being delivered in favour of the Respondents, a Notice of Entry of Judgment was served upon the Appellant's insured who failed to satisfy the judgment which led to the Respondents serving the Appellant with a demand letter seeking for the Appellant to satisfy the decretal sum as ordered by the court plus costs and interest. And, failure to comply is what led the Respondents filing the declaratory suit.
6. That the declaratory suit was filed as a mode of execution thus the Respondents were seeking for the entire decretal sum plus costs and interest as ordered in the primary suit.

That the Appellant did not take any steps to be exempted from satisfying the judgment.

7. That upon receipt of the Notice of Institution of suit regarding the primary suit, the Appellant failed to instruct a firm of Advocates to enter appearance and defend their suit hence the primary suit proceeded and judgment was entered against the insured. That to claim that the Appellant was not served with the Notice of Institution of the suit at the declaratory suit does not suffice. That the Appellant did not adduce evidence at trial of the declaratory suit to challenge the claim of the Respondent and proceeded to close their case without raising an objection to the Respondent's claim. Therefore, the statement of defence cannot replace evidence. In this regard, reliance was placed on the case of **Rono v Lomsons Enterprises (Civil Case No. 5 of 2019) [2024] KEHC 6249 (KLR) (31st May, 2024)** where it was held that;

“A defence in which no evidence is adduced to support it cannot be used to challenge the plaintiff's case. The failure to call evidence means that the evidence adduced by the plaintiff remain uncontroverted and therefore unchallenged.”

8. Further, it is urged that the Appellant has not attached the decree that it wishes to be exempted from.

9. This being a first appellate court, its duty is to re-evaluate what transpired before the trial court and come up with its own independent conclusions. In **Abok James Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] KECA 203 (KLR)** it was stated that;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212 wherein the Court of Appeal held inter alia that:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

10. In the primary suit, **Nyahururu CMCC No. 265 of 2018** the Appellant's insured was required to pay the Respondent a sum of Kshs.3,215,050/- plus costs and interest. The sum remained unpaid which compelled the Respondent to file a declaratory suit against the Appellant. A contractual obligation existed between the Appellant and the insured, hence the Appellant was under an obligation to satisfy the judgment in compliance with the contract they had. Evidence was tendered of the fact of the claim having been valid as their claim was within the policy covered.

11. Section 10 (1) of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405 Laws of Kenya (Act) provides thus;

10. Duty of insurer to satisfy judgments against persons insured.

(1)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.

Provided that the sum payable under a judgment for a liability pursuant to this section shall not exceed the maximum percentage of the sum specified in section 5(b) prescribed in respect thereof in the Schedule.

- 12.** From the aforesaid provision of the law, the Appellant was obligated to settle the judgment obtained against its insured. In ***Opiyo v Sanlam General Insurance Company Ltd (Criminal Appeal E120 of 2024) [2025] KEHC 12629 (KLR)*** Mabeya J stated that;

“18.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.

19.Firstly, that the motor vehicle in question was insured by the appellant; Secondly, that the respondent has a judgement in his favour against the insured; Thirdly, that statutory notice was issued to the insurer either at least 14 days before the filing of the suit wherein judgement

has been obtained or within 30 days of filing the suit where judgement has been obtained and finally the respondent was a person covered by the insurance policy. See Roseline Violet Akinyi v Celestine Opiyo Wangwau (2020) eKLR and Stephen Kiarie Chege v Insurance Regulatory Authority & Another (2009) eKLR.

- 13.** In the instant case, the Appellant (insurer) does not dispute duty to settle the debt hence satisfying the decree. The challenge is to what magnitude. It is submitted that the Appellant should settle the statutory limit of Kshs.3,000,000/- as provided in **Section 5(b)(iv) of the Act** that stipulates thus;

(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—

(iv)liability of any sum in excess of three million shillings, arising out of a claim by one person.

14. In the cited case, **CIC General Insurance Group Ltd v Gerald Ochoki alias Marube [2020] KECA 447 (KLR)** the Court of Appeal stated that;

“Section 5(b)(vi) sets the maximum liability of the insurer at Kshs.3,000,000.00. We are therefore of the considered view that the judge was correct in coming to that conclusion. Further, in this court’s decision of Justus Mutiga & Others vs Law Society of Kenya & Another CA No. 141 of 2016, it was held:

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.

We too are of the same considered position. A court is not estopped from awarding a litigant a sum in excess of what is provided in the Act. As stated, any sum in excess of Kshs 3,000,000.00 is recoverable from an insured. It is on account of this conclusion that we find no merit in the appeal and the cross-appeal.”

- 15.** The obligation of an Insurance Company in as far as **Section 5(b)(iv) of the Act** is concerned is to cover liability not exceeding three million shillings (3,000,000/-) which arises out of a claim by a single individual as in the instant case. In **Law Society of Kenya v Attorney General, Petition No. 148 of 2014 [2016] eKLR** the court held that;

“[85] In the end, I hold 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 sum if any by the insured.”

16. In **Africa Merchant Assurance Company Limited v William Muriithi Kimaru [2016] eKLR** the court considered the issue of statutory limitation and delivered itself thus;

“The respondent prayed for a declaration under the Act and implicit in such a declaration for the insurer to settle the decretal sum under the Act is the limitation under section 5(b) (iv) thereof. In other words, the limitation is implied and a declaratory order directing settlement of the decretal amount is an order directing settlement of the decretal of amount to a maximum of Kshs. 3,000,000.00 permitted under the Act.

For reasons I have stated, I allow the appeal to the extent that the trial magistrate erred by relying on Law Society of Kenya v Attorney General (Supra) in declining to review the order striking out the appellant’s statement of defence. Although the appeal has succeeded, I decline to set aside the order striking out the appellant’s defence as the amount the decree-holder can recover from the insurance company is provided for by the Act. The insurer is not obliged to pay any amount above Kshs. 3,000,000.00 nor can the decree-holder recover more than that.”

17. This is however an appeal where it is argued that the Appellant failed to attach a copy of the decree that it wishes to be exempted from satisfying by the Honorable Court to the record of appeal which renders the appeal defective. Circumstances under which the decree is not annexed have not been explained. The Record of Appeal was incomplete. In **Alfred Asidaga Mulima & 2 Others v the Attorney General & 8 Others Petition/Applicant No. 17 or 2019** where parties did not obtain a decree, the Supreme Court stated that;

“The upshot of our findings above is that, while the non-filing of a document mentioned in rule 33(4)(d) without explanation would otherwise be fatal and the whole record of appeal would attract the strict sanction of striking out, a party that explains itself sufficiently for an omission would be the beneficiary of a favourable exercise of discretion by this court. Further, where no prejudice is shown to be caused to the opposing party, the exercise of discretion would even be more warranted. The petitioners in this case, on both fronts, are deserving of that discretion.”

18. It is mandatory to file a decree. Where the decree isn't filed, it renders the appeal incompetent.

19. In **Belinda Murai & 9 Others v Amos Wainaina** the Court of Appeal stated that;

“Exclusion of such an important document has always been fatal as there would be no basis to the appeal. In this case it does not appear that there was any mistakes of law that a decree was not necessary because the record of appeal as originally filed contains a document which purports to be a decree. We were not persuaded that the failure to include the decree in the record is a mere technicality upon which the court should not insist.”

20. The decree having not been included in the Record of Appeal rendered the appeal incompetent. Accordingly, the appeal is struck out with costs to the Respondents.

21. It is so ordered.

Dated, signed and delivered virtually this 17th day of December, 2025.

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L.N. MUTENDE
JUDGE