

**REPUBLIC OF KENYA**

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

**HCCA NO. E092 OF 2023**

**JOSEPH NDIRANGU WAIGWA ..... 1<sup>ST</sup>**

**APPELLANT**

**PAMELA MANGA NYANGALA ..... 2<sup>ND</sup>**

**APPELLANT**

***(Being the legal representatives of the estate of GERALD WAHOME WAIGWA)***

**-VERSUS-**

**AFRICA MERCHANT ASSURANCE CO. LTD &**

**DIRECTLINE ASSURANCE CO. LTD .....**

**RESPONDENTS**

***(Being an appeal from the ruling and order of Hon. B. Ireri, SPM delivered in Makindu Magistrates Court Civil Case no. E108 of 2021)***

**JUDGMENT**

**1.** This appeal arises from the ruling and order of Hon. B. N. Ireri (SPM) delivered on 6<sup>th</sup> March, 2023 in **Makindu SPMCC No. E108 of 2021**. The genesis is traceable to a

declaratory suit filed by the Appellants seeking to compel the 2<sup>nd</sup> Respondent, as insurer, to satisfy a judgment delivered on 1<sup>st</sup> October, 2019 in the primary suit.

2. Following execution proceedings, the 2<sup>nd</sup> Respondent filed applications dated 28<sup>th</sup> March, 2022 and 4<sup>th</sup> April, 2022 seeking, *inter alia*, stay of execution, lifting of warrants of attachment, and a declaration that it had discharged its statutory obligation under **Section 5 (b) (iv)** of the **Insurance (Motor Vehicle Third Party Risks) Act, Cap 405** upon payment of the statutory limit.

3. The trial Court allowed the applications and held that the 2<sup>nd</sup> Respondent's liability could not exceed the statutory limit of Kshs.3,000,000/=. Aggrieved by that determination, the Appellants lodged the present appeal on the following grounds:

***a) That the learned Magistrate erred in law and in fact in allowing the 2<sup>nd</sup> Respondent's application.***

***b) That the learned Magistrate erred in law and in fact in failing to find that the 2<sup>nd</sup> Respondent was liable to pay interest and***

*costs on Kes 3,000,000 for failure to pay from the date of judgment.*

*c) That the learned Magistrate erred in law and in fact in failing to appreciate that the sum of Kes 3,000,000 was paid piecemeal.*

*d) That the learned Magistrate erred in law and in fact in ignoring binding authorities.*

*e) That the learned Magistrate erred in law and in fact in disregarding the Appellants' submissions.*

*f) That the learned Magistrate erred in law and in fact by failing to give reasons for the decision reached.*

**Submissions:**

4. The Appellants submit that judgment in the primary suit was delivered on 1<sup>st</sup> October, 2019, with liability apportioned at 80% against the 2<sup>nd</sup> Respondent's insured and with costs and interest awarded. The 2<sup>nd</sup> Respondent was notified of the judgment on 16<sup>th</sup> October, 2019 and granted thirty days within which to settle approximately Kshs.3,243,382/= but failed to pay. Instead, it filed a

Notice of Motion dated 13<sup>th</sup> February, 2020 seeking leave to appeal out of time and stay of execution.

5. By a ruling delivered on 16<sup>th</sup> March, 2021, the High Court granted a conditional stay requiring payment of Kshs.800,000/= within thirty days and the filing of an appeal within the same period. The 2<sup>nd</sup> Respondent neither filed the appeal nor complied with the payment condition within the stipulated period, eventually remitting Kshs.800,000/= only on 6<sup>th</sup> October, 2021, several months after the stipulated period had lapsed.
6. Because of that default, the Appellants filed the declaratory suit on 5<sup>th</sup> May, 2021 to compel satisfaction of the decree and later applied, by Notice of Motion dated 11<sup>th</sup> August, 2021 to strike out the defence. The trial Court allowed that application and entered judgment on 25<sup>th</sup> January, 2022. When payment was still not forthcoming, warrants of attachment were issued on 23<sup>rd</sup> March, 2022 for Kshs.3,667,405/= comprising the decretal balance, costs of the declaratory suit (Kshs.248,009/=) and accrued interest (Kshs.973,014/=). The 2<sup>nd</sup> Respondent thereafter paid Kshs.2,200,000= on 24<sup>th</sup> March, 2022, but declined to settle any further sums,

asserting that its liability was capped at Kshs.3,000,000/= under **Section 5 (b) (iv) of Cap 405.**

7. The Appellants argue that the statutory cap under **Section 5 (b) (iv)** applies only to the principal award and does not extend to interest or costs, which flow from the judgment and from the insurer's delay in settling an undisputed statutory obligation. Reliance is placed on authorities including ***Kiamuko & another v ICEA Lion General Insurance Co. Ltd (Judgment delivered on 1<sup>st</sup> July, 2022)***, where Odunga, J. held that the statutory limit relates only to the principal award and does not encompass costs or interest; ***Peter Gichihi Njuguna v Jubilee Insurance Co. Ltd [2016] eKLR***, where the Court held that costs incurred due to an insurer's failure to honour the statutory obligation remain payable.
8. Further reliance was placed on ***Bernard Mutisya Wambua v Kenya Orient Insurance Company Limited [2020] eKLR***, in which the Court found that failure to promptly pay the statutory limit renders the insurer liable for interest and costs from the date of the award. They also cite ***Edward Mungai Waweru v Monarch Insurance Company Limited [2021] eKLR***

for the proposition that the costs of the primary suit are recoverable in excess of the statutory cap.

**9.** It is further submitted that the 2<sup>nd</sup> Respondent paid the Kshs.3,000,000/= piecemeal and after a delay of approximately two years and five months from the date of judgment, thereby occasioning additional costs and interest which, according to the cited jurisprudence, remain recoverable from the insurer. The Appellants contend that the trial magistrate erred by treating the statutory limit as inclusive of all liabilities and by granting a declaration through an interlocutory application that effectively extinguished the Appellants' claim for interest and costs.

**10.** They urge the appellate Court to find that the insurer's liability for interest on the statutory sum and for costs of both the primary and declaratory suits subsists notwithstanding payment of the capped principal amount, and to allow the appeal with costs.

**11.** The Respondents did not file submissions to the appeal.

### **Analysis & Determination:**

**12.** As a first appellate Court, this Court is obligated to reconsider and re-evaluate the material that was placed before the trial Court and to arrive at its own independent conclusions. In doing so, the Court must exercise caution before interfering with findings of fact unless it is demonstrated that the trial Court misapprehended the evidence, took into account irrelevant considerations, failed to consider relevant matters, or arrived at a conclusion that is plainly wrong. This duty has long been settled in authorities such as **Selle & another v Associated Motor Boat Co. Ltd. (1968) EA 123** and **Peters v Sunday Post Limited (1958) EA 424.**

**13.** Having regard to the Memorandum of Appeal and the submissions filed, the appeal in substance turns on a single issue, namely: whether, notwithstanding payment of the statutory limit of Kshs.3,000,000/= under **Section 5 (b) (iv)** of the **Insurance (Motor Vehicle Third Party Risks) Act, Cap 405**, the 2<sup>nd</sup> Respondent remained liable for interest on the statutory sum and for the costs of the primary and declaratory suits, and consequently whether

the learned Magistrate erred in allowing the applications dated 28<sup>th</sup> March, 2022 and 4<sup>th</sup> April, 2022.

**14. Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405** provides the statutory foundation upon which the present appeal rests. It provides that once judgment is obtained against an insured person, the insurer becomes statutorily bound to satisfy that judgment. The provision states:

***“10 (1) If, after a certificate of insurance has been issued under subsection (4) of section 4 in favour of the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of subsection (1) 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... 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 by virtue of any written law relating to interest on judgments.”**

**15.** The language of the statute is deliberate. The obligation imposed upon the insurer is not confined to the principal award alone. It extends to costs and to interest arising by operation of law. That statutory duty arose upon delivery of judgment on 1<sup>st</sup> October, 2019. Yet despite the notice of judgment having been issued on 16<sup>th</sup> October, 2019, the 2<sup>nd</sup> Respondent failed to pay within the thirty days granted, instead filing an application dated 13<sup>th</sup> February, 2020 for stay.

**16.** Even after the High Court’s ruling of 16<sup>th</sup> March, 2021 directing payment of Kshs.800,000/= within thirty days, payment was only made on 6<sup>th</sup> October, 2021. The declaratory suit filed on 5<sup>th</sup> May, 2021 and the subsequent execution on 23<sup>rd</sup> March, 2022 were therefore direct consequences of the insurer’s continued delay. The payment of Kshs.2,200,000/= on 24<sup>th</sup> March, 2022 came only after execution had issued.

17. In **Estate of Said Masha Nyamani vs Directline Assurance Co Limited (Civil Appeal No. 15 of 2022) [2023] KEHC 25339 (KLR)**, Judgment delivered on 7<sup>th</sup> November, 2023, the Court addressed the effect of **Section 5 (b) (iv) vis-à-vis** interest and costs and held:

***"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.”***

**18.** The Court proceeded to observe:

***“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 Kshs. 4,250,000. Then the insurance decides to pay only Kshs.3,000,000/= and leaves Kshs.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...”***

***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 Kshs.3,000,000/=. It is the costs of the unnecessary suit... There is no prohibition under section 5 of payment of costs.***

***Costs will always follow the event... 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.”***

**19. In 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), Judgment delivered on 9<sup>th</sup> September, 2024, the Court addressed a situation where delay caused the decretal amount to exceed the statutory cap and held:**

***“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..... Ex turpi causa non oritur actio. No action should arise from an illegal act... Certainly, it could not have been the intention of the legislature... 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.*"

20. The same interpretation appears in **Kiamuko & another v ICEA Lion General Insurance Co Limited (Civil Suit 26 of 2018) [2022] KLR (Judgment delivered on 1<sup>st</sup> July, 2022)**, where the Court stated:

*"Section 5 aforesaid only deals with liability in respect of the principal award. It does not contemplate interest or costs which follow the event. Accordingly, where the insurer, knowing well that it is liable to pay the said sum fails to*

*do so... he cannot escape payment of costs and interests.”*

- 21.** Read together, those authorities interpret **Sections 5 (b) (iv)** and **10** harmoniously. **Section 5 (b) (iv)** places a ceiling upon the principal liability arising from the accident. **Section 10**, however, preserves the statutory obligation to satisfy the judgment, inclusive of interest and costs. The chronology herein, judgment on 1<sup>st</sup> October, 2019, conditional orders of 16<sup>th</sup> March, 2021, delayed payment on 6<sup>th</sup> October, 2021, execution on 23<sup>rd</sup> March, 2022, and final payment only on 24<sup>th</sup> March, 2022, demonstrates that interest and further costs accrued not by reason of the accident itself but by reason of the insurer’s delay in discharging a statutory obligation.
- 22.** It is apparent from the foregoing exposition of the law that interest represents the legal consequence of delayed payment under **Section 26** of the **Civil Procedure Act**, and that costs arise under **Section 27** thereof. Neither is absorbed into the statutory cap contemplated under **Section 5 (b) (iv)**.
- 23.** In the premises, the learned magistrate fell into error. The learned magistrate correctly set out portions

of the statutory framework and the cited authorities touching on **Section 5 (b) (iv) of Cap 405**, but proceeded to reduce the entire issue to the proposition that once the 2<sup>nd</sup> Respondent had paid Kshs.3,000,000/= its obligation was extinguished. The ruling states, in material part, that:

*“I find that the 2nd defendant by virtue of section 5(b)(iv) of the Insurance (motor vehicle third party) Cap 405 Laws of Kenya is only bound to pay the decretal not in excess of 3 million. In the premises I find the application having merit, the same is allowed as prayed.”*

24. In my view, and from the material before me, that conclusion was reached without consideration to **Section 10** of the **Act** which expressly provides for payment of “any amount payable in respect of costs and any sum payable... relating to interest on judgments” and amounted to a misdirection of the law. The learned magistrate treated the statutory cap as an all-inclusive ceiling covering principal, costs, and interest alike.

**25.** The existence of the cap was never in dispute, but the legal consequences of the insurer's failure to promptly satisfy a judgment delivered on 1<sup>st</sup> October, 2019. The learned magistrate misdirected himself in law by treating the statutory limit under **Section 5 (b) (iv)** of the **Insurance (Motor Vehicle Third Party Risks) Act, Cap 405** as extinguishing the insurer's liability for interest and costs, and by failing to give effect to **Section 10** of the **Act** which expressly preserves liability for "any amount payable in respect of costs" and for interest arising by operation of law.

**Disposition:**

**26.** Accordingly, the orders of this Court are as follows:

***a) The appeal is hereby allowed.***

***b) The ruling and orders of Hon. B. N. Ileri (SPM) delivered on 6<sup>th</sup> March, 2023 in Makindu SPMCC No. E108 of 2021 are hereby set aside.***

***c) In place thereof, it is declared that payment by the 2<sup>nd</sup> Respondent of the statutory limit of***

*Kes 3,000,000/- did not extinguish liability for interest accruing on the principal sum from 1<sup>st</sup> October, 2019 until payment in full, nor liability for the costs of the primary suit and the declaratory suit.*

*d) The applications dated 28<sup>th</sup> March, 2022 and 4<sup>th</sup> April, 2022 stand dismissed.*

*e) The Appellants shall have the costs of the appeal as against the 2<sup>nd</sup> Respondent.*

27. Orders accordingly.

**DATED, DELIVERED and SIGNED at NAIROBI** through the Microsoft Teams Online Platform on this **18<sup>TH</sup>** day of **FEBRUARY, 2026.**

.....

**HON. C. KENDAGOR**

**JUDGE**

**In the presence of:**

Court Assistant: Beryl

Ms Mango Advocate for the Appellant

No attendance for the Respondent

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