

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CIVIL APPEAL NO. E014 OF 2025

**ROBINSON GICHIMU GATU (Suing as the
Personal Representative of the Estate of
Mary Macharia (Deceased)).....
.....APPELLANT**

VERSUS

**HERITAGE INSURANCE COMPANY.....
RESPONDENT
(Being an appeal from the Judgment and Decree of Hon. J. Ndeng'eri (SRM)
in Naivasha MCCC No. E1024 of 2022 delivered on 5th February, 2025)**

JUDGMENT

Background of the Appeal

1. By the plaint dated 24th November 2022, the appellant instituted suit against the respondent seeking, inter alia, a declaration that the respondent is bound to pay the decretal sum and any liabilities arising out of Naivasha CMCC No. 263 of 2020, together with judgment for the said sum, costs of the suit, and interest at court rates.
2. The appellant's case was that on or about 4th November 2019, the deceased was a passenger aboard motor vehicle registration number KCS 659A when, upon reaching cornerstone area along Naivasha-Mai

Mahiu Road, the driver of motor vehicle registration number KCF 440R/ZB 6510 so negligently operated the vehicle, causing it to collide with the vehicle in which the deceased was travelling thus occasioning to her fatal injuries.

3. The said vehicle, Reg No KCF 440R/ZB6510 had been insured by the respondent under policy No. P/No. 101978070232, which covered persons such as the deceased for injuries occasioned by the insured motor vehicle.
4. On 26th June 2020, the appellant filed a civil suit vide Naivasha CMCC No. 263 of 2020 against the owners of the two motor vehicles including the respondents insured. On 31st May 2021, judgment was delivered in favor of the appellant in the sum of Kshs. 3,447,750/-, interest on the principal of Kshs. 120,319/-, and costs of Kshs. 108,080/-.
5. The appellant further contended that the judgment and decree arose from liability covered under the said insurance policy and that, pursuant to section 10 of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405, Laws of Kenya, the respondent was bound to pay the total decretal amount of Kshs. 3,675,549/-.
6. In pursuit of that position, the appellant then filed Naivasha CMCC No. E1024 of 2022 and sought a declaration against the respondent for settlement of the decree against its insured. The claim was there having been the insurer of the offending motor vehicle, the

respondent was statutorily bound to settle the decree against its insured.

7. In a Statement of Defence dated 19th December 2022, the respondent denied liability arising from the accident. It admitted that motor vehicle registration number KCF 440R/ZB 6510 was registered in the name of one Nyangau Milka Mokeira, but averred that the insured had defaulted on the insurance premium financing facility obtained from NIC Bank. Consequently, the bank issued a policy cancellation letter dated 24th August 2019, requesting a refund of premiums under the insurance financing agreement due to the insured's default. The respondent further stated that the cancellation notice was to take effect on 30th September 2019 and that, had Nyangau Milka Mokeira regularized the insurance premium before that date, the policy would have remained in force. As the premiums remained unpaid, the respondent contended that the policy had been effectively cancelled and it was therefore not liable to indemnify the insured.
8. The matter was heard by viva voce evidence at which each party called one witness. In a reserved judgment, the trial court came to the rendition that the claim was unmerited for lack of a policy in force as at the date of the accident. The suit was thus dismissed with costs which then prompted this appeal.

9. Aggrieved by the trial court's decision, the appellant preferred the present appeal via a Memorandum of Appeal dated 10th February 2025, seeking orders that the judgment and decree in Naivasha CMCC No. 1024 of 2022 be set aside and that judgment be entered in his favor as prayed in the lower court's suit. The appellant further seeks costs of this appeal and the lower court proceedings.

10. The appeal is anchored on the following grounds: -

a) THAT the Honourable Learned Trial Court erred in law and in fact in dismissing the appellant's suit and awarding costs to the respondent against the appellant.

b) THAT the Honourable Learned Trial Court erred in law and in fact in failing to consider the appellant's evidence and submissions.

c) THAT the Honourable Learned Trial Court erred in its misappreciation and misapplication of the provisions of section 10(4) of the Insurance (Motor Vehicle Third Party Risks) Act Chapter 405 Laws of Kenya which obligated the respondent (insurer) to obtain a declaration within three months after commencement of the primary suit, to wit Naivasha CMCC No. 263 of 2020, to the effect that it was entitled to avoid its obligations vide policy number

101978070232 on the ground of its insured's default in paying premium financing instalments.

d) THAT the Honourable Learned Trial Court erred in its misappreciation and misapplication of the proviso of section 10(4) of the Insurance (Motor Vehicle Third Party Risks) Act Chapter 405 Laws of Kenya which obligated the respondent (insurer), after obtaining the declaration alluded to in paragraph 3 hereinabove to notify the appellant within fourteen (14) days after the commencement of the primary suit alluded to in paragraph 3 hereinabove.

e) THAT the Honourable Learned Trial Court erred in law and in fact by holding that the respondent was not liable to the appellant.

11. Even though it was directed that parties file and serve written submissions within set timelines and despite the fact that the respondent was served with notice to attend court and show cause why the appeal could proceed without its submissions, as at the time of writing this judgment, only the appellant had filed his submissions.

12. That however invites no undue advantage upon the appellant just as it visits no prejudice upon the respondent because the court is duty bound to proceed by way of a retrial and to reevaluate and

reassess the evidence on record afresh with a view to coming with own independent decision.

Appellant's Submissions

13. The appellant reiterated that he had been awarded Kshs. 3,447,750/- in Naivasha CMCC E263 of 2020 against the respondent's insured, Meshack Omari Okeago.
14. He submitted that Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405, Laws of Kenya, obliges an insurer to pay and compensate any third party injured as a result of the use of an insured motor vehicle. He further explained that the provision sets out a fourfold test for liability to arise, that is; (i) the motor vehicle in question must have been insured by the insurer; (ii) the plaintiff must have obtained a judgment against the insured; (iii) statutory notice must be issued to the insurer either at least 14 days prior to filing the suit in which judgment is sought or within 30 days where judgment has already been obtained; and (iv) the plaintiff must be a person covered under the insurance policy. In support, he cited the decisions in **Roseline Violet Akinyi v Celestine Opiyi Wangwau [2020] eKLR** and **Stephen Kiaries Chege v Insurance Regulatory Authority & Another [2009] eKLR**.
15. He then proceeded to identify four issues for determination by the court.

16. The first issue concerns whether there was a valid insurance policy at the time of the accident. On this point, the appellant submitted that the respondent issued the insured a comprehensive motor vehicle policy covering third party risks for motor vehicle registration number KCF 440R/ZB 6510, with policy certificates B9673667 and B9674160. He stated that the insured vehicle had been financed by NIC Bank, with a premium sum of Kshs. 528,969.80/- to be financed under an Insurance Premium Finance Agreement. The policy was to run from 30th May 2019 to 5th May 2020, both dates inclusive. The appellant argued that the respondent's contention that it was entitled to avoid the policy on grounds of non-payment of premiums was misplaced, as the law holds that non-payment of premiums does not automatically invalidate an insurance contract. He relied on the decision in **Insurance Company of East Africa v Marwa Distributors Limited [2015] eKLR** in support of this proposition.

17. The second issue concerns whether the respondent obtained a declaratory order within three months after commencement of the suit absolving it from the obligations to settle the decretal amount in Naivasha CMCC 263 of 2020 on grounds of policy cancellation. The appellant submitted that no such declaration had been obtained or produced by the respondent.

18. The third issue relates to whether the respondent, upon being served with the statutory notice of institution of suit dated 6th July 2020, informed the appellant of the policy cancellation or its intention to deny liability. The appellant argued that Section 12(1A) of the Act requires an insurer, upon being served with statutory notice, to admit or deny liability in writing, specifying the grounds for denial.

19. He submitted that the statutory notice dated 21st November 2019 for the primary suit was served on the respondent on 4th December 2019, and the notice of institution of the suit dated 6th July 2020 was likewise served on the respondent on 6th July 2020. Despite this, the respondent did not respond to the primary suit, but instead raised a defence in the declaratory suit purporting to void the policy

20. In support, the appellant relied on the decision in **Kenyan Alliance Insurance Company Limited v Naomi Wambui Ngira & Another [2021] eKLR**, where the Court held:

“32. This Court has analyzed the provisions of Section 10(4) of the Act. The section requires that an insured seeking to deny liability must obtain a declaration either before or not more than three (3) months following commencement of the primary suit. This is achieved by filing a declaratory suit. Such action is only valid if the insured, within fourteen (14) days of the filing of the

primary suit, gives notice to the plaintiff that it is not liable. Repudiation of liability is therefore two-fold: first, by giving notice to the plaintiff in the primary suit, and second, by filing a declaratory suit.”

21. The fourth and final issue concerns whether the respondent is liable to pay the decretal sum as awarded in the primary suit. On this, the appellant contended that he had demonstrated the following:

- I. Motor vehicle registration number KCF 440R/ZB 6510 was insured by the respondent;
- II. He had a valid judgment in his favour against the respondent's insured from Naivasha CMCC No. 263 of 2020;
- III. Statutory notice was served to the respondent either at least 14 days before filing the suit or within 30 days of the judgment;
- IV. The respondent did not obtain any declaratory order within three months from commencement of the primary suit to absolve itself from liability under the policy;
- V. No declaration was served upon the appellant despite multiple statutory notices over a period of three years and sixteen days; and

VI. The appellant was a person covered under the insurance policy.

Issues, Analysis, And Determination

22. The court has carefully considered the record of appeal and the submissions filed by the respondent. In its view, the singular issue falling for determination is whether a valid policy of insurance was in force in respect of motor vehicle registration numbers KCF 440R/ZB 6510 at the time of the accident which occurred on 4th November 2019.

23. It is not in dispute that the respondent issued a motor vehicle insurance policy covering third-party risks to the insured, Nyangau Milka Mokeira, under Policy Numbers B9673667 and B9674160. The policy period ran from 30th May 2019 to 5th May 2020. The respondent, however, contends that the policy was cancelled prior to the accident on account of non-payment of premiums under an insurance premium financing facility.

24. The starting point is the legal effect of non-payment of premiums. The position in law is settled. In **Mohansons (Kenya) Limited v Cannon Assurance (Kenya) Limited [2019] KEHC 627**, the court, at paragraph 34, stated as follows:

“In the case of Virani t/a Kisumu Beach Resort vs Pheonix of East Africa Assurance Company Ltd (Supra) the court of appeal in this regard held that;

“Ordinarily, a policy of insurance remains valid once issued and liability attaches despite non-payment of premiums, so that non-payment of a premium does not amount to a failure of consideration vitiating the contract of insurance. The only qualification to that general proposition of law is that the policy itself may provide that the failure to pay the premium would avoid liability for the insurer or the failure to pay the premium amounts in the circumstances to a repudiation of the contract. “

25. The principle emerging from the above authority is that non-payment of premium does not, of itself, automatically render a policy void unless the policy expressly so provides or the circumstances amount to repudiation.
26. The matter must further be considered within the framework of the Insurance (Motor Vehicle Third Party Risks) Act (hereinafter referred to as “the Act”). Section 10(1) thereof imposes a statutory duty upon an insurer to satisfy judgments obtained against persons insured in respect of liabilities required to be covered under Section 5(b), notwithstanding that the insurer may be entitled to avoid or cancel the policy.
27. Section 10(2) of the Act sets out specific circumstances under which an insurer may avoid liability. It stipulates that an insurer *avoids liability over a judgment against its insured where; before or*

within thirty days after the commencement of the proceedings in which the judgment was given, the insurer had been given a notice of the bringing of the proceedings; or where there is granted by the court an order of stay pending appeal or the policy was cancelled by mutual consent or by virtue of any provision contained therein, and either; 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 after the happening of the event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the 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 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.

28. The use of the disjunctive “or” in section 10(2) signifies that proof of any one of the stipulated circumstances may suffice to relieve an insurer of liability. This interpretation was restated in **Mua Insurance (Kenya) Limited v Kibira (Civil Case E003 of 2022) [2025] KEHC 5284 (KLR)**, where the court enumerated the

statutory instances under which an insurer may lawfully avoid liability.

29. In the present case, the respondent produced a letter dated 23rd September 2019 addressed to the insured, indicating that it had received a default notice from NIC Bank Limited under an Insurance Premium Financing (IPF) arrangement. The letter purported to issue a seven-day notice of cancellation, stating that the policy would stand cancelled with effect from 30th September 2019. The insured was required to surrender the original and duplicate certificates of insurance. The letter further indicated that the decision to cancel would be reversed if the IPF account was regularized prior to the effective date of cancellation. There was no evidence whether any development in the nature of payment or surrender occurred. The effect is that that notice by itself was not a cancellation unless the statutory thresholds were met.

30. The statutory requirements governing cancellation are set out under Section 10(2)(c) of the Insurance (Motor Vehicle Third Party Risks) Act. For cancellation to relieve an insurer of liability, it must be demonstrated that the policy was cancelled before the occurrence of the accident and that one of the following conditions was satisfied: either the certificate of insurance was surrendered (or a statutory declaration of loss made), or, within twenty-eight days of the taking effect of cancellation, the insurer notified both the Registrar of Motor

Vehicles and the Commissioner of Police in writing of the failure to surrender the certificate.

31. Although the respondent exhibited a letter dated 30th August 2019 addressed to the Registrar of Motor Vehicles purporting to surrender certificates in respect of several motor vehicles, including the subject motor vehicle, there is no evidence on record demonstrating that the cancellation notice was served upon the insured. Equally, there is no proof that the Commissioner of Police was notified as required by statute. The Act deliberately employs the conjunctive “and”, thereby making notification to both offices’ mandatory. Compliance with one limb only does not suffice.

32. Moreover, there is a material inconsistency in the respondent’s position. The cancellation notice to the insured indicated that cancellation would take effect on 30th September 2019. However, the letter to the Registrar of Motor Vehicles is dated 30th August 2019, a full month prior to the purported effective date of cancellation. Section 10(2)(c)(iii) contemplates notification to the Registrar and the Commissioner of Police within twenty-eight days *from the taking effect of the cancellation*. The statutory language presupposes an existing effective cancellation. A notification issued prior to the effective date of cancellation is, at best, premature and does not satisfy the statutory sequence envisaged by the Act.

33. In the absence of proof of proper service upon the insured, and in the absence of evidence demonstrating notification to both the Registrar of Motor Vehicles and the Commissioner of Police within the statutory framework, this court is unable to find that the respondent discharged the burden of proving lawful cancellation in compliance with Section 10(2) of the Act.
34. Further, Clause 10(b) of the Commercial Vehicle Insurance Policy provided that the insurer could cancel the policy by issuing fourteen (14) days' written notice to the insured's last known address. The policy does not provide that non-payment of premium automatically vitiates the policy. Under the premium finance clause, the insurer reserved the right to deduct outstanding financed sums from any claim settlement and remit the same to the financier. Notably, the policy does not expressly stipulate that non-payment of premium under a financing arrangement terminates cover automatically.
35. In light of the foregoing, this court finds that the respondent has not demonstrated compliance with the statutory requirements necessary to avoid liability under Section 10(2) of the Act. Consequently, a valid policy of insurance is deemed to have been in force at the time of the accident and with all its attendant obligations upon the respondent.

36. The respondent is therefore legally liable to satisfy the decretal sum arising from Naivasha CMCC No. E263 of 2020. For that finding, the decision of the trial court dismissing the suit is hereby set aside, and, in its place substituted a judgment declaring that the respondent is under a statutory duty to settle the decree in the primary suit.

37. However, pursuant to Section 5(b)(iv) of the Act, liability for death of one person under a third-party policy is capped at Kshs. 3,000,000/=. This position was affirmed by the Court of Appeal in **Kiruku v Kenya Orient Insurance Company Limited (Civil Appeal E189 of 2022) [2024] KECA 8 (KLR)**.

38. Therefore, even though the trial court awarded damages in the aggregate sum of Kshs. 3,675,549/=: the respondent's statutory obligation under a third-party policy cannot exceed Kshs. 3,000,000/=. It is by law limited and capped at 3,000,000. That is the maximum obligation the respondent shoulders in this matter.

39. Accordingly, the appeal succeeds. The respondent is declared to be liable to the appellant for the settlement of the decree issued in Naivasha CMCC No. 263 of 2020 in the sum of Kshs. 3,000,000/=. The appellant having succeeded shall have the costs of this appeal as well as the costs of the proceedings before the trial court.

=Dated, signed and delivered at Lodwar this 20th day of February 2026

Patrick J O Otieno

Judge

Original