Kiruku v Kenya Orient Insurance Company Limited (Civil Appeal E189 of 2022) [2024] KECA 8 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KECA 8 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E189 OF 2022

DK MUSINGA, HA OMONDI & GWN MACHARIA, JJA

JANUARY 25, 2024

BETWEEN

KENNEDY KAGAI KIRUKU .... APPELLANT

AND

KENYA ORIENT INSURANCE COMPANY LIMITED .... RESPONDENT

(Being an Appeal from the Judgment and Order of the High Court at Nairobi (Sergon, J.) delivered on 25th March 2022 in HCCA No. E344 of 2020)

JUDGMENT

1. The genesis of this appeal is a civil suit filed by the appellant in the Chief Magistrate's Court at Nairobi, CMCC No. 6727 of 2017 (Kennedy Kagai Kiruku vs. Vincent Molouche Bowen & Osman Hassan Bashir) ("the primary suit"), arising out of a road traffic accident. The trial court (A. M. Obura, SPM) entered judgment in his favour in the sum of Kshs.8,955,310/=. When the defendants did not satisfy the judgment, the appellant filed a declaratory suit before the Chief Magistrates' Court at Milimani Commercial Court against the respondent in Civil suit No. 6900 of 2019, by way of a plaint dated 16th September 2019. In the latter suit, he sought a declaratory order to the effect that the respondent was liable to pay the decretal amount together with costs and interests thereon.

2. The appellant pleaded in the plaint that the defendants in the primary suit, namely Vincent Molouche Bowen and Osman Hassan Bashir, were at all material times the driver and the registered owner respectively of motor vehicle registration number KBX 160V, and that the said motor vehicle was at all material times insured by the respondent, and thus, the respondent was liable to pay the decretal sum awarded in the primary suit. At the time of the accident, he was a passenger in motor vehicle registration number KBJ 263L, Toyota Fielder, which he claimed was hit by motor vehicle registration number KBZ 160V, and that as a result, he sustained a fracture of the right tibia and fibula, cuts and abrasions, and loss of 3cm of the right leg.

3. The respondent entered appearance and filed its statement of defence on 4th October, 2019, denying the claim, whilst averring that it was never served with the requisite Statutory Notice, and that it was liable to satisfy the judgment sum in the primary suit. The suit proceeded to trial with the appellant being the only witness.

4. Upon conclusion of the hearing, the trial court (G. Mmasi SPM), delivered its judgment on 29th May 2020 in favour of the appellant, granting the declaratory orders as sought. Aggrieved, the respondent filed a Notice of Motion dated 29th July 2020 and amended on 27th August 2020, whereupon it sought to have the judgment reviewed and substituted with a judgment in the sum of Kshs.3,000,000/=. The amended Notice of Motion was opposed by the appellant vide Grounds of Opposition dated 8th September 2020.

5. Upon hearing the parties on the amended application, the trial court vide a ruling delivered on 30th November, 2020 dismissed it with no order as to costs.

6. Being aggrieved by the said ruling, the respondent appealed to the High Court. In its Memorandum of Appeal dated 3rd December 2020 and amended on 29th June 2021, it raised the following grounds of appeal:

   a. That the learned trial magistrate erred both in law and fact in dismissing the amended application in whole and holding that there were no grounds that the respondent had demonstrated showing that there was an error on the face of the record and there were sufficient reasons to warrant a review.

   b. That the learned trial magistrate erred both in law and fact in failing to appreciate that the respondent's legal obligation as insurer was limited to the statutory and contractual indemnity limit of Kshs.3,000,000/ which amount it had already remitted to the appellant.

   c. That the learned trial magistrate erred both in law and fact in disregarding the written submissions as filed by it in support of the application for review.

   d. That the learned trial magistrate erred both in law and fact in holding that the respondent in its amended application was seeking to prosecute the suit again when it was seeking review based on legitimate grounds.

   e. That the learned trial magistrate erred both in law and fact in not appreciating the strength of the respondent's application.

7. The High Court (Sergon, J.) in its judgment held that the respondent approached the learned trial magistrate under the grounds of 'error apparent on the face of the record' and 'any other sufficient reason'; that the error being referenced was in relation to the provisions of section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act*, and when read together with section 5(b) thereof, expressed that liability of an insurance company was limited to a sum not exceeding Kshs.3,000,000/=; and that it was apparent that the policy document tendered by the respondent set the limit at Kshs.3,000,000/ =, which limit was supported by statute.

8. The court further found that the respondent's liability to the appellant was limited to the sum of Kshs.3,000,000/=, and that the respondent was correct in pointing out an error apparent on the face of the record since the learned trial magistrate ought to have taken the above factors into account.

   Further, that upon establishing that the insurance policy taken out with the respondent set the limit of claims at the sum of Kshs.3,000,000/=, it followed that the appellant was required to pursue payment of any additional sums from the insured and not the respondent; and that the respondent had since

satisfied the judgment to the extent of the sum of Kshs.3,000,000/=, and had therefore discharged its statutory obligations on liability. The court then allowed the appeal as follows:

i. The ruling delivered on 30th November, 2011 is hereby set aside and is substituted with an order allowing the Amended Notice of Motion dated 29th June, 2021, with no order on costs.

ii. The judgment award in the sum of Kshs.8,955,310/= or as the case may be, is hereby set aside and is substituted with an award in the sum of Kshs.3,000,000/= being the statutory and contractual sum payable by the respondent, and which sum has since been paid in full.

iii. The appellant was also entitled to costs of the declaratory suit.

iv. The appellant was at liberty to pursue the remaining balance of the judgment sum from Osman Hassan Bashir, being the person insured by the respondent at all material times and in respect to the motor vehicle registration number KBX 160V.

v. The parties to bear their respective costs on the appeal.

9. Aggrieved by the said judgment, the appellant filed the instant appeal, raising nine grounds in his Memorandum of Appeal dated 19th April 2022, which we have collapsed as follows: that the learned judge failed to appreciate the law as it relates to an application for review under section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules; that the learned judge erred in law in ignoring the well-established principle of stare decisis by failing to follow the legally binding judicial precedents cited by the appellant and departing from previous determinations made by him, and relating to cognate issues of law; and that the learned judge erred in entertaining, admitting and/or placing reliance on evidence of a contract between the respondent and its insured adduced post judgment without reason, notwithstanding the unequivocal denials of the existence of the said evidence in its primary pleadings, thereby reaching an erroneous conclusion in law.

He prayed that the appeal be allowed with costs, both in this Court and the High Court; that the judgment of the first appellate court be set aside, and status quo ante be restored; and that the decision of the trial court dismissing the respondent's application for review of the judgment therein be upheld.

10. When the matter came up for hearing, learned counsel Mr. Kahonge appeared for the appellant, but there was no appearance by the respondent's advocate, despite service of a hearing notice. Mr. Kahonge entirely relied on the appellant's written submissions dated 24th June 2022. The respondent too had filed submissions dated 14th November 2022.

11. The appellant submitted that the learned judge failed to determine the issues as framed by the parties, thereby misapprehending the basic facts of the case, and making a curious finding, being whether the respondent was legally liable to compensate the appellant beyond the so-called statutory limit; that the learned judge therefore mistook the appeal before him to be a substantive appeal against the judgement in the declaratory suit, as opposed to an appeal against the ruling dismissing the application seeking a review of the judgment; that the respondent's application for review was not premised on an error apparent on the face of the record, and the learned judge determined an appeal premised on a non-existent application; that the order that was being sought to be set aside was neither part of the record of appeal, nor extracted, thus rendering the entire appeal hollow, ineffectual and an exercise in futility, as there was nothing placed before the first appellate court on which the appeal could be determined.

12. The appellant further submitted that the judgment of the first appellate court purported to set aside the ruling of the trial court and not the order arising therefrom; and that there was a mistake by the first appellate court in allowing the insurance policy document between the respondent and its insured to be produced on appeal, yet it was not adduced before the trial court. Furthermore, the learned judge

ignored his submissions, more so to the effect that the so-called statutory limitation is not a barrier to any contracting parties desirous of imposing on themselves a higher compensation limit from doing so; and that therefore, the existence of such a contract outside the statutory ambit remains a question of fact, which of necessity must be pleaded. In buttressing this submission, he relied on the case of Justus Mutiga & others vs. Law Society of Kenya & another [2018] eKLR.

13. He further submitted that the issue of statutory limitation would have been a very potent ground in a substantive appeal, but not as a ground for an application of the discretionary remedy of review; that the error alluded to by the learned judge can never be said to go to the merits of the case, and that he had absolutely no basis to alter the substance of the decree, either on the amount payable, or in apportioning the pecuniary liability between the respondent and a third party.

14. The respondent submitted that vide a consent dated 6th August 2020, there was a change of advocates for the appellant, thus the current advocates on records for the appellant, M/s. Macharia Kahonge & Co Advocates, were improperly on record. On the substance of the appeal, it submitted that the first appellate court was fully guided by the law in arriving at its decision, and that it gave legal reasons for disturbing the trial court's ruling. It submitted that no injustice had been occasioned by findings of the first appellate court to warrant any interference by this Court. To the contrary, the learned judge properly re-evaluated the material and evidence placed before him, and tackled the appeal on the backdrop of the grounds of appeal set out; that in fairness, it ordered that the appellant was at liberty to pursue the remaining balance of the judgment sum from the respondent's insured, even if the issue had not specifically been appealed against so as to ensure that justice was served upon all parties; that the respondent having already fulfilled its contractual and statutory obligation, it cannot be held liable for any other sums above its contractual limit; and that in any case, there is no legal requirement that an appellate court cannot depart from its own decisions if circumstances and legal reasoning so permit. We were thus urged to dismiss the appeal with costs.

15. We have considered the record of appeal, the respective submissions and authorities, and the law. We also take cognizance of the fact that this is a second appeal, and thus our mandate as a second appellate court will be confined to matters of law only, unless it is shown that the courts below considered matters they ought to not have considered, or failed to consider matters they should have considered, or looking at the entire decision, it is perverse.

16. This was aptly stated in Kenya Breweries Limited vs. Godfrey Odoyo [2010] eKLR (Civil Appeal No. 127 of 2007) by Onyango Otieno, J.A. as follows:

> " In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."

17. We isolated the issue for determination to be whether the learned judge erred and misapprehended the law, more particularly as to whether he erred in finding that the liability of the respondent was limited to indemnifying the appellant to the tune of Kshs. 3,000,000 only.

18. To properly appreciate the issue before us, it is necessary to quote the relevant provisions of the law sought by parties to be interpreted. And in this regard, we shall be delving into whether the learned

judge properly applied them in his judgment. Section 5(b)(iv) of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405 of the Laws of Kenya provides that:

> 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 specified in the policy in respect of 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 road:
>
> Provided that a policy in terms of this Section shall not be required to cover-
>
> i) ....
>
> ii) ....
>
> iii) ....
>
> iv) liability of any sum in excess of three million shillings, arising out of a claim by one person.

19. Further, section 10(1) of the said Act also provides:

> 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. (emphasis ours)

20. Notably, the trial court in dismissing the application held that:

> “ the courts are at liberty to award damages over and above the limit of Kshs. 3,000,000 when circumstances demand. For those reasons the defendant’s application is disallowed, the same is dismissed in its entirety”

21. Flowing from the above cited provisions, it is clear that, while the trial court was correct in holding that a court is not limited to an award of Kshs.3,000,000/=, it erred in holding that the respondent was liable for the whole decretal sum. It is trite that court orders are not made in a vacuum, but they ought and should be anchored in law; and in this case, the law is the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405. It has clearly limited an insurer's liability to the insured to Kshs.3,000,000/=. We underscore the fact that this piece of law is not ambiguous. It is stated in very clear and simple language that its interpretation does not require rocket science. It is trite then that a court is conferred with the discretion to award any amount of compensation, even way beyond Ksh.3,000,000/=. However, the amount beyond Ksh. 3,000,000/= should be recovered from the insured and not the insurance company.

22. Indeed, the constitutionality of these provisions was challenged and decided on by this Court, differently constituted, in Justus Mutiga & 2 others vs. Law Society of Kenya & another [2018] eKLR where at paragraph 30, the Court had this to say:

> " 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. (emphasis ours)
>
> To that extent, this would not amount to usurpation of the court's judicial independence, authority and discretion."

23. Further, it is also trite that a court does not give orders in vain. It is a waste of judicial time to give orders incapable of execution, or orders that would hinder a successful litigant from enjoying the fruits of his or her judgment.

24. The superior court in its determination held as follows:

> " From my study of the pleadings and material which was placed before the trial court, I note that the error being referenced by the appellant was in relation to the provisions of Section 10 of the Act which I have cited hereinabove and which when read together with Section 5(b), expressing that liability of an insurance company is limited to a sum not exceeding Kshs.3,000,000/=.
>
> Upon my re-examination of the evidence, I observed that the appellant tendered a copy of the policy document which shows that in respect to the limits of liability arising out of the death or bodily injury to any person; as was the case here; the same is indicated as being Kshs.3,000,000/=. It is therefore apparent that the policy document in question set the limit at Kshs.3,000,000/= which limit is now supported by statute as seen above.
>
> In view of the foregoing, I find that the appellant's liability to the respondent was limited to the sum of Kshs.3,000,000/=."

25. We cannot then belabor to conclude that the learned judge did not err in holding that the respondent could only cushion and pay a maximum compensation of Kshs. 3,000,000/=. It is not in dispute that the respondent vide cheques Nos. 160567, 160868, 160869 and 160870 paid to the appellant sums totaling to Kshs. 3,000,000/-. Consequently, it has met its statutory obligations, and it bears

no additional obligation towards the appellant. As correctly ordered by the first appellate court, the appellant is at liberty to pursue the remaining balance of the decretal amount from the defendants in Civil Case No. 6727 of 2017.

26. Finally, we wish to comment on an issue that was raised by the respondent's counsel in its submissions. This was that the appellant's counsel was not properly on record. To us, this issue was raised too late in the day, in the submissions, when the appellant's counsel could not respond. In any event, even if we had expunged the appellant's document on record, the outcome of the appeal would have remained the same, as the determination is premised purely on law.

27. In conclusion, we find no merit in this appeal. The same is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY 2024.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

H. A. OMONDI

....

JUDGE OF APPEAL

G.W. NGENYE- MACHARIA

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

SIGNED

DEPUTY REGISTRAR