



Campon (Suing as the Holder of the Power of Attorney for Bautista Buendia Valentin and Maria Doloves Martinez as Administrator of the Estate of the Late Esther Buendia Martinez) v Lion of Kenya Insurance Co Ltd & another (Civil Suit 76 of 2018) [2025] KEHC 8515 (KLR) (23 January 2025) (Judgment)

Neutral citation: [2025] KEHC 8515 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 76 OF 2018
JK NG'ARNG'AR, J
JANUARY 23, 2025**

BETWEEN

ALEJANDRO CAMPON PLAINTIFF

AND

LION OF KENYA INSURANCE CO LTD 1ST DEFENDANT

ICEA LION GENERAL INSURANCE KENYA CO LTD 2ND DEFENDANT

JUDGMENT

1. The Plaintiff vide a Complaint dated 17th September 2018 and filed on 18th September 2018 sought for judgment against the Defendants jointly and severally for award for general damages and costs in Kshs. 860,000 with interest at court rates from 31st May 2016, award for special damages in Kshs. 645,978 with interest at court rates from 17th August 2011, award in Euros – Euros 180,960 with interest applicable at court rates from 31st May 2016 (On 17th September 2018, the exchange rate of Kshs. to the Euro was Kshs. 117.8197 to the Euro making this Kshs. 21,320,652.913), and costs.
2. The Plaintiff pleaded in the Complaint that by policy number TPO/181/206XXX003 issued by the 1st Defendant to Mash Bus Services Limited in consideration of premium then paid to the Defendant by Mash Bus Services alia all sums which Mash Bus Services would become legally liable to pay in respect to of any claim by any person including passengers, pedestrians, other third parties caused by or arising out of the use of motor vehicle registration number KAX 627T owned by Mash Bus Services Limited and in addition thereto legal fees payable in connection with the suit claim.
3. The Plaintiff further pleaded in the Complaint that on or about 2nd September 2008, while the deceased was a lawful passenger at Taita village along Nairobi-Mombasa Road when motor vehicle registration number KAX 627T, owned by Mash Bus Services was driven by his authorized driver, servant and/



or agent Swaleh Brok Islam who negligently drove, managed and/or controlled the said motor vehicle that it lost control and collided with a Nissan semi-trailer registration number KBA 449Q. That as a consequence of the said negligent driving by the Defendant's insured driver, servant, agent and/or employee, the deceased sustained fatal injuries and the Plaintiff suffered loss and damages.

4. It was pleaded by the Plaintiff that at the time of the accident, the 1st Defendant herein had issued the aforesaid Third Party Insurance Policy under the Insurance (Motor Vehicle Third Party Risks) Act to Mash Bus Services Limited for motor vehicle registration number KAX 627T and the policy was in operation. The Plaintiff that on 16th August 2011, the Plaintiff instituted an action, *Alejandro Campon* (Suing as the holder of the power of attorney for *Bautista Buendia Valentin* and *Maria Doloves Martinez* as administrator of the estate of the late *Esther Buendia Martinez*) *v Swaleh Brok Islam & Another*, *HCCC No. 248 of 2011* for general damages and special damages in respect of the injuries and consequential loss and damage.
5. The Plaintiff averred that in a judgment dated and signed on 31st May 2016, Justice P.J. Otieno entered judgment against the Defendant's insured wherein the Defendant insured was held liable for the accident and a sum of Kshs. 860,000 was awarded on general damages costs with interest applicable at court rates from 31st May 2016, special damages at Kshs. 645,978 with interest applicable at court rates from 17th August 2011 and Euros 180,960 was awarded with interest applicable at court rates from 31st May 2016.
6. The Defendants entered appearance upon service of the summons and filed its Statement of Defence dated 8th October 2018 where they denied the allegation in the Plaint save that they entered into an insurance agreement with Mash Bus Services Limited on 22nd May 2007 for the insurance of motor vehicle registration number KAX 627T for a period of one year which period lapsed on 10th April 2018. That the said contractual relationship was governed by terms of the policy document and the relevant provisions of the Finance Act 2006 and that the Plaintiff is estopped from averring otherwise. The Defendants stated that the sum was statutorily limited to the sum of Kshs. 3,000,000 pursuant to the provisions of Section 33 of the Finance Act 2006 read together with Section 5 (b) (iv) of the Insurance (Motor Vehicle Third Party Risks) Act.
7. The Defendants further stated that pursuant to provisions of the policy, the relevant statutes and in good faith, they fully discharged their obligation and made the payment of Kshs. 3,000,000 as final payment of the Plaintiff's claim vide cheque numbers 07XX67 - Kshs. 850,000, 075968 - Kshs. 800,000, 075969 - Kshs. 450,000, and 075970 - Kshs. 900,000. They maintained that they fulfilled their obligation in law and complied with statutory provisions. That the suit offends public policy and moves beyond the claim for restitution as the Plaintiff is embarking on unjust enrichment.
8. At the hearing, the Plaintiff and Defendant testified to support their case. Their witness statements and bundle of documents filed in court were adopted as evidence of the court. The witnesses were also cross examined. At the close of the hearing, the court gave directions for parties to file and serve their submissions.
9. The Plaintiff filed submissions dated 2nd October 2024 and argued that Kshs. 3,000,000 was paid by the Defendants after the suit was filed. That the Defendants became liable to pay on 16th May 2016 when judgment in the primary suit was entered. That the Defendants therefore delayed in paying their portion of the claim for 29 months and the Plaintiff is entitled to interest for the said months at 12% p.a. The Plaintiff maintained that the Defendants having been the offending parties that failed to pay up occasioning interest and filing of the declaratory suit herein after issuance of the demand cannot be protected from its own mischief of non-payment or use it on a defence. The Plaintiff relied on the holding in the case of *Mutete Ndonge v Muli Munyao & 4 Others* (2012) eKLR and *Sabina*



Nyanokwe Gatimwa & 5 Others v Moraa Wambura Gatimwa (2011) eKLR. The Plaintiff stated that the Defendants have come to court with dirty hands and cannot benefit from the court's discretion on issues of costs and interest.

10. The Plaintiff further cited the case of Peter Gichihi Njuguna v Jubilee Insurance Co. Limited, HCCC No. 57 of 2013 where the court held that the insurance company will be liable for the accrued interest from the date of the judgment in the primary suit until it pays up and also for costs of the declaratory suit even if the interest and costs amount to over Kshs. 3,000,000. That judgment should therefore be entered for the Plaintiff for Kshs. 3,000,000 plus interest at the rate of 12% p.a. from 16th May 2016 when judgment in the primary suit was entered to 28th September 2018 when Kshs. 3,000,000 was paid.
11. The Defendants in their submissions dated 22nd October 2024 contended that under Section 5(b)(iv) of the Insurance (Motor Vehicle Third Party Risks) Act, the insurer is only liable to pay a maximum of Kshs. 3,000,000 per claim. The Defendants also cited of the Act and relied on the holding in the case of Kenya Orient Insurance Co. Limited v Kennedy Kagai Kiruku (2022) eKLR where the court held that the Respondent in the case was required to pursue any additional sums from the insured and not the Appellant. The Defendants submitted that from the pleadings by the parties and subsequent testimony in court, it is not in dispute that the Defendants have already paid the Plaintiff the sum of Kshs. 3,000,000.
12. I have considered the pleadings, evidence adduced by the parties, and submissions. The issue for determination in this case is whether beside paying Kshs. 3,000,000 the Defendant are liable to pay costs and interest from 16th May 2016 when judgment in the primary suit was entered to 28th September 2018 when the amount was paid up.
13. The suit herein is a declaratory suit requiring an insurer to settle the decretal amount pursuant to Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act which provides: -

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.

14. On the issue of payment of interest and costs beside the Kshs. 3,000,000 payable, this court relied on the holding in the case of Directline Assurance Company Limited v Mganga (Legal representative of the Estate of Simon Chilango Kiwila (Deceased) & Another (Civil Appeal 5 of 2022) [2023] KEHC 27005 (KLR) (21 November 2023) (Judgment) which held as follows: -

“The limit of three million in general damages is not contestable. It is a statutory limit. The question arises, where a court awards amounts less than Ksh. 3,000,000/= and the Insurer is either bogus or takes its sweet time to pay. Does it pay the same Ksh 3,000,000/= years later?

The example I have in mind is the authority referred to above where damage for 14 million was awarded. The insurer is to pay 3,000,000/= and the insured 11 million. If both parties



delay and interest increases, does the interest also shift to the insured? If a court awards 3,010,000/=. The insured decides to pay 10,000/= leaving the insurance with 3,000,000/=. Ten years later interest will have gone to 7,200,000/=. Will the insurer require the insured to foot the difference of 4,200,000? This cannot be the legislative intent.

In this case, the award by the court was far less than 3,000,000/=. The insurance took its sweet time. The amount exceeded three million. It cannot throw the buck to the insured. This will both be unfair to the insured and the other insurance companies with sound practice of paying their fair share of damages.

In this respect they state that order 2 rule 15 provides for striking out cases such as the Appellant's pleading. Their main issue is that they were being asked to cover liability exceeding Ksh. 3 million. This was answered will not what was being asked of them they were required to cover liability Kshs. 2,687,765/=. They did not do so. The same has resulted in several suits for enforcement together with the attendant costs interests and special damages.

Instead of paying they started running all over the courts to stay the decree. The said amount has attracted interest. Interest is not liability arising out of the Accident. It is interest on the amounts due. I do not find a clam that Kshs. 3,4446,995 is beyond the statutory period. The appellant is being dishonest and disingenuous. In the case of George Wangarai Mwangi v David Mwangi Muteti [CA 540 of 2013](#), the court was clear out of 14,612,540. 20 awarded on 3,000,000 was payable.

The amount awardable under the decree is increased by two aspects: -

- a. Costs of the suit
- b. Interest on unpaid amounts”

15. In consideration of the above, I find that beside paying Kshs. 3,000,000 the Defendant are liable to pay costs and interest from 16th May 2016 when judgment in the primary suit was entered to 28th September 2018 when the amount was paid up. While costs are awarded for the amounts incurred for litigation in accordance with Section 27 of the [Civil Procedure Act](#), interest is the cost of delaying in making payments as provided for under Section 26 of the [Civil Procedure Act](#).
16. Accordingly, I enter judgment in favour of the the Plaintiff for Kshs. 3,000,000 plus interest at the rate of 12% p.a. from 16th May 2016 when judgment in the primary suit was entered to 28th September 2018 when Kshs. 3,000,000 was paid up.

DELIVERED VIRTUALLY VIA CTS AT MOMBASA THIS 23RD DAY OF JANUARY, 2025.

.....

J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

..... Advocate for the Plaintiff

..... Advocate for the Defendants

Court Assistant – Shitemi

J.K. NG'ARNG'AR, J.

