



**Gakuru & another (Suing as the representatives of the Estate of the Late Francis Ritho Mugo) v Corporate Insurance Co Limited (Civil Case 408 of 2014) [2024] KEHC 6353 (KLR) (Civ) (31 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6353 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL CASE 408 OF 2014**

**AN ONGERI, J**

**MAY 31, 2024**

**BETWEEN**

**GRACE NJOKI GAKURU & PRISCILLA WANGUI RITHO (SUING AS THE REPRESENTATIVES OF THE ESTATE OF THE LATE FRANCIS RITHO MUGO) ..... PLAINTIFF**

**AND**

**CORPORATE INSURANCE CO LIMITED ..... DEFENDANT**

**JUDGMENT**

1. The plaintiffs in this case Grace Njoki Gakuru and Priscillah Wangui Titho (hereafter referred to as the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs respectively) filed this declaratory suit in their capacity as personal representatives of the estate of Francis Ritho Mugo (deceased) against Corporate Insurance Company Limited (hereafter referred to as the defendant only).
2. The plaintiffs are seeking the following orders against the defendants;
  - i. A declaration under Section 10Y (2) of the Motor Vehicle Third Party Risks Act, Cap 405 that the defendant is liable to pay the plaintiff judgment decreed in HCCC No. 434 of 2011.
  - ii. An order compelling the defendant to produce signed insurance policy document in respect of CO1/070/1/908010/1010.
  - iii. Cost of this suit.
  - iv. Interest on (i) and (ii) above at court rates.
  - v. Any other or further relief as this honorable court may deem fit and roper to grant.



3. The plaintiffs aver in their plaint dated 10/11/2014 filed in court on 21/11/2014 as follows;  
At all material times to this suit Motor vehicle registration no. KAP 406S belonging to Joseph N. Wanjiku, the defendant in the primary suit HCCC No. 434 of 2011, was insured by the defendant, the Corporate Insurance Company Ltd vide policy number COT/070/1/908010/1010 to cover Third Party Risks as contemplated by the Insurance (Motor Vehicle Thirty risks) Act Cap 405.
4. On or about 16<sup>th</sup> day of December 2010, Francis Ritho Mugo (deceased) was lawfully walking along the Jogoo road when by reason of negligence, carelessness and/or recklessness on the part of the defendant insured, its servant, employee, agent and or driver namely David Mburu in driving, managing and/or controlling motor vehicle registration number KAP 406S he permitted it to knock down the deceased thus occasioning fatal injuries to the deceased.
5. The plaintiffs aver that being the personal representatives of the estate of the deceased (Grace Njoki Gakuru & Priscillah Wangui Ritho) instituted legal proceedings against Joseph N. Wanjiku the registered owner of the afore-mentioned motor vehicle in HCCC No. 434 of 2011, the said motor vehicle at the material time of the accident was insured by the defendant in this suit.
6. The plaintiffs aver that when the suit came up for hearing on the 19<sup>th</sup> day of November 2013 when it was heard to conclusion.
7. The plaintiffs aver that judgment was properly entered in court in favour of the plaintiff to the tune of ksh.9,336,500/= together with costs.
8. Despite demand being made and notice of intention to sue being given the defendants have failed, refused and/or neglected to pay the said sum or any part thereof to the plaintiffs.
9. The defendant filed a defense to the plaintiffs' claim dated 26/1/2015 and also raised a counterclaim in the amended defense and counter/claim dated 11/8/2015 in which it denied the plaintiffs' claim and stating that it did not have privity of contract with the defendant in the primary suit since the motor vehicle had been sold to one David Mburu Matiru at the time of the accident.
10. The hearing of this case proceeded exparte on 16/1/2024, the defendant having been served with the hearing notice but having failed to appear in court for the hearing. The defendant's counter claim was dismissed for none attendance by the defendant.
11. The plaintiffs called one witness (PW 1) Grace Njoki Gakuru who said that she is the widow of the deceased, Francis Ritho Mugo (deceased).
12. PW 1 said she filed this suit together with her daughter Priscilla Wangui Ritho. PW 1 adopted her witness statement dated 10/11/2014 as her evidence in chief.
13. PW 1 stated in the said that her late husband was involved in an accident on 16/12/201 along Jogoo Road.
14. She subsequently filed the primary suit for compensation being HCCC no. 434 of 2011 for the wrongful death of her husband as his personal representative.
15. The primary suit proceeded exparte and she was awarded 9,366,500 as general and special damages. PW 1 said that the defendant was notified of the judgment on 25/2/2014 and she filed this declaratory suit.
16. The plaintiff filed written submissions and asserted that it was not in doubt that the Defendant had insured the suit Motor vehicle as it had not denied issuing the Policy in the Primary suit.



17. The Plaintiff's further submitted that the Defendant was aware of both the primary suit and the current one, as adequate notice of the suit has been served on the Defendant in compliance with Section 10 of Cap 405. The Defendant had in fact acknowledged receipt by placing its official stamp on the Plaintiff's notice.
18. The Plaintiffs asserted that the question of whether they had been issued by this honourable court with a decree of Kshs. 9,366,500 against the Defendant was well settled, and it was mandatory for the Defendant to settle the amount. They relied on the finding in the case of Thomas Muoka Muthoka v Another v Insurance Company of East Africa Limited where the court stated that:

“the insurer is under mandatory statutory liability to first pay the full judgement sum to the person entitled to the benefit of the judgement (the injured or the estate of the deceased).
19. The Plaintiffs submitted that once they obtained judgement against the Defendant, as contemplated by Section 10 of Cap 405, it was liable to pay.
20. It is the duty of the plaintiffs to prove their case to the required standard in civil cases which is on a balance of probabilities.
21. The issues for determination in this suit are as follows;
  - i. Whether the motor vehicle registration no. KAP 406S in the primary suit was insured by the defendant.
  - ii. Whether the defendant was served with the statutory notice under Section 10 of Cap 405.
  - iii. Whether the plaintiffs are entitled to the declaratory orders they are seeking against the defendant.
22. On the issue as to whether the motor vehicle registration no. KAP 406S was insured by the defendant there is evidence that the motor vehicle was insured by the defendant as indicated in the police abstract. in the case of Ogada Odongo – VS – Phoenix of East Africa Insurance (Kisumu Hccc No.132 of 2003 where it was held -:

“By an insurer issuing a policy of insurance, it automatically assumes the rights of third parties. It simply means, the right/obligation of the insured automatically transferred to the insurer unless it proved otherwise. By covering third party rights, the insurance was in essence performing a statutory duty imposed by an Act of Parliament”.
23. The Defendant herein had an opportunity, in the primary suit, to prove that it was not the insurer of the suit Motor vehicle at the time of the accident, yet it did not challenge that evidence. The insurance policy is thus uncontroverted evidence that the Defendant was the insurer, and as such, it automatically took over the liability of the insured over third parties.
24. There is also evidence that the defendant was served with the mandamus statutory notice under Section 10 of Cap 405 which states as follows.
  - (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.

- (1A) The Cabinet Secretary may, in consultation with the Director of Medical Services and the Insurance Regulatory Authority, prescribe compensation for other categories of disablement not provided for in the Schedule.
- (1B) The percentage of the sum specified in section 5(b) and prescribed in the Schedule under this Act shall include but not limited to the medical expenses on the judgment or claim.
- (2) No sum shall be payable by an insurer under the foregoing provisions of this section—
  - (a) in respect of any judgment, unless before or within thirty days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings; or
  - (b) in respect of any judgment, so long as execution thereon is stayed pending an appeal; or
  - (c) in connection with any liability if, before the happening of the event which was the cause of the death or bodily injury giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provision contained therein, and either—
    - (i) 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
    - (ii) 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
    - (iii) 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.
- (3) It shall be the duty of a person who makes a statutory declaration, as provided in subparagraphs (i) and (ii) of paragraph (c) of subsection (2), to cause such statutory declaration to be duly served upon the insurer together with a disclosure under oath of all the documents intended to be used to prove the claim whether in or out of court.
- (3A) No judgment or claim shall be payable by an insurer unless the claimant had, before determination of liability at the request of the insurer, subjected themselves to medical examination by a certified medical practitioner.
- (3B) An insurer shall have a right to obtain or verify information from the institution which issued the documents intended to be used to prove the claim and this right shall be enforceable before judgment is passed.

Provided that such verification shall be done within a month.



- (4) No sum shall be payable by an insurer under the foregoing provisions of this section if in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto.

- (4A) Notwithstanding any other provision under this Act or any other written law, any person who willfully presents false or inaccurate information to the insurer or any court of competent jurisdiction with the intention of benefitting under this Act through—
- (a) falsification and alteration of treatment documents and records;
  - (b) exaggeration of injuries or degree of incapacitation;
  - (c) falsification and alteration of police documents and records;
  - (d) falsification and alteration of identification documents and records, commits an offence and upon conviction, in addition to the applicable penalty, the claim or judgment the subject matter of the false or inaccurate information shall not be payable by the insurer.
- (5) Deleted by Act No. 8 of 2009, s. 41.
- (6) In this section, "material" means of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk, and, if so, at what premium and on what conditions; and "liability covered by the terms of the policy" means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel, or has avoided or cancelled, the policy.
- (7) In this Act, references to a certificate of insurance in any provision relating to the surrender or the loss or destruction of a certificate of insurance shall, in relation to policies under which more than one certificate is issued, be construed as references to all the certificates, and shall, where any copy has been issued of any certificate, be construed as including a reference to that copy.

25. In the case of *Bem Kariuki In Shadrack Amakobe Tacher vs United Insurance Co. Ltd* (2005)eKLR it was held:-

“At the time of the institution of the suit, the plaintiff had given the defendant notice dated 8/8/1997. As it valid and in conformity with section 10(2) of the Insurance Act. The act requires the insurer to have had notice of the institution of the suit. Section 10 (2) focuses



on receipts of the notice by the insurer. It requires the notice to have been received by the insurer”

26. The Court in the matter of *UAP Insurance Co. Ltd v Patrick Charo Chiro* [2021] eKLR applied Section 10 of *Cap 405* as follows:

“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. 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. . . I find that the test under section 10(2)(a) of the Insurance (Motor Vehicle Third Party Risks) Act CAP 405 has been met and the respondent’s claims is not defeated by want of the statutory notice since the appellant was sufficiently notified of the existence of the two suits. The appellant wants to suggest that the letters sent to it by the respondent do not amount to a statutory notice. . . By and large, the most important factor is whether an underwriter has been notified pursuant to the provisions of section 10(2)(a) of the Insurance (Motor Vehicle Third Party Risks) Act. . . I am satisfied that the Appellant was duly notified and should now settle the sums due to the respondent.”

27. I find that the plaintiffs have met the four-prong test as stipulated in *UAP Insurance Co. Ltd v Patrick Charo Chiro* [2021] eKLR and are entitled to the declaratory orders.
28. A declaratory order be and is hereby issued that the defendant is liable to settle the judgment in HCCC NO. 434 of 2011 (the primary suit)
29. The defendant to pay the costs of this suit and interest from the date of the judgment in the primary suit until payment in full.

Orders to issue accordingly.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 31<sup>ST</sup> DAY OF MAY, 2024.**

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**A. N. ONGERI**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant

