



REPUBLIC OF KENYA



**Kithuku v APA Insurance Limited (Civil Appeal E369 of 2021)
[2024] KEHC 8449 (KLR) (Civ) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8449 (KLR)

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

CIVIL

CIVIL APPEAL E369 OF 2021

JN NJAGI, J

JUNE 27, 2024

BETWEEN

JOSEPH NGUI KITHUKU APPELLANT

AND

APA INSURANCE LIMITED RESPONDENT

(Being an appeal from the judgment and decree of Hon L.L.Gicheha, Chief Magistrate, in Milimani CMCC No. 7744 of 2016 delivered on 28/5/2021)

JUDGMENT

1. The appellant brought suit against the respondent seeking for a declaration that the respondent was bound to honour a decree sum and any liabilities arising out of Nairobi CMCC No 2148/2014 in the sum of Kshs 3,829, 496.60.
2. The respondent filed a defence stating that it was only liable to pay the statutory maximum of Kshs 3,000,000/= as provided under Section 5 (b) (iv) of the Insurance Act.
3. The suit proceeded to full trial and the trial court entered judgment in favour of the appellant and declared that the respondent was only liable to pay the statutory maximum of Kshs 3,000,000/= and the balance ought to be recovered from the insured. The appellant was aggrieved by the determination and filed this appeal.
4. The grounds of appeal are that:
 1. The learned trial magistrate erred in law and fact in evaluation of the pleadings and evidence before her and in reaching a wrong conclusion.



2. The learned trial magistrate erred in law and in fact in and/or failure of assessment of the pleadings, evidence and submissions presented before her by the Appellant.
 3. The learned trial magistrate erred in law and fact in her interpretation of Section 5(b) and Section 10 of Cap 405 Laws of Kenya and thereby arriving at a wrong conclusion on costs and interest.
 4. The learned trial magistrate erred in law and in fact in failing to appreciate that costs of the suit follow the events as between parties before her.
 5. The learned trial magistrate erred in law and fact in failing to appreciate that the Respondent's refusal and failure to honour its Statutory obligations under Section 10 of Cap 405 Laws of Kenya, resulted in accrued interest on the statutory limit of Kenya Shillings Three Million (Kshs 3,000,000/=) of the sum awarded by the courts in Milimani CMCC No 2148 of 2014 in any event.
 6. The trial magistrate erred in fact and in law in not differentiating the award in the original suit vide Milimani CMCC No 2148 of 2014 and the prayers in the subject declaratory suit Milimani CMCC 7744 of 2016 in terms of costs and interest.
 7. The learned trial magistrate erred in law and fact in not appreciating that the insured was not a party to the proceedings before her.
 8. The learned trial magistrate erred in law and fact in failing to appreciate that parties are bound by their pleadings in any event.
5. The appeal was disposed of by written submission.

Appellants Submissions

6. The appellant submitted that under Section 10(1) & (2) of the *Insurance (Motor Vehicle Third Party Risks) Act*, the respondent is statutorily bound to pay the persons entitled to benefit of the judgment, any sum payable without any such third party having to move the court through a declaratory suit.
7. It was submitted that any sums accruing over and above the statutory capping of Kshs 3,000,000/= post judgment and as a result of the insurance failing to meet its obligation ought to be borne by the insurance. The appellant in this respect relied on the case of *Peter Gichibi Njuguna v Jubilee Insurance Co. Ltd* (2016) eKLR where the defendant had declined to pay interest over and above the statutory maximum of Kshs 3,000,000/= and the court held that:

The defendant shall pay interest at court rates on the said sum of Kshs 3,000,000/= from the 20th March 2013 when judgment was delivered in Nakuru HCCC No 405 of 2013.

8. The appellant also relied on the holding in the case of *Benard Mutisya Wambua v Kenya Orient Insurance Co.* (2020) eKLR where the court in similar circumstances as in this case ordered the defendant to pay interest from the date of judgment.
9. The appellant submitted that accrued interests' post-judgment is outside the statutory limit set under Section 5 (b) (2) of the *Insurance Act*. Additionally, that had the insurance company paid Kshs 3,000,000/= as of 10th November 2015 being the date of judgment of the substantive suit at the lower court, there could be no declaratory suit filed. That it is the respondent who had caused the declaratory suit to be filed by refusing to honour its statutory obligation.



10. On costs, it was submitted that the suit before the trial court was against the defendant and it is trite that costs must follow an event, hence should be against the respondent and its insured. Counsel for the appellant referred the Court to the authority in *Kiamuko & another (suing as the Administrators of the estate of the late Evans Kyallo Maundu-deceased v ICEA Lion General Insurance* (2018) eKLR where the court in similar circumstances ordered the defendant to pay costs and interest.
11. It was further submitted that the trial court erred by holding that such interest be paid by a party who was not a party to the suit.

Respondent's Submissions

12. In reply, the respondent submitted that they had forwarded payment cheques to the appellant's advocates on 28th May 2021. It submitted that the appellant's conduct of accepting payment of the trial court decree knowingly very well that it had appealed was unacceptable. Therefore that this appeal is compromised under the doctrine of approbation and reprobation.
13. Counsel submitted that the appellant has not established a case for ordering payment of interest on the award. The respondent urged that it had expeditiously settled the judgment sum on 30th June 2021 within a month of the judgment. Any interest accruing thereafter post-judgment would have been negligible. Counsel placed reliance on Section 10(1) of the *Insurance (Motor Vehicles Third Party Risks) Act*.
14. Counsel urged that the maximum recoverable from an insurance company under Section 10 of the Act is Kshs 3,000,000/=. He submitted that although the trial court awarded interest on damages, that interest is therefore part and parcel of the decree sum for which the insurer's liability is capped at Kshs 3,000,000/=.
15. The appellant submitted that the constitutionality of Section 5(b) of the *Insurance Act* limiting an insurer's liability at Kshs 3 million was upheld by the Court of Appeal in *Justus Mutiga & others v Law Society of Kenya & Attorney General* where the court held that the said section was not unconstitutional.
16. It was submitted that interest and costs comprise part of the primary suit award. That awarding additional interest on the 3 million from the date of filing declaratory suit as sought by the appellant would be contrary to the express provisions of Section 5 of Cap 405 and the Court of Appeal's finding.
17. The respondent distinguished the holdings in *Peter Gichibi* and *Bernard Mutisya Wambua* cases (*supra*) where the judges awarded interest on the statutory cap of 3 million from the respective dates of the primary suit judgments in that the judges in those cases do not appear to have considered the Court of Appeal finding in *Justus Mutiga* case.
18. The respondent referred this court to the cases of *Patricia Mona Anthony & others v Africa Merchant Assurance Co. Ltd* (2019) eKLR, *Gateway Insurance Co. Ltd v Jamila Suleiman & another* (2018) eKLR and *Kenya Orient Insurance Co. Ltd* (2020) eKLR where the courts held that the maximum recoverable from an insurer is Kshs 3 million which is inclusive of costs of the primary suit and awarded interest thereon.
19. It was submitted that awarding interest from the date of judgment would defeat the purpose of fixing a statutory limit. The respondent urged this Court to dismiss the appeal and uphold the decision of the trial court.



Analysis and Determination

20. I have considered the grounds of appeal as well as the submissions by counsels appearing for the parties and the authorities filed in the matter. Being a first appeal, this court's duty is to analyze and re-assess the evidence on record and reach its own independent conclusions as was held in the case of *Selle v Associated Motor Boat Co.* [1968] EA 123.
21. The subject matter of the suit herein is a declaratory suit, brought under the provisions of the *Insurance (Motor Vehicles Third Party Risks) Act*, seeking to have the Defendant, an insurance company settle interest and costs.
22. Section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act* provides for the duty of an insurer to settle a decretal amount as follows:-
 10. Duty of insurer to satisfy judgments against persons insured

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.
23. Upon entry of judgment in such accident claims where the Defendant was insured, the above provisions require the insurer to settle the decretal amount as awarded and following the provisions of the Act. It is however not always the case that the insurers willingly settle the claim and this necessitates the filing of a declaratory suit to compel the insurer to settle the decree.
24. It is not in dispute that the appellant herein obtained judgment against the respondent's insured Milimani CMCC No 2148 of 2014 in the sum of Kshs 3,159,080/= plus costs and interest. I have noted from the court record that after the delivery of the judgment on 9th November 2015, the advocate for the appellant wrote a letter to the respondent dated 11th November 2015 demanding payment of the principal sum of Kshs 3,159,080/=, accrued interest, costs once assessed and accrued interest thereof. The respondent did not pay as demanded. The appellant filed a declaratory suit on 11th November 2016 seeking payment of the principle sum of Kshs 3,159,089/=, costs of Kshs 229,511 and accrued interest at the time of filing suit of Kshs 440,905/=, all to the total of Kshs 3,829,496.60/=. The respondent filed a defence denying the claim. It contended that the maximum recoverable from an insurance company in a declaratory suit under section 10 of Cap 405 is Kshs 3 million and therefore that the appellant's claim was misconceived.
25. The trial magistrate in finding for the respondent cited the cases of *Law Society of Kenya v AG & 3 others* (2016) eKLR and *Africa Merchant Assurance Co. Ltd v William Kimaru* (2016) eKLR where the respective courts held that an insurance company is not obligated to pay an insured compensation of more than Kshs 3 million.



26. It is clear to me that the dispute between the appellant and the respondent arose when the appellant wrote the respondent the letter dated 11th November 2015 demanding to be paid the principal sum of Kshs 3,158,080.60/=, interest and costs of the suit.
27. The appellant is now arguing that the respondent should be held liable for the interest accrued after the delivery of the judgment because it refused to honour its obligation under section 10 (1) and (2) of Cap 405 by not paying the maximum limit of Kshs 3 million thereby necessitating him to move to court to seek for declaratory orders.
28. I have considered the argument raised by the appellant. I have perused the record of the lower court and I have not seen any document wherein the appellant demanded the statutory sum of Kshs 3 million from the respondent and they refused to pay. According to the demand letter from appellant's advocate, they were demanding the principal sum of Kshs 3,159,080.60/= plus the accrued interest and costs. The appellant's claim as per paragraph 8 of the plaint and the final orders sought therein was that the respondent was bound to pay the total decretal sum of Ksh3,829,496.60/=. The appellant then cannot argue that the respondent refused to pay the statutory sum of Kshs 3 million when they never made demand of that sum and the respondent refused to make good. They cannot argue that the respondent was liable for interest that accrued after the delivery of the judgment when they never demanded payment of Kshs 3 million and the respondent refused to pay. I do not think that the respondent was under obligation to pay the sum of Kshs 3 million when what was being demanded was more than their statutory obligation. They were at no fault to wait for the court to make a determination on how much they were required to pay and pay after determination was made.
29. I am in agreement with the authorities cited above that hold that an insurance company is not obligated to pay more than 3 million in a claim for to a single person and that anything over and above that should be claimed from the insured. The Court of Appeal in *CIC General Insurance Group Ltd v Gerald Ocboki* [2020] eKLR affirmed this position when it stated that;
- “Section 5(b)(iv) sets the maximum liability of the insurer at Kshs 3,000,000. We are therefore of the considered view that the judge was correct in coming to that conclusion. Further, in this court's decision of *Justus Mutiga & others v Law Society of Kenya & another* CA No 141 of 2016, it was held:
- 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 Kshs 3 million. What this would mean is that any compensation awarded by the court in excess of Kshs 3 million would be recoverable from the insured and not from the insurance company...
30. A similar position was taken in *The Monarch Insurance Company v Catherine Earnest Ochango* Civil Appeal 12 of 2018. The trial court in this matter was therefore correct in holding that the respondent was not liable to pay anything more than Kshs 3 million and that what was above that figure ought to have been claimed from the insured. I find that the respondent was not liable for the accruing interest after the delivery of the judgment as it did not refuse to pay its statutory obligation of Kshs 3 million.
31. In view of the foregoing, I find no merit in the appeal. The same is dismissed with costs to the Respondent.



DELIVERED, DATED AND SIGNED AT NAIROBI THIS 27TH JUNE 2024.

J. N. NJAGI

JUDGE

In the presence of:

Miss Obaga for Appellant

No appearance for Respondent

Court Assistant – Mokera

30 days R/A.

