



**Madison Insurance Co Ltd v Xplico Insurance Co Limited & another (Civil Appeal E828 of 2021) [2024] KEHC 7656 (KLR) (Civ) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7656 (KLR)

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

**CIVIL**

**CIVIL APPEAL E828 OF 2021**

**DKN MAGARE, J**

**JUNE 27, 2024**

**BETWEEN**

**MADISON INSURANCE CO LTD ..... APPELLANT**

**AND**

**XPLICO INSURANCE CO LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**DAVID KAMAU MWANGI ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. This is an Appeal from the judgment and decree of Hon. E. Wanjala, Principal Magistrate in Milimani CMCC No. 9070 of 2019.
2. The Appellant was the 1<sup>st</sup> Defendant in the suit in court below. He set out 5 grounds of appeal as follows:-
  - a. That the learned magistrate erred and misdirected herself in law and fact in failing to appreciate that the appellant had discharged its statutory obligation through payment of the sum of Kshs.1,603,229.00 to the 1<sup>st</sup> Respondent which was admitted.
  - b. That the learned trial magistrate erred and misdirected herself in law and fact in failing to appreciate that having not been a party in the primary suit Milimani CMCC No. 5493 of 2015, the finding on joint and several liability against the Defendant's therein could not automatically be applied to the suit before her as the issue of liability in the suit was one for trial and determination.
  - c. That the learned trial magistrate erred and misdirected herself in law and fact by failing to consider, try and determine as an issue arising from the pleadings filed in the suit before her



the extent and/or scope of the respective liabilities of the appellant and the 2<sup>nd</sup> Respondent in respect of the 1<sup>st</sup> Respondent's claim in the suit.

- d. That the learned trial magistrate erred and misdirected herself in law and fact by failing to consider and appreciate that in entering judgment in the manner that she did as against the appellant who had already paid the sum Kshs.1,603,229.30, she effectively imposed liability on the Appellant in respect of the decree in the said Milimani CMCC No. 5493 of 2015 which was beyond the maximum pecuniary statutory liability in terms of the provisions of Section 5(b)(iv) of the *Insurance (Motor Vehicles Third party Risks) Act*, Cap 405 Laws of Kenya hence rendering her decision paternity unlawful for being contrary to an express statutory provision.
  - e. That the learned trial magistrate erred and misdirected herself in law in making an award for payment of interest from 5/04/2019 way before the Appellant's liability in the suit had had been determined yet the claim on interest was not premised on contract.
3. The 2<sup>nd</sup> Respondent filed suit against motorcycle registration No. KMCX 945A and KMCW 910M respectively under policy of insurance No. HQS/708/03/7860/20X Comp and 071/070540/13/17/010.
  4. On 22/4/2014 when an accident occurred involving the said motorcycles in which the 2<sup>nd</sup> Respondent sued the Appellants and the 1<sup>st</sup> Respondents insured in Milimani CMCC 5493 of 2015. It is said that judgment was entered for Kshs.2,938,601 plus costs and interest per the decree given on 5/7/2019 and that the balance of Kshs.1,979,541.83 is outstanding.
  5. The 2<sup>nd</sup> Respondent is evasive as to how the sum reduced from Kshs.3,471,342.83/= . The Appellant sought the said amount of Kshs.1,979,541.83/= together with interest at court rates from 5/4/2019 to the Appellant, the issue is not whether to settle or not. It is whether there is a balance due and owing.
  6. The decree in CMCC No. 5495 of 2015 was jointly and severally at 100%. Nobody sought that this liability be apportioned.
  7. The general damages that were awarded were as follows:-
    - i. General damages Kshs.1,200,000/-
    - ii. Special damages Kshs.223,601/-
    - iii. Loss of earning Kshs.840,000/-
    - iv. Future moral treatment Kshs.420,000/-
    - v. Loss of future earning Kshs.300,000Total Kshs.2,938,601/-
  8. Costs were awarded as Kshs.286,835/-
  9. The 2<sup>nd</sup> Respondent filed an application dated 9/6/2020 seeking the following orders:-
    - a. That the Defendant's Defence be struck out
    - b. Judgement be entered for the Plaintiffs against the Defendants as prayed in the Plaintiff.
    - c. Costs be provided for.
  10. The appellant filed a Replying Affidavit on 28/10/2020 sworn by Charles Gathu, dated 27/10/2020. In its Ruling, the court dismissed the Application.



## Evidence

11. The parties proceeded for hearing. In the hearing the 2<sup>nd</sup> Respondent admitted that Kshs.1,603,229 had been paid by the appellant. Gathu Charles testified that the judgment is jointly and severally. He noted that the same could be paid and as claim made against Xplico.
12. The 1<sup>st</sup> Respondent did not tender any evidence.
13. The court entered judgement. In the judgement the court declared that jointly and severally mean 50:50. The court declared that:
  - a. The two insurance companies are liable to pay Kshs. 1,979,541.83 jointly and severally.
  - b. Interest from 5/4/2019 costs of the suit.

## Submissions

14. The Appellants filed submissions dated 2/11/2020 wherein they relied on the case of Africa Merchant Assurance Co. Limited Vs Confas Maranga Ntabo 2016 ECLR. It was their case that while both are liable there can be no contribution. Reliance was also placed on R v the Permanent Secretary In Charge of Internal Security exparte Joshua Paul (2013) eCLR. On this, it was their case that part payment did not exonerate the 1<sup>st</sup> Appellant. Based on these authorities, it was submitted that as liability was joint and several, each of the Defendants was to fully bear the liability.
15. The Appellant filed submissions dated 11/11/2020, relying on case of William Charles Fryda Vs Lance P. Nadeau & Another (2015) eCLR and Job Kiloch Vs Nation Media Group Ltd Salaba Agencies Ltd and Michael Riorio (2015) eCLR together with Merry Beach Ltd Vs Barclays Bank of Kenya Ltd and Another (2014) eCLR. The court has perused and considered the said authorities.

## Analysis

16. This being a first Appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a Trial Court, unlike the Appellate Court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
17. In the cases of Peters vs Sunday Post Limited [1958] EA 424 , the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”
18. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in



mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

19. This court is of the view that the lower court was correct in stating that it cannot apportion liability between the two defendants that is the Appellant and 1<sup>st</sup> Respondent. I concur with the decisions as relied upon by the lower court as follows: William Charles Fryda Vs Lance P. Nadeau & Another (2015) eKLR and Job Kiloch Vs Nation Media Group Ltd Salaba Agencies Ltd and Michael Riorio (2015) eKLR together with Merry Beach Ltd Vs Barclays Bank of Kenya Ltd and Another (2014) eKLR.
20. However, the lower court did not have regard to two aspects: The 2<sup>nd</sup> Respondent did not plead that a sum of Kshs. 1,603,229.30 was already paid. As a result, parties had to go to unnecessary lengths to prove things they should never have.
21. The limit under Section 5(b)(iv) of the Insurance (Motor Vehicles) Third Party Risks Act, Cap 405, is Kshs. 3,000,000/- it is provided thereunder as doth:  
In order to comply with the requirements of section 4, the policy of insurance must be a policy which—
  - (a) ...
  - (b) insures such person, persons or classes of persons as may be specified in the policy in respect of any 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 a 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.
22. The court will not apportion liability between the parties liable to pay. However, whether decreed or not, the insurance companies can only pay a limit of Kshs.3,000,000/- each.
23. The court notes that the 1<sup>st</sup> Respondent has not paid. Even if the Appellant was to pay they cannot pay amounts over and above Kshs. 3,000,000/-. Consequently the court erred in failing to declare the said maximum. I also note that the claim is not just Kshs. 1,979,510.83. There are costs and interest. There has to be a smooth way to conclude this matter without unduly prejudicing the other parties.
24. In this case the Appellant had paid Kshs.1,603,229.30. Interest stopped running on amounts paid. The xplico has not paid therefore the interest will ad infinitum. It is not for the parties who have paid. In the circumstance I will have to cap the payable limit as provided under the [Insurance \(Motor Vehicles Third Party Risks\) Act](#), Cap 405. The limit per claim is 3,000,000/
25. Therefore, I set aside the decree in respect only to the Appellant and decree that they are liable to pay a maximum of Kshs. 3,000,000/-

### Determination

26. The upshot of the foregoing I make the following Orders:-
  - a. It is hereby declared that the Appellant has paid a sum of Kshs. 1,603,229.30.



- b. The Appellant can only pay a further sum of Kshs. 1,396,770.70 in full settlement of the claim.
- c. The balance shall be settled by the 1<sup>st</sup> Respondent including all costs and interests will accrue till payment in full.
- d. Upon payment of Kshs. 1,396,770.70 the case against the Appellant shall be marked as settled.
- e. The two insurance companies can claim for indemnity against each other except that in seeking indemnity the interest accruing after the second Appellant has paid shall exclusively be borne by the 1<sup>st</sup> Respondent.
- f. Given the confusion caused by the Respondents, each party shall bear their own cost.
- g. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 27<sup>TH</sup> DAY OF JUNE, 2024.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

Instructed By:

Mutua Waweru & Co. Advocates for the Appellant

Nelson Kabaru & Co. Advocates for the 1<sup>st</sup> Respondent

Ngaywa & Kibet Partners LLP for the 2<sup>nd</sup> Respondent

Court Assistant - Jedidah

