REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL NO. 34 OF 2016

BETWEEN

AFRICA MERCHANT ASSURANCE

COMPANY LIMITED ……..……..……..APPELLANT

AND

WILLIAM MURIITHI KIMARU suing as administrator of

estate of PATRICK KUIRA MURIITHI (DECEASED) …RESPONDENT

(Being an appeal from the Ruling and Order of Hon. T. Obutu, PM at the Chief Magistrates Court at Kisumu in Civil Case No. 108 of 2015 dated 13th May 2016)

JUDGMENT

1. This is an appeal from the decision of the subordinate court rejecting the appellant's application seeking to review an order striking out the appellant's statement of defence.

2. Before the subordinate court, the respondent, as administrator of Patrick Kuira Muriithi ("the deceased"), sued Charles Odongo, as the 1st defendant, and Sultan Hardwares Limited, as the 2nd defendant, in ***Kisumu Chief Magistrates Court Civil Case No. 205 of 2009***. The claim was for damages under the ***Fatal Accidents Act (Chapter 31 of the Laws of Kenya)*** and the ***Law Reform Act (Chapter 26 of the Laws of Kenya)*** arising from the deceased death in a road traffic accident which took place on 15th February 2009. The accident involved the 2nd defendant's motor vehicle registration No. KAA 099N being driven by the 1st defendant. After trial, judgment was entered for the plaintiff against the defendants for Kshs. 6,105,999/- as damages together with costs assessed at Kshs. 295,000/=.

3. As the decree remained unsettled, the respondent lodged another suit in the subordinate court against the defendant seeking relief under the ***Insurance (Motor Vehicle Third Party Risks) Act (Chapter 405 of the Laws of Kenya)*** ("the ***Act***") for;

> *A declaration that the Defendant is bound to pay and settle the decretal amount in Kisumu CMCC No. 205 of 2009; William Muriithi Kimaru (suing as the Administrator of the Estate of Patrick Kuira Muriithi (Deceased) -vs- Charles Odongo & Sultan Hardware together with any further costs, fees and interest therefore at the prevailing court rates and the said decree the executed against it in this suit.*

4. The respondent averred that the appellant was the insurer of motor vehicle registration No. KAA 099 N for a period of one month from 23rd January 2009 upto 22nd February 2009 vide policy Number AN4/080/1/02641/07/12 issued pursuant to the ***Act***. In its statement of defence, the appellant denied liability and averred that it dealt with AK Enterprises Ltd as such that was no privity of contract between itself and Charles Odongo or Sultan Hardware Limited. It further averred that it never issued the Policy to Sultan Hardware Ltd or Charles Odongo. It denied that Charles Odongo or Sultan Hardware Ltd were defendants in ***Kisumu CMCC No. 205 of 2009***. It also contended that Charles Odongo lodged an appeal against the judgment in ***Kisumu HC Civil Appeal No. 63 of 2014***.

5. After the close of pleadings, the respondent moved the court to strike out the appellant's defence under the provision of **Order 2 rule 15 (b) (c)** and **(d)** of the ***Court Procedure Rules*** because it was frivolous and meant to delay the respondent from enjoying the fruits of the judgment in its favour. The appellant opposed the application along the contours set out in its statement of defence. By a ruling dated 21st October 2015, the trial magistrate held that the documentary evidence was clear that the respondent insured the subject motor vehicle. He took the view that there were no triable issues and proceeded to strike out the claim.

6. After its defence was struck out, the appellant moved that court by a Notice of Motion dated 28th January 2006 under the provisions of **Order 45 Rules 1, 2, 3** and **4** of the ***Civil Procedure Rules*** seeking, inter alia, the following orders;

> *[b] The court be pleased to find and hereby finds that there is an error apparent on the face of the record in its judgment delivered on 21/10/2015 on account of the provisions of section 5(b) (iv) of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405.*
>
> *[c] The ruling dated and delivered on 21/10/2015 be and is hereby reviewed and the same be and is hereby set aside to the extent to which it is in excess of the provisions of section 5(b) (iv) of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405; the Defendant/Applicant shall pay a sum of Kshs. 3,000,000.00 together with accrued interest and the cost of this suit in settlement of its statutory obligations/liability arising out of the cause of action herein.*

7. The respondent filed grounds of opposition dated 3rd February 2016 arguing that the application was fatally defective, it was misconceived, mischievous or otherwise an abuse of the court process and that the respondent misconceived the provisions of ***Insurance (Motor Vehicle Third Party Risks) Act***.

8. After hearing the matter, the trial magistrate ruled as follows;

> *All the issued raised by the Applicant are now settled Law more so in the case of Petition No. 148 of 2014 In the matter of the LSK V The Hon. AG. The High Court found section 5(b) of Cap 405 to be unconstitutional and to that extent I will have nothing meaningful to add. I do proceed to dismiss the application dated 28.1.2016 with costs to the respondent.*

9. It is this order that has now precipitated this appeal. In the Memorandum of Appeal dated 13th May, 2016, the appellant raised several grounds, inter alia;

> *[3] The trial court erred both in law and fact in misapprehending, misconstruing and misinterpreting the decision in **Law Society of Kenya v Attorney General & 3 others [2016] eKLR**.*
>
> *[4] The decision, ruling, orders and or findings of the learned trial court are against the spirit and letter of the Law, i.e., Section 5 (b) (iv) of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405.*

10. The key issue before the trial court and this court concerns the application of **section 5(b)(iv)** of the ***Act*** which limits to the insurers liability to pay a third party Kshs. 3,000,000.00 arising out of a claim by one person. This provision must be read in the context of the ***Act*** whose purpose is to enable persons

injured in a motor vehicle accidents to recover damages awarded even against impecunious motor vehicle owners. **Section 5** of the ***Act*** is to be read with **section 4(1)** of the ***Act*** which provides as follows;

> *4(1) Subject to this Act, no person shall use, or cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Act.*
>
> **Section 5** provides, in part,as follows;
>
> *In order to comply with the requirements of section 4, the policy of insurance must be a policy which-*
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> ---
>
> *(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 harm 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 requires to cover-*
>
> *(i)……..*
>
> *(ii)……..*
>
> *(iii) ……..*
>
> *(iv) liability if any sum in excess of three million shilling arising out of a claim by one person.* [Emphasis mine]

11. The appellant argued that by failing to consider the mandatory provisions of the ***Act*** limiting the insurer's liability, there was an error apparent on the face of the record that can only be redressed by an order of review to ensure that the decision is in accordance with the law.

12. In response, the respondent contended that the appellant did not meet the grounds for review under **Order 45** of the ***Civil Procedure Rules***. Counsel contended that in so far as the appellant's contention was that the trial court misconstrued the law, it is erroneous, as the appellant never raised the limitation in the ***Act*** at the hearing of the application for striking out the defence. Counsel submitted that therefore the issue of misconstruing the law cannot be the basis for review.

13. The trial magistrate based his reasoning on the outcome of ***Law Society of Kenya v Attorney*** **NBI Petition No. 148 of 2014 [2016]eKLR**. In that case the court declared certain sections of the ***Act*** unconstitutional. Onguto J., considered the constitutionality of the provisions of **section 5(b)(iv)** of the ***Act*** and held as follows;

> *[85] In the end, I hold that the Principal Act does not exclude compensation to affect proprietary rights. It only limits who pays how much by apportioning a maximum of Kshs. 3,000,000/- to be paid by the insurer and the additional sum if any by the insured.*

14. In effect, the court declined to declare the **section 5(b)(iv)** of the ***Act*** unconstitutional. It is therefore clear that the trial magistrate misunderstood the finding in ***Law Society of Kenya v Attorney General*** **(Supra)**. The respondent submitted that misconstruing of a court decision cannot constitute a ground for review. The respondent relied on the dicta in ***National Bank of Kenya Limited v Ndungu Njau*** **[1996] KLR 469** where the Court of Appeal explained what constitutes an error of law apparent on the face of the record:

> *A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be ground for review*. [Emphasis mine]

15. I take a different view of the matter. This is not a case where there was an incorrect exposition of the law or a misconstruction of a statute. The statutory provision remains unaffected by the decision in ***Law Society of Kenya v Attorney General*** **(Supra)**. The ***Act*** is clear enough; it sets a ceiling in compensation by the insurance company.

16. The respondent argued that appellant ought to have pleaded or raised the issue of the statutory limitation on compensation during the hearing of the application to strike out the defence. I reject this argument. The respondent prayed for a declaration under the ***Act*** and implicit in such a declaration for the insurer to settle the decretal sum under the ***Act*** is the limitation under **section 5(b)(iv)** thereof. In other words, the limitation is implied and a declaratory order directing settlement of the decretal amount is an order directing settlement of the decretal of amount to a maximum of Kshs. 3,000,000.00 permitted under the ***Act***.

17. For reasons I have stated, I allow the appeal to the extent that the trial magistrate erred by relying on ***Law Society of Kenya v Attorney General (Supra)*** in declining to review the order striking out the appellant's statement of defence. Although the appeal has succeeded, I decline to set aside the order striking out the appellant's defence as the amount the decree-holder can recover from the insurance company is provided for by the ***Act***. The insurer is not obliged to pay any amount above Kshs. 3,000,000.00 nor can the decree-holder recover more than that.

18. In view of the position I have taken in the matter, I make no order as to costs.

DATED and DELIVERED at KISUMU this 14th day of December 2016.

D.S. MAJANJA

JUDGE

Mr Onsongo instructed by Onsongo and Company Advocates for the appellant.

Mr Odeny instructed by Odeny and Company Advocates for the respondent.