



**UAP Old Mutual Insurance Co. Limited v Tabitha (Civil Appeal  
E683 of 2021) [2023] KEHC 3532 (KLR) (Civ) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3532 (KLR)

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

**CIVIL**

**CIVIL APPEAL E683 OF 2021**

**AA VISRAM, J**

**APRIL 28, 2023**

**BETWEEN**

**UAP OLD MUTUAL INSURANCE CO. LIMITED ..... APPELLANT**

**AND**

**MWAURA LINZY NYOKABI TABITHA ..... RESPONDENT**

*(Being an Appeal from the Judgment delivered on 28th September, 2021 by  
Hon. J. P. Omollo in Milimani Small Claims Court SCCOM 614 of 2021)*

**JUDGMENT**

1. This is an appeal arising out of the Small Claims Court.
2. The issue before the lower court related to whether or not the appellant (defendant in the lower court) was obligated to honour the decree in Milimani CMCC No 457 of 2019, and accordingly reimburse the respondent (claimant in the lower court) the sum of Kshs. 507, 032/-, which she had paid to a third party, out of her own personal funds, arising from the said decree.
3. The decree arose out of an accident that occurred on 13<sup>th</sup> September, 2016 and subsequent finding of liability on the part of the respondent in CMCC No 457 of 2019.
4. The adjudicator in the lower court found that the appellant was in breach of the contract of insurance between the parties by failing to indemnify the respondent for her loss arising out of the said claim.
5. The adjudicator entered judgment in favour of the respondent as follows:
  - a. A declaration that the respondent is legally obligated to honour the decree in Milimani CMCC No 457 of 2019 and thus the respondent be ordered to pay the claimant the sum totaling Kshs. 507,032/-; costs of the suit; and interest.



6. Aggrieved by the above decision, the appellant filed the present appeal dated 19<sup>th</sup> October, 2021 based on the following grounds:
- a. That the Learned Honourable Magistrate erred in law and fact in purporting to amend the contract of insurance entered between the parties that required the respondent to notify the appellant of an occurrence of an accident as soon as possible with full particulars.
  - b. That the Learned Honourable Magistrate erred in law and fact in holding that the appellant, having become aware of the accident through a third party had a legal obligation to take certain steps to contact the respondent to get the particulars of the accident and to further engage in due diligence to obtain the documentation which holding/conclusion has no legal or contractual basis.
  - c. That the Learned Honourable Magistrate erred in law and fact in filing (*sic*) to dismiss the respondent's case upon finding that there was no evidence tendered by the respondent to show that she personally reported the claim to the appellant.
  - d. That the Learned Honourable Magistrate erred in law and fact in allowing the respondent's entire claim against the appellant despite the fact that the respondent had admitted having not paid the policy excess of Kshs. 7,500/- which was a conditional precedent before any claim can be taken up and /or settled by the appellant.
  - e. That the Learned Honourable Magistrate erred in law and fact in ignoring the appellant's written submissions including on consequential loss which is not covered under the contract between the parties.
7. The parties agreed that this appeal be disposed of by way of written submissions. The appellant filed its written submission dated 11<sup>th</sup> January, 2023. The 1<sup>st</sup> respondent filed its written submission dated 10<sup>th</sup> January, 2023.
8. I have read the record in its entirety and considered the grounds of appeal raised by the appellant. The issue is whether the respondent breached the contract of insurance, which disentitled her to be indemnified by the appellant.
9. Section 38 of the [Small Claims Court Act](#), states as follows:
- Appeals
- (1) A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.
10. In the Court of Appeal decision of [Timamy Issa Abdalla v Swaleh Salim Swaleh Imu & 3 others](#) Civil Appeal No 36 of 2013; [2014] eKLR, the court in urging caution as to how to approach issues law and fact, stated as follows:
- “This caution is of greater significance in an appeal such as the one before us where the right of appeal is limited to matters of law only, because the jurisdiction of this Court to draw its own conclusions can only apply to conclusions of law. We must therefore be careful to isolate conclusions of law from conclusions of facts, and only interfere if two conditions are met. Firstly, that the conclusions are conclusions of law, and that secondly, the conclusions of law arrived at cannot reasonably be drawn from findings of the lower Court on the facts.”



11. In the Supreme Court decision of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR, the court further clarified that matters of law are restricted to the following: the interpretation of provision of Constitution or legislation; application of provision of Constitution or legislation to facts or evidence by trial Judge; and conclusions arrived at based on no evidence, or not supported by facts or evidence on record, or so perverse or illegal that no reasonable tribunal could arrive at same.
12. I have considered the grounds set out in the memorandum of appeal and I am satisfied that the said grounds are matters of fact and not law. In order to ascertain whether or not the respondent breached the contract this court is bound to undertake a fact finding journey. The questions the court must resolve include, and revolve around, whether as a matter of fact, the parties performed their obligations under the contract of insurance. Some of the questions that arise include; did the respondent notify the appellant of its claim in good time? when did it do so? Did the respondent provide the appellant with the necessary paper work to process her claim? These and other similar factual questions arise for determination in order to answer the issue of breach.
13. The court cannot reach a conclusion without re-evaluating the said facts, which it has no jurisdiction to do so on appeal from the Small Claims Court. Further, beyond the ground of appeal, the appellant has not submitted with sufficient clarity how or where the lower court went wrong in its application or interpretation of the law to any of the particular facts. Nor has it provided any legal authorities in support of what the appellant contends the correct legal position is in respect of where the lower court went wrong in its application or interpretation of law.
14. Finally, in relation to the ground that the lower court failed to fully take into account the appellant's written submissions, the correct position is that submissions are not evidence and cannot take the place of evidence. A court is not bound by written submissions and the lower court was entitled to reach its conclusions based on the evidence before it, and not based on submissions by counsel.
15. Based on the reasons stated above, I am satisfied that this appeal does not raise any issues of law. The appeal is accordingly dismissed with costs to the respondent.

**DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 28<sup>TH</sup> DAY OF APRIL 2023**

**ALEEM VISRAM**

**JUDGE**

**In the presence of;**

.....for the Appellant

.....for the Respondent

