



REPUBLIC OF KENYA



**UAP Insurance Company Limited & another v Ram (Suing through his registered legal Attorney Guy Amsellem) (Civil Appeal E046 of 2021) [2023] KEHC 27529 (KLR) (24 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 27529 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E046 OF 2021  
F WANGARI, J  
NOVEMBER 24, 2023**

**BETWEEN**

**UAP INSURANCE COMPANY LIMITED ..... 1<sup>ST</sup> APPELLANT**

**STARMAX INSURANCE AGENCY ..... 2<sup>ND</sup> APPELLANT**

**AND**

**BOAZ RAM (SUING THROUGH HIS REGISTERED LEGAL ATTORNEY GUY AMSELLEM) ..... RESPONDENT**

**JUDGMENT**

1. This Appeal arises from the Judgment and Decree of Trial Court delivered on 29<sup>th</sup> March 2021- by Hon. Lesootia Saitabau, PM in Mombasa CMCC No 1335 of 2018. The Trial Court entered Judgement for the Respondents for Kshs 3,200,000/- plus costs and interest.
2. The Appellant being aggrieved by the Award filed this Appeal and preferred the following grounds in the Memorandum of Appeal.
  - a. The Trial Court erred in law and fact in finding that the Appellant was in breach of contract.
  - b. The Trial Court erred in law and fact in awarding the Respondent General Damages for breach of contract of Kshs 2,000,000/=
  - c. The Trial Court erred in law and fact in misapprehending evidence produced by the parties.
  - d. The Trial Court erred in law and fact in failing to consider the submission and authorities of the Appellant
3. The Appellant closed its case in the lower court without calling witnesses.



4. The Respondent materially sued on a dispute arising from an insurance policy. The Plaintiff testified that the Appellant had insured the Respondent's Motor Vehicle Registration No KBA 950Y to the tune of Kshs 3,200,000/=. The Insurance was Comprehensive and against loss. Unfortunately, fate occurred and the said insured motor vehicle was stolen on 2<sup>nd</sup> September 2012. The Appellant failed to indemnify the Respondent hence the claim in the Lower Court.

### Submissions

5. It was the submission of the Appellant that the Trial Court erred in finding breach of contract against the Appellant. Further, it was submitted that the Respondent breached the terms of the insurance contract and the duty to utmost good faith.
6. Counsel submitted that it was in error when the trial court failed to find that the Respondent failed to inform the Appellant of change of address and this, among other conduct, amounted to breach of the utmost good faith. Reliance was placed inter alia on the case of *Jubilee Insurance Co. Ltd v John Sematengo* (1965) EA 233.
7. It also submitted that the trial court misapprehended evidence that could lead to the finding that the Plaintiff failed to prove his case on a balance of probabilities as required under Section 107 of the *Evidence Act*.
8. It was the submission by counsel that the Respondent proved breach of contract on the part of the Appellant and the trial court was correct in its finding. It was submitted that failure by the Respondent to disclose change of address and executing transfer documents would not amount to material non-disclosure.
9. The Respondent relied on the case of *UAP Insurance Co. Ltd v Lemmy Mutua* (2018) eKLR. On this it was submitted that the Appellant did not discharge the burden to prove material nondisclosure as alleged.
10. Further, counsel submitted that indeed the Respondent lost an insurance interest in the property that was recoverable from the Appellant and the court correctly so established. It was thus submitted that Under Section 8 of the *Traffic Act*, the motor vehicle was deemed to be registered in the name to which it was registered.
11. Further, the Respondent submitted that the Appellant had never repudiated the contract.
12. In conclusion, counsel submitted that the Judgment of the Honourable Magistrate was well based and there was not need to disturb it.

### Analysis

13. This Court has considered the pleadings, evidence, submissions and authorities relied on by the parties in support and opposition to the Appeal. The issue that fall for this Court's determination is whether the Trial Court erred in the award of damages for breach of the Insurance Contract.
14. This being a first Appeal, the Court should with judicious alertness re-evaluate the evidence, and consider arguments by parties and apply the law thereto, and, make its own determination of the issues in controversy.
15. Except however, that it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies.



16. In the case of *Selle & another v Associated Motor Board Company Ltd.* [1968] EA 123, the Court stated as follows:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the 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, in particular the court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

17. I note that in the Lower Court, the Plaintiff sought specific performance to compel the Defendant to indemnify the Plaintiff or in the alternative an order for compensation up to the insured amount.

18. The Appellant’s case is materially that the Respondent breached the impugned Insurance contract and in fact the Appellant had repudiated the contract following the breaches. It is not in dispute that the subject motor vehicle was stolen and at the that time the policy was valid.

19. The Appellant maintains that the Respondent had already sold the motor vehicle without disclosing to the Appellant this fact and as such the Appellant had repudiated the contract.

20. I also note that Appellant to state that by selling the motor vehicle, the Respondent breached the term of the policy that required the immediate return of the insurance certificates.

21. I have perused the subject Policy. It provided that in the event of the sale of the motor vehicle or cancellation of the policy, the insured would immediately return the insurance certificates in respect of the motor vehicle. I have no doubt that this clause would be operational after the sale. The Appellant’s case is that the Boaz Ram lodged a Transfer with the Registrar of Motor Vehicles thereby terminating the insurable interest of Guy Amsellem in the motor vehicle.

22. The Respondents do not dispute that actual possession of the motor vehicle changed after of delivery of possession. However, it is the case of the Respondents that Boaz Ram continued to pay the premiums even after the sale and never sold the interest. I do not think this was good faith. The insured was bound to inform the insurer of the change in address or sale.

23. In *Securicor Kenya Limited v Kyumba Holdings Limited* [2005] 1 KLR 748, the Court of Appeal found as follows:

“It was apparent, therefore, that though the appellant remained the registered owner of the motor vehicle its actual possession had passed to a third party. In view of this finding, the trial judge cannot be right under section 8 of the *Traffic Act* when she states that the true owner of the motor vehicle was the appellant.”

24. I agree with the Respondents submission that the motor vehicle ownership can change without actual transfer being registered. However, upon such change of ownership, the seller cannot expect to be the owner of the same motor vehicle as to benefit from the insurance policy. This would be an absurd eventuality and negate the very doctrine of indemnity and insurable interest. I say so because it is not candid for one to allege that they are a policy holder for a motor vehicle which they have already sold to a third party who is not an insured because of lack of privity of contract.



25. I am fortified by the dictum of the court in the case of *Leli Chaka Ndoro v Maree Ahmed & S.M. Lardhib* [2017] eKLR where the court stated as follows in respect of a similar fact situation:

The Respondent's position is that it can pay the hospital bills but the money should be claimed by Resolution Health Insurance Company. That is not logical. I do agree that the Respondent's liability is not dependent on the Appellant's wise decision to take up an accident or medical cover. The respondents are simply liable due to the negligence on their part. The respondents cannot take the place of Resolution Health Insurance Company as they are not parties to the existing arrangement between the appellant and his insurer. It is up to Resolution Health to decide on its arrangement with the appellant.

26. Proceeding along this line, I note that the trial court found that at the time of the theft, the motor vehicle was still in the name of the Plaintiff and even though the transfer of the motor vehicle had been initiated, the same had not been completed for it to be said that there was change of address or sale.
27. I do not agree with this finding on the part of the trial court for two reasons. First, to do so would mean that after paying the agreed purchase price and releasing the motor vehicle to the uninsured purchaser, the insured seller still remained with ownership simply because the transfer papers had not been registered. Secondly, it would then mean that the insurance company would retain the records of the insured seller who was had in fact lost possession of the motor vehicle vide delivery following sale and as such had no obligation to remit premiums.
28. The law cannot countenance such an eventuality. The moment the motor vehicle was sold and possession changed hands to an uninsured person under the policy, the insurance company ought to have been immediately informed. This is so because there was no contract between the insurer and the new owner even though the name may not have changed on the paperwork of transfer documents.
29. The new owner was supposed to seek and benefit from a temporary cover to be issued by the insurer for a period of not exceeding 3 months after sale. Section 76 A of *Insurance Act* Cap 407 Laws of Kenya provides;

- “1. Upon change of ownership of a motor vehicle, an insurer should;
- a) Only issue a temporary cover for a period not exceeding three months pending the registration of the motor vehicle in the name of the new owner.
  - b) Not renew the temporary cover or issue any annual policy in respect of the motor vehicle unless the new owner provides proof of the registration of the motor vehicle. In his name by the Registrar of motor vehicles.”

30. The question therefore that this court is to determine is whether the theft of the motor vehicle happened while the insured had not handed its possession to the new uninsured owner. From the records in court, it is Guy Amsellem who reported that his motor vehicle had been stolen.
31. The said Amsellem was not the insured under the policy. Boaz Ram was the insured and the registered owner who had however sold and handed possession of the motor vehicle to the said Guy Amsellem and the process of registration of the transfer to generate a new Log Book to reflect the sale was underway.



32. In the circumstances of this case, I do not agree that the policy between Boaz Ram and the Appellant was not affected after the motor vehicle changed hands. This is so because there was no insurance contract between the new owner who had already taken possession and the Appellant.
33. The insured owner acted in breach of good faith which abounds insurance contracts by not timely reporting the fact of the change of possession following the sale. The Learned Trial Magistrate got this wrong and was of the impression that so long as the transfer had not been registered and a new log book generated, the insurable interest remained with the initial insured owner even after giving away the motor vehicle to uninsured third party.
34. In the case of *Opiss v Lion of Kenya Insurance Company* Civil Appeal No 185 of 1991:  
“The right to subrogate does not create a privity of contract between the insurance company and the third party; it only gives the insurance company the right to take over the rights and privileges of the insured and therefore must be brought in the name of the insured.”
35. I therefore agree with the submission of the Appellant that the failure by the insured to disclose the change of possession of the insured motor vehicle after its sale and delivery to an insured owner was calculated to conceal material facts and was in breach of the doctrine of *uberrima fidei* so as to render the same null and void and not payable.
36. As was the view of Sir Udo Udoma, CJ in *Jubilee Insurance Co. Ltd v John Sematengo* [1965] EA 233.  
“It is well established that a contract of insurance is *uberrimae fidei* and therefore requires that utmost good faith from both parties during the making of it. Nondisclosure of a material fact or a representation of fact false in some material particular renders the contract voidable. Non-disclosure of a material fact as such may not by itself be a ground for damages; the only remedy available would appear to be the avoidance of the contract. The contract being *uberrimae fidei* the insurer is entitled to be put in possession of all material information possessed by the insured. The contract of life insurance is one *uberrimae fidei* and the insurer is entitled to be put in possession of all material information possessed by the insured. In policies of insurance, whether marine insurance or life insurance, there is an understanding that the contract is *uberrimae fidei*, that, if you know any circumstance at all that may influence the underwriter’s opinion as to the risk he is incurring, and consequently as to whether he will take it, you will state what you know. There is an obligation therefore to disclose what you know, and the concealment of a material circumstance known to you, whether you thought it material or not, avoids the policy. There is, therefore, something more than an obligation to treat the insurer honestly and frankly, and freely to tell him what the applicant thinks it is material he should know.”
37. The principle was also emphasized by the Court of Appeal in the *Co-operative Insurance Company Ltd v David Wachira Wambugu* NYR CA Civil Appeal No 66 of 2008 [2010] eKLR where the court quoted Bullen and Leake, *Precedents of Pleading*, 14<sup>th</sup> Edition, Vol. 2, which states as follows;  
Contracts of insurance are contracts of the utmost good faith. This gives rise to a legal obligation upon the insured, prior to the contract being made, to disclose to the insurer all material facts and circumstances known to the insured which affect the risk being run. Lord Mansfield’s words in *Carter v Boehm* (1766) Burr. 1905 have stood the test of time:  
“Insurance is a contract of speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of



the assured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist and to induce him to estimate the risqué as if it did not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void; because the risqué run is really different from the risqué understood and intended to be run at the time of the agreement...

38. I have said enough to show that this Appeal succeeds. In the upshot, the court orders as hereunder;
- a. Judgement and Decree of the Trial Court is set aside and substituted with an Order dismissing the Plaintiff's suit.
  - b. Each party to bear their own costs.

It is so ordered

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 24<sup>TH</sup> DAY OF NOVEMBER, 2023**

**F. WANGARI**

**JUDGE**

In the presence of: -

Wanyama Advocate for the Appellant

Anangwa Advocate for the Respondent

Barile, Court Assistant

