Madison Insurance Company Limited v Mungiti (Civil Appeal E954 of 2022)
[2025] KEHC 1174 (KLR) (Civ) (18 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1174 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E954 OF 2022

AM MUTETI, J

FEBRUARY 18, 2025

BETWEEN

MADISON INSURANCE COMPANY LIMITED ..... APPELLANT

AND

LEONARD MUSILI MUNGITI ..... RESPONDENT

(Appeal from the Judgment of Honourable Selina N. Muchunji (Mrs.) (CM) delivered on 21st October 2022.)

JUDGMENT

1. The suit herein was filed on 28/09/2017 by the respondent Leonard Musili Munguti. The respondent prayed that Judgment be entered against the appellant for the sum of Kshs. 308,712/=, costs of the suit and interest at court rates.

2. The respondent stated that he was the registered owner of motor vehicle registration No. KBU 662J which was insured by the appellant vide policy number HQS/701/56908/2013.

3. The respondent further pleaded that the terms of the insurance cover/policy were that should the vehicle be involved in any accident during the period of the cover any damages occasioned would be repaired by the appellant to his satisfaction.

4. On 21/10/2016 the vehicle was involved in a self-involving accident' along Kwa- Kathoka- Kwa Karesa road and it was badly damaged.

5. According to the respondent, he reported the accident at Makueni police station and contacted the appellant for help but the appellant ignored his request forcing him to undertake the repairs of the vehicle on his own.

6. The costs of repairs were assessed at a total of Kshs. 308,712/- inclusive of towing charges, assessment report charges cost of spares and labour.

7. The respondents' demands to be refunded the amount used were not honoured by the appellant hence the filing of the suit.

8. The lower court upon hearing the matter entered judgment in favor of the respondent provoking the instant appeal.

Memorandum Of Appeal

9. The appellant aggrieved by the decision of the learned honorable court filed a memorandum of appeal raising the following grounds that ;-

    a. The Learned Magistrate erred in law and in fact in failing to consider the evidence by the two Defence witnesses which is uncontroverted.

    b. The Learned Magistrate erred in Law and in fact in failing to consider the contents of the Defendant's written submissions on record.

    c. The learned Magistrate erred in law and in fact in making a finding that the Plaintiff established a case. The Plaintiff who gave evidence in this matter as PW1 did not call any witness to collaborate his evidence which was hearsay with many contradictions and is inadmissible in law.

    d. The Learned Magistrate erred in Law and in fact in awarding of Kenya Shillings Two hundred and Ninety eight thousand, Seven hundred and Twelve (Kshs. 298,712/= to the Plaintiff when the same was paid by a stranger one Lawrence Kitaka Patrick which the respondent was to reimburse and the respondent did not dispute the contents of the agreement for sale dated 22nd November 2016 which was attached in defence exhibit 1. The above -named person was not a party in the proceedings. Special damages were therefore not specifically pleaded and proved by the Plaintiff.

    e. The Learned Magistrate erred in law and in fact in making an award for the Plaintiff when his claim was fraudulent and the Plaintiff was guilty of breaching the utmost good faith principle as well as material non-disclosure. The Appellant was therefore justified in repudiating the claim.

10. The appellant on the strength of the grounds set out above urged this honorable court to allow the appeal set aside the judgment of the lower court and substitute the same with an order dismissing the suit.

Issues For Determination

11. The issues that arise from the grounds set out by the appellant are;-

    a. Whether the learned honorable magistrates' decision was supported by the evidence on record.

    b. Whether the respondent was entitled to recover the costs incurred in the repair of the motor vehicle from the appellant.

    c. Whether the learned honorable magistrate erred in failing to find that the respondents claim was fraudulent.

    d. Whether the respondent proved his case to the required standard.

Appellant's Case

12. The appellant cited Section 107 (1) of the *Evidence Act* which provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

13. The appellant submitted that she had clearly proved that the Respondent herein clearly breached the utmost good faith principle and failed to disclose material facts relevant to the alleged accident by exaggerating facts about the accident in an attempt to have the Appellant settle the claim. According to the appellant the respondent was a victim of his own fault.

14. The appellant maintained that insurance contracts are contracts of good faith and it is expected of all parties to deal fairly and truthfully with one another.

15. The appellant cited the case of Margaret Nduta Kamithi & George Njenga Kamithi vs Kenindia Assurance Company Limited [2001] eklr, in which T. Mbaruto J. with a view of expounding the utmost good faith principle quoted Mc Gillivray on Insurance Law, 9th Edition paragraph *17* at page 390 where the learned author states:

> " Insurance is one of certain contracts expressed by the law to be contracts of the utmost good faith - uberrimae fidei - and as a consequence each party is required to disclose material facts before conclusion of the contract.

16. The appellant further cited the case of Kenya Orient Insurance Limited v Kelvin Macharia Karanja [2017] eKLR where E. K. O. Ogola J referred to the case of Carter v. Boehm where the general principles upon which the duty of disclosure is based are stated by Lord Mansfield who held as follows:

> " 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. THE KEEPING BACK SUCH CIRCUMSTANCES 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... (emphasis added)

17. The appellant further cited the case of Day Break Limited VS Monarch Insurance Co. Limited [2013] eklr, E. K. O. Ogola J. did observe that it is trite law that one of the principles in an insurance contract is uberrima fides, that is, utmost good faith is required. The appellant argued that the respondent was guilty of breaching that very principle in lodging the instant suit.

18. The dispute herein revolves around an insured and an insurance company and the contract is guided by the principle of uberrimae fidei. Under the uberrimae fidei principle one has to essentially abstain from bad faith and act in good faith in an insurance contract.

19. The appellants' position is that at the conclusion of the investigations, the investigators concluded that the Respondent had breached the terms of the policy. It is after the conclusion of the investigations that

the Appellant decided to void the Respondent's policy due to his failure to disclose all the information related to the Motor Vehicle covered by the policy, the circumstances under which the subject motor vehicle was being used at the time of the accident and his failure to uphold the principle of utmost good faith which is expected of the insured.

20. The appellant called DW 2 who testified that the claim was denied as the Respondent was in breach of the utmost good faith principle and was guilty of material non-disclosure contrary to the terms and conditions of the policy of insurance agreed upon by the parties.

21. On issue of indemnification, it is trite law that special damages must not only be specifically pleaded; they must be strictly proved. In Capital Fish Kenya Limited v The Kenya Power and Lighting Company Limited [2016] Eklr, the court of Appeal stated:

[I]t is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit.

13. The appellant thus argued that for the respondent to succeed in his claim to be indemnified, the respondent must specifically plead and prove the special damages incurred in the repair of the motor vehicle.

14. The appellant further cited the case of Provisional Insurance Co. EA Ltd v Mordekai Mwanga Nandwa, KSM CACA 179 of 1995(ur), to emphasize the point that special damages must be specifically pleaded and strictly proved.

15. Further the appellant submitted that no general damages may be awarded for breach of contract. And in support of the argument cited the case of Mitchell Costs(k) Ltd v Musa Freighters [2011] eKLR)

22. The supreme Court of Nigeria weighed in on the issue in Union Bank of Nigeria PLC v Alhaji Adams Ayabule & another (2011) JELR 48225 (SC) (SC 221/2005(16/2/2011)). Where Mahmud Mohammed, JSC, stated:

> I must emphasise that the law is firmly established that special damages must be pleaded with distinct particularly and strictly proved and as such a court is not entitled to make an award for special damages based on conjecture or on some fluid and speculative estimate of loss sustained by a respondent..... Therefore, as far as the requirement of the law are concerned on the award of special damages, a trial court cannot make its own individual arbitrary assessment of what it conceives the respondent may be entitled to. What the law requires in such a case is for the court to act strictly on the hard facts presented before the court and accepted by it as establishing the amount claimed justifying the award.

23. In the present case, the appellant contends that no damages were proved at the hearing. The evidence was clear that a stranger to the policy one Lawrence Kitaka Patrick is the one who met the costs of repair of motor vehicle registration number KBU 662J and that is why the Respondent was to reimburse him as stipulated in paragraph 10 of the agreement for sale dated 22nd November 2016.

24. The appellant therefore submitted that the Respondent did not specifically plead and prove his claim.

25. The appellant went on to rely on the decision of Linus Nganga Kiongo & 3 others v Town Council of Kikuyu [2012] eKLR, in which Odunga, J stated as follows on the consequences of failure by a party to call evidence:

> " What are the consequences of a party failing to adduce evidence" In the case Motex Knitwear Limited vs Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002

Justice Lesiit, citing the case of Autar Singh Bahra and Another vs. Raju Govindji, HCCC No. 548 of 1998 stated:

"Although the Appellant has denied liability is an amended Defence and Counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1 Respondent's case stand unchallenged but also that the claims made by the Appellant in his Defence and Counter-claim are unsubstantiated. In the circumstances must fail"

26. The Respondent herein failed to call the known driver of the motor vehicle one Lawrence Kitaka Patrick. The vehicle was under his control at the alleged date and time. The evidence produced before the trial was therefore hearsay evidence.

27. The appellant thus urged this court to disturb the award and also find that the trial court proceeded on the wrong principles or misapprehended the law and proceed to dismiss the suit as the same was not proved.

28. The Appellant also sought to have the costs of this Appeal.

Respondent's Case

29. The respondent in answer to the submissions by the appellant submitted that the court took into consideration the evidence as well as submissions for both parties. There is no contention by either parties' witnesses that the Respondent was the registered owner of motor vehicle registration number KBU 662) as the date of accident (21/10/2016).

30. Further, that the Appellants' witnesses also admitted having privately and comprehensively insured the said Respondent's motor vehicle as at the date of accident. Both parties also admit that the self-involving accident occurred whereupon the Respondent's motor vehicle was extensively damaged. The allegations made by the defence witnesses that the Respondent's motor-vehicle as at the date of accident was on self-hire and that the Respondent had sold the said motor vehicle to one Lawrence Kitaka was not proved. These were mere allegations and which the trial court could not rely on without strict proof.

31. That the honourable trial court considered evidence and submissions of all parties and the court determined that there was no sufficient evidence by the defence as to why it did not undertake repairs of the motor vehicle despite acknowledging having covered the motor vehicle comprehensively and which cover was valid on 21/10/2016 when the accident occured.

32. The Respondent went on and submitted that he called evidence that sufficiently established a case against the appellant on a balance of probabilities. It was not disputed that the accident happened. It was also not in dispute that the motor vehicle belonging to the Respondent sustained damage.

33. The Respondent's evidence during trial demonstrated the Appellant did not give valid reasons and/or sufficient proof for not repairing the Respondent's motor vehicle despite being its insurer and despite the Respondent informing the Appellant of the accident. The Respondent proved that he had no option but to organize and have the vehicle repaired privately upon being advised that the insurer had declined to cater for repair charges.

34. The Respondent further proved that the driver of his motor vehicle at the time of accident one, Lawrence Kitaka was a friend and did not hire the motor vehicle nor had he sold it to him as at the time of the accident. The Defense in the respondents' submission did not prove the contrary.

35. As to whether the Learned Magistrate erred in law and in fact in awarding of Kenya Shillings Two hundred and Ninety-eight thousand, Seven hundred and Twelve (Kshs. 298,712/=) to the respondent when the same was paid by a stranger one Lawrence Kitaka Patrick which the respondent was to reimburse, the respondent respondent contended that he was entitled to recover the amount since he was covered by the appellant.

36. The agreement for sale dated 22nd November 2016 which was attached in defence exhibit 1 but the respondent maintained that he had not yet transferred the the vehicle to the said Lawrence kithaka.

Analysis And Determination

37. The appellants' appeal is hinged on the principle of uberrimae fidei under Insurance Law. The parties to an insurance contract are under duty to act with utmost good faith otherwise the other party can avoid liability where it is proved that the principle was violated.

38. It is the duty of a party to make a full and frank disclosure of all material facts that could influence the decision of the other party to an insurance contract. The principle of uberrimae fidei requires high standard of good faith in all dealings under an insurance contract.

39. The principle primarily protects the insurer against the problem of deceitful insured persons who may out of their own character and behavior with respect to the risk covered, expose the insurer to the payment of claims arising out their conduct. The full disclosure principle enable the insurer to set premiums commensurate to the degree of risk assumed.

40. The appellant in this case has not denied having insured the respondent but has advanced two main reasons for their failure to settle the claim. The appellant maintains that at the time of the accident ownership of the motor vehicle had changed hands a fact that the respondent made the claim did not disclose. The appellant has in support of that argument adduced evidence through a sale agreement which shows that one Lawrence Kithaka had bought the motor vehicle.

41. The respondent has not denied the existence of the agreement but insisted that following the accident he caused the repairs to be done.

42. In exercising the function of this court as a first appellate court, I have perused the record with a view to drawing my own conclusions on the matter in order to determine whether the learned honorable magistrate correctly arrived at the decision she did. See Selle and Another v Associated Motor Boat Co. ltd and Others [1968] EA 123.

43. In my analysis of the evidence by the respondent this court has been able to establish that at the time the accident happened the Motor vehicle was not in the hands of the insured but a third party. The respondent testified that he paid for the expenses and Lawrence paid for the repair charges. The respondent conceded while under cross examination that the invoices for demanding payment were initially addressed to Lawrence.

44. The question that immediately arises in my mind is , why would Lawrence have the invoices addressed to him if the motor vehicle was still owned by the respondent? Further, it is also important to ask why all the receipts tendered in evidence did bear the name of the respondent a fact that he concede under cross-examination.

45. The evidence by the respondent also raised very serious doubts about the genuineness of the claim. The respondent was categorical that some of the receipts that he relied on were undated and none of them bore his name.

46. Although the respondent says that he sold the vehicle Lawrence after the accident, the Sale Agreement showed that it was done on 22nd November 2017and he stated that at that time the repairs were on going and according to him the insurance was to pay.

47. The appellant case is that the payments having been made by a third party who was not party to the proceedings the were not bound to meet the claim. The argument by the appellant simply is that there being no insurance contract between them and the person who met the repair costs, there was no privity of contract between them and the said Lawrence was a stranger to them.

48. The law on special damages is clear that they must not only be pleaded but also be proved by the party seeking to recover.

49. The supreme Court of Nigeria weighed in on the issue in Union Bank of Nigeria PLC v Alhaji Adams Ayabule & another [2011] JELR 48225 (SC) (SC 221/2005(16/2/2011)). Where Mahmud Mohammed, JSC, stated:

> "I must must emphasise that the law is firmly established that special damages must be pleaded with distinct particularly and strictly proved and as such a court is not entitled to make an award for special damages based on conjecture or on some fluid and speculative estimate of loss sustained by a respondent..... Therefore, as far as the requirement of the law are concerned on the award of special damages, a trial court cannot make its own individual arbitrary assessment of what it conceives the respondent may be entitled to. What the law requires in such a case is for the court to act strictly on the hard facts presented before the court and accepted by it as establishing the amount claimed justifying the award."

50. The Respondent having admitted that payments were made by someone else, he failed to prove that the appellant was obligated under the insurance contract to reimburse that other party

51. It is the view of this court that the suit was basically brought by the respondent to recover the repair costs for and on behalf of Lawrence. The evidence of the respondent on the issue of payments was contradictory and grossly inconsistent. The respondent did not discharge the evidential burden cast upon him under Section 107 of the *Evidence Act*.

52. Even though the vehicle was still in his name at the time of the accident, the fact that he did not meet the cost of repairs in person rendered it impossible for him to recover from the insurer. The learned honorable magistrate therefore erred in allowing the claim.

53. It is the considered view of the court that the learned honorable magistrate did not accord due weight to the evidence tendered by the two witnesses who testified on behalf of the appellant. The claim being a material damage claim was strictly a claim in the nature of special damages which this court has found not to have been proved.

54. The appeal therefore succeeds and the judgment of the lower court is hereby set aside.

55. The respondent having been insured by the appellant to whom he gave business is spared the costs of the appeal. Consequently, each party shall bear its own costs.

56. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF FEBRUARY 2025.

A. M. MUTETI

JUDGE

In the presence of:

Court Assistant: Kiptoo

Karini for the Appellant

Asio holding brief Nzavi for the Respondent

Nairobi High Court Civil Appeal No. E 513 of 2022– Madison Insurance Company Limited Vs- -Leonard Musili Mungiti