



REPUBLIC OF KENYA



**Mboci v UAP Insurance Company Limited (Civil Appeal E313 of 2024)
[2024] KEHC 16757 (KLR) (Civ) (23 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 16757 (KLR)

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

**CIVIL
CIVIL APPEAL E313 OF 2024**

**NIO ADAGI, J
SEPTEMBER 23, 2024**

BETWEEN

ASNATH KAGENDO MBOCI APPELLANT

AND

UAP INSURANCE COMPANY LIMITED RESPONDENT

*(n Appeal from the Judgment of Hon. C. K. Cheptoo (PM) in
Nairobi CMCC. No. 3447 of 2019 delivered on 02/02/2024)*

JUDGMENT

1. By a Plaint dated 29.04.2020, the Respondent sued the Appellant seeking the following prayers:-
 - a) A declaration that the Defendant was in breach of insurance contract/policy in respect to Insurance Policy No.020/070/1/001354/2017:
 - b) The sum of Ksh.760,145/- plus interest at commercial rates.
 - c) Costs of the suit in favour of the Plaintiff.
 - d) Any other relief that this Honourable Court deems fair and just.
2. It was the Respondent's case that it had provided a motor vehicle insurance policy to the Appellant vide Policy Number 020/070/1/001354/2017 in respect of Motor Vehicle registration number KCG 435J, Toyota Fielder.
3. The said Appellant's motor vehicle caused an accident on or about 22.04. 2017 along Muretha Road, Nairobi in which one Zakaria Martin Aswan sustained injuries. Zakarla Martin Aswan then instituted a civil Claim being Milimani CMCC No. 5407 of 2017 against the Appellant herein.



4. The Appellant was served with Summons to Enter Appearance by Zakaria Martin Aswan upon the filing of the said suit but did not tender the same to the Respondent.
5. That due to the Appellant's failure to inform the Respondent about the suit. Zakaria Martin Aswan proceeded to obtain an Interlocutory judgment against the Appellant which was entered on 16.04.2018.
6. It was a term of the insurance policy and/or contract that the Defendant was to forward to the Plaintiff the summons and any other pleadings immediately upon service.
7. The particulars of breach of conditions/contract by the Appellant were as follows:
 - a. Failure to forward Summons to enter appearance to the Respondent.
 - b. Failure to enter appearance in CMCC NO. 5407 of 2017.
 - c. Failure to follow the right procedure to involve the Respondent in the said civil claim.
8. That the judgment in the said suit settled the issue of liability at 100% against the Appellant herein (The Defendant in CMCC NO. 5407 of 2017).
9. The Respondent became aware of the said judgment later on or about 05/11/2018 when the Appellant forwarded a letter from the Plaintiff's Advocates requesting settlement of decretal sum at Kshs.656,000/- and costs at Kshs.104,145/- all amounting to Kshs.760,145
10. The Respondent settled the above said amount to avoid a declaratory suit being filed against it.
11. The Respondent thereafter instituted Civil suit No. E3447 OF 2020 against the Appellant from which the appeal herein arises.
12. Upon considering the pleadings, evidence and documents tendered by the Parties, the trial Magistrate found that since there was evidence that the Respondent settled the decree in civil case No. 5407 of 2017 then it followed that the Respondent was entitled to a refund of the same. Judgment was entered for the Respondent as sought in the Plaint save that the interest was awarded at court rates.
13. Aggrieved by the said judgment, the Appellant filed the appeal herein raising 13 grounds of appeal.
14. I have perused through the grounds of appeal and the outstanding issues for determination in this appeal are:
 - i. Whether the Respondent proved on a balance of probability that the Appellant had breached the insurance policy between her and the Respondent.
 - ii. Whether the payment made by the Respondent to Zakaria Martin Aswan was illegal
 - iii. Whether the issue of service of Summons to enter appearance upon the Appellant in civil case No. 5407/2017, jurisdiction of the trial court and lack of authority to institute suit can be addressed in this appeal.
 - iv. Who should bear the costs of this appeal.

i. Whether the Respondent proved on a balance of probability that the Appellant had breached the insurance policy between her and the Respondent.

15. I have also carefully perused the Record of Appeal, considered and weighed the rival submissions on the appeal and also taken into consideration the judicial decisions cited.



16. Upon reading Clause 5 of the Conditions contained in the Insurance Policy No. 020/07/001354/2017 between the Appellant and the Respondent, the Appellant was under mandatory obligation to notify the Respondent of any accident involving the insured motor vehicle with full particulars. She was also expected to notify and forward to the Respondent immediately on receipt, writ summons and process. The Appellant herein did not notify the Respondent of the accident giving rise to the claim in the lower court. The Appellant did not forward to the Respondent Summons to Enter Appearance in CMCC 5407 OF 2017.
17. The Appellant continued to breach the contract between herself and the Respondent by not reporting the entry of judgment against her. She instead, appointed a counsel (the same firm of advocates representing her herein) to set aside the initial judgment. She did not prosecute that application to set aside the judgment. The Respondent herein only learnt of the judgment when it was served with a demand to settle the judgment in NRB CMCC 5407 OF 2017. The judgment was settled to avoid a declaratory suit against the respondent herein.
18. This was a clear breach of the insurance policy which the Appellant herein was liable to compensate/ indemnify the Respondent for the loss it incurred due to the breach.
19. It is trite law that insurance is a contract based on utmost good faith. The Respondent acted in good faith and proceeded to settle the decretal amount in NRB CMCC 5407 OF 2017 and was rightly entitled to claim the same from the Appellant. In the case of *Imara Steel Mills Ltd v Heritage Insurance Co. Kenya Ltd & 38 others* [2016] eKLR, reference was made to *Apperian (Insurance Law and Practice* at pg 2 – 5 (Revised Edition 1981) which stipulates stipulates on notice as follows:

“ The purpose of a policy provision requiring the insured to give the company prompt notice of an accident or claim is t give the insurer an opportunity to make a timely and adequate investigations of all the circumstances of the occurrence, and further if the insurer is thus given the opportunity for a timely investigation reasonable comprises and settlements may be made, thereby avoiding prolonged and unnecessary litigation.”
20. The court also cited *National Consumer Dispute Redressal Commission New Dell, Revision Petition No. 1503 of 2004. G. Kothainacliar W/O K. Guvundani 1 – A Agraham Street Madavawalgam, S. Tamil Nadu – 626 v The Branch Manager, United India, Insurance Co. Ltd, C-52, 1st Mani Road, Anna Nagar Chennai 600 – 102* on the proposition that statutory liability of an insurer and mere fact that there was a violation of terms and conditions in the policy cannot have the effect of exonerating insured in regard to payment made to a third party.
21. The case of *Alfred Mcalphine PlcvV Bai (Run Off) Ltd 2000 Lloyds Pep 43* which also cited the case of *Sirins v Frunds Provident Life & Persons Ltd [2005] EWCA Civbo* for the proposition on repudiation.

“ In the case of fundamental or material breach, a contract has to demonstrate that it was a condition precedent and fundamental in terms to be invoked in order to avoid the policy.
22. I therefore find that the trial court rightly found that the Appellant was in breach of the subject insurance policy in this matter. I uphold the same.

ii. Whether the payment made by the Respondent to Zakaria Martin Aswan was illegal, fictitious or marred with fraud

23. The trial Magistrate found that since there was evidence that the Respondent settled the decree in civil case No. 5407 of 2017 it then followed that the Respondent was entitled to a refund of the same.



The payment was made in settlement of a valid court decree and the Appellant having not challenged the legality of the said decree and having failed to raise any allegations of fraud whether in Civil Case No. 5407 of 2017 or in the trial court is barred from making such wild allegations in this appeal. The Appellant's allegations of the decree being illegal or of a fictitious sum are misplaced and baseless.

(i) Whether the issue of service of Summons to enter appearance upon the Appellant in Civil Case No. 5407 of 2017, jurisdiction of the trial court and lack of authority to institute suit can be addressed in this appeal.

24. The record shows that the Appellant challenged the mode of service of Summons to enter Appearance upon her in the initial suit in Civil Case No. 5407/2017. In fact, the Appellant denied being served with Summons to enter Appearance. However, her averment was wrong as the court must have been satisfied with mode of service before it entered interlocutory judgment against the Appellant. She was therefore, properly served with the Summons to enter Appearance and chose to sleep on them. She ought to have forwarded them to the Respondent herein for it to appoint a counsel to defend the suit. The issues of mode of service ought to have been canvassed in the Appellant's application to set aside the interlocutory judgment which she chose not to prosecute. The Appellant did not appeal the court's decision on the issue of Summons to enter Appearance upon her in that case.
25. In her grounds 10, 11 and 12 of the Memorandum of Appeal, the Appellant has raised the issue of authority to institute the suit and jurisdiction of the trial court by virtue of Section 12 of the Small Claims Court, 2016.
26. To address this issue, this court has to investigate the pleadings of the Appellant and confirm if the issues were not addressed before the trial court.
27. My investigation of the record reveals that the issue of lack of authority to institute the suit was raised for the first time in the memorandum of appeal.
28. The law is very clear, an Appellant can only argue issues raised in the pleadings and not spinning surprises by introducing new matters on appeal and in submissions. See the case of Galaxy Paints Co.Ltd vs Falcon Guards Ltd [2000]2EA 385 (CAK) where it was held that:

“ the issues for determination in a suit flowed from the pleadings and a trial court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the court's determination. Unless pleadings were amended, parties were confined to their pleadings...”.
29. This being an appellate court, it should not entertain new issues or facts not addressed by the trial court.

iv. Who should bear costs of the appeal?

30. As provided under Section 27(1) of the *Civil Procedure Act* and as restated in various decisions including the case of Orix Oil (Kenya) Ltd Vs Paul Kabeu & Others [2014] eKLR, costs follow the event and in the instant matter there are no exceptional circumstances that would persuade this court not to grant the Respondent costs and interest
31. Accordingly, I find that the appeal lacks merit and is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 23RD DAY OF SEPTEMBER 2024

NOEL I. ADAGI



JUDGE

