



**UAP Insurance Co. Ltd v Momanyi (Civil Appeal 555 of 2019)  
[2023] KEHC 4104 (KLR) (Civ) (2 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 4104 (KLR)

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

**CIVIL**

**CIVIL APPEAL 555 OF 2019**

**AN ONGERI, J**

**MAY 2, 2023**

**BETWEEN**

**UAP INSURANCE CO. LTD ..... APPELLANT**

**AND**

**BOY MOMANYI ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. Orenge  
(SRM) in CMCC no. 5987 of 2017 delivered on 3/9/2019)*

**JUDGMENT**

1. The Respondent in this case Boy Momanyi (hereafter referred to as the Respondent only) was the plaintiff in CMCC No. 5987 of 2017 where he sued the Appellant UAP Insurance Company Limited seeking declaratory orders against the Appellant to settle the entire decretal sum, costs and interest awarded in CMCC No. 4586 of 2012.
2. The Respondent was awarded kshs. 601,306 in the primary suit in respect of general damages for pain and suffering and special damages for injuries the Respondent sustained in road traffic accident on 05/10/2011 while travelling in motor vehicle registration no. KAR 697U.
3. The Respondent filed a defence in the primary suit against the registered owner of the motor vehicle and the driver and upon being awarded ksh.601,306/= the Respondent filed the declaratory suit against the Appellant and the trial court found that the Appellant was liable to settle the claim.
4. The Appellant has now appealed against the judgment of the trial court on the following grounds;
  - a. The learned magistrate erred in law and fact in finding that the defendant had failed to challenge the evidence in the primary suit, while in fact, it had raised a challenge that it had not insured Bruce Demesi when the accident occurred.



- b. The learned magistrate erred in fact and in law in failing to properly analyze the evidence before it.
  - c. The learned magistrate erred in law and in fact in failing to appreciate that the appellant could only be heard at the declaratory suit and not at the primary suit, where there were not a party.
  - d. The learned magistrate erred in law and in fact in failing to consider that the sale agreement indicates that the proprietary right in the insured vehicle had changed hands and that, that had terminated the insurance policy when the new owner took possession.
5. The appeal was canvassed by way of written submissions as follows; the appellants in its submissions argued that it had never insured the two persons named in the primary suit. DWI produced the Policy Proposal Form as DEXI that shows the insured individual was one Bento Ocholi. The said person Bento was not a party in the primary suit and no judgment was obtained against him. The Respondent's statutory notice dated 8th August 2012 cited "Bruce Demesi Ombuya" as the insured and there is no other statutory notice served on the Appellant herein relating to its insured "Bento"
  6. The appellant further argued that DWI produced a sale Agreement as DEX2 page 13 of the Record in relation to the subject motor vehicle KAR 697U dated 4th July 2011. The said document proves categorically that the said vehicle had been sold to one Bruce on 4th July 2011. That under the Insurance Law and contract, the benefits under the policy were not transferable to the buyer (Bruce). That according to the record the registered owner of motor vehicle KAR 697U as of 5/10/2011 was Bento O. Omuloli and National Bank of Kenya Ltd. The respondent had the document in his possession and never sought to enjoin the said registered owners to the primary suit.
  7. The appellant argued that the Appellant did not have the right to appear in the primary suit, nor instruct an advocate, as neither its insured was sued nor did the date of accident relate to the actual date of the accident in issue.
  8. Finally, the appellants argued that the trial court erred in failing to consider that the Sale Agreement indicated that the proprietary right in the said vehicle had passed on the 4/7/2011 when the said vehicle changed hands. That had the trial court found as such, then it would have ultimately reached the conclusion that under Section 8 of the *Traffic Act* Cap 403 Laws of Kenya, a Party can adduce evidence to disprove ownership of a vehicle at a particular date. Section 8 provides that the "the person whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be owner of the vehicle".
  9. The respondent submitted that the appellant failed to challenge the evidence in the primary suit. That when the respondent carried out the search on the motor vehicle, the registered owner was shown as Edwina Achieng Nyandat who the respondent sued as the 1<sup>st</sup> defendant and that the police abstract clearly showed that Bruce Demesi Ombuya was the driver and was sued as the 2<sup>nd</sup> defendant.
  10. The respondent indicated that the appellant forwarded to the main claim form that had been completed by on Bento. O. Omuloli showing that he was the insured and the 2<sup>nd</sup> defendant was his driver and he had his authority to use the vehicle.
  11. The respondent argued that the appellant should have raised the issues herein in his defence which he did not. The respondent indicated that the appellant is liable and has an obligation to satisfy the respondents claim herein because the vehicle was insured by them.
  12. This being a first appeal, the duty of the 1<sup>st</sup> appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at my own conclusion whether or not to support the findings of the trial



court while bearing in mind that the trial court had the opportunity to see the witnesses. In *Selle –vs- Associated Motor Boat Co.* [1968] EA 123 in the following terms: -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this 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, this 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 demeanor of a witness is inconsistent with the evidence in the case generally.”

13. The issues for determination in this appeal are as follows;
  - i. Whether motor vehicle registration no. KAR 697U was insured by the Appellant at the time of the accident.
  - ii. Whether the trial court was right in making a finding that the Appellant was bound to settle the claim in CMCC 4586 of 2012.
14. The Appellant submitted that at the time of the accident, the motor vehicle had been sold by their insured to a 3<sup>rd</sup> party. The accident was on 05/10/2011 and the motor vehicle had been sold on 4/7/2011.
15. The Appellant also submitted that their insured failed to notify them of the sale of motor vehicle and also failed to surrender the certificate of insurance for cancellation by the Appellant.
16. Further, that the Respondent submitted a fraudulent claim form citing an evidently wrong accident date and misrepresented in the said claim form that “Bruce” was the insured’s authorized driver knowing that was a false statement.
17. The Respondent submitted that he sued Edwina Achieng Nyandat in the primary suit upon doing a search that showed she was the registered owner together with Bruce Demesi Ombuya who was the driver to the motor vehicle at the time of the accident.
18. The Respondent also submitted that one Bento O. Omuloli completed the insurance claim form and stated the driver had authority to use the motor vehicle.
19. The Respondent further said that the primary suit was not defended despite the fact that the firm of Mugambi Mungania and Co. Advocates was served.
20. On the issue as to whether the motor vehicle was insured by the Appellant at the time of the accident, I find that the answer is in the affirmative.
21. There is evidence that the motor vehicle had an insurance cover covering the period from 31<sup>st</sup> August 2011 to 1/9/2012.



- 22. There is also evidence that the insured one Bento Ocholi Omuloli completed a claim form on 2/11/2011. The accident occurred on 05/10/2011.
- 23. I therefore find that there was a valid insurance cover in place at the time of the accident and that the cover was issued by the Appellant.
- 24. On the issue as to whether the trial court was right in making a finding that the Appellant is bound to settle the award in the primary suit, the Appellant submitted that there is no judgment against their insured and further that their insured failed to notify the Appellant of the sale of the motor vehicle on 4/7/2011 and also failed to surrender the certificate of cancellation by the Appellant.
- 25. The Respondent on their part said in their submissions that the insured completed a claim form on 2/11/2011 and further that the sale agreement dated 4/7/2011 was prepared to thwart the course of justice.
- 26. I find that the trial court was right in making the finding that the Appellant is bound to settle the claim for the following reasons
  - i. The judgment in the primary suit was not challenged by the Appellant.
  - ii. The Appellant had issued an insurance cover which was valid at the time of the accident.
  - iii. The evidence on the alleged sale of the motor vehicle was not availed in the primary suit and in the declaratory suit and the same cannot be introduced at appeal stage.
  - iv. The insured completed a claim form on 2/11/2011.
- 27. I accordingly find that this appeal lacks in merit and I dismiss it with costs to the Respondent.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 2<sup>ND</sup> DAY OF MAY, 2023.**

.....  
**A. N. ONGERI**  
**JUDGE**

**In the presence of:**

..... for the Appellant  
 ..... for the Respondent

