Madison Insurance Company Limited v Kirukua (Civil Suit 6 of 2016) [2026] KEHC 3273 (KLR) (11 March 2026) (Judgment)

Neutral citation: [2026] KEHC 3273 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CIVIL SUIT 6 OF 2016

JK NG'ARNG'AR, J

MARCH 11, 2026

BETWEEN

MADISON INSURANCE COMPANY LIMITED .... PLAINTIFF

AND

KALIKIA JASON KIRUKUA .... DEFENDANT

JUDGMENT

1. This declaratory suit was instituted through a Plaint dated 11th October 2016. The Plaintiff sought a declaratory order against the Defendant that it was not liable to indemnify the Defendant against claims that arose from a road traffic accident involving the Defendant's motor vehicle registration number KCD 526V on 24th December 2015.
2. The Plaintiff stated that it insured violated the terms of the insurance police because the Defendant's motor vehicle was insured on a private hire on chauffer basis but when it was involved in the accident it was on a hire on self-drive basis.
3. The Defendant did not enter appearance or file a Defence in this matter. The matter proceeded to formal proof hearing.

The Plaintiff's case

4. Moses Barasa (PW1) testified that he was the Plaintiff's Legal Officer and that the Defendant's motor vehicle registration number KCD 526V was issued a policy cover number MCK/709/094154/15 which commenced on 25th September 2015 for use on a private hire on chauffer driven basis. PW1 further testified that the Defendant's motor vehicle was involved in an accident and when investigations were done, it was discovered the motor vehicle was hired on a self-drive basis to one Victor Julius Osee.
5. It was PW1's testimony that it was a term of the policy that the Plaintiff would indemnify the insured against third party claims in the event of an accident caused or arising from the use of the motor

vehicle as provided for in the policy. It was PW1's further testimony that the said motor vehicle was not supposed to be used for a self-drive basis.

6. It was PW1's testimony that there was a public Inquest into the deceased's death and the same was closed that the driver of motor vehicle registration number KCG 763M could not be blamed for causing the accident.

Court's determination

7. From the onset it is salient to note from PW1's testimony that he told the court that he produced the Insurance Policy Document, Investigation Report and Plaint in Bomet PMCC Numbers 14 and 16 of 2016 as P. Exh 2, 3 and 4 respectively. I have gone through the record and I have noted that the Plaintiff filed its Plaint alongside its List of Documents and List of Witnesses. From the annextures, the Plaintiff did not attach the said documents but only filed the List of Documents. I have meticulously searched the court record including the CTS and there are no such filed documents. However, I have taken judicial notice that there were several Applications filed thereafter and they contained the Policy Document and Plaints as P. Exh 2 and 4 respectively. Since there was no opposition, I accept them (Policy Document and Plaints) as exhibits.

8. In its written submissions dated 17th November 2025, the Plaintiff submitted that from its list of documents which were produced as evidence, it had clearly demonstrated that at the time of the accident, the Defendant's motor vehicle was hired on a self-drive basis as opposed to a private hire on chauffer driven basis. That it was clear from the evidence that the Defendant breached the terms of the policy and that it was not liable to settle the claim.

9. It was the Plaintiff's submission that when a Defendant failed to traverse or dispute the Plaintiff's pleadings, the Plaintiff's averments were deemed admitted. It relied on Paul Kiema Nyamai vs Oshwal Lumnium Industries Limited (2023) eKLR. That the Defendant's consequence for failing to enter appearance or file a Defence is that the Plaintiff's evidentiary burden at formal proof hearing is significantly reduced.

10. As I have stated earlier, the only exhibits on record were the Policy Document (P. Exh 2) and the Plaints in the lower court matters (P. Exh 4). In my view, after considering PW1's testimony alongside the exhibits, it is my finding that the Plaintiff was able to prove that it insured the Defendant's motor vehicle KCD 526V on a private hire on chauffer driven basis. The Plaintiff was also able to prove the existence of third-party claims against the Defendant in the lower court in which the Plaintiff sought to avoid liability, hence the present declaratory suit.

11. However, for the Plaintiff to prove that the Defendant breached the terms of the policy, he had to produce the investigation report that he relied on in its testimony and submissions. As I have earlier stated, the said investigation report was not produced as evidence. In my view, there can be no liability attached to the Defendant without the Plaintiff proving that the Defendant breached the terms of the policy.

12. I agree with the Plaintiff's submission that the failure of the Defendant to enter appearance and file a Defence lowered its (Plaintiff's) evidentiary burden at the formal proof stage. However, I am of the view that the Plaintiff's burden of proof does not change even if the Defendant failed to enter appearance or file a defence. The Court of Appeal in Karugi & another v Kabiya & 3 others [1983] KECA 38 (KLR) held: -

> " ....I agree with the judgments that have been read, and would only like to emphasise two points. The first is that I am not surprised that the words "formal proof" have once again

led to misunderstanding. They should not be used as they are no longer part of the Civil Procedure Rules. Orders IXA & IXB of those Rules do not employ them. As will be seen for Order IXA Rules 8 & 9, when any party does not appear or defend the plaintiff may set down the suit for hearing under Order IXB Rule 1. In the latter rule the plaintiff sets the suit down for hearing having given reasonable notice to every defendant who has appeared. There was an appearance in this case. Then under Order IXB rule 3, when the plaintiff only has attended, the court may proceed "ex parte". The plaintiff has therefore to prove his case. To do so he calls evidence, such evidence before the court, the court may consider it unchallenged and proceed upon it, unless it is clear that it is intrinsically unreliable. No court will believe that the noon is actually the sun however unchallenged that statement may be."

13. More recently, the Court of Appeal in Imanyara & 2 others v Attorney General [2016] KECA 557 (KLR) held: -

> " .....It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side....."

14. Flowing from the above, it is my finding that the Plaintiff failed to discharge its burden of proof.

15. In the end, the Plaintiff's claim against the Defendant fails and is dismissed. There will be no orders as to costs.

JUDGMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 11TH DAY OF MARCH, 2026.

....

HON. JULIUS K. NG'ARNG'AR

JUDGE

Judgment Delivered Virtually in the absence of parties

Notice to issue

Susan/Siele – Court Assistants