KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Mburugu v Madison Insurance Co Ltd (Civil Appeal 192 of 2019) [2025] KECA 1434 (KLR) (31 July 2025) (Judgment)

Neutral citation: [2025] KECA 1434 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 192 OF 2019

W KARANJA, J MOHAMMED & LK KIMARU, JJA

JULY 31, 2025

BETWEEN

STANLEY KINOTI MBURUGU .... APPELLANT

AND

MADISON INSURANCE CO LTD .... RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court at Meru (A. Mabeya, J.) dated 30th May 2019 in H.C.C.A No. 87 of 2018)

JUDGMENT

1. This appeal arises from a judgment delivered by the High Court at Meru (A. Mabeya J.) on 30th May 2019 in Meru H. C. Civil Appeal No. 87 of 2018, in which the High Court allowed an appeal filed by Madison Insurance Co Ltd, the respondent herein, and set aside the judgment of the trial court which had been rendered in favour of Stanley Kinoti Mburugu, the appellant herein. The appellant was the plaintiff in the Chief Magistrate's Court Civil Suit No. 21 of 2017 filed at the Chief Magistrate's Court at Githongo. By a plaint dated 9th June 2017, the appellant pleaded that he was the owner of motor vehicle registration No KBY 139M, Isuzu Lorry. Sometime on 20th February 2017 the motor vehicle was involved in a fire accident while at his home and it was completely damaged. At the time, the said lorry was insured by the respondent.

2. In its defence, the respondent denied liability. It denied that the motor vehicle was damaged in a fire and pleaded that if at all there was a fire the same was caused by arson through the hand of the appellant.

3. At the hearing, the appellant testified that he was the owner of the subject vehicle and that he had insured it against fire with the respondent. That on 20th February, 2017, the subject vehicle caught fire and was extensively burnt. He lodged a claim with the respondent but it was declined.

4. PW2, the driver of the subject vehicle told the trial court how he had used the subject vehicle on the material day to transport sand. He said that he packed the same in the appellant's father's compound at 8.00pm on the night in question. The following morning, he received information that the same had caught fire and burnt extensively.

5. PW3, the appellant's father, told the court how he was awakened by the barking of dogs on the material night. When he went outside, he found the subject vehicle on fire. With the help of neighbours, they were able to put out the fire before the vehicle was completely destroyed.

6. DW1, the respondent's claims manager, admitted that the subject vehicle was covered by the respondent for about Kshs.5.2 million. That the respondent received a claim on the policy from the appellant on 21st February, 2017. The respondent engaged the services of Parity Loss Assessment to investigate the incident. According to the witness, the investigations revealed that the fire was as a result of arson whereby, the respondent declined to settle the claim.

7. DW2 received instructions from the respondent to investigate the incident.He engaged the services of a fire expert, DW3 whose analysis of the evidence at the scene and the subject vehicle concluded that the fire was started by an accelerant. They advised the respondent accordingly.

8. In its judgment dated 7th August 2018, the Chief Magistrate's Court (C. Kemei, SRM) found that the appellant had proved his case on a balance of probability and entered judgment issuing a declaration that the respondent was under an obligation to replace the appellant's damaged motor vehicle.

9. Dissatisfied with the trial court's decision, the appellant preferred an appeal to the High Court at Meru in HCCA No. 87 of 2018 faulting the learned magistrate for arriving at a decision that was against the weight of the evidence. In particular, the evidence of the private investigator and the registered fire safety officer: in dismissing the clear evidence tendered that the subject vehicle had been sold by the bank after the respondent had failed to service a loan for which the subject vehicle had been used as security; in ordering the appellant to replace a vehicle that was no longer in the possession and/or ownership of the respondent contrary to the principle of indemnity; and in ordering the respondent to replace a motor vehicle without any assessment and/or valuation or whatever form of ascertainment of the extent of damage, if any, to be indemnified.

10. In a judgment rendered on 30th May 2019 the learned Judge having heard the matter pronounced himself as follows:

> "31 In the present case, on 9th February, 2018, Counsel for the respondent informed the trial court that the vehicle was sold and was no longer available. The question therefore that arises is, as at the time the court rendered its judgment, was the vehicle available to be repaired and/or replaced? I do not think so.
>
> 32. The vehicle having left the possession and ownership of the respondent by his own act or otherwise, it could not be repaired. As for replacement, it is not clear whether it is its full value that was to be replaced or the insured value. Of course, it could not be the full value because, firstly, its value was not known and secondly, the policy being a contract of insurance, the value replaceable is only that which would indemnify the respondent for the loss suffered.
>
> 36. Accordingly, the 3rd and 4th grounds of appeal succeed. The end result is that the appeal has merit and the judgment and decree of the trial court cannot stand. The appeal is allowed. The suit in the trial court is dismissed with no orders as to costs."

11. Aggrieved by that decision, the appellant filed the instant appeal on the grounds that the learned Judge erred in law and fact: in allowing the appeal when the same had no merit and only deserved to be dismissed; in faulting the judgment of the lower court when the same was proper and was based on sound factual and legal basis; in failing to find that the claim herein was for replacement of the damaged motor-vehicle which was proved on allowed standards and whose value was the amount of the policy; in dismissing the appellant's suit even after finding as a fact that the appellant had established that his motor vehicle was burnt and he was entitled to compensation; and in failing to apply Article 159 of *the Constitution* in order to determine the entire suit on merit and not on technicality.

12. The appellant seeks orders: that the superior court's judgment be set aside and the lower court judgment be reinstated with costs to the appellant.

13. The appeal was heard before us on 19th December 2023. Learned counsel for the appellant, Mr. Kimathi Kiara relied on his written submissions dated 15th May 2023 while learned counsel Mr. Kimaita relied on the submissions dated 23rd June 2023.

14. Counsel for the appellant emphasised that Article 159 of the Constitution has urged courts to do justice without undue regard to procedural technicalities. Further, that this Court has inherent powers to give orders which are necessary to meet the ends of justice under sections 1A, 1B and 3A of the *Civil Procedure Act*. He urged that courts should not give too much prominence to technicalities. Reliance was placed in Kenya Ports Authority -vs- Kenya Power & Lighting Co. Limited [2012] eKLR.

15. According to Counsel, the learned Judge erred in saying that the appellant did not specify the nature and extent of loss and damage he had suffered. That the learned Judge had stated that any loss he suffered was special damage and should have been pleaded with particularity and proved. It was submitted that in this particular case the appellant had explicitly stated that he was claiming the value of the said motor vehicle which was 5.8 million shillings.

16. In rebuttal learned counsel for the respondent submitted that the appeal is incompetent and incurably defective as the appellant has not attached a decree to the record of appeal thereby rendering it incompetent and incurably defective. Reliance was placed in Bwana Mohamed Bwana -vs- Silvano Buko Bonaya & 2 others [2015] eKLR and Chege -vs- Suleiman [1988] eKLR.

17. Further, it was submitted that parties are bound by their pleadings and that the procedural technicalities referred to by the appellant go to the root of doctrinal principles that anchor indemnifying insurable claims and that procedure in this matter is intertwined with substance. It was submitted that parties are bound by their pleadings. Reliance was placed in Independent Electoral and Boundaries Commission & another -vs- Stephen Mutinda Mule & 3 others [2014] eKLR and Hesbon Onyuro & another (suing as the Administrators of Alice Akoth Okong'o (Deceased) -vs- First Assurance Company Limited [2017] eKLR.

18. Finally, it was submitted that a prayer for a declaration that the respondent indemnifies the appellant is an equivalent to a material damage claim. Such a declaration is as good as an order of indemnity against the respondent. According to counsel, the appellant's claim in his submissions that he was to be indemnified as per the Policy Document was not even pleaded in the first place.

19. It was submitted that the High Court was faced with a predicament, as there is no Policy Document on the record, and the court cannot speculate. Further, the salvage value of the motor vehicle was not pleaded and neither was there any assessment report showing the same.

20. We were urged to dismiss the appeal with costs.

21. This is a second appeal in respect of which our mandate is limited.

On the Court's jurisdiction on a second appeal, this Court had this to say in the case of Charles Kipkoech Leting vs. Express (K) Ltd & another [2018] eKLR:

> "Our mandate is as has been enunciated in a long line of cases decided by the Court. See Maina versus Mugiria [1983] KLR 78, Kenya Breweries Ltd versus Godfrey Odongo, Civil Appeal No. 127 of 2007, and Stanley N. Muriithi & Another versus Bernard Munene Ithiga [2016] eKLR, for the holdings, inter alia, that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See also the English case of Martin versus Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511 where in, it was held inter alia that, where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

22. We have considered the record of appeal in its entirety, the submissions, the authorities cited and the law. We find that the points of law that fall for our determination are: whether the appellant had an insurable interest in the motor vehicle and whether the trial court erred in declining to award the appellant special damages.

23. On the first issue since most contracts of insurance are contracts of indemnity, whereby the insurer agrees to compensate the assured for the loss that the latter may sustain through the happening of an event which is uncertain and upon which the insurer's liability arises, it follows that the assured is required to have an interest in the subject matter of the insurance, for otherwise he will incur no loss through the happening of the insured event. This insurable interest is discernible from the assured's relationship with the subject matter of the insurance.

24. As to whether the appellant had an insurable interest in the motor vehicle, the trial Judge noted in his judgment at paragraph *31* that on 9th February 2018 counsel for the appellant informed the trial court that the vehicle was sold and was no longer available. The learned Judge asked himself whether as at the time the court rendered its judgment the vehicle was available to be repaired and/or replaced, and found that it was not. We agree with the learned Judge's position that as at 7th August 2018 when the Magistrates' Court delivered its judgment the vehicle insured by the appellant was not available to be repaired and/or replaced.

25. In our view the appellant had failed to disclose that he had already sold the motor vehicle and that he had no insurable interest in it at the time the trial court rendered its judgement. This was a concurrent finding by the two courts below and we must defer to it.

26. We are guided by the case of Peters -vs- General Accident Fire & Life Assurance [1938] 2 All ER which held that there can be no transfer of an insurance policy where the subject insured is transferred. Further, as held in Smith -vs- Ralph [1963] 2 Lloyds, a policy of insurance does not extend beyond the time of sale of the insured property as the insurable interest is lost once the insured property is sold.

27. The insurance contract being one of utmost good faith, it was incumbent upon the appellant to make full disclosure to the insurer, that he had sold the motor vehicle. It was also incumbent upon him to return the insurance certificate upon selling the motor vehicle. It is notable that possession of the motor

vehicle had already passed to the new owner, and the appellant had ceased to have an insurable interest in the subject matter of the insurance policy.

28. As to whether the trial court erred in declining to award the appellant special damages, it is patently clear from the record that the appellant did not particularise in the plaint the special damages he allegedly suffered.

29. It is a basic principle that, before a court can award special damages, those damages must be specifically pleaded and strictly proved. In Ouma -vs- Nairobi City Council [1976] KLR 207, Chesoni, J. (As he then was) held as follows:

> " Thus, for a plaintiff to succeed on a claim for special damages he must plead it with sufficient particularity and must also prove it by evidence."

30. The authors of McGregor on Damages (10th Edition), Para. 1498 explain why special damages must be specially pleaded, as follows:

> "Where the precise amount of particular item of damages has become clear before the trial, either because it has already occurred and so become crystallised, or because it can be measured with complete accuracy, the exact loss must be pleaded as special damages."

31. Similarly, in Banque Indosuez -vs- D J. Lowe & Co. Ltd. [2006] 2 KLR 208, this Court held as follows:

> " It is simply not enough for the respondent to pluck figures from the air and throw them in the face of the court and expect them to be awarded. It is trite that special damages must not only be claimed specially but proved strictly for they are not the direct and natural or probable consequences of the act complained of and may not be inferred from the act."

32. When the law requires special damages to be specially pleaded, it means that those damages must be stated with certainty and particularity in the plaint or petition. The reason for this is plain to see. In Esso Petroleum Co. Ltd -vs- Southport Corporation [1956] AC 218, Lord Normand explained that:

> " The function of pleadings is to give fair notice of the case which has to be met, so that the opposing party may direct his evidence to the issue disclosed by them."

33. And, in Gandy -vs. Caspar Air Charters Ltd [1956] 23 EACA, 139, the predecessor of this Court held that:

> "The object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them; so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule, relief not founded on the pleadings will not be given." [Emphasis ours]

See also Coast Bus Services Ltd -vs- Murunga Danyi & 2 Others, *CA No. 192 of 1992*.

34. The respondent submitted that the appellant was not entitled to special damages because those damages were not pleaded in the plaint. We agree. In paragraph 33 of the judgment, the learned Judge held that under sections 107 through 109 of the Evidence Act Cap 80, Laws of Kenya, it is he who alleges that must prove.

The learned Judge held that it was the appellant who claimed to have suffered loss and it was upon him to prove and quantify that loss. We agree with that holding by the learned Judge and find that in the absence of pleaded special damages in the plaint, the appellant was not entitled to award of special

damages. Over and above seeking the declaratory order, the appellant should have pleaded the special damages that he was claiming.

35. Even assuming the court had found that the appellant had an insurable interest in the motor vehicle in question, what was the actual value of the motor vehicle as at the time it was damaged? If the motor vehicle was a write off what was the salvage value? What was the cost of restoring the motor vehicle? Material deficiencies in pleadings are not technicalities and cannot be salvaged by invoking Article 159 of *the Constitution* or the Oxygen rule.

36. The upshot of the above analysis is that we find no merit in the appeal before us and we dismiss it with costs to the respondent.

DATED AND DELIVERED AT NYERI THIS 31ST DAY OF JULY, 2025.

W. KARANJA

....

JUDGE OF APPEAL

JAMILA MOHAMMED

....

JUDGE OF APPEAL

L. KIMARU

....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR