



Kinyanjui v Kenya Orient Insurance Company & another (Civil Appeal 372 of 2017) [2022] KECA 1333 (KLR) (2 December 2022) (Judgment)

Neutral citation: [2022] KECA 1333 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 372 OF 2017
W KARANJA, AK MURGOR & J MOHAMMED, JJA
DECEMBER 2, 2022**

BETWEEN

FREDRICK NJERU KINYANJUI APPELLANT

AND

KENYA ORIENT INSURANCE COMPANY 1ST RESPONDENT

KELVIN MACHARIA KARANJA ALIAS KELVIN MACHARIA

KARANI 2ND RESPONDENT

(Being an appeal against the judgment/decree of the High Court at Nairobi (Onguto, J.) dated 12th May, 2017 in HCCC NO. 595 OF 2014)

JUDGMENT

Background

1. The 1st respondent, Kenya Orient Insurance Company Limited, an insurance company and the plaintiff in the High Court, filed an amended plaint dated October 16, 2015 seeking various declaratory orders.
2. A brief background will put the appeal in perspective. Through an insurance broker, Stepz Insurance Agency, the 1st respondent issued a third-party private motor vehicle insurance to Kelvin Macharia Karanja alias Kelvin Macharia Karani (the 2nd respondent). The motor vehicle to be insured was KQY 039 (the motor vehicle). Fredrick Njeru Kinyanjui (the appellant) was enjoined in the proceedings in the High Court as an Interested Party having been a victim of the said accident.
3. The insurance policy was to run for one year and was to commence on January 10, 2010 to January 9, 2011. A Certificate of Insurance Number C6668216 in respect of policy number 7010912579PO was issued in favour of the 2nd respondent. The 2nd respondent completed and signed a Questionnaire and



Proposal Form confirming inter alia that he was the registered owner of the motor vehicle which was to be used by the 2nd respondent and his employees in the ordinary course of business.

4. The insurance policy contained the following notice:

“a) ...

b. The company (the 1st respondent herein) should be informed immediately of any change of address, if a vehicle is sold or the policy is to be cancelled, the insurance certificate must be returned to the company.

b. In the event of the insured motor vehicle(s) being sold, policy can only be transferred to the new owner provided a proposal form is satisfactorily completed by the company. The vehicle must not be used by the owner until he receives a certificate of insurance in his own name.”

5. The motor vehicle was involved in an accident on August 27, 2010 (the accident) and the 2nd respondent filled a Motor Accident Report Form on September 4, 2010. The 2nd respondent disclosed that as a result of the accident, a pedestrian had died and one Benson Gathura who was the driver at the material time was injured. He further disclosed that other passengers were in the motor vehicle, namely, Fredrick Njeru Kinyanjui, the appellant herein, Dominic Marika Mwaura, Maximo Kuria and Edward Muchiri.

6. The 1st respondent commenced investigations regarding the accident and hired Messrs Index Assessment and Insurance Investigators to look into the circumstances leading to the occurrence of the accident. The investigation report revealed inter alia: that the accident took place on August 27, 2010, that at the time of the accident, the 2nd respondent had since sold the motor vehicle to one Dominic Marika Mwaura; that the sale of the motor vehicle had taken place on July 27, 2010 and the purchase price was Kshs. 30,000; that at the time of the accident, the 2nd respondent had received Kshs. 28,000 towards the purchase price of the motor vehicle and Kshs. 1,500 was paid to the 2nd respondent as further payment of the purchase price a few days after the occurrence of the accident; and that at the time of the accident the 2nd respondent had parted with actual possession and/or control of the motor vehicle and the same was under the possession, management and control of Dominic Marika Mwaura.

7. In February 2011, two (2) third party claims were filed by the appellant and by Benson Gathura against the 1st respondent. Upon receipt of the summons, the 1st respondent alleged breach of the insurance policy conditions by the 2nd respondent in selling the motor vehicle and by not advising the 1st respondent to cancel the insurance certificate. As a consequence of the alleged breach, the 1st respondent claimed that the 2nd respondent had no insurable interest in the motor vehicle.

8. Vide an amended plaint dated October 16, 2015, which was filed on October 19, 2015, the 1st respondent (the plaintiff in the High Court) sought declaratory orders that: it was entitled to repudiate the insurance policy; that it was not liable to indemnify the 2nd respondent against any liability arising from the accident; and that it was not liable to and/or legally obligated to satisfy judgments and decrees arising out of suits filed or those that may be filed by third parties against the 2nd respondent in relation to the accident involving the motor vehicle. The 2nd respondent also prayed for costs of the suit and interest thereon.

9. The 2nd respondent, though served did not enter appearance or contest the claim leaving the 1st respondent to formally prove its claim. The 2nd respondent called two witnesses in support of its case.



These were Ms. Sarah Weru (PW1), the 1st respondent's Legal Officer and Harrison Mwaura Kuria (PW2), an insurance investigator.

10. It was the 1st respondent's claim that at the time the 2nd respondent reported the occurrence of the accident, he failed to disclose the fact that he had already sold the motor vehicle and in so doing, he misrepresented the truth and failed to act in good faith. Further, that the 2nd respondent breached the insurance policy by inter alia: failing to return the insurance certificate after he sold the motor vehicle and/or in failing to inform the 1st respondent of the sale of the motor vehicle.
11. The 1st respondent further asserted that the 2nd respondent acted in a fraudulent manner in failing to disclose the truth and in making false statements in the Motor Accident Report Form dated September 4, 2010.
12. In the particulars of misrepresentation and non-disclosure, breach of the insurance policy and fraud, the 1st respondent cited the failure to disclose the true ownership and possession of the motor vehicle at the time of the accident; failing to disclose that he had already sold the motor vehicle to Dominic Marika Mwaura; failing to inform the 1st respondent of the sale of the motor vehicle; failing to observe and fulfil the terms of the Insurance Policy in respect of its return for purposes of cancellation after the sale of the motor vehicle; misrepresenting that on the material day and time, the driver was his employee when he was not; and failure to disclose the lack of insurable interest over the motor vehicle at the time of the accident.
13. It was the 1st respondent's claim that by reason of the alleged non-disclosure of material facts and lack of insurable interest, it was entitled to repudiate liability in respect of the insurance policy. It further asserted that it was not liable to make good or indemnify the 2nd respondent against any claims arising from the accident.
14. At the hearing at the High Court, the 1st respondent led evidence and called two witnesses as aforesaid. Ms. Weru (PW1), the 1st respondent's Legal Officer testified that the 2nd respondent had taken a third-party policy cover; that the 2nd respondent filled a motor Accident Report following an accident and availed a police abstract; that the 1st respondent instructed an investigator who reported inter alia that, the motor vehicle had been sold by the time of the accident; and that consequently, the 1st respondent had on March 17, 2011 repudiated the policy through the 2nd respondent's agent.
15. It was PW1's further testimony that the 2nd respondent had given false information to the 1st respondent that he was still the owner of the motor vehicle as at the time of the accident and that his employee was driving the motor vehicle at the material time. Further, that the 2nd respondent had failed to disclose that he had sold the motor vehicle to a third party.
16. Harrison Mwaura Kuria, (PW2), the Managing Director of Index Assessment and Insurance Investigations Limited testified and produced an investigative report. It was his testimony that he was an authorized and licensed insurance investigator. That upon receiving the 1st respondent's instructions to investigate the accident, he proceeded to interview the 2nd respondent being the insured and recorded statements from the occupants of the motor vehicle on the material day. It was his further evidence that he obtained the requisite documents from the police service, the 2nd respondent and the passengers in the motor vehicle and prepared a comprehensive report.
17. In a nutshell, PW2 testified that his investigations revealed that both the driver of the motor vehicle and the pedestrian who had succumbed to his injuries were to blame for the accident. PW2 testified that the motor vehicle had been sold to a third party namely, Dominic Marika Mwaura by the time



of the accident and the 2nd respondent did not therefore have an insurable interest as at the time of the accident.

18. The appellant and the 1st respondent filed written submissions. The 1st respondent submitted that it had proven its case to the required standard, that the motor vehicle had been sold by the 2nd respondent as at the time of the accident and there was therefore no insurable interest as at the time of the accident to warrant any indemnity by the 1st respondent. The 1st respondent relied on the report produced by PW2 which adduced evidence of an admission of the sale by the 2nd respondent and of payment of the purchase price by the purchaser of the motor vehicle.
19. The appellant submitted that the 1st respondent was under a duty to prove its case to the required standard, the absence of the 2nd respondent in the proceedings, notwithstanding. It was the appellant's further submission that the 1st respondent had not established the required ingredients of non-disclosure to justify the repudiation of the insurance policy.
20. It was the appellant's further submission that the 1st respondent had a duty to show that the facts not disclosed by the 2nd respondent, as the insured, were material and were within the insured's knowledge and that if disclosed, it would have influenced the judgment of a prudent insurer which the 1st respondent had failed to do.
21. The appellant further submitted that the 1st respondent had failed to prove that as at the time of the accident the title to the motor vehicle had passed to the new owner. That there was no sale agreement or any evidence adduced to prove that title had passed. The appellant was emphatic that the 1st respondent was not entitled to repudiate the insurance contract between the 1st and 2nd respondents.
22. The learned Judge considered the pleadings and the submissions and discerned two (2) issues for determination: whether the 2nd respondent was guilty of material non-disclosure and/or misrepresentation; and whether the 2nd respondent had disposed of his insurable interest in the motor vehicle as at the time of the accident.
23. On the question whether the 2nd respondent was guilty of material non-disclosure and misrepresentation, the learned Judge stated that:

“Misrepresentation or non-disclosure once established, leads to inference of breach of the uberrimae fidei principle, any keeping back is fraud and the policy may be avoided.”
24. The learned Judge found that the 2nd respondent should have disclosed that the sale had taken place at the point of reporting the accident. That the disclosure of the fact of sale would have influenced a prudent hypothetical insurer and affected the decision to indemnify the 2nd respondent or any third-party claims.
25. Further, that the 2nd respondent's misrepresentation that the driver was at the material time his employee was untrue. The learned Judge found that the misrepresentation was fraudulent and was intended to mislead the 1st appellant and that the misrepresentation tainted the claim. The learned Judge further found that the 2nd respondent was in breach of the insurance policy when he failed to surrender to the 1st respondent the certificate of insurance once he sold the motor vehicle. The learned Judge entered judgment for the 1st respondent as prayed in the amended plaint dated October 16, 2016 with costs to the 1st respondent.
26. Aggrieved by that decision, the appellant filed the instant appeal on the grounds that the learned Judge erred in law and fact: in failing to adequately consider the appellant's submissions; in failing to properly



consider the issues before him and thereby reaching a decision based on the wrong principles of law; in failing to hold that PW2's testimony was hearsay and therefore inadmissible; in failing to hold that the 2nd respondent had an insurable interest in the motor vehicle; and in entering judgment in favour of the 1st respondent against the weight of the evidence.

27. The appellant seeks orders: that the findings and judgment of the learned Judge be set aside and substituted with a judgment dismissing the 1st respondent's suit against the 2nd respondent; and that the costs of the appeal and in the High Court be awarded to the appellant.
28. The appeal was heard by way of written submissions. Learned counsel for the appellant, Mr. B. G. Wainaina relied on his written submissions. Mr. Wainaina informed the Court that the 2nd respondent was unrepresented in the High Court. There was no representation for the 2nd respondent at the hearing and no written submissions have been filed on his behalf. Learned counsel for the 2nd respondent, Mr. Kiplagat relied on his written submissions and highlighted that the proceedings in the High Court were undefended and the matter proceeded for formal proof.
29. In his written submissions, the appellant submitted that the 1st respondent failed to prove its case to the required standard to wit: that it failed to prove that the 2nd respondent was not the registered owner of the motor vehicle at the time he executed the proposal form; that the evidence tendered in court did not either in the pleadings, exhibits and witnesses' testimonies allege nor prove the registered owner of the motor vehicle as at January 10, 2016 when the proposal form was signed; that there was no evidence that the 2nd respondent was not the registered owner nor was evidence adduced that the motor vehicle was registered in the name of another party as at the time the proposal form was signed. Counsel submitted that in the absence of direct evidence, the issue of misrepresentation could not arise.
30. Counsel further submitted that the 1st respondent failed to allege or prove that the alleged misrepresentation induced the 1st respondent to underwrite the risks. That in the evidence produced by PW1 and PW2, there was no mention that the alleged misrepresentation and non-disclosure of the registered owner of the motor vehicle induced the 1st respondent to underwrite the risks. That the 1st respondent did not plead, allege nor prove that the alleged misrepresentation induced them to underwrite the risks and as such cannot rely on the alleged misrepresentation or non-disclosure to repudiate the insurance policy.
31. Counsel further submitted that the 1st respondent failed to prove that the 2nd respondent had sold the motor vehicle to a third party. Counsel asserted that the 1st respondent failed to produce a copy of the sale agreement between the 2nd respondent and the alleged buyer; evidence of payment of the purchase price to the 2nd respondent; the terms of the sale agreement; that title had passed to the buyer; and that the alleged buyer had taken possession of the motor vehicle.
32. Further, that the 1st respondent did not prove the allegations of fraud against the 2nd respondent within the standards required in law. That the evidence presented on behalf of the 1st respondent was hearsay and therefore inadmissible as the source of that information was not called to testify.
33. Counsel asserted that the 2nd respondent had an insurable interest in the motor vehicle. That the key to determining whether a person had an insurable interest is whether the insured will be directly and financially affected by the loss of the property insured. That even if the 2nd respondent had sold his motor vehicle (which fact was not proved), the evidence by PW2 was that there was a balance of Kshs 2,000 and he therefore had a direct pecuniary interest in the motor vehicle to the extent of the unpaid purchase price. Counsel asserted that the 2nd respondent had an insurable interest in the motor vehicle at the time of the accident and the trial court therefore erred in failing to so hold.



34. Counsel urged the court to set aside the findings and judgment of the learned Judge and substitute it with a judgment dismissing the 1st respondent's suit against the 2nd respondent. Counsel also prayed for costs of the appeal and in the High Court.
35. Counsel for the 1st respondent opposed the appeal and submitted that they seek affirmation of the impugned judgment. On the nature of proceedings in the High Court, counsel submitted that the 2nd respondent who was the defendant in the suit in the High Court suit did not appear nor file appearance hence the proceedings were conducted under Order 10 of Rule 9 of the Civil Procedure Code in view of the fact that the reliefs sought were declaratory in nature.
36. It was counsel's further submission that PW1 led direct evidence based on documentation that had been executed between the 1st and 2nd respondent in relation to the insurance contract between the parties. That the evidence included a notice given to the policy holder relating to the effect of the sale of the insured motor vehicle.
37. PW1 in her evidence asserted that the insurance policy would not be transferred to a buyer if the motor vehicle was sold. The new buyer was required to file a proposal form and the risk accepted by the 1st respondent. Further, the new owner was also required not to use the motor vehicle until a certificate in his name was issued.
38. Counsel further submitted that expert evidence was led and the investigation report produced by PW2 proved that as at the time of the accident, the 2nd respondent had sold the motor vehicle. Counsel asserted that the evidence of PW2 was expert testimony within the meaning of Section 48 of the Evidence Act. Counsel urged that in the circumstances, the evidence adduced by PW2 was expert testimony and the documents produced were admissible in law under Section 49 of the Evidence Act which creates an exception to the Hearsay Rule when dealing with expert testimony.
39. Counsel concluded by stating that taking into account the facts and evidence that was in the High Court, the learned trial Judge judiciously considered the evidence led, the applicable law and he did not take into account an irrelevant factor or fail to consider a relevant factor.

Determination

40. This is a first appeal. A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. (See *Selle & another v Associated Motor Boat Co. Ltd. & Others* [1968] EA 123:
41. As was held by the Court of Appeal for East Africa in *Peters v Sunday Post Limited* [1958] EA page 424:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”
42. We have considered the record of appeal, the pleadings, the submissions, the authorities cited and the law. We discern the following issues for determination:



- a. Whether PW1’s testimony was hearsay and therefore inadmissible; and
 - b. Whether the 2nd respondent had an insurable interest in the motor vehicle.
43. On the question whether the learned Judge erred in failing to hold that PW2’s evidence was inadmissible; Section 48 of the [Evidence Act](#) provides that:

“When the court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of the relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact; but such opinion shall not be sufficient to prove a marriage in proceedings under the Divorce Act, or in prosecutions under section 153 of the [Penal Code Act](#).”

Further the term “art” is defined in [Black’s Law Dictionary](#), Eighth Edition in the following terms:

“...An occupation or business that requires skill.”

44. PW2, a professional investigator led evidence that he was in the business of insurance investigations and was licenced to conduct insurance investigations. PW2 was therefore an expert and his evidence was therefore expert testimony and opinion evidence. The report that he produced was therefore admissible under Section 49 of the [Evidence Act](#) which provides that:

“Whenever the opinion of any living person is relevant, the grounds on which that opinion is based are also relevant.”

We find that the evidence adduced by PW2 was expert testimony and the documents produced were therefore admissible in accordance with Section 49 of the [Evidence Act](#).

45. On the question whether the 2nd respondent had an insurable interest in the motor vehicle, counsel for the 1st respondent submitted that the 2nd respondent failed to disclose that he had sold the motor vehicle and that he had no insurable interest in the motor vehicle. The 1st respondent relied on the accident report form and the subsequent investigation report produced by PW2. Having found that PW2 was an expert witness, we find that his expert opinion was adduced vide the Investigation Report was admissible.

46. Further, on the issue of ownership of the motor vehicle, this Court in [Ignatius Makau Mutisya vs Reuben Musyoki Muli](#) [2015] eKLR stated as follows:

“...the presumption that the person is registered as owner of a motor vehicle in the log book is the actual owner is rebuttable. Where there exists other compelling evidence to prove otherwise, then the Court can make a finding of ownership that is different from that contained in the log book. Each case must however be considered on its own peculiar facts. As observed by this Court in the case of Francis Nzioka Ngao v Silas Thiani Nkunga, Civil Appeal No 93 of 1998:

“Whether the property in a chattel being sold has or has not been passed to the buyer is a question of fact to be determined on the facts of each individual case.”

47. From the Investigation Report adduced by PW2, the 2nd respondent admitted that he had sold the motor vehicle to Dominic Marika Mwaura for Kshs. 30,000. Acknowledgment of receipt of payments made in respect of the purchase price in instalments from Dominic Marika Mwaura to the 2nd



respondent are on record. It is notable that the first acknowledgment of receipt for Kshs. 20,000 is dated July 22, 2010.

48. In the circumstances, we find, like the learned Judge did, that as at the time of the accident the 2nd respondent did not have an insurable interest in the motor vehicle which warranted protection. From the record, as at the time of the accident, the 2nd respondent had parted with both possession and the beneficial ownership of the motor vehicle.

49. Section 36 of the *Sale of Goods Act* provides that:

“The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.”

50. We are guided by the case of *Peters v 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 V 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.

51. In the circumstances, we find that the 2nd respondent had a contractual duty to disclose to the 1st respondent that a sale had taken place at the point of reporting the accident as he had at the time, no insurable interest in the motor vehicle.

52. On the question whether the 1st respondent was entitled to repudiate the insurance contract, we find that the 2nd respondent failed to return the Certificate of Insurance. As per the terms of the insurance contract, the 2nd respondent was duty bound to return the Certificate once he sold the motor vehicle for cancellation. He failed to do so in breach of the insurance contract. The learned Judge found that the 1st respondent was entitled to avoid the policy by reason of the non-disclosure of material facts, misrepresentation and want of an insurable interest on the part of the 2nd respondent.

53. In *Co-operative Insurance Company Ltd v David Wachira Wambugu* [2010] eKLR this Court stated as follows:

“The learned judge was right in saying that a contract of insurance is one of good faith. As was said in *Joel v Law Union & Crown Insurance Company* (2) [(1908) 2 K B at page 883] by Fletcher Moulton, L.J.:

“The contract of life insurance is one of uberrimae fidei. The insurer is entitled to be put in possession of all material information possessed by the insured. This is authoritatively laid down in the clearest language by Lord Blackburn in *Brownlee v Campbell* 5 A C 925 at page 954:

‘In policies of insurance, whether marine insurance or life insurance, there is an understanding that the contract is uberrimae fidei, that, if you know any circumstance at all that may influence the underwriter’s opinion as to the risk he is incurring, and consequently as to whether he will take it, you will state what you know. There is an obligation there to



disclose what you know, and the concealment of a material circumstance known to you, whether you thought it material or not, avoids the policy.”

The learned authors of Bullen & Leake, Precedent of Pleadings, 14th Edition, Vol. 2 states at page 908: “Contracts of insurance are contracts of the utmost good faith. This gives rise to a legal obligation upon the insured, prior to the contract being made, to disclose to the insurer all material facts and circumstances known to the insured which affect the risk being run. Lord Mansfield’s words in *Carter vs Boehm* (1766) Burr. 1905 have stood the test of time:

“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 and to induce him to estimate the risk as if it did not exist. The keeping back such circumstance 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 risk run is really different from the risk understood and intended to be run at the time of the agreement... The policy would be equally void against the underwriter if he concealed... The governing principle is applicable to all contracts and dealings. Good faith forbids either party, by concealing what he privately knows to draw the other into a bargain from his ignorance of the fact and his believing the contrary...” [Emphasis supplied].

54. By parity of reasoning, the insurance contract being one of utmost good faith, it was incumbent upon the 2nd respondent to make full disclosure to the insurer, the 1st appellant herein that he had sold the motor vehicle. It was also incumbent on 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. These facts were well within the appellant’s knowledge and were expressly stated in the insurance contract. It was incumbent on the 2nd respondent to disclose all the existing circumstances to enable the 1st respondent herein assess its risk and determine whether it wanted to underwrite the insurance and if so willing, the cost thereof. By reason of the concealment of material facts, the 1st respondent was entitled to avoid the policy.
55. The upshot is that we find no merit in the appeal and dismiss it. We award the costs of this appeal and of the High Court to the 1st respondent.
56. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2022

W. KARANJA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

