Kenya Orient Insurance Limited v Mzungu (Civil Appeal E232 of 2024) [2025] KEHC 12308 (KLR) (7 August 2025) (Judgment)

Neutral citation: [2025] KEHC 12308 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E232 OF 2024

F WANGARI, J

AUGUST 7, 2025

BETWEEN

KENYA ORIENT INSURANCE LIMITED ..... APPELLANT

AND

CECILIA LUVUNO MZUNGU ..... RESPONDENT

(Being an appeal against the Judgment and decree of Hon. L. Gatheru (PM) delivered on 25th July 2024 in Mombasa Chief Magistrate's Court Civil Suit No. E787 of 2016, Cecilia Luvuno Mzungu v Kenya Orient Insurance Company Limited)

JUDGMENT

1. The suit in the lower court was instituted through an Amended Plaint dated 14/10/2019 where the Plaintiff/Respondent averred that sometime in January 2013, she obtained a comprehensive motor private policy on the motor vehicle from the Defendant which was to cover all loss and damage to the motor vehicle, its accessories and spare parts. That the policy was entered on the principle of uberrimae fidei which provided that the Plaintiff pays premiums and the Defendant was to meet its obligations under the policy.

2. The Plaintiff stated that she faithfully paid the premiums as and when they fell due until November 2013 when the motor vehicle in issue was involved in an accident along the Kilifi-Mombasa Road. That as a result of the accident, the Plaintiff suffered loss and damage which was to be recovered under the motor private policy as per the insurance policy between the Plaintiff and the Defendant.

3. The Plaintiff averred that she informed the Defendant of the accident as per the insurance policy between the Plaintiff and the Defendant but the Defendant failed, denied and/or refused to pay, repair or replace the damage on the motor vehicle.

4. The Plaintiff/Respondent prayed for judgment against the Defendant/Appellant for a sum of Kshs. 288,000/- being the expenses incurred by the Plaintiff for the repairs on the motor vehicle, with interest

from the date of filing this suit to payment in full, costs of this suit, and any other relief that this Honourable Court may deem fit and just to grant.

5. The Defendant/Appellant entered appearance and filed a Statement of Defence and Counterclaim dated 03/06/2016. The Defendant/Appellant then filed a "Reply to the Amended Plaint" dated 10/03/2020 where they reiterated paragraphs 1-28 of their defence and counterclaim dated 03/06/2016. The Defendant/Appellant stated that save and except what was expressly admitted, they denied each and every allegation contained in the plaint.

6. According to the Defendant/Appellant, it was a very strict term of the insurance policy that the insurance cover was limited to the use of the subject motor vehicle for social, domestic, pleasure and professional purposes only within the Republic of Kenya. That it was also a very strict term of the insurance policy that the Defendant would not be liable to indemnify the Plaintiff in respect of any loss and/or damage in the event the subject motor vehicle was being used contrary to the limitations as to the use clause.

7. That it was also a very strict term of the insurance policy that the Plaintiff would make a full declaration and/or disclosure of all material facts arising from a claim under the policy. That pursuant to the insurance policy, the Defendant was not contractually and/or statutorily bound to indemnify and/or compensate the Plaintiff for the alleged loss and damage as the Plaintiff had breached the express and strict terms of the policy of insurance in using the subject motor vehicle for hire and reward.

8. The Defendant prayed that the Plaintiff's suit be dismissed with costs and judgment be entered against the Plaintiff for a declaration that the Defendant was entitled to avoid the Insurance Policy Number MSA/101/075437/2013 in force between the Plaintiff and the Defendant and consequently was not obliged and/or legally bound to settle any claim or to honour any judgment and all consequential orders arising from the insurance policy and/or accident that occurred on 03/11/2013. That a declaration be made that the Defendant was not obliged or legally bound to indemnify the Plaintiff for the alleged loss and damage on the subject motor vehicle neither was it legally bound to settle any claim that arose from the alleged accident. The Defendant also prayed for costs of the suit and counterclaim and any other or further relief that the court deemed fit to grant.

9. This suit was heard in the trial court and judgment delivered on 25/07/2024 where the court found in favour of the Plaintiff against the Defendant for a sum of Ksh. 288,000/- together with interest at court rates from the date of filing the suit. Costs to the plaintiff with interest from the date of delivery of this judgment.

10. Being dissatisfied, the Appellant appealed against the judgment and decree through the Memorandum of Appeal dated 01/08/2024 on grounds that the learned trial magistrate erred in law and in fact in holding that the Plaintiff had proved her case on a balance of probability and in holding that the Defendant/Appellant had not proved the counterclaim.

11. That the learned trial magistrate misdirected himself on the principle of uberrimae fidei and in shifting the burden of proof to the Appellant on key issues other than to the person in possession and use of the motor vehicle. That the learned trial magistrate erred in law and in fact and misdirected himself in failing to hold against the respondent for failure to call key witnesses who had custody and use of the car at the time of the accident. That the learned trial magistrate erred in law by failing to properly evaluate and analyse the evidence in the matter hence making findings that were contrary to the weight of the evidence.

12. The Appellant prayed for orders that the appeal be allowed with costs, that Judgment of the lower court be set aside and be replaced with an order dismissing the suit with costs, and that the order dismissing

the counter claim be set aside and be replaced with an order entering judgment for the Appellant as prayed in the counterclaim plus costs, and for costs of the appeal.

Submissions

13. The appeal was canvassed by way of written submissions. The Appellant in their submissions dated 11/03/2025 argued that it is trite law that if a party does not file a defence, the assumption is that it has admitted the facts as pleaded. The Appellant cited Order 2 Rule 11 of the Civil Procedure Rules on admissions and denials, Order 2 Rule 12 on denial by joinder of issue, and the decision in Herta Elizabeth Charlotte Nazari v Herta Elizabeth Charlotte Nazari (1984) eKLR.

14. The Appellant then submitted that it was thus contrary to Order 2 Rule 11 when the magistrate held that failure to file a defence to the counterclaim by the Appellant did not amount to an admission that the driver of the motor vehicle had hired the motor vehicle and paid Kshs. 800.

15. That under Section 112 of the *Evidence Act*, when facts are within the knowledge of a party, he or she has the obligation of disapproving them. That the Respondent could therefore not purport to state that she did not know the circumstances under which the motor vehicle was being used. The Appellant relied on the holding in Lazarus Wanjala Musubili & another v Republic (2005) eKLR.

16. The Appellant submitted that the trial court further fell into error in failing to address the issue of the type of contract that was before court. That the contract of uberrimae fidei places on the insured the duty to full material disclosure and that the Respondent had the duty to present the persons who had physical custody of the motor vehicle as witnesses. That failure to call them negated the Respondent's suit as hearsay. The Appellant cited the case of Margaret Nduta Kamithi & George Njenga Kamithi v Kenindia Assurance Company Limited (2001) eKLR

17. The Appellant further argued that the Respondent pleaded Kshs. 288,000 as special damages. That however, particulars of the said amount were not provided and that the Respondent produced receipts which neither bore revenue stamps nor the electronic tax register (ETR) receipts. The Appellant cited the case of Eunice Auma Onyango v Salin Akinyi Oluoch (2015) eKLR and submitted that the receipts produced are thus of zero probative value and that the claim of Kshs. 288,000/= was not proved to the required standard.

18. According to the Appellant, the initial plaint lodged in court had a verifying affidavit sworn by Harrison Mzungu who was not authorized to swear it unless he had a power of attorney from the Respondent to file the suit in her name. That the trial court failed to address this aspect and that the suit was incurably defective from the start. That the law allows a party to sign documents on his or her behalf if it is a co-litigant as provided under Order 1 Rule 13 (1) and (2) of the Civil Procedure Rules.

19. The Appellant stated that to try and remedy this anomaly, the Respondent filed an Amended Verifying Affidavit on 09/03/2020, 7 years after the case was filed. That it is trite law that evidence under oath like an affidavit can be supplemented but cannot be amended. That a document known as an Amended Verifying Affidavit is thus unknown in law and hence there was no verifying affidavit to these proceedings. That according to Re the Estate of James Thuo (2006) eKLR, an affidavit cannot be amended.

20. The Respondent in her submissions dated 08/04/2025 contended that inasmuch as she was out of the country at the time of the accident, she was contacted by her agent who requested for one Nancy Muthoni to use the motor vehicle on humanitarian grounds, which she approved, and that there was no consideration for use of the motor vehicle. That the allegation that Nancy Muthoni paid Kshs. 800 as car hire fees are therefore unfounded. That on the material day of the accident, the insured motor

vehicle under Motor Vehicle Insurance Policy Number MSA/101/075437/2013 was not hired to any individual.

21. The Respondent stated that on the issue of damages, the principles upon which an appellate court can interfere with a trial court's award of damages were set out in Kemfro Africa Ltd t/a Meru Express Services 1976 & Gathogo Kanini v A.M. Lubia & Olive Lubia (1982-1988) 1KAR 727. The Respondent also stated that the law is settled that a claim for special damages must not only be specifically pleaded but must also be strictly proved with as much particularity as circumstances permit as held in Provincial Insurance Co. E.A. Ltd v Mordekai Mwanga Nandwa, Civil Appeal No. 179 of 1995 [1995-1998] 2 EA 289.

22. The Respondent submitted that it is evident from the record that she produced several receipts as proof of expenses incurred in repairing the insured motor vehicle. That the receipts were all produced and admitted in evidence, and the Appellant never raised any objection. The Respondent stated that even though Section 9 (1)(a) & (b) of the *Stamp Duty Act* provides that for an instrument to be produced in evidence it is supposed to bear a revenue stamp for it to be admissible, Section 88 of the same Act places the duty to affix a revenue stamp on a receipt upon the giver.

23. That to decline admission of such receipt would therefore be to punish an innocent party as was held in the case of Jackson Kariuki Kahungura & another v John Karanja Kihagi & 5 others (2018) eKLR. The Respondent therefore submitted that the grounds of appeal ought to fail.

Analysis

24. I have considered the Record of Appeal and submissions by the parties. The issues for determination are: -

    a. Whether findings of the trial were proper in the circumstances

    b. What orders on costs should issue

25. The role of the first appellate court to re-examine and to re-evaluate evidence to come up with its own findings was set out in Selle v Associated Motor Boat Co. (1968) E.A 123 as follows: -

> " ... 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 ..."

26. The Appellant avers that the Respondent had breached the terms of the motor vehicle policy by using the suit vehicle for hire. The accident occurred when one Nancy Muthoni had hire the vehicle at a rate of Kshs. 800/= from one Mr. Omar, the cousin to the Respondent, on the other hand, the Respondent admits that Nancy Muthoni was in possession and control of the vehicle at the time of the accident, but denied that she had hired the vehicle.

27. Both parties gave their evidence in court. For the Plaintiff's case, only the Respondent (Plaintiff) testified. For the Defence case (Appellant) the Relationship Manager testified. Both parties produced as exhibits the documents as listed in their respective list of documents.

28. The Respondent had the burden to prove that the vehicle was used for purposes as per the insurance policy. On the other hand, if the Respondent failed to proof her case, the Appellant had the burden to proof that the vehicle was used outside the limitation of use as per the policy, hence having a valid ground to repudiate the claim.

29. In Section 107 of the *Evidence Act* it states as follows;

> "S 107 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

30. Even though the Respondent submitted that the statements and documentary exhibits having been produced as exhibits, the evidence was deemed as uncontroverted. That does not discharge the burden of proof. In Kirugi and Another v Kabiya & 3 others [1987] KLR 347 the Court of Appeal held as follows: -

> "...The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof..."

31. The evidence on the part of the Respondent was all hearsay. Nothing stopped the Plaintiff from availing Mr. Omar or Nancy to give evidence as to whether or not the vehicle was under car hire or within the limitation of use as per the insurance policy.

32. In the Court of Appeal case of CMC Aviation Ltd Vs. Crusair Ltd (No.1) (1987) KLR 103 C.B. Madan JA stated as follows;

> "The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents."

33. Further, in Nguku v Republic [1985] KLR 412, it was held that;

> "Where a party fails to produce certain evidence, a presumption arises that the evidence, if produced, would be unfavourable to that party; this presumption is not confined to oral testimony but can also apply to evidence of tape recording which is withheld."

34. The fact that the Plaintiff pleaded and also relied on the documents as her evidence, I find that the Plaintiff ought to have availed the material witnesses in support of her position. She has failed to discharge the burden of prove that the vehicle was being used in accordance with the insurance policy.

35. On the claim for special damages, I agree with the submissions by the Appellant that even if the Respondent had met the standard of proof, the claim for special damages would have failed for the receipts produced had no probative value there being no revenue stamps or ETR receipts. (See Leonard Nyongesa v Derrick Ngula Right, Civil Appeal No. 168 of 2008 at Mombasa (unreported).

36. On the other hand, the Defendant/ Appellant filed a counterclaim seeking a declaration to have the Defendant entitled to avoid the insurance policy no. MSA/101/075437/2013 by virtue and is not obliged to settle any claims or honour any judgment arising from the insurance policy and or accident that occurred on 03/11/2023.

37. The Appellant's witness gave evidence that one Harrison Mzungu and Nancy Muthoni recorded statements confirming that Nancy had hired the vehicle for Kshs. 800/= from Mr. Oman. From the proceedings, it is not clear whether or not the statements were made in the presence of the investigator

or they were retrieved from the police records. No witness was called to adduce evidence in support of the documentary exhibits produced.

38. I have perused through the impugned Judgment at paragraph 14 to 18 (Page 196 and 197 of the R.O.A), I do find fault in the finding of the court that the Plaintiff had proved her case and shifted the burden of proof to the Defendant. From the evidence on record as recorded hereinabove, the Plaintiff/ Respondent's evidence does not meet the standard of proof, and so is the Defendant/ Appellant' evidence in support of the counterclaim. Both parties fail in their claims.

39. The Judgment entered in favour of the Plaintiff/ Respondent is hereby set aside and substituted with the Judgment dismissing the Plaintiff's suit. The Defendant's Counterclaim is also dismissed.

40. On costs, both parties' claims having failed to meet the threshold of the standard of proof, each party is to bear its own costs both in the lower court and on appeal.

Determination

41. The upshot of the foregoing is as follows:

    a. That the appeal is partially successful and is allowed on the following terms;

        i. The Judgment of the lower court is set aside and substituted with Judgment dismissing the Plaintiff's suit.

        ii. That Judgment on counterclaim fails, and the Defendant's Counterclaim is hereby dismissed.

    b. Each party to bear its own costs.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 7TH DAY OF AUGUST, 2025.

.....

HON. F. WANGARI

JUDGE

In the presence of:-

Mr. Kioko Advocate for the Appellant

N/A by the Respondent.

Ms. Norah, Court Assistant