



**UAP Insurance Co. Limited v Karuma (Civil Suit 107 of 2019)
[2022] KEHC 11891 (KLR) (Civ) (21 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 11891 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL SUIT 107 OF 2019
CW MEOLI, J
JULY 21, 2022**

BETWEEN

UAP INSURANCE CO. LIMITED PLAINTIFF

AND

JAMES GACHUKIA KARUMA DEFENDANT

(Emanating from Thika CMCC No. 3 of 2018)

JUDGMENT

1. UAP Insurance Co Ltd, (hereafter the plaintiff) has sued James Gachukia Karuma (hereafter the defendant) seeking *inter alia* a declaration that the plaintiff is entitled to repudiate any claim that arose as a result of a road traffic accident on January 15, 2017 and that it is not bound to compensate the claimant in Thika CMCC No 3 of 2018 – Moses Kasiaviku Muchafu v Kennedy Ongutu Ochieng & James Karuma Gachukia (hereafter primary suit). It was averred that the plaintiff had insured the defendant's motor vehicle registration number KCC 548H (hereafter insured's motor vehicle) under policy No 100/850/1/006229/2017 and that on or about the January 17, 2018 the plaintiff was served with pleadings by a claimant relating to civil proceedings in respect of a road traffic accident that had allegedly occurred on the June 2, 2017 involving the insured's motor vehicle.
2. It was further averred that the defendant was in breach of the terms of the insurance policy and contract entered into by the parties by his failure to report to the plaintiff the occurrence of the said accident; that despite written requests to the defendant to comply with the requirement for documentation of the claim and payment of policy excess, the defendant had defaulted, necessitating the suit.
3. The defendant, though duly served with summons, failed to enter appearance or file defence and on June 23, 2020 the plaintiff requested for interlocutory judgment in default of appearance and or a defence.



4. Thereafter, the suit proceeded to formal proof during which Frankline Njuki Nyaga (PW1) testified on behalf of the plaintiff. He identified himself as a senior Legal Officer at the plaintiff company and adopted his witness statement dated October 8, 2021 as his evidence-in-chief. He produced several exhibits, including a copy of the plaint in Thika CMCC No 3 of 2018 (PExh 1), email dated April 24, 2018 to the defendant's agent (PExh 2), letter dated 2.07.18 to the defendant (PExh 3) and policy document No 100/850/1/006229/2017 and Schedule (PExh 4). He urged the court to grant the reliefs sought.
5. Upon the close of its case, the plaintiff's counsel filed submissions. Counsel for the plaintiff submitted that under section 2 clause 2 of the policy document, the defendant was entitled to seek indemnity from the plaintiff for any claim that would become legally payable in respect to *inter alia* bodily injury to a claimant. However, under the exceptions to the said clause, the plaintiff was not liable to indemnify the defendant, if the defendant did not observe clause No 5 in the conditions of the policy agreement. That the said provision created a condition precedent to assumption of liability to the effect that the defendant was obligated to notify the plaintiff of the occurrence of the material accident under which a claim was raised.
6. It was further submitted that the plaintiff only became aware of the accident upon receipt of the pleadings in Thika CMCC No 3 of 2018 and despite requests made to the defendant to avail documents in respect of the claim and to co-operate with the appointed advocates he willfully or otherwise chose not to. Relying on *The Law of Marine Insurance* 2nd Edition (2006) Pg 536 and the definition of 'condition precedent' as defined in the English decision in *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1992] 1AC 233 counsel argued that notification of an event likely to give rise to a claim was an obligation and a condition precedent to the assumption of the duty of the plaintiff to indemnify the defendant. And hence, where the defendant failed to satisfy the said condition, the claim became voidable at the option of the plaintiff. He asserted that the plaintiff is not liable to satisfy any judgment that may arise out of the primary suit. The court was thus urged to grant the prayers in the plaint with costs.
7. The court has considered the pleadings by the plaintiff as well as the submissions filed in respect of the matter. The sole issue for determination is whether the plaintiff has established on a balance of probabilities that the defendant was in breach of the policy agreement and that the plaintiff is therefore entitled to repudiate liability arising from the primary suit
8. The plaintiff by its plaint averred at paragraphs 3, 4, 5, 6 and 7 that:
 - “ 3. At all material times, the plaintiff had insured the defendant's motor vehicle registration number KCC 548H under policy 100/850/1/006229/2017 from the March 23, 2017 to March 22, 2018 both days inclusive. The plaintiff will rely on the said policy for its effect and purport.
 4. That on or about the January 17, 2018 the plaintiff received a plaint from a claimant pursuant to *cap 405* Laws of Kenya of an intention to institute civil proceedings in respect of a road traffic accident that had allegedly occurred on the June 2, 2017 involving the said vehicle along Kiganjo road.
 5. That the defendant had not reported to the plaintiff the occurrence of the said accident on the June 2, 2017 and this was in breach of terms of the insurance policy and contract entered into by the parties herein.

Particulars of Breach



The defendant was in breach of the insurance policy and contract by; -

- a. Failing to notify the plaintiff of an accident that was likely to give rise to a claim in terms of the policy document.
 - b. Failing to pay policy excess for the accident on June 2, 2017.
 - c. Disabling the plaintiff from properly defending the third party suits.
6. On January 9, 2018, one Moses K Machafu filed suit in the Chief Magistrates Court in Thika being Thika CMCC NO 3 of 2018 Moses Kasiavuki Machafu vs Kennedy Ongut Ochieng & James Karuma Gachukia in relation to the road traffic accident referred to in paragraph 4 hereof.
7. Despite written requests to the defendant to date, to comply with the documentation of the claim and payments of policy excess, the defendant has failed to comply thus necessitating this suit.” (sic).
9. The plaintiff's claim is founded on alleged breach of contract in this case the policy agreement. At the hearing, (PW1) adopted his witness statement whose key assertions are;
- “2. That the said underwriter has insured motor vehicle KCC 548H (hereinafter referred to as the insured vehicle) belonging to the defendant herein under a comprehensive cover commencing on 23.3.17 to 22.3.18.
 - 3. That on 17.1.18 the plaintiff received pleadings in respect of Thika CMCC No 3 of 2018 an alleged accident that had occurred on the 2.06.17 involving the insured's vehicle and a pedestrian.
 - 4. That the plaintiff requested the defendant both via verbal and written communication to avail documentation in respect to the alleged accident in lieu of which the plaintiff would repudiate the claim.
 - 5. That the defendant declined willingly and or otherwise to avail any documentation as well as pay the requisite policy excess as required by the policy contract.
 - 6. That as a result of the breach of the terms of the policy contract the plaintiff now seeks a declaration that it is entitled to repudiate any claim for any accident that occurred on June 2, 2017 involving the insured's vehicle under cap 405 Laws of Kenya.” (sic) .
10. The onus was on the plaintiff to prove the alleged breach of contract. The applicable law as to the burden of proof is found in sections 107, 108 and 109 of the Evidence Act. In Karugi & Another v Kabiya & 3 Others [1987] KLR 347 the Court of Appeal stated that:

“[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”



11. The plaintiff's case rests on the alleged breach by the defendant of the contract of insurance between the parties and in particular clause No 5 of the conditions in the policy document. The contract of insurance or policy agreement prescribes the rights and obligation of the respective parties. PW1 while testifying produced several documents including the policy document in respect of policy No 100/850/1/006229/2017 and policy schedule (PExh 4). The conditions' part of the policy document states that it applies to all sections of the policy document. It is provided in condition therein 2 that:

“The due observance and fulfillment of the terms of this policy in so far as they relate to anything to be done by the insured and ...shall be conditions precedent to any liability of the company to make any payment under this policy. “

12. Condition 5 placed an obligation upon the defendant to report to the plaintiff and with full particulars, as soon as possible, any occurrence that may give rise to a claim under the policy. Further, to notify or forward to the plaintiff any latter, claim, pleadings, or other process immediately on receipt. This duty on the part of the defendant, the plaintiff argues, is a condition precedent as defined in the Bank of Nova Scotia case, to the assumption of the plaintiff's duty to perform its obligation under the policy.

13. The plaintiff's evidence stands uncontested. The defendant did not report to the plaintiff the occurrence of the accident leading to the claim represented in Thika CMCC No 3 of 2018 Moses Kasiavuki Muchafu vs Kennedy Ongutu Ochieng & James Karuma Gachukia , and the plaintiff only learned about the accident a year later when served directly with summons and or pleadings. And despite correspondence (PExh 3) sent to the defendant by the plaintiff to document the claim, the defendant did not respond. In the circumstances, the court is satisfied that the plaintiff has established its case on a balance of probabilities. Accordingly, judgment is entered for the plaintiff against the defendant as prayed in the plaint, with cost.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 21ST DAY OF JULY 2022

C. MEOLI

JUDGE

In the presence of:

Mr Ngechu for the plaintiff

N/A for the defendant

C/A: Carol

