



**UAP Insurance Co Limited v Four Seasons Limited (Civil Suit
86 of 2019) [2023] KEHC 1721 (KLR) (Civ) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1721 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT 86 OF 2019

CW MEOLI, J

MARCH 2, 2023

BETWEEN

UAP INSURANCE CO LIMITED PLAINTIFF

AND

FOUR SEASONS LIMITED DEFENDANT

JUDGMENT

1. UAP Insurance Co Ltd, (hereafter the plaintiff) sued Four Seasons Limited (hereafter the defendant) seeking *inter alia* a declaration that the plaintiff is entitled to repudiate any claims arising from a road traffic accident that occurred on January 15, 2016 and is not bound to compensate the claimant in Mavoko CMCC No 102 of 2018 Josephat Kathethu Wambua v Michael Mulei Kimeu & Four Seasons Ltd (hereafter primary suit). It was averred that the plaintiff had insured the defendant's motor vehicle registration number KAL 662C (hereafter insured's motor vehicle) under policy 120/087/1/014776/2010 and that on or about the February 3, 2016 and March 5, 2018 the plaintiff received a statutory notice from a potential claimant, of his intention to institute civil proceedings in respect of a road traffic accident that occurred on January 15, 2016.
2. It was further averred that as at filing this suit the defendant had not reported to the plaintiff the occurrence of the said accident and is thus in breach of the terms of the insurance policy and contract entered into by the parties herein. That the plaintiff on March 3, 2016 wrote to the defendant through its brokers requesting it to avail claim supporting documents and payment of excess as per its obligations under the policy but the defendant failed to comply, thus necessitating this suit. The defendant despite being served with summons to enter appearance failed to enter appearance or file defence and a default judgment was entered on January 22, 2021.
3. The suit proceeded for formal proof hearing during which Joy Muthoka testified on behalf of the plaintiff asPW1 and was the sole witness. She identified herself as a legal officer at the plaintiff company



and adopted her witness statement dated January 25, 2022 as her evidence-in-chief. She also produced the bundle of documents being the policy document & policy schedule, demand letter & statutory notice dated February 3, 2016 and email dated March 3, 2016 attached to the plaintiff's list of documents dated April 25, 2019 as PExh.1.

4. It was her further evidence that under condition 5 of the policy document, the insured was required to report any accident to the insurer which the insured failed to do in respect of the material accident or document the claim. That the plaintiff only learnt of the accident through the statutory notice served upon by a third party and is therefore entitled to repudiate the policy and is not obligated to settle any claims in respect of the said accident.
5. After the hearing, the plaintiff's counsel filed submissions. Counsel submitted that under section 2 clause 2 of the policy document the defendant was entitled in the period of the insurance cover to seek indemnity from the plaintiff for any claim that became legally payable in respect to *inter alia* bodily injury. However, under the exceptions to the said clause, the plaintiff was not liable to indemnify the defendant, if the defendant did not observe "condition no 5" of the policy of insurance. That the said provision created a condition to the policy that the defendant had an obligation to notify the plaintiff, and to document the incident, upon the occurrence of the accident respecting which the demand notice and statutory was received.
6. It was further submitted that the plaintiff only became aware of the of the accident upon receipt of the demand letter and statutory notice and that despite requesting the defendant to cooperate with the appointed advocates and avail documents, the defendant willfully chose not to, thus necessitating the filing of the instant suit. Relying on *The Law of Marine Insurance* 2nd Edition (2006) Pg 536 and the decision English decision in *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1992] 1AC 233 the plaintiff's counsel argued that notification of an event likely to give rise to a claim was an obligation and a condition precedent to the duty of the plaintiff to indemnify the defendant. And hence, the failure by the defendant to satisfy the said condition entitled the plaintiff to repudiate any claims arising from the material accident. And that the defendant's failure to satisfy the conditions precedent rendered the claim voidable at the option of the plaintiff.
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 plaintiff has established on a balance of probabilities that the defendant was in breach of the policy of insurance and whether the plaintiff is entitled to repudiate any liability in respect of the primary suit. pertinent to the determination of the said issue are the pleadings, which form the basis of the plaintiff's case before this court. Hence a review thereof is apposite before dealing with evidentiary matters. In *Wareham t/a AF Wareham & 2 Others Kenya Post Office Savings Bank* [2004] 2 KLR 91, the Court of Appeal stated in this regard that: -

"We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or court on the basis of those pleadings pursuant to the provisions of order XIV of the Civil Procedure Rules. And the burden of proof is on the plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail."



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 KAL 662C under policy 120/087/1/014776/2010. The plaintiff will rely on the said policy for its full purport and effect.
4. That on or about February 3, 2016 and March 5, 2018 the plaintiff received a statutory notices from a potential claimant pursuant to cap 405 laws of Kenya of an intention to institute civil proceedings in respect of a road traffic accident that had occurred on the 19 January, 2016 involving the said vehicle along Peponi Area, Athi River.
5. The defendant has to date not reported to the plaintiff the occurrence of the said accident in respect of a road traffic accident that had occurred on the January 15, 2016 is thus in breach of the terms of the insurance policy and contract entered into by the parties herein. The plaintiff on March 3, 2016 wrote to the defendant through its Broker requesting it to avail claim support documents as per its obligations under the policy but the defendant neglected to comply.

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 documents.
 - (b) Failing to pay policy excess for the accident on the January 15, 2016.
 - (c) Disabling the plaintiff from properly defend the third party suits.
6. On January 12, 2018, one Josephat Kahehu Wambua filed suit being Mavoko — CMCC No 102 of 2018. - Josephat Kathethu Wambua vs Michael Mulei Kimeu & Four Seasons Ltd.
 7. Despite written requests to the defendant to comply with the documentation of the claim and payments of excess the defendant has failed to comply thus necessitating this suit.” (sic).
9. The plaintiff's claim is founded on alleged breach of contract, particularly breach of policy No 120/087/1/014776/2010 (hereafter policy of insurance). At the hearing, PW1 adopted her witness statement whose key assertions are that:
- “ 4. That the plaintiff requested the defendant as was required both 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 willfully or otherwise to avail the requisite documentation as well as pay the requisite policy excess as required under 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 arising from the accident that occurred on January 15, 2016 involving the insured vehicle”.
10. Despite the suit having proceeded *ex parte*, the onus was on the plaintiff to prove the alleged breach of the policy of insurance. The applicable law as to the burden of proof can be found in section 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 contract of insurance or policy agreement prescribes the rights and obligations of the respective parties. PW1 while testifying produced several documents among them the policy document in respect of policy No 120/087/1/014776/2010 and policy schedule, all as PExh 1 conditions 2 of the said policy document provides that; -
- “2. Insured’s duty
- “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. Whereas condition 5 provides that;-
- “ 5. Notification of accidents
- In the event of any occurrence which may give rise to a claim under the policy the insured shall as soon as possible give notice thereof to the company with full particulars. Every letter claim writ summons and process shall be notified or forwarded to the company immediately on receipt. Notices shall also be given to the company immediately the insured or any person claiming to be indemnified shall have knowledge of any impending prosecution, inquest or fatal inquiry in connection with any such occurrence. In the case of theft or other criminal act which may give rise to a claim under this policy the insured shall give immediate notice to the police and cooperate with the company in securing the conviction of the offender.”
13. Under the policy document, these and other conditions apply to all sections of the policy document. 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 letter, 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 indemnify the defendant in due performance of its obligation under the policy.



14. The plaintiff's evidence stands uncontroverted. The defendant did not report to the plaintiff the occurrence of the accident leading to the claim represented in Mavoko CMCC No 102 of 2018 Josephat Kathethu Wambua v Michael Mulei Kimeu & Four Seasons Ltd and that the plaintiff only learned about the accident upon being directly served with the statutory notice (letter dated February 3, 2016 in PExh1) . And despite correspondence (email dated March 3, 2016 by the plaintiff to the defendant's insurance agent in PExh1), the defendant and or his agent 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 hereby entered in favour of the plaintiff against the defendant as prayed in the plaint.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 2ND DAY OF MARCH 2023.

C.MEOLI

JUDGE

In the presence of:

Mr. Ngechu for the Plaintiff

Defendant: N/A

