



**Britam General Insurance Co (Kenya) Ltd v Kimani (Civil Case
E008B of 2023) [2024] KEHC 9106 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9106 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL CASE E008B OF 2023
MA ODERO, J
JULY 26, 2024**

BETWEEN

BRITAM GENERAL INSURANCE CO (KENYA) LTD PLAINTIFF

AND

LAWRENCE WAWERU KIMANI DEFENDANT

JUDGMENT

1. The plaintiff herein Britam General Insurance Co (Kenya) Limited commenced this suit by way of a plaint dated 15th February 2023 seeking the following orders;-
 - " a. A Declaration that the Defendant had no valid policy at the time of the accident.
 - b. A Declaration that the Defendant had breached fundamental conditions and warranties of the Insurance Policy No. 582/807/1/003296/2021/03 thereby discharging the Plaintiff from liability in respect of any claim arising from the accident involving Motor Vehicle Registration No. KBU 9xxx and Trailer Registration No. ZE 3xxx on 28th March 2021.
 - c. A Declaration that the Plaintiff is not liable to satisfy any Judgement claims arising from the accident which occurred on 28th March, 2021 involving Motor Vehicle Registration No. KBU 9xxx and Trailer Registration No. ZE 3xxx.
 - d. Costs of the suit.
 - e. A Declaration that the Plaintiff is not bound to make any payments or indemnify the Defendant under the Insurance Policy No. 582/807/1/003xxx/2021/03 in respect of any claim, bodily injury or death to any person or passenger being carried arising out of the road traffic accident



which occurred on 28th March 2021 along the Nyeri-Karatina Road at Kirigu area.”

2. The Defendant Lawrence Waweru Kimani did not enter appearance in the matter neither did he file any defence to the suit. The hearing then proceeded for formal proof.
3. PW1 Wilson Julius Odek told the court that he was a legal officer with the plaintiff company. The witness adopted as his evidence his written statement dated 15th February, 2023.
4. Vide a Proposal form dated 12th March, 2021 the Defendant requested for an Insurance Cover and the plaintiff issued to the Defendant a comprehensive and third party insurance policy No. 582/807/1/003xxx/2021/03 (hereinafter ‘the Insurance Policy’) subject to certain terms and conditions. The policy was to cover liability for third party risks in respect of the Defendants motor vehicle Registration No. KBU xxx and Trailer No. ZE 3xxx.
5. The terms of the contract provided that the policy was predicated upon the Defendant paying to the plaintiff the stipulated premium of Kshs. 245,891,138. According to the plaintiff the Defendant never paid any part of the said premium. That the Defendant gave out a cheque of Kshs. 66,000 but the said cheque was dishonoured.
6. On 28th March, 2021 the motor vehicle and trailer in question were involved in a traffic accident as a result of which the following suits were filed.
 - i. CMCC No. 77 of 2021
 - ii. CMCC No. 78 of 2021
 - iii. CMCC No. E001 of 2022
 - iv. CMCC No. E013 of 2022
7. The plaintiff filed this suit seeking to be exempted from any liability under the policy in respect of the said accident.
8. The plaintiff submitted that the failure by the Defendant to make any single payment towards the required premiums amounted to a fundamental breach of the insurance policy. As such the plaintiffs contended that they were in the circumstances entitled to a declaration to void the policy. They urged the court to allow the prayers sought in the suit.

Analysis and Determination

9. I have considered the suit filed in this court, the evidence tendered by the plaintiffs as well as the written submissions filed by the plaintiff.
10. It is trite law that he who alleges must prove.
11. This maxim is encapsulated by Section 107 of the *Evidence Act*, Cap 80 Laws of Kenya which provides as follows 107.
 - (1) Whoever desires any court to give judgment as to any legal right or liability dependent on 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.



12. The fact that the parties herein entered into a contract for provision of Insurance cover by the plaintiff in respect of motor vehicle Registration No. KBU 9xxx and trailer Registration No. ZE 3xxx is not in any doubt. A copy of the combined Application/Proposal Form dated 12th March, 2021 duly signed by the Defendant is annexed to the statement of PW1. The proposal form indicated that the Insurance period was to run from 12th March, 2021 to 11th March, 2022.
13. The Policy schedule set out the total premium payable which amounted to Kshs. 245,891.38
14. The duty of any court in such a dispute is to enforce the terms of the contract entered into by the parties. It is not business of the court to alter, vary and/or re-write the contract.
15. In the case of *National Bank of Kenya Ltd -vs- Pipe Plastic Samkolit (k) Limited & Another* [2007] eKLR the court of Appeal stated as follows:-

“A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion fraud or undue influence are pleaded and proved.”
16. There has been no allegation much less proof by the Defendant that they entered into the contract on the basis of fraud, misrepresentation and/or undue influence. As such I find that the Defendant voluntarily entered into the contract in issue and is therefore bound by the terms of the said contract.
17. The plaintiffs state that the Defendant never paid any portion of the required premium. That the Defendant only issued to the plaintiffs a Cheque No. 00xxxx dated 15th March 2021 for Kshs. 66,675 which cheque was dishonoured (bounced) on account of ‘insufficient funds’
18. As stated earlier the Defendant despite having been properly served did not enter appearance in this matter, did not file any defence and did not attend court for hearing of the suit. Therefore the evidence adduced by the plaintiff remained uncontroverted.
19. The vehicle and trailer belonging to the Defendant were involved in an accident on 28th March 2021. Third parties who suffered injuries as a result of said accident filed suits claiming for damages. The plaintiff seeks a declaration that due to non-payment of the agreed premiums they are not liable in respect of damages arising from the said accident.
20. It is common knowledge that contract for provision of Insurance Cover will only take effect once the required premiums are paid. Insurance Companies are not charitable institutions. They do not provide cover for free.
21. In order to benefit from Insurance cover the Defendant needed to fulfil the terms and conditions of the contract. It was an express term of the policy that;-

“The insurer shall not assume risk unless and until the premiums payable thereon is received by the Insurer.”
22. Section 156 (1) of the *Insurance Act*, Cap 487 Laws of Kenya provides that:-

“No Insurer shall assume a risk in Kenya in respect of Insurance business unless the premium payable thereon is received by the Insurer”
23. In this case no premium was received by the plaintiff (Insurer). As such the plaintiff has no obligation to assume any risk in respect of the said policy.



24. The plaintiff has been served with the various causes of action arising from the accident involving the Defendant Motor Vehicle and trailer. As such the plaintiff had to file this suit seeking a declaration to enable them avoid any liability arising from said accident.
25. In failing to make any payment towards the premiums required by the Defendant breached a critical aspect of the contract. This failure to remit any payment is indeed a fundamental breach of the said contract and renders the entire policy null and void. In the circumstances the plaintiff would have no obligations under the said policy.
26. I am satisfied that the plaintiffs have proved their case on a balance of probability. I allow the suit and make the following orders;-
 1. A Declaration is hereby issued that the Defendant had no valid policy at the time of the accident on 28/3/2021.
 2. A Declaration is hereby issued that the Defendant had breached fundamental conditions and warranties of the Insurance Policy No. 582/807/1/003xxx/2021/03 thereby discharging the Plaintiff from liability in respect of any claim arising from the accident involving Motor Vehicle Registration No. KBU 9xxx and Trailer Registration No. ZE 3xxx on 28/3/2021.
 3. A Declaration is hereby issued that the Plaintiff is not liable to satisfy any Judgement claims arising from the accident which occurred on 28/3/2021 involving Motor Vehicle Registration No. KBU 9xxx and Trailer Registration No. ZE 3xxx.
 4. A Declaration is hereby issued that the Plaintiff is not bound to make any payments or indemnify the Defendant under the Insurance Policy No. 582/807/1/003xxx/2021/03 in respect of any claim, bodily injury or death to any person or passenger being carried arising out of the road traffic accident which occurred on 28/3/2021 along Nyeri-Karatina Road at Kirigu Area.
 5. Costs of this suit to be met by the Defendant.

DATED IN NYERI THIS 26TH DAY OF JULY, 2024.

MAUREEN A. ODERO

JUDGE

