



**Metroplitan Cannon General Insurance Ltd v Ouma (Civil Case  
E002 of 2021) [2024] KEHC 17218 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 17218 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CIVIL CASE E002 OF 2021  
TM MATHEKA, J  
JULY 26, 2024**

**BETWEEN**

**METROPLITAN CANNON GENERAL INSURANCE LTD ..... PLAINTIFF**

**AND**

**GEORGE OMONDI OUMA ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff herein issued the defendant with a comprehensive private motor vehicle policy of insurance against 3rd Party Risk for Motor Vehicle Registration No. KCT 728P Toyota Voxy. This was No. 0101/07/36599/2020 COMP for one month from 24/09/2020 to 23/10/2020.
2. The terms of the policy were inter alia that the plaintiff agreed to indemnify the defendant against sums the defendant would become legally liable to pay in the event of an accident caused by or out of the use of the motor vehicle in respect of death and/or bodily injury to any 3rd party being a liability required to be covered by a policy of insurance under section 5(b) of the Insurance (Motor Vehicle) Third Party Risks Act.
3. The cover was for the use of the motor vehicle for social and domestic use.
4. On 20/10/2020 – around 3:30 pm the motor vehicle was involved in an road traffic accident along Nairobi – Mombasa highway while being driven by one Paul Ouma Otieno. It is the plaintiff's contention that the motor vehicle was ferrying fare paying passengers when the accident happened and the motor vehicle collided with motor tractor registration number KTCB 083J at Kiunduani. The plaintiff contends that the said Paul Ouma Otieno was the authorized driver of the plaintiff and was using the motor vehicle for the carriage of passengers for hire and reward at the behest of the defendant.
5. The plaintiff contends that for the foregoing reason the plaintiff is entitled under section 10(4) of the said Act to avoid the policy on grounds of non-disclosure of material facts by the defendant.



6. The plaintiff brought the suit on 14/6/2021 seeking the following orders:
  - a. A declaration that the plaintiff is and has at all material times been entitled to avoid the aforesaid policy of insurance number 0101/07/36599/2020 COMP apart from any provisions contained therein on the ground that the said policy of insurance was obtained by:-
    - i. Non-disclosure of a material fact or facts or
    - ii. Representations of facts which were false in material particulars or
    - iii. Both (i) and (ii) above.
  - b. A declaration that the plaintiff is not liable to make any payment under the aforesaid policy of insurance number 0101/07/36599/2020 COMP in respect of any claims against the defendant herein arising out of damage to any motor vehicle or bodily injuries, loss or damage sustained by any party in the accident on 20th October, 2020 involving motor vehicle registration number KCT 728P and KTCB 083J.
  - c. A declaration that motor vehicle registration number KCT 728P was being used for uninsured purposes on 20th October 2020 and therefore the plaintiff is not liable to pay and claim arising out of the accident of even date.
  - d. Costs of this suit.
7. By a statement of defence filed on 3/9/2021 the defendant put the plaintiff to strict proof of the claim that the motor vehicle was being driven with fare paying passengers.
8. The defendant filed a counter claim – based on the said policy stating:-The defendant states that during the currency of the said policy and more specifically on 20/10/2020 the plaintiff's motor vehicle registration No. KCT 728P was being driven along the Nairobi-Mombasa road by the defendant's driver who was duly authorized by the defendant to drive the said motor vehicle when an accident occurred involving third parties who were allegedly injured.The defendant states that immediately after occurrence of the said accident the defendant informed the plaintiff of the said accident as required of him.The defendant further states that on 25/10/2020 he filled and filed claim form with the defendant as required by the plaintiff and the law.The defendant states that on or about 10th February 2021 he was served with summons to enter appearance, plaint and other claim documents from third parties who had sued the defendant following the said accident vide plaints filed in the Principal Magistrate's court at Makindu, more specifically Makindu PMCC NO. E21 OF 2021 Daniel Musee Mutua –vs- George Omondi Ouma, Makindu PMCC No. E22 of 2021 – Dennis Juma Muthama –vs- George Omondi Ouma, Makindu PMCC E23 OF 2021 – Joel Omar –vs- George Omondi Ouma which claims were filed on 8/2/2021.The defendant further states that upon receipt of the said summons and claim documents he forwarded the same to the plaintiff immediately and the plaintiff assured him that it will take over the defence of the said claims and to deal with them as per the terms of the policy.The defendant further states that a few days later he received a notice from the plaintiff that the plaintiff had declined the policy and therefore the plaintiff declined to take over the conduct and settlement of the claims stated at paragraph 18 above.The defendant now states that the said declinature was based on false and unsupported reasons, unfounded allegations and had no basis at all and that the plaintiff has deliberately failed, refused and or out rightly breached the said policy.
9. The defendant avers that he suffered loss in advocates and court fees in defending the suits above – which he claims against the plaintiff.



10. The defendant seeks in the counter claim that the plaintiff's suit be dismissed and judgment be entered for the defendant against the plaintiff as follows;
  - a. A declaration that the plaintiff is liable to satisfy the whole of the decrees that arises or may arise out of the use of the said motor vehicle Registration Number KCT 728P on 20/10/2020 more particularly decrees that may arise out of Makindu PMCCC No. E21 of 2021, Makindu PMCCC No. E22 of 2020, Makindu PMCCC No. E21 of 2020, Makindu PMCCC No. E155 of 2021, and any other consequent suits that may arise out of the use of the motor vehicle KCT 728P on 20/10/2020 as above.
  - b. Refund to the defendant of any sums that the defendant may have or will have used in respect of defence of Makindu PMCCC No. E21 of 2021, Makindu PMCCC No. E22 of 2020, Makindu PMCCC No. E21 of 2020, Makindu PMCCC No. E155 of 2021, and any other consequent suits that may arise out of the use of the motor vehicle KCT 728P on 20/10/2020 as above.
  - c. Costs of the counter –claim.
11. On 27/9/2021 the plaintiff filed a reply to the defence and defence to the counter claim.
12. In the defence to counter claim, the plaintiff denied the claim and put the defendant to strict proof of the allegations. The plaintiff states as follows:
  - i. That the defendant's declared use of the motor vehicle at the point of obtaining the policy of insurance was for his own private use to wit social and domestic purposes;
  - ii. That at the time of the accident of 20/10/2020 the defendant was using his motor vehicle for the carriage of passengers for hire and reward which was completely contrary to and in contravention of the policy terms and conditions;
  - iii. That by reason of the foregoing the plaintiff is and was at all material times entitled under section 10(4) of the said Act to avoid the policy on the grounds that the said policy was obtained by defendant by non-disclosure and/or misrepresentation of one or more material facts.
13. The matter was heard orally.
14. The plaintiff called PW1 Abdalla Chioga Ngwaru – who testified that he was working with MIROX Insurance Investigators who were instructed by the plaintiff to investigate this accident. He produced the report and all its annexures. On cross examination he said that the issues he was investigating were: whether there was an accident; which motor vehicles were involved and whether anyone sustained injuries. He was also to find out who was to blame for the accident.
15. He told the court that he drew the conclusion that at the time of the accident the subject motor vehicle was ferrying passengers from Nairobi to Mombasa contrary to the policy of the motor vehicle.
16. He confirmed that an accident happened – however he would not confirm whether the motor vehicle was ferrying any passenger – fare paying passengers. He did not interview any fare paying passengers, he did not find any evidence of any fare paying passengers in the police records or police abstract – and other than an allegation that money sent from the driver's phone to the defendant was collections from the alleged fare paying passengers there was no evidence from him that anyone was a fare paying passenger in the said motor vehicle.
17. PW2 Clement Kipkoech Ng'eno a Senior Claims Officer at the plaintiff confirmed that an Insurance Policy was issued to the defendant between 24/9/2020 and 23/10/2020, and that the accident



happened on 20th October 2020 during the life of the policy. That the accident was reported on 25/10/2020. He said 3rd parties were injured – he said he was not aware of any suits filed by 3rd parties. He said that they had not received any service of claims against the defendant.

18. The defendant testified and called the person who was driving motor vehicle on the material date. Both confirmed that there was an accident – both denied that motor vehicle was being used for ferrying fare paying passengers contrary to the insurance policy. The driver Peter Ouma Otieno confirmed that he was using motor vehicle to travel to Mombasa but did not have any fare paying passengers.
19. DW3 John Thuo Njeru simply confirmed that the defendant was his mechanic and that he was aware the defendant had a motor vehicle.
20. DW4 was Chief Inspector (No. 235795) Peter Kinyua who told the court he had appeared to produce the police abstract of the Road Traffic Accident on 20/10/2020. He said the driver and passengers of the trailer sustained injuries. He testified that the motor vehicle KCT 728P Toyota Voxy rammed into the tractor. He said on cross examination that the report from the police said that passengers in the Voxy escaped unhurt – and that save for the name of the driver –there were no other names in the police report. He produced the abstract.
21. At the close of the case for the defendant – parties filed written submissions which I have considered
22. The only issue for determination is whether the plaintiff has proved on a balance of probability that the defendant is guilty of a breach of the insurance policy he obtained from the plaintiff; policy no. 0101/07/36599/2020 COMP for motor registration No. KCT 728P.
23. It is submitted that the proof that the DW2 was ferrying passengers for fare are the M PESA transactions between the defendant and the DW2. It is also submitted that the PW1 visited the Makindu Police Station where the Investigating Officer informed him that there were passengers in the defendant’s motor vehicle but whose names were not captured allegedly because they were not injured.
24. It is further submitted that the defendant’s case was incredible especially the testimony of the driver.
25. It was submitted that the journeys made by DW2 with the motor vehicle were evidence of the fact that he was using the same to ferry passengers.
26. The submissions indicated that the plaintiff did not believe the case for the defendant and wanted this court not to do so. It was submitted that the defendant’s and DW2’s testimony were proof that they had something to hide, – further the plaintiff submitted that DW4’s statement that passengers in the Voxy escaped unhurt was telling – that there were other passengers who never sustained injuries and hence their names were not captured.
27. It was submitted that the PW1 and PW2 has established that the motor vehicle was ferrying passengers in breach of the insurance policy.
28. Relying on Cooperative Insurance Company Limited –vs- David Wachira Wambugu Nyeri Court of Appeal Civil Appeal No. 66 of 2008 [2010] e KLR the plaintiff submitted that contracts of insurance are contracts of utmost faith creating the legal obligation on the insured to disclose all material facts that may affect the risk being insured.
29. That the duty to disclose lies with the insured – see Sita Steel Rolling Mills Ltd –vs- Jubilee Insurance Company Limited vs Jubilee Insurance Company Limited Mombasa High Court Civil Case 86 of 2000 [2007] e KLR.

That by not disclosing that the motor vehicle would be used for fare paying passengers the defendant failed to uphold the principle of utmost good faith.



30. On the need for disclosure it was submitted that the insurer is able to determine whether to take the risk or the premiums to charge see Pan Atlantic Insurance Company –vs- Pine Top Insurance Company Limited [1994] ALL ER 581, 606:

Every fact and circumstance, which can possibly influence the mind of a prudent intelligent insurer, in determining whether he will underwrite the policy at all, or at what premium he will underwrite it, is material. Subsequently, any information availed by the defendant in the Claim Form was material to the plaintiff with regard to the accident and the claim thereafter.

31. Ultimately, it was submitted that the defendant had breached the policy and the plaintiff was under no obligation to indemnify the defendant in any claims under the policy of insurance and Section 10(4) of the Insurance (Motor Vehicle Third Party Risk) Act allowed the plaintiff to repudiate the policy as it was obtained through non- disclosure or misrepresentation of material facts. See Charles Momanyi Mageto –vs- Co-operative Insurance Company of Kenya Ltd [2016] e KLR; daybreak Limited v- Monarch Insurance Company Limited [2013] e KLR; Paul Mutsya v Jubilee Insurance Company of Kenya Limited [2018] e KLR; where the court held that a breach of the terms and conditions of a policy by an insured entitles the insurer to repudiate any liability incurred by the insured. See Monarch Insurance Company Limited v Joseph Njenga Maina [2021] e KLR where it was held In the result, it is my finding that the plaintiff has proved its case on balance of probabilities. A declaration be and is hereby issued that the plaintiff is not liable or bound to make payments or indemnify the defendant under the said insurance policy cover in respect of any claim in respect to death or bodily injury to any person or passenger being carried arising out of the road traffic accident which occurred on 5th March 2014 along Nairobi-Kangundo road involving the defendant’s motor vehicle registration number KAM 997Z. The plaintiff is awarded costs of the suit plus interest.

See Monarch Insurance Company Limited v Swaleh Moi Juma [2020] eKLR where the court reiterated that provisions of section 10 of the Insurance (Motor Third Party Risk) Act Cap 405 that provides that the insurer can obtain a declaration that although the policy apparently covered the liability, it would be repudiated by non-disclosure of a material fact, in the case where the motor vehicle was being used for hire and reward as opposed to private use.

32. The court was urged to allow the plaintiff’s claim.
33. For the defendant it is submitted that the failure by PW1 the investigator to call any of the persons be allegedly interviewed as witness recorded his evidence about what they told him to be hearsay and inadmissible.
34. With regard to the alleged passengers in motor vehicle registration KCT – it is submitted it was not enough to argue that there were passengers – there was a duty to prove that indeed there were fare paying passengers in the said motor vehicle.
35. On whether the defendant was served with the repudiation notice it is submitted that it was served on a party other than the defendant – the defendant relied on Kimwa Holdings Limited vs Occidental Insurance Company Limited [2018] e KLR to the effect that a party is entitled to be heard on any allegation made against him before a decision is made against him failure to do so amounts to violation of the rules of natural justice – the court proceeded to find that the failure made the process to be in violation of the rights of the appellant. The same holding was made in Kenya Orient Insurance Company Limited vs Robert Gakei Muringi and 4 Others [2020] e KLR.



36. It was further submitted that the insurance policy was for covering 3rd party risks – in this case 3rd parties were injured in the Road Traffic Accident and the insurer was obligated to satisfy the decrees in MCCC E21, E22, E23 and 151 of 2021.
37. Finally the defendant submitted that the suit was wrongly before the court and was time barred by dint of section 10(4) of the Insurance (Motor Vehicle 3rd Party Risks) Act Cap 405 Laws of Kenya. The defendant relies on Monarch Insurance Company Limited vs Wycliffe Onyango Odenda and 2 Others [2018] e KLR.
38. As I have stated herein above the pertinent issue for determination is whether the plaintiff has proved on a balance of probability that the defendant breached the policy as alleged.
39. The ground for this allegation is that on the date of the accident the defendant's motor vehicle was ferrying fare paying passengers in breach of the insurance policy.
40. I have carefully considered the evidence, the submissions by counsel and all the authorities cited.
41. It is not in dispute the Plaintiff issued a policy to the defendant covering 3rd party risks. Neither is it in dispute an accident happened. What is in dispute is whether the m/v was driven while ferrying fare paying passengers contrary to the terms of that Policy.
42. The record will show that PW1 the investigator did not produce any evidence to establish that the motor vehicle ferried fare paying passengers.
43. The plaintiff spoke about M PESA payments – but not a single witness appeared to tell the court that indeed they were ferried by the said motor vehicle on the day of the Road traffic Accident and paid fare.
44. The plaintiff also put a lot of weight in the words allegedly stated by DW4 – that passengers in the motor vehicle escaped unhurt – hence their names were not captured – It is evident that this was not the Investigating Officer. He did not investigate the accident – and the statement that passengers in the motor vehicle escaped unhurt could be interpreted, without any other evidence to the contrary to mean – the driver who was the occupant of the said motor vehicle.  
That besides it any passenger in any of the motor vehicles would have been witness for the police – and I doubt that only those injured would appear in the police records.
45. The issue of the MPESA statement is not proof that there were fare paying passengers – the plaintiff needed to produce more than mere speculation.
46. I am of the view that from the foregoing evidence, the plaintiff failed to establish the single fact upon which the plaintiff was claiming that defendant had breached the policy.
47. The plaintiff's suit fails.
48. The defendant established that he obtained an insurance policy from the plaintiff, and that the accident happened during the life of the policy, and the report was made within the requisite time. In my view the defendant's counter claim succeeds.
49. Ultimately the plaintiff's suit is dismissed.
50. The defendant's counter claim is allowed.
51. The defendant will have the costs of this suit plus interest at court rates.

**DATED, SIGNED AND DELIVERED THIS 26TH DAY OF JULY 2024 MUMBUA T MATHEKA  
JUDGE**



**SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA**  
**THE JUDICIARY OF KENYA.**  
**MAKUENI HIGH COURT**  
**HIGH COURT DIV**

