



REPUBLIC OF KENYA



KENYA LAW
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**Jubilee Insurance Company Limited v Aguda (Civil Case 103 of 2011)
[2023] KEHC 1435 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1435 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL CASE 103 OF 2011
AN ONGERI, J
FEBRUARY 23, 2023**

BETWEEN

JUBILEE INSURANCE COMPANY LIMITED PLAINTIFF

AND

DANIEL ORIWA AGUDA DEFENDANT

JUDGMENT

1. The Plaintiff in this case Jubilee Insurance Company Limited filed this suit *vide* plaint dated 26/7/2011 against the Defendant Daniel Oriwa Aguda seeking the following remedies;
 - i. A declaration that plaintiff is and has at all material times been entitled to avoid the policy of insurance number P/NRB/2010/2010/50894 apart from any provisions therein contained on the grounds that the defendant breached fundamental conditions precedent to any liability of the plaintiff.
 - ii. Costs of this suit both party and party costs and advocate and client's costs with interest thereon at court rates.
 - iii. Such further or other relief as this Court may deem fit and just.
2. The Defendant filed a defence dated November 15, 2011 denying the plaintiff's claim.
3. The case proceeded *Exparte* the Defendant having been served with a hearing notice but having failed to appear in court for the hearing of the case.
4. The Plaintiff called one witness who adopted her witness statement as her evidence in chief. evidence is as follows;



5. That on or about the 13/9/2010 the Defendant filled in a Motor Private Proposal Form in respect of motor vehicle registration number KAZ 582S a Toyota corona in which he indicated that the use of the vehicle would be solely for social and domestic purposes and for use of own or employer's business.
6. She stated that the Defendant indicated that the motor vehicle would not be used for carriage of fare paying passengers or goods for hire or reward or for any other purpose and that based on such disclosure, the Plaintiff issued a policy number P/NRB/2010/2010/50894 on October 13, 2010 to September 12, 2011 after which the Defendant was issued with the insurance sticker and expressly stated that its limitations as to use were private.
7. The witness stated that on or about the October 30, 2010 the motor vehicle was involved in an accident while carrying fare paying passengers and being used for hire and reward hence the Plaintiff informed the Defendant that the claim by the third parties under the policy were inadmissible as the terms and conditions of policy had been fundamentally breached.
8. The witness said that the Plaintiff was statutorily obliged to file the case in order to seek a declaration by the court that it was entitled to avoid any obligations under the policy due to the breach of the fundamental terms by the Defendant.
9. The witness Lydia Obondi said in her evidence in court that the Defendant was doing the business of carrying fare paying passengers in the motor vehicle against the policy.
10. The witness (PW1) said they hired a private investigator who gave them a report which they are relying on this case. The report dated February 12, 2011 was produced as an exhibit in this case.
11. The Plaintiff submitted that it issued a comprehensive policy of insurance of motor vehicle KAZ 582S Toyota corona at the request of the Defendant and that the said motor vehicle was involved in a road accident on October 30, 2010.
12. The Plaintiff further submitted that the Defendant breached the fundamental terms of the policy of insurance which entitles the Plaintiff to avoid the policy since at the time of the accident the motor vehicle was carrying fare paying passengers and was being used for hire and reward. He referred to Sections 5(b) (ii), 11 and 17 of the *Insurance (Motor Vehicles) Third Party Risks Act* and cited the case of *Paul Mutsya v Jubilee Insurance Company of Kenya Limited* [2018] eKLR, Machakos Civil Case 17 of 2006, *Corporate Insurance Company Ltd Vs Elias Okinyi Ofire* [1999] eKLR, Nakuru civ app 12 of 98 and *Kenya Orient Insurance Co Ltd V Samuel Kipyegon Kenduiywo* [2018] eKLR, Kericho Civil Appeal 8 of 2011.
13. The Plaintiff further submitted that it was the duty of the insured to disclose the material fact to the insurer and therefore failure by the Defendant to disclose that at the time of accident the motor vehicle was carrying fare paying passengers and was being used for hire and reward discharges the Plaintiff from liability.
14. It was the Plaintiff's submissions that it filed this declaratory suit to avoid liability within 3 months of the institution of the suit against it by the Defendant in accordance to Section 10(4) of the *Insurance (Motor Vehicle Third Party Risks) Act* CAP 405.
15. The Plaintiff concluded that it had proved its case on a balance of probability and it was therefore not liable to compensate third parties who were injured with respect to the accident which occurred on October 30, 2010 involving the Defendant's motor vehicle registration number KAZ 582S a Toyota corona.



16. I have considered the evidence adduced by the Plaintiff. I find that the said evidence is not controverted since the Defendant did not come to court to defend the suit.
17. The degree of proof required in civil cases is on a balance of probabilities;

Lord Denning J in *Miller vs Minister of Pensions* (1947) 2 ALL ER 372, discussing that burden of proof had this to say-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not.

Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

18. I find that the Plaintiff has proved its case to the required standard in civil cases.
19. I enter Judgment in favor of the Plaintiff against the Defendant in the following terms;
- i. That a declaration be and is hereby issued to the effect that the Plaintiff is entitled to avoid the policy No P/NRB/2010/2010/50894 on the grounds that the Defendant breached fundamental conditions of the said policy.
 - ii. The Defendant be and is hereby ordered to pay the costs of this suit.

Orders to issue accordingly.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 23RD DAY OF FEBRUARY 2023.

A. N. ONGERI

JUDGE

