



REPUBLIC OF KENYA



**Monarch Insurance Company Ltd v Mbugua (Civil Case 19 of 2017)
[2023] KEHC 1304 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1304 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL CASE 19 OF 2017
F GIKONYO, J
FEBRUARY 23, 2023**

BETWEEN

MONARCH INSURANCE COMPANY LTD PLAINTIFF

AND

BETHUEL MBUGUA DEFENDANT

JUDGMENT

1. The plaintiff filed a plaint dated November 25, 2017 seeking the following orders;
 - a. A declaration that motor vehicle registration number KBR 552H was not to be used by any other unauthorized and unqualified driver other than the defendant or anybody other than the designated driver of the defendant.
 - b. A declaration that the motor vehicle KBR 552H was not to be used by the defendant for ferrying passengers and that the use of the said vehicle for that purpose was in breach of policy conditions.
 - c. A declaration that the plaintiff is entitled to avoid the said policy NKR/0800/000246/2015 TPO on the ground that the said policy of insurance was obtained by non-disclosure of material facts and or misrepresentation of the facts which were false in some material particulars.
 - d. A declaration that the plaintiff is not liable to indemnify the defendant in respect of injuries sustained by any person claiming to have been injured or fatally died as a result of the alleged accident on June 30, 2016 involving motor vehicle registration number KBR522H and that the party obtaining a judgment against the defendant following the accident that occurred on June 30, 2017 policy number NKR/0800/000246/2015-TPO.



Brief facts

2. The defendant took out insurance over his motor vehicle registration number KBR522H Isuzu Lorry. He was issued with a certificate of insurance policy number NKR/0800/000246/2015-TPO for the period starting from July 22, 2016 to July 21, 2017. The class of insurance is motor commercial. The limitation as to use are; for use for social, domestic, and pleasure purposes and the insured's business or profession or; 2) use for the carriage of passengers in connection with the insured's business. This policy does not cover use for racing, competitions, rallies, or trials (or use for practice for any of them).
3. The cover taken was a motor commercial. it was a term of the policy that only the defendant and or an authorized driver were to operate the said motor vehicle.
4. According to the defendant's statement dated January 20, 2017, motor vehicle registration no KBR522H was involved in an accident on June 30, 2016 at 8.00 P.M. the vehicle got stuck in the mud and pedestrians assisted to pull it out during which it overturned landing on two pedestrians, at the time it was being driven by one Kariuki. The vehicle was loaded with sacks of potatoes belonging to a client.
5. The plaintiff contends that the said vehicle had its owner on the cover at all material times and the driver at the time should have been Bethwel Mbugua Mbaki as per statements or any other qualified and authorized driver whose information should have been availed to the plaintiff. Therefore, in absolute misrepresentation and without justification the defendant allowed the said vehicle to be driven without any authorization or approval from the plaintiff completely negating the clearly laid down terms of the policy.
6. The defendant thereby breached the terms of the policy following an accident where fatalities and injuries were realized thus the plaintiff rushed to court for protection resulting in this suit.
7. As a result of the above-mentioned accident several suits were filed against the defendant in Naivasha CMCC No 757,771,768,757 and 758 of 2016 by the fare-paying passengers in the motor vehicle registration number KBR522H on the ground that the injuries suffered were caused by the negligence of the driver.
8. The defendant chose not to participate in the suit even after several services of notices to him and his advocate on record and the suit proceeded for formal proof.

Evidence

9. The plaintiff called one witness in support of its case.
10. PW1-Ronald Kiprono Ramkat testified that he worked with the plaintiff in Nakuru but currently, he is a branch manager at Eldoret. While at Nakuru they insured a motor vehicle KBR522H. It was involved in an accident in 30/6/2016. Six people were injured and two people died.
11. His testimony shows that the defendant is now sued because the plaintiff is not liable for the injuries and deaths arising out of the accident. The reason was that the vehicle was insured as a commercial vehicle to ferry own goods but the defendant was using it for hire. Under the policy, only an authorized driver or the defendant is insured to drive the vehicle. The authorized driver gave the vehicle to a person not known to him to drive the vehicle. He was also not competent or licensed to drive a commercial vehicle. The other reason is that the vehicle is not authorized to carry passengers yet it carried passengers on the fateful date. He filed a statement dated November 25, 2017 and a list of documents dated the same day and filed on November 27, 2017. He tendered the same in evidence as P Exh1 and P Exh2(a)-



(f) respectively. He prays the court to declare that the plaintiff is not liable for the accident for breach of the policy and costs of the suit.

Directions Of The Court

12. This court directed that since the defendant is absent after being duly served, the plaintiff's case is closed and the defendant is deemed not to have evidence to offer. The plaintiff is to file submissions in 14 days.

Plaintiff's Submissions

13. The plaintiff submitted that the policy was obtained by non-disclosure of a material fact or facts and / or by representations of facts which were false in material particular namely that the vehicle would be used only for ferrying own goods and driven by an authorized person or the defendant himself, whereas the defendant gave out the motor vehicle to an unknown person who used it to ferry client's goods and passengers. The plaintiff is therefore entitled to avoid the said policy.
14. The plaintiff submitted the defendant breached an express term on limitation of use. His vehicle was limited to social, domestic, and pleasure purposes and for the defendant's business or profession and carriage of passengers in connection with his business but not for carriage of fare-paying passengers. Therefore, the plaintiff is entitled to avoid the policy of insurance by reason of the defendant's violation of express terms and conditions and obtaining his insurance policy through non-disclosure of material facts and the defendant breached the policy herein.
15. In the end, the plaintiff submitted that the defendant breached the conditions and terms of the policy as set out in paragraph 8 of the plaint with regard to the use of the insured motor vehicle registration number KBR522H. They, therefore, pray that the orders sought to be granted as prayed.
16. The plaintiff has relied on the following authorities;
 - i. Section 5(b) (i) of the [Insurance \(Motor Vehicle Third Party Risks\) Act.](#)
 - ii. [Gateway Insurance Company Ltd Vs Sudan Mathews](#) (Milimani Commercial Courts) Civil Case no 10178 Of 2000
 - iii. [National Bank of Kenya Ltd V Pipeplastic Samkolit \(K\) Ltd & Another](#), Civil Appeal no 95 Of 1999[2001] eKLR
 - iv. Nairobi HCCC no 9 Of 2004 [Gateway Insurance Co Ltd Vs Albert JN Njagi](#)
 - v. Nairobi HCCC no 666 Of 2004 [Gateway Insurance Co. Ltd Vs Musyoka Mutbegi](#)
 - vi. Nairobi HCCC no 569 Of 2003 [Gateway Insurance Co. Ltd Vs Kabotkek Formers Co-Operative Society Limited.](#)

ANALYSIS AND DETERMINATION

17. From the pleadings filed herein, the evidence and the plaintiff's submissions, the overarching issue for determination in this suit is;
 - a. Whether the plaintiff is entitled to avoid liability against the insured under the policy of insurance issued to the insured on account of alleged breach of terms or conditions of the policy.



Burden and Standard Of Proof.

18. Although this suit proceeded ex parte, the onus of proof rests with the plaintiff. The proof has to be on a balance of probabilities. See section 107 and 109 of the [Evidence Act](#) as well as case law.

Avoiding Liability Under The Policy.

Of validity of the insurance cover at the time of the accident

19. The defendant's motor vehicle registration no KBR522H got involved in an accident on June 30, 2016. According to the statement by PW1, the motor vehicle KBR522H was insured by the plaintiff under policy number NKR/0800/000246/2015-TPO commencing on 9/07/2015 and expiring on 8/07/2016. As per the attached police abstract dated July 21, 2016, the policy was to expire on 8/07/2016. I note that the policy schedule attached to the list of documents by the plaintiff shows that the policy was policy no NKR/0800/000246/ 2015 and the period of insurance was from July 22, 2016 to July 21, 2017. I also do note that the plaintiff's pleadings indicate that the insured motor vehicle is registration no KBR552H, yet, as per the insurance schedule and other evidence adduced, the insured motor vehicle is KBR 522H. Nevertheless, the plaintiff acknowledges that the accident occurred during the pendency of the insurance policy cover.
20. The biggest dilemma in this case is that the policy document produced is in respect of a period of insurance running from July 22, 2016 to July 21, 2017. The accident in question occurred on June 30, 2016. Therefore, the said policy could not cover the subject matter of this case.
21. I note from the motor commercial insurance policy provided, that, the schedule is the one that indicates who the insured is, the period of the insurance as well as the type of policy issued. Therefore, the court can only lawfully act upon the particular policy issued for the material period. Despite the other evidence adduced, it is not proper to attempt to impute or imply that the terms of the policy submitted in court are the terms in the relevant policy. Such would be speculative and dangerous venture-something a court of law should never do. On this score alone the case should be dismissed. But, let me consider the merits nonetheless.

Alleged Breaches

i. Of un-authorized driver

22. The plaintiff contends that the defendant allowed the said vehicle to be driven without any authorization or approval from the plaintiff completely negating the clearly laid down terms of the policy.
23. The plaintiff further contends that the said motor vehicle was driven by a non-authorized person.
24. The defendant in his statement stated that he had assigned a driver by the name of Kariuki as he attended a burial at Muranga town. The defendant stated that he had since misplaced the contact of Kariuki. The only detail of the insured's driver was one named Kariuki. The insured did not have full details. According to the defendant, Kariuki fled the scene of the accident shortly after the vehicle was towed. The defendant was charged with failing to keep records of his driver. This latter fact was corroborated by the police attached abstract and report by Factline insurance investigators.
25. Be that as it may, the Plaintiff's specific allegations were that the person driving the vehicle at the time of the accident drove it without the permission of the defendant, and that he was not licensed to drive. These allegations required specific proof. The fact that the defendant did not keep record of his driver



does not in itself prove that the driver at the material time did not have the permission of the defendant or was not licensed to drive. This is strange but it does not warrant an inference that the person did not have the authority of the owner or valid license to drive the vehicle. In fact, the statement by the defendant is categorical that he had allowed him to drive the vehicle at the time.

26. In sum, the plaintiff did not prove the two allegations that the driver was un-authorized driver in breach of the terms or conditions of the policy.
27. I must reiterate, however, that the plaintiff did not produce the relevant insurance policy.

ii. Unauthorized Use Of The Suit Motor Vehicle

28. The plaintiff contends that the motor vehicle herein was ferrying non-authorized goods and passengers in breach of terms and conditions of the policy.
29. The defendant stated in his statement that the vehicle was being used for hire and rewards and used to ferry potatoes from Narok county. He stated that he did not have a turn man as it was the duty of the client to provide loaders.
30. From the evidence adduced and in the absence of the policy, it is impossible to establish whether the policy permitted or excluded carrying of goods for hire or reward.
31. On allegation on fare-paying passengers; other than making the allegation in the pleadings, evidence and report by the investigator, no independent evidence was adduced to substantiate the allegation. The evidence available show the persons on board were loaders hired by the owner of the potatoes.
32. Accordingly, the allegations by the plaintiff that the vehicle was used to carry fare-paying passengers, and goods for hire and reward contrary to the policy conditions have not been proved.

Of The Class Of Insurance

33. On the basis of the findings on the policy, the plaintiff did not prove the type of policy in place at the material time was third party only.

Insurers Duty

34. Under section 10 of the *Insurance (Motor Vehicle Third Party Risks) Act*, the insurer bears a statutory duty to satisfy judgments by third parties against persons insured under a policy of insurance. The Act constitutes exception to privity of contract and serves to provide compensation under the policy for third parties who are injured by use of a vehicle on the road. Therefore, declarations to avoid a policy and liability arising under the statutory duty under section 10 of the said *Act* must be issued upon prove that the policy was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it. Similarly, the breach of the terms or conditions of the policy for which liability is to be avoided must be proved to the required standard. See section 10 and particularly section 10(4) on some of the peremptory substantive as well as procedural requirements before a declaration is issued to avoid liability to third parties. These protections are statutory and not mere adornments; thus, absent an order to the contrary, they require absolute observance and enforcement.

Conclusions and Orders

35. This suit lacks a foot on which to stand as the relevant insurance policy document was not produced in court. Also, on the basis of my analysis above, the plaintiff has not proved its case on a balance of



probabilities. Therefore, I dismiss the suit. No order as to costs as the matter proceeded *ex parte*. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS
23RD DAY OF FEBRUARY, 2023**

F. GIKONYO M.

JUDGE

In the presence of:

- 1. Ngaya for plaintiff**
- 2. Mr. Kasaso – C/A**
- 3. Defendant - absent**

