



REPUBLIC OF KENYA



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**Britam Insurance Company Limited v Murage; Mose & 4 others (Interested Parties)
(Civil Suit 27 of 2019) [2023] KEHC 2588 (KLR) (29 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2588 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL SUIT 27 OF 2019
MW MUIGAI, J
MARCH 29, 2023**

BETWEEN

THE BRITAM INSURANCE COMPANY LIMITED PLAINTIFF

AND

ESTHER NJAMBI MURAGE DEFENDANT

AND

SAMSON MAGWARO MOSE INTERESTED PARTY

WASHINGTON NDERITU GICHOI INTERESTED PARTY

NICHOLAS KIPKIRUI YEGON INTERESTED PARTY

MORGAN STANLEY OGUNDEN INTERESTED PARTY

HEZRON OMONDI OKUMU INTERESTED PARTY

JUDGMENT

Trial Court Record

Plaint

1. Vide Plaintiff dated July 24, 2019 in which the Plaintiff averred that it is a licensed insurer within the meaning of the *Insurance Act*, Cap 487 and the Defendant's motor vehicle KBP 789R (Hereinafter referred to as "the motor vehicle") had been issued with a certificate of insurance for use as a private motor vehicle under policy number NR4/MPRV/POL/2122152 for the period July 1, 2016 to June 30, 2017.
2. The motor vehicle was allegedly involved in an accident on April 30, 2017 along Matuu- Thika road at Kwa Majini Bridge in which five passengers in the said motor vehicle sustained injuries and the passengers in the other vehicles were also injured.



3. The Plaintiff averred that the motor vehicle was being used for ferrying fare paying passengers contrary to the terms of and conditions of the insurance policy/ contract between themselves and the Defendant.
4. The Plaintiff contended that it had been served with a notice of the intention to sue and summons to enter appearance in Kithimani PMCCNo 331 of 2018, Samson Magwaro Mose v Brian Muia, Esther Njambi Murage And Milka Wachuka Murage, PMCC No 330 Of 2018, Hezron Omondi Okumu v Brian Muia, Esther Njambi Murage And Milka Wachuka Murage, PMCC No 384 Of 2018 Nicholas Kipkirui Yegon v Brian Muia, Esther Njambi Murage And Milka Wachuka Murage, PMCC No 393 of 2018 Washington v Brian Muia, Esther Njambi Murage And Milka Wachuka Murage, PMCC No 332 Of 2018 Morgan Stanley Ogunden v Brian Muia, Esther Njambi Murage And Milka Wachuka Murage in which the injured passengers in the two motor vehicles are claiming special and general damages arising from the said accident.
5. The Plaintiff contended that it is entitled to avoid the contract under Section 10 of [Cap 405](#) Laws of Kenya and particularized the breach of contract as follows;
 - a. Obtaining insurance for vehicle registration number KBP 789 R by misrepresentation of the material facts on the use of the motor vehicle
 - b. Use of the motor vehicle as taxi outside the insured purpose that is for social, domestic and pleasure purposes.
 - c. Failing to disclose to the Plaintiff that the motor vehicle while insured was being used for carrying fare paying passengers.
 - d. Acting contrary to the doctrine of utmost good faith- *uberimae fides*.
6. The Plaintiff contends that it has no legal or contractual obligation or duty to satisfy any judgment obtained by any of the party against the Defendant nor compensate her for any loss or claim or damage arising from the accident. it was averred that the policy was obtained by non-disclosure or misrepresentation of the material facts.
7. The Plaintiff prayed for judgment to be entered in its favor as follows;
 - a. A declaration that motor vehicle registration number KBP 789 was not to be used by the Defendant for ferrying fare paying passengers
 - b. A declaration that the Plaintiff is and has at all material times been entitled to avoid the said policy of insurance apart from any provision contained therein on the ground that the said policy of insurance was obtained by non-disclosure if material facts and/ or misrepresentation of the facts which were false in some material particulars.
 - c. A declaration that the Plaintiff is not liable to indemnify the Defendant in respect of the injuries sustained by the said injured persons and that it is entitled to avoid any and all the claims by the Defendant or any other party obtaining a judgment against the defendant following the accident that occurred on 30th April 2017 under policy number NR4/MPRV/ POL/2122152.
 - d. Such other and further relief that this Honourable Court may deem fit to grant.



- e. Cost of and incidental to this suit.

Defence

8. The Defendant did not file a defense nor participate in the hearing.
9. Interlocutory judgment entered against Esther Njambi Murage on July 10, 2021.
10. The 1st, 2nd, 3rd, 4th and 5th interested parties did not file any defenses.

Hearing

Plaintiff's Case

11. PW.1 was Solomon Wachira Kamweki an Investigator in Insurance stated that he conducted investigations of the accident and use of the insured motor vehicle KBP 789R of April 30, 2017. He produced Investigations Report as MFI-1 and a Police abstract as MFI -2 and then as exhibits.
12. Upon Cross – examination by Mr. Kilonzo for the interested parties, he stated that the 1st, 2nd, 3rd & 4th interested parties were in Land Cruiser G.K. A406 H and not in motor vehicle Registration KBP 789 U. He was suspicious of KBP 789R that it was conducting business as a taxi. He suspected but he did not find evidence. He saw telephone calls between the insured and Waithaka cars that were made after the accident. He did not find any calls made before the accident. He did not witness the accident. The interested parties were injured while in G.K. A406 by collision with KBP 789R and they would not know if there is any breach of insurance contract. He said KBP 789 R had carried passengers. The interested parties were not in KBP 789R.
13. Upon Re-examination he said he conducted the investigations in this matter and I interviewed the driver and recorded a statement.
14. PW.2 Peter Ngola, Legal Manager at Britam Insurance Company Limited produced his statement is at pg 6 of the bundle filed in which he stated that after the accident, the injured passengers in motor vehicle KBP 789R reported the accident to Matuu police station and the police commenced investigation and the driver of the motor vehicle was charged with careless driving. The police indicated that Britam Insurance Company was the insurer of the motor vehicle under policy number NR4/MPRV/POL/2122152 expiring on June 30, 2017 as per the police abstract.
15. He further stated that upon the accident being reported, a routine investigation was commissioned to establish the circumstances surrounding the accident and it was established that at the material time of the accident, the Defendant was carrying fare paying passengers contrary to the terms of the insurance contract which stipulated that the vehicle was only to be used for private purposes. He said the Defendant obtained the insurance cover under misrepresentation that that the vehicle was to be used for private purposes and is therefore in material breach of the insurance contract.
16. He contended that the employer is entitled to avoid the contract under section 10(4) of Cap405 Laws of Kenya and has served a statutory notice to that effect to the Defendant. He further contends that the employer has no legal or contractual obligation to satisfy any judgment that may be obtained in PMCC No 331 of 2018, Samson Magwaro Mose v Brian Muia, Esther Njambi Murage And Milka Wachuka Murage, PMCC No 330 Of 2018, Hezron Omondi Okumu v Brian Muia, Esther Njambi Murage And Milka Wachuka Murage, PMCC No 384 Of 2018 Nicholas Kipkirui Yegon v Brian Muia, Esther Njambi Murage And Milka Wachuka Murage, PMCC No 393 Of 2018 Washington v Brian



Muia, Esther Njambi Murage And Milka Wachuka Murage, PMCC No 332 of 2018 Morgan Stanley Ogunden v Brian Muia, Esther Njambi Murage And Milka Wachuka Murage.

17. Marked for identification were TOR accident report form and certificate of examination. They wrote to the Defendant and stated they would not be paying the Insurance Claim by letter dated April 23, 2019 as the defendant breached insurance claim which he produced. His employer had an investigation was conducted and report availed to court. The Policy is NR4/MPRV/POL/2122152. He testified that he was aware of the prayers and relied on the same.
18. Upon Cross examination, he said he is a Confirmation Claims Associate and that KBP 789R collided with GK A406 H and KBU 164 A on April 30, 2017. The defendant at the time had a valid insurance cover from them (Britam) which covered all 3rd parties who might be covered and subject to limitations in the policy schedule page 13 which he read out.
19. The five interested parties and were travelling in land cruiser GK A406 H though he could not confirm. He said he had gone through the investigation report and they were not passengers in the defendants motor vehicle KBP 789R. He was aware of *Insurance 3rd Party Risks (Motor Vehicle Insurance) Act*, the interested parties are 3rd parties in the said Act. The contract of insurance between the Defendant and the Insurance Company. He said the interested parties are part of the Insurance Company. The interested parties are not involved in that matter. They are not affected.
20. The interested parties served Notice of February 16, 2018 to the Insurance Company and was received on April 23, 2018, they complied with the law. He was aware the interested parties filed their suits in Kithimani law courts against the defendants in 2019. They wrote a letter disclaiming liability. It was his testimony that the suits filed in Kithimani law courts were not stopped, this suit was to stop execution. Investigation report indicated the motor vehicle was used as a taxi.
21. Upon Re-examination, he made reference to page 20 particulars of fraud ; one insured loses right to the policy, page 3 the plaint where they seek declaration that they can avoid any policy if there was fraud. He said they obtained an investigation and got the finding.
22. That marked the close of the plaintiff's case.

Interested Parties

23. The Interested parties did not call any witnesses.

Submissions

Plaintiff

24. It filed submissions on November 3, 2022 in which he contended that it had proven that the Defendant had breached the terms and conditions of the insurance policy and failed to disclose that he was ferrying passengers for hire and reward in the claim form. The Plaintiff relied on Section 10 (4) of the *Insurance (Motor Vehicles Third Party Risks) Act*, cap 405 which it was contended provides that;

“No sum shall be payable by an insurer under the foregoing provisions of this section if in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it 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

25. Reliance was also placed on the cases of Nairobi HCCC No 9 of 2004 *Gateway Insurance Co Limited v Albert J. Njagi*, Nairobi HCCC No 666 of 2004 *Gateway Insurance Co Limited v Musyoka Muthengi* and Nairobi HCCC No 569 of 2003 *Gateway Insurance Co Limited v Kaboykek Farmers Co-operative Society Limited*.

1,2nd, 3rd, 4th and 5th Interested Parties

26. Submissions were filed on November 10, 2022 in which it was contended that Plaintiff is seeking to avoid a policy of insurance issued to the Defendant vide a plaint filed on 24.10.2019 yet the third parties suits were filed on July 19, 2018 and therefore statutory notice is not in dispute.
27. While relying on Section 10 (4) of the *Insurance (Motor Vehicles Third Party Risks) Act*, cap 405 it was submitted that the Plaint herein is dated July 24, 2019 and filed on October 24, 2019 and was therefore filed outside 3 months stipulated by law. That the Plaintiff never filed an application in court to seek leave to file the same out of time. It was opined that the interested parties were 3rd parties are police officers who were travelling in police motor vehicle registration number GK 406 Toyota Land Cruiser in the cause of duty and are not party to the dispute as may arise or exists between the Plaintiff and the Defendant. Further, that the policy document in court does not state anywhere that it shall not indemnify passengers traveling in a 3rd Party Motor vehicle. Section 11 of the policy document on record made reference to 3rd Parties and the Amount payable to them.
28. It was submitted that the investigation report dated July 1, 2017 stated that there was a third party motor vehicle (GKA 406 Toyota Land Cruiser that was knocked by the Defendant's motor vehicle and he also indicated that save for the interested parties herein, there was one more police officer namely Joseph Kipkemoi Koech who has also filed a case in Kithimani Law courts being PMCC 348 of 2018.
29. Reference was made to the grounds of opposition dated July 12, 2021 filed by the interested parties, a statutory notice was personally served upon the Plaintiff on April 23, 2018 prior to filing of primary suits and was captured by the ruling delivered on November 11, 2021. The Interested Parties cited the cases of Machakos HCC App 1 of 2017 *APA Insurance Company v Vincent Ntbuka*, Kajiado HCC 14 of 2017 *Britam Genreal Insurance Co (Kenya) Ltd v Josephat Ondiek* and Migori HCCA 98 of 2016 *APA Insurance Limited v Gabriel Opondo Ogenga*.

Determination

30. I have considered the pleadings and the evidence before this court and the question that seems to recur is whether the Plaintiff ought to indemnify those who were injured in the accident that occurred on April 30, 2017 along Matuu- Thika road at Kwa Majini Bridge.
31. It is not in dispute that the accident occurred and that the Plaintiff was served with a statutory notice. It is also not in dispute that the interested parties have filed various suits at Kithimani Law Courts being Kithimani PMCC No 331 of 2018, Samson Magwaro Mose v Brian Muia, Esther Njambi Murage And Milka Wachuka Murage, PMCC No 330 of 2018, Hezron Omondi Okumu v Brian Muia, Esther Njambi Murage And Milka Wachuka Murage, PMCC No 384 Of 2018 Nicholas Kipkirui Yegon v Brian Muia, Esther Njambi Murage And Milka Wachuka Murage, PMCC No 393 of 2018 Washington v Brian Muia, Esther Njambi Murage And Milka Wachuka Murage, PMCC No 332 of 2018 Morgan Stanley Ogunden v Brian Muia, Esther Njambi Murage And Milka Wachuka Murage for various reliefs. The status of those cases has not been disclosed by the interested parties.



32. The Defendant did not appear neither did she file a defence and therefore as it stands, the evidence of the Plaintiff remains uncontroverted.

33. In the case of *Karuru Munyororo v. Joseph Ndumia Murage & Another* Nyeri HCCC No 95 of 1988 Makhandia, J. held that:

“The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff’s evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon”.

34. The Court had noted in its Ruling dated November 11, 2021 that the interlocutory judgment is only conclusive of a liquidated amount and formal proof proceedings are conducted. Thus this suit proceeded for formal proof.

35. The Court of Appeal in the case of *Felix Mathenge v Kenya Power & Lighting Company Ltd* [2008] eKLR held that:

“the role of the court after entering the interlocutory judgment in such a case like this was only to assess damages since interlocutory judgment having been regularly obtained there can never be any doubt that judgment was final with regard to liability and was unassailable. It was only interlocutory with regard to the quantum of damages”

36. The Plaintiff contends that it is entitled to avoid the contract under Section 10 (4) of the *Insurance (Motor Vehicles Third Party Risks) Act*, cap 405. This section provides as follows;

No sum shall be payable by an insurer under the foregoing provisions of this section if in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it 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:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto.

37. According to the policy document under the general exceptions is a proviso that states;

We will not be liable in respect of:

1. Any accident, loss , damage or liability caused, sustained or incurred;
 - a.
 - b. While on your order or with your permission or to your knowledge any vehicle in respect of which indemnity is provided



by this policy is being used contrary to the limitations as to use clause.

Limitations as to use

“use only for social, domestic and pleasure purposes and for your business and profession”

The policy does not cover use for racing, competitions, rallies or trials (or use for practice for any of them) or the carriage of passengers for hire or reward

38. Policy documents under clause 7:

Fraud. Insured: Esther Njambi Murage

“if any claim is found to be fraudulent and you or any one acting on your behalf has given us any false documents or information you will lose any rights under this policy. We may refer such cases to law enforcers”

39. According to the evidence on record, the motor vehicle was being used for taxi business. According to the Investigation analysis report involving motor vehicle registration KBP 789R on April 30, 2017 dated July 1, 2017, prior to the accident, the insured vehicle was being used for taxi business and managed by Waithaka cars and at the time of the accident, the accident was on hire by the insured’s driver contrary to the policy. This evidence was corroborated by the testimony of PW1 and PW2.

40. This court when dealing with a similar situation and which decision I resonate with in the case of *Britam Insurance Company Limited v Stephen Wambua Musila* [2022] eKLR stated that;

“If the Defendant at the time of taking out the policy knew that the vehicle was going to be used for the said purpose of hire and/or reward but did not disclose this, the failure to do so clearly amounted to the failure on her part to disclose to the insurer a fact material to the risk. On the other hand, if the Defendant put to use the vehicle for a purpose for which it was not insured, that would amount to a breach of the terms and conditions of the policy. Either way the insurance company, the Plaintiff herein, would not be liable. The reason for this, as was held in *The Motor Union Insurance Co. Ltd v A K Ddamba* [1963] EA 271 is that this is because had the proposer disclosed all the relevant and material information in the proposal form, the plaintiff insurance company might very well have taken a different attitude to the risk. The facts of this case were similar to those of *Corporate Insurance Company Ltd v. Elias Okinyi Ofire* [1999] eKLR; [1999] 2 EA 61 wherein the Court of appeal found that:

“The respondent (plaintiff there) said: “The vehicle was carrying passengers on the material day. I paid fare as I was charged. The vehicle had other passengers as well as some luggage on top.” There can be no doubt that the vehicle was being used as a “matatu”. But was it insured as a “matatu” “ The policy of insurance produced as an exhibit by the appellant’s witness one Mr. Zacharia who is a senior executive assistant employed by the appellant, shows that the same is a Commercial Vehicle Policy. It is described in the schedule to the policy as a Toyota pick-up with carrying capacity of one ton and carries the following limitation: “Use in connection with insured’s business. Use for the carriage of passengers in connection with the insured’s business. (1)The policy does not cover use for hire or reward or for racing, pacemaking, reliability, trial or speed testing. (2)Use



while drawing a trailer except the towing (other than for reward) of any one disabled mechanically propelled vehicle." The vehicle was therefore insured as a commercial vehicle for use in connection with the insured's business which business is described as "Farmer/Business." It is not the insured's business to run "matatus". If that was his business he would have had to obtain a different insurance cover namely that of carrying passengers for hire and reward. If an insured after obtaining an insurance cover for a commercial vehicle for use in connection with his business changes the nature of the vehicle to that of a "matatu" the nature of the policy remains that of a commercial vehicle policy and such change does not and cannot make the insurer liable to the passengers who are thereafter carried in the vehicle for reward (fare). If this were the case most insurers would decline to issue a commercial vehicle policy."

41. In the circumstances, I find that the Defendant breached the terms of the policy agreement it had with the Plaintiff. The Plaintiff is under no duty to indemnify the passengers who were in the Defendant's motor vehicle that should have been covered on third party by the policy.
42. Before the court pen's off, the court must look at the place of the interested parties in these proceedings. The Supreme Court in the case of *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others* [2014] eKLR defined an interested party as

"..one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause..."
43. The same Court in the case of *Francis Kariuki Muruatetu & another v Republic & 5 others* [2016] eKLR stated that;

“(42) Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues, or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court.”
44. In this case the interested parties have also admitted that they are not party to the dispute between the Plaintiff and the Defendant as they were passengers in Motor Vehicle GKA 406 Toyota Land Cruiser. They have however not filed an independent suit to be determined by this court, the court can only be guided by the primary pleadings which in this case is only the Plaintiff.
45. The Interested parties raise issues but the same has not been done through the proper channel and it is not clear upon which pleading their prayers stand. The orders being sought have only come out through the submissions as the Grounds of opposition being referred to cannot be used to decide on the issues that had been raised in the Plaintiff. The grounds of opposition was used to make a determination of the Notice of Motion Application dated June 11, 2021 and once the ruling was delivered, the purpose for which it was filed was spent.



46. Having found that the Defendant breached the terms of the contract and is not liable to indemnify the passengers in KBP 789R. As regards the interested parties, their cases are still pending in court and there is no indication that has been given whether it has been concluded or not. This court cannot thus address its mind to this issue as it is a matter that is still active in court.

Disposition

47. In the premises I find merit in this suit and I hereby issue the following orders:

- a. A declaration the motor vehicle KBP 7809R was not to be used by the defendant for ferrying fare paying passengers
- b. A declaration that the Plaintiff is and has at all material times been entitled to avoid the said policy of insurance apart from any provision contained therein 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
- c. A declaration that the Plaintiff is not liable to indemnify the Defendant in respect of the injuries sustained by the said injured persons and that it is entitled to avoid any and all the claims by the Defendant or any other party obtaining a judgment against the defendant following the accident that occurred on April 30, 2017 under policy number NR4/MPRV/POL/2122152
- d. The interested parties shall pursue their claim against the Defendant.
- e. There will be no order as to costs.

DELIVERED SIGNED & DELIVERED IN OPEN COURT IN MACHAKOS ON 29TH MARCH 2023. (PHYSICAL/VIRTUAL CONFERENCE)

M.W.MUIGAI

JUDGE

In The Presence Of

Mr. Mbaabu - For the Plaintiff – Present Online

Mr. Muriuki - For the Defendant-Present Online

Geoffrey/ Patrick - Court Assistant(s)

