



Kivuti v Provincial Insurance Company of EA Ltd & 3 others (Civil Case 3919 of 1994) [2023] KEHC 24255 (KLR) (Civ) (27 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24255 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 3919 OF 1994

AN ONGERI, J

OCTOBER 27, 2023

BETWEEN

LENNY KIVUTI PLAINTIFF

AND

PROVINCIAL INSURANCE COMPANY OF EA LTD 1ST DEFENDANT

JOY IMPORT & EXPORT LIMITED 2ND DEFENDANT

D.S. KANDOLA 3RD DEFENDANT

THE REGISTRAR OF MOTOR VEHICLES 4TH DEFENDANT

JUDGMENT

1. The plaintiff filed plaint dated 2/11/1994 which was amended on 22/3/1999 seeking compensation in respect of motor vehicle registration No KAC 852Q make Mitsubishi Pajero inter cooler which was violently robbed from the plaintiff on 14/3/1993.
2. At the material time of loss of the motor vehicle it was insured by the 1st defendant comprehensively at a value of 1,800,000.
3. The 1st defendant filed a defence denying the plaintiff's claim and raised a counter claim. The 2nd defendant was the importer of the motor after satisfying the importation conditions imposed by the 4th defendant who had issued the motor vehicle log book.
4. The plaintiff said in his witness dated 5/12/2021 he bought the motor vehicle from the 2nd defendant on 27/10/1992 at a price of Kshs 1,950,000 and the plaintiff took possession of the vehicle and the transfer was effected by the 4th defendant.



5. When the motor vehicle was stolen, the 1st defendant refused to compensate the plaintiff for the loss hence this suit.
6. The plaintiff's evidence was that he reported the robbery incident and was issued with a police abstract and he reported the matter to the 1st defendant.
7. The plaintiff said one year later while awaiting for the settlement of the claim he was asked for the importation documents of the motor vehicle.
8. The plaintiff obtained the importation documents from the 4th defendant and forwarded them to the 1st defendant including the application for authority to import the motor vehicle, dated 4/6/1992, the bill of lading dated 28/3/1992 and customs clearance/entry forms dated 5/6/1992.
9. The 1st Defendant refused to compensate the plaintiff hence the filing of this suit.
10. The 1st defendant called one witness DW1 Frankline Njoki Nyaga who adopted his written witness statement dated 4/7/2019 in which he stated that the plaintiff took a comprehensive cover for the subject motor vehicle and was issued with policy number 9103069-1 Endorsement number M92/03/05367 in the sum Kshs 1,800,000.
11. On or about 14/5/1993 the 1st defendant was notified by the plaintiff that he had been robbed of his motor vehicle. They immediately commenced investigations to ascertain the validity of the claim and requested the plaintiff to furnish them with the original copies of the import documents. They also request for the details of the passenger at the time of the alleged incident but the plaintiff failed to provide the same.
12. The 1st defendant nevertheless continued with its investigations that revealed there was non-disclosure of material facts which go to the root of the insurance contract. they discovered that the customs Import entry number for motor vehicle KAC 825Q was 492. The records at the road transport office showed that the vehicle was imported from Dubai. The description of the vehicle was stated to be a new Mitsubishi Station Wagon of which the chassis numbers were 01365 and 2746 respectively. The record with the road transport office showed that the number of the Bill of Lading of the vehicle was 5824(6650) and that the vehicle was imported from Chibe Japan. On further investigation they discovered that import entry number 492 relates to a Toyota Carina Vehicle which was imported from Singapore.
13. DW1 indicated that disclosure of this information by the plaintiff was material in influencing our fixing of insurance premium but also the decision on whether to take up the risk or not. The conclusion of the investigation was that the contract was tainted with illegality ab initio which raised doubt as to whether the plaintiff had any insurable interest in the motor vehicle at the time of taking up the policy.
14. The witness DW1 said in his testimony in court that he used to work with the 1st defendant which used to be called Provincial Insurance Company EA Ltd but now it is called Old Mutual.
15. DW1 said the plaintiff applied for a comprehensive policy cover in respect of motor vehicle registration No KAC 852Q Mitsubishi Pajero.
16. DW1 said he asked for a copy of the log book which was never availed.
17. DW1 said upon carrying out investigations they established that the importation documents availed belonged to a different motor vehicle and they declined to compensate the plaintiff.
18. The 2nd defendant was served with the summons to enter appearance and file a defence but declined to do so and interlocutory judgment was entered on 12/10/2009 against the 2nd defendant.



19. The 3rd and 4th defendants did not call any witnesses.
20. The parties filed written submissions as follows; the plaintiff submitted that the subject motor vehicle had been imported into the country by the 2nd defendant who had registered it locally and had been issued with its log book by the 4th defendant. The plaintiff contended that the registrar must have been satisfied that there was full compliance with the requirements and provisions of the Customs & Excise Act before approving the registration of the vehicle locally.
21. The plaintiff argued that he was purchaser for value, without notice of any defect in title and if there was any, no evidence was adduced to counter the same. the register could not have registered the vehicle if he was not satisfied with the import documents and customs clearances. The plaintiff informed the 2nd defendant of his new acquisition and requested the 1st defendant to insure it comprehensively which it did under Endorsement No M92/03/05366 commencing on 27/10/1992.
22. The plaintiff used the car for his personal benefit but was violently robbed of the same on the night of 15/5/1993 at Olympic estate Nairobi when dropping off a friend and he promptly reported the incident to both the police at Kilimani Police station under OB. No 24/15/5/93 and the 2nd defendant through Centa-line Insurance Brokers. The 1st defendant however wrote to the plaintiff to avail proper documents from the 2nd defendant. The plaintiff was not the importer of the car but he managed to obtain copies of the import documents from the 4th defendants records and these were forwarded to the 1st defendant through the insurance agent.
23. On the counterclaim the plaintiff argued that the 1st defendant declined to pay his claim because of faulty or improper import documents. However, the 1st defendant has not produced any documents to show that the subject vehicle was improperly registered. After the 1st defendant was supplied with the documents it had requested it alleged to have come across another Customs Entry Form No 492 which was for another different motor vehicle. The said form was allegedly obtained by the 1st defendant's investigator and by that time the 2nd defendants motor vehicle had been already registered locally on 25/9/1992 and given Reg. No KAC 852Q.
24. DW2 told the court that there was a problem with the import documents for the plaintiff's vehicle in that the vehicle is alleged to have been imported from Dubai whereas the bill of lading showed the vehicle had been imported from Chiba Japan. The witness also alleged that they failed to also honor the claim because there were discrepancies in the particulars of both the engine and chasis numbers. He claimed that the numbers were incomplete but did not explain how and also did not produce the documents to show the same.
25. The plaintiff submitted that the Bill of Lading clearly shows that the unit was part of three new units and the log book shows that the 2nd defendant was first registered owner who then sold and transferred it to the plaintiff upon completion of its registration.
26. The 1st defendant submitted that it is not in dispute that the plaintiff took out a comprehensive insurance cover for motor vehicle Reg No KAC 852Q and was issued with policy number 9103069-1 Endorsement No M92/03/05367 in the sum of Kshs 1,800,000. On or about 14/5/1993 the 1st defendant was notified of the robbery and the plaintiff sought to be compensated. The 1st defendant asked the plaintiff to provide the original copies of the import documents for the said motor vehicle but the plaintiff failed to provide the same. the 1st defendant through its investigations discovered that there was non-disclosure of material facts which go to the root of the insurance contract. the non-disclosure was done in breach of the law and the 4th defendant did not challenge the illegality in the importation of the motor vehicle.



27. It is the 1st defendant's submission that there cannot be an insurable interest in a vehicle that has been imported illegally as the seller passed a defective title to him. Section 10 of the Traffic Act Cap. 403 of the Laws of Kenya prohibits the registration of motor vehicles exported or imported unlawfully. Further, section 187 of the Customs & Exercise Act Cap 472 Laws of Kenya makes it an offence for any person who makes an entry which is false or incorrect in any particular or makes or causes to be made a declaration, certificate, application, return, estimate, account or other document which is false or incorrect in any particular. In support the 1st defendant cited Geismar v Sun Alliance & London Insurance Ltd and another [1975] G.No 3758 where it was held thus:
- “To allow the Plaintiff to recover under the policies for goods illegally imported would be to allow him to recover the insured value of goods which might have been confiscated at any moment and were potentially without value to him; the policies would be unenforceable as to enforce them would conflict with public policy; accordingly since there had been a deliberate breach of the law, the court would not assist the plaintiff derive a profit from it.”
28. The 1st defendant submitted that the plaintiff cannot rely on the initial registration of the motor vehicle to purportedly validate the sale of the motor vehicle. Once the illegality in the importation is established, as it has been, the purported registration is void since it is contrary to the provisions of section 10(b) of the Traffic Act.
29. The 1st defendant argued that Plaintiff has failed to discharge its burden of proof, and consequently the claims made in these proceedings against the First Defendant should fail.
30. I have carefully considered the evidence on record in this case together with the rival submissions filed by the parties.
31. It is the duty of the plaintiff to prove his case to the required standard in civil cases which is on a balance of probabilities.
32. The issues for determination in this case are as follows;
- i. Whether the plaintiff has proved his case to the required standard.
 - ii. Whether the plaintiff had insurable interest in the motor vehicle.
 - iii. Who is liable to compensate the plaintiff for loss of the motor vehicle?
 - iv. Who pays the costs of this suit?
33. On the issue as to whether the plaintiff has proved his case to the required standard, the plaintiff's evidence which has not been controverted is that he bought the motor vehicle from the 3rd defendant who was acting on behalf of the 2nd defendant for a sum of Kshs 1,950,000 on 2/10/1992.
34. The 3rd defendant had the motor vehicle registered in the plaintiff's name.
35. The plaintiff had the motor vehicle issued with a comprehensive cover by the 1st defendant worth Kshs 1,800,000.
36. There is evidence that the plaintiff was issued with a certificate of insurance No 545XXX by the first defendant for the period 1st December 1992 to 30/11/1993 under comprehensive insurance No 910XXX9-1.
37. There is also evidence that the plaintiff had the motor vehicle fitted with an alarm and anti-theft device.



38. When the plaintiff was robbed of the motor vehicle the 1st defendant declined to compensate the plaintiff and demanded importation documents of the motor vehicle.
39. Subsequently the 1st defendants found discrepancies in the importation documents and they maintained that the plaintiff did not have insurable interest in the motor vehicle.
40. The 1st defendant also raised the issue that the chassis number and the engine numbers were incomplete.
41. Further, they alleged that the documents held by the 4th defendant related to a Toyota carina and further the import details were different from those supplied to the 1st defendant by the 2nd defendant.
42. I find that the plaintiff has proved that he was a bona fide purchaser of the motor vehicle for value without notice of defect in title.
43. The 4th defendant had transferred the motor vehicle to the plaintiff's name and the issue of the discrepancies in the importation of the motor vehicle did not arise until the plaintiff had been robbed of the motor vehicle.
44. I find that the plaintiff has proved that he is entitled to compensation of the loss of his vehicle which he purchased for value and obtained an insurance policy which was valid at the time of loss of the motor vehicle.
45. If there was a discrepancy in the importation documents the plaintiff was not to blame for the same since it was the 4th defendant who was responsible for approvals for importation and also for issues of registration of motor vehicles and transfers.
46. On the issue as to whether the plaintiff had insurable interest in the motor vehicle, I find that the plaintiff was entitled to compensation since he had a valid insurance contract with the 1st Defendant at the time of loss of the motor vehicle.
47. I further find that it was the duty of the 1st defendant to establish that a person has insurable interest before issuing an insurance cover; rather than wait for a claim to be filed before action is taken.
48. I find that the plaintiff as the bona fide owner had an insurable interest in the motor vehicle and that is why the 1st Defendant insured the same for Kshs 1.8 million.
49. The 1st defendant is estopped from avoiding their lawful obligation on the basis of discrepancies in the importation documents obtained from parties that were not privy to the contract between the plaintiff and the 1st Defendant.
50. The plaintiff was a bona fide purchaser for value without defect in the title of the motor vehicle and therefore he had a good title.
51. The Court of Appeal in the case of *Weston Gitonga & 10 others v Peter Rugu Gikanga & another* [2017] eKLR held as follows as regards a bona fide purchaser:

“23. *Black's law Dictionary* 8th Edition defines “bona fide purchaser” as:

“One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”



24. In the Ugandan case of *Katende v Haridar & Company Limited* [2008] 2 E.A.173 it was held:-

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:

- a. he holds a certificate of title;
- b. he purchased the property in good faith;
- c. he had no knowledge of the fraud;
- d. he purchased for valuable consideration;
- e. the vendors had apparent valid title;
- f. he purchased without notice of any fraud;
- g. he was not party to any fraud.

A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”

52. The plaintiff is therefore entitled to compensation for loss of the motor vehicle. He had a certificate of insurance that was valid at the time he lost the motor vehicle.
53. On the issue as to who is to compensate the plaintiff, I find that the 1st Defendant is liable to compensate the Plaintiff.
54. The 1st defendant issued the comprehensive policy cover and is therefore liable to compensate the plaintiff.
55. It has not been shown that the issue of the irregular importation documents was within the knowledge of the plaintiff at the time the 1st Defendant insured the motor vehicle.
56. The 1st Defendant insured the value of the motor vehicle and not the validity of the importation documents.
57. There is no evidence that the plaintiff failed to make full disclosure of the particulars of the motor vehicle at the time he insured the motor vehicle.
58. I accordingly find the 2nd, 3rd and 4th defendants are not liable for the loss the plaintiff sustained.
59. Although interlocutory judgment had already been entered against the 2nd defendant on 12/10/2009, the plaintiff did not establish during formal prove that the 2nd Defendant was liable to compensate the plaintiff the value of the motor vehicle.
60. In a nutshell, I find that 1st Defendant is liable to compensate the plaintiff the insured value of the motor vehicle which is 1,800,000 together with costs of the suit and interest at court rates from the date of filing the original suit until payment in full.
61. On the issue as to who pays the costs of this suit, it is trite law that costs follow the event. I direct that the 1st Defendant pays the plaintiff's costs of this suit.
62. However, had it not been for discrepancies in the registration documents, this case would not have come to court. For that reason, the 2nd, 3rd and 4th Defendants are not entitled to the costs of this suit.



63. The plaintiff's suit against the 2nd, 3rd and 4th Defendants is accordingly dismissed with no orders as to costs.
64. Judgment be and is hereby entered in favor of the plaintiff against the 1st defendant in the sum of Kshs 1,800,000 together with costs of this suit and interest at court rates from the date of filing this suit (on 2/11/1994) until payment in full.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 27TH DAY OF OCTOBER, 2023.

A. N. ONGERI

JUDGE

