



REPUBLIC OF KENYA



**Britam General Insurance Company (K) Ltd v Ngige (Civil Suit  
4 of 2021) [2023] KEHC 26772 (KLR) (22 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26772 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CIVIL SUIT 4 OF 2021  
SM GITHINJI, J  
DECEMBER 22, 2023**

**BETWEEN**

**BRITAM GENERAL INSURANCE COMPANY (K) LTD ..... PLAINTIFF**

**AND**

**DAVID KIMANI NGIGE ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff instituted this suit by way of a plaint dated 21<sup>st</sup> April 2021 seeking that judgment be entered against the Defendant for: -
  - a. A declaration be made that the Plaintiff is entitled to avoid or repudiate the insurance policy No 590/070/00003 and/or any claims arising thereto or any addendums, endorsements and renewals thereof issued by itself to the defendant.
  - b. A declaration be made that the Plaintiff has no contractual or legal liability to satisfy any judgment obtained pursuant to the accident which occurred on 7<sup>th</sup> March 2020 along Malindi-Mombasa Road at Watamu by any claimant against the Defendant.
  - c. Costs of the suit.
  - d. Any other relief the court may deem just to grant.
2. The gist of the Plaintiff's case is that the Defendant was at all material times the beneficial owner of motor vehicle registration No KCD 831F Toyota Axio (the vehicle), insured by the Plaintiff under a Comprehensive Motor Vehicle Insurance Policy Number 590/070/00003. The policy period commencing on 18<sup>th</sup> July 2019 to 19<sup>th</sup> May 2020. The Plaintiff averred that it was an express term of the policy that the Defendant would lose any rights under the policy in any situation where it is established that the Defendant made a fraudulent claim, breached the policy and insurance principles, or that the Defendant or any person acting on his behalf gave false information relating to a claim.



3. It would follow that on 7<sup>th</sup> March 2020, the vehicle was involved in a road traffic accident along the Malindi-Mombasa Road causing extensive damage to the vehicle and injury of third parties. The Plaintiff averred that the Defendant represented to them that as at the time of the accident, the driver was his friend one Rene Hauschke, a German national and that the said vehicle was hit by an overtaking vehicle.
4. The Plaintiff further averred that pursuant to paragraph 10 of the insurance policy, they instructed a private investigator to investigate the said accident and they discovered that the Defendant had misrepresented and/or concealed material facts when reporting the claim in total breach of the policy. The Plaintiff outlined the particulars of misrepresentation and breach as follows: -
  - a. Putting the motor vehicle for a hire and reward use at the time of the accident.
  - b. Misrepresenting to the Plaintiff that the driver of motor vehicle registration KCD 831F Toyota Axio at the time of the accident was a friend yet the said driver had hired the motor vehicle.
  - c. Permitting motor vehicle registration number KCD 831F Toyota Axio to be driven by an unauthorized driver.
  - d. Deliberately and willfully withholding facts concerning the accident.
  - e. Concealing material facts on the cause of the accident.
  - f. Failing to provide any document in proof of ownership of the insured motor vehicle in confirmation of the insurable interest.
  - g. Breaching the principle of utmost good faith.
5. On 6<sup>th</sup> May 2021, the firm of George Kariuki & Associates entered appearance for the Defendant and filed a statement of defence dated 18<sup>th</sup> May 2021. The Defendant denied breaching any of the terms of the policy as alleged by the Plaintiff. He averred that as at the time of the accident he was the registered owner of the vehicle. The Defendant asserted that on the material date, he had given the vehicle to his friend Ann Rene who was in the company of and was driven by the said Rene Hauschke. The Defendant contested that he was not present at the time of the accident and that any information he gave to the Plaintiff was given without prejudice and on the basis that it was hearsay.

### **The Evidence**

6. Andrew Mukhebi Sifuna (PW1) told the court that he works for the Plaintiff as a claims' handler. He adopted his statement dated 8<sup>th</sup> July 2021 as part of his evidence in chief. He produced the claim form dated 20<sup>th</sup> March 2020 (PEXh-1), Decline letter dated 28<sup>th</sup> May 2020 (PEXh-2), instructions to file suit (PEXh-3), plaint in Malindi CMCC E45/2020 (PEXh-4), and letter dated 10<sup>th</sup> March 2020 from the Defendant's advocates (PEXh-5).
7. PW1 testified that the circumstances of the accident were not clear which necessitated the appointment of an investigator. The Plaintiff thus appointed Pinnacle Insurance Investigators who established the said breach of policy.
8. Upon cross-examination by Mr. Kariuki, counsel for the Defendant, PW1 confirmed that he did not produce the policy document and that the Plaintiff did not disclose the breached terms. He also confirmed that comprehensive policy covers the insured vehicle and 3<sup>rd</sup> party liabilities. He told the court that what the Plaintiff found suspicious was the extent of the damage in relation to the



- Defendant's statement. The witness confirmed that at all material times, the Defendant communicated with the Plaintiff through the Plaintiff's agent, one Anne Awuor.
9. On re-examination, the witness told the court that he was not aware of all the communication between the said agent and the Defendant except that which was forwarded to the Plaintiff. He added that as per police abstract, the accident involved other vehicles and persons.
  10. Patrick Ogonyi (PW2) an investigator at Pinnacle Insurance Investigators, made and produced an investigation report dated 21<sup>st</sup> May 2020. He stated that during his investigations, he interrogated the Defendant, driver, one occupant of the vehicle and another witness identified as John Momanyi. He also visited Malindi Police Station. That due to Covid-19, the interrogations were done virtually and written statements sent via email to the mentioned individuals for signing.
  11. PW2 testified that as per the police report, the driver of the vehicle herein encroached the opposite lane causing collusion with a 3<sup>rd</sup> party. He also established that the vehicle was registered to one Abubakar Masoud and at the time of the accident, it was being used as a taxi.
  12. On cross-examination, PW2 confirmed that he never recorded a witness statement and that he did not have any authority to appear on behalf of Pinnacle Investigators. He added that he had no certificate for the photographs attached to the report. PW2 told the court that he never conducted a motor vehicle search with NTSA but only relied on a logbook copy. He added that the interrogation statements were not signed by the respective witnesses.
  13. On re-examination, PW2 explained that the procedure at Pinnacle was that a junior officer like himself would conduct the investigations but the report would be signed by his senior, in this case it was signed by one George Wambua. He explained that he retrieved the witnesses' contacts for interrogation from the claim form given to him by the Plaintiff, and that he got a copy of the log book from the Defendant. At this point, PW2 told the court that the defendant, Anne and the said Job Momanyi managed to sign their statements during his investigations.
  14. David Kimani Ngige (DW1) the defendant in this case, adopted his statement as his evidence in chief. He produced the documents in the bundle of documents dated 9<sup>th</sup> June 2021 as DExh-1-13; and the document in the supplementary list dated 9<sup>th</sup> July 2021 as DExh-14.
  15. On cross-examination by Ms. Barasa, the Defendant asserted that he had a duty to disclose the true facts and information relating to the policy. He narrated that he did not witness the accident since he was not the driver on that particular date. The Defendant confirmed that according to the police abstract dated 19<sup>th</sup> March 2020, the driver of the vehicle herein was to blame for the accident. He added that the copy of logbook he attached was in the name of Abubakar Masoud and that is what he had given to the Insurance.
  16. The Defendant stated that although he was into taxi business, he had not used the vehicle as a taxi. He was shown a letter dated 28<sup>th</sup> May 2020 and confirmed that by then the logbook was in the name of another person.
  17. In re-examination, the Defendant indicated that he was not shown the policy clauses said to have been breached and that he only recorded what the driver had told him about the accident. He added that he objected the Plaintiff's decision to repudiate the policy through its agent Anne Awuor who failed to acknowledge receipt of the objection letter.
  18. At the close of the defence case the parties agreed to file and exchange written submissions.



## The Plaintiff's Submissions dated 8<sup>th</sup> May 2023

19. Counsel for the Plaintiff identified two issues for determination. Firstly, whether the Defendant was the rightful owner of the vehicle and therefore entitled to compensation. It was counsel's argument that the Defendant purchased the suit vehicle from its previous owner but failed to avail a sale agreement as proof of insurable interest and ownership as at the time of the accident. Counsel submitted that ownership of a vehicle could only be proven in accordance with section 8 of the Traffic Act. Therefore, having failed to discharge his obligation under section 107 and 108 of the Evidence Act, he had no insurable interest in the subject vehicle. He relied on the case of Securicor Kenya Limited v Kyumba Holdings Civil Appeal No 73 of 2002.
20. The second issue was based on the argument that concealment of material facts is a breach of the principle of utmost good faith. Counsel reiterated that the Defendant's misrepresentation of facts and the use of the vehicle for hire was contrary to the risks covered under the policy. As such the Plaintiff is not obliged to indemnify him for any loss or liability. Counsel added that according to section 10 (4) of the Insurance (Motor Vehicle Third Party Risk) Act, the Plaintiff is allowed to repudiate the policy in the circumstances herein. To buttress this point, counsel relied on the case of Charles Momanyi Mageto v Co-operative Insurance Company of Kenya Ltd [2016] eKLR; Daybreak Limited v Monarch Insurance Co. Ltd [2013] eKLR; Paul Mutsya v Jubilee Insurance Company of Kenya Limited [2018] eKLR; and Monarch Insurance Company Limited v Joseph Njenga Maina [2021] eKLR.
21. It is pertinent to note that as at the time of writing this judgment the Defendant had not filed his submissions. It is also manifest from the proceedings that on 10<sup>th</sup> July 2023, the interested party was allowed to join this suit. He filed his submissions on 9<sup>th</sup> August 2023 which I have summarized as below.

## The Interested Party's Submissions

22. What I establish from these submissions is that the Interested Party was the Plaintiff in Malindi CMCC No 45 of 2020 filed against the Defendant herein. The Interested Party claim in that suit was for recovery of general and special damages incurred as a result of the accident in this matter. The decretal sum in that suit was Kshs 1,405,230/- which prompted the Defendant to file declaratory suit, Malindi CMCC E104 of 2022 to compel the Plaintiff herein to satisfy the aforesaid judgment. Subsequently and upon issuance of a statutory notice, the Plaintiff herein settled the entire decretal sum in Malindi CMCC E104 of 2022. To the Interested Party, the present suit is an academic exercise and a waste of judicial time.
23. Counsel submitted that the present case was filed outside the statutory 3 months period envisaged under section 10 (4) of the Insurance (Motor Vehicle Third Party Risks) Act, therefore the Plaintiff was statutory bound to compensate the 3<sup>rd</sup> parties. Counsel relied on the case of Geminia Insurance Company Limited v EN (minor suing through his father and next friend AAO) [2019] eKLR where the learned judge quoted INTRA Africa Assurance Company Limited v Simon N Njoroge Avertana Da Costa NRB CA Civil Appeal No 41 of 1996 [1997] eKLR.
24. To counsel, there was no room to seek extension of time, thus upon the lapse of 3 months after proceedings are commenced, the insurer had only one option, that is to settle the claims. This, counsel submitted, was the position in Corporate Insurance Co. Ltd v Reuben Murigi Mwangi [2018] eKLR.
25. It follows that the following issues arise for determination: -
  - i. Whether at the time of the accident the Defendant was in breach of the terms of the insurance policy.



- ii. Whether the reliefs sought in the plaint are merited.
26. The answer to the foregoing issues lies in the evidence adduced by the parties. The undisputed evidence before this court is that the insurance cover issued to the Defendant indemnified him from any loss or liability arising from the private use of his vehicle. On one hand, the Plaintiff insists that the occupants in the defendant's vehicle at the time of the accident had hired the vehicle and that the driver was an unauthorized driver, which violated the terms of the policy. In addition, the Plaintiff alleges that the Defendant concealed material facts relating to the cause of accident and failed to produce the vehicle's ownership documents.
27. On the other hand, the Defendant's case is that the occupants were his friends and that he had only given them the vehicle for use without any payment in return. The Defendant insists that as at the time of the accident he was the registered owner of the vehicle and that any information he gave regarding the accident was hearsay hence given without prejudice.
28. The Plaintiff failed to produce a copy of the policy document, it is therefore difficult for this court to ascertain the nature of clauses said to have been breached. That notwithstanding, there was no evidence that the Defendant had given the vehicle for hire at the time of the accident. The police abstract has no reference to payment of any reward by the occupants of the vehicle and in any event, the same was not produced as an exhibit.
29. PW2 produced an investigation report. I have perused the report and do note that it was signed by a different person. However, he insisted that he was the maker of the report and owned it when he testified in Court. That notwithstanding, I find that the report does not add any value to the Plaintiff's case. I say so because the key supporting documents, being the statements allegedly made by the persons who were occupants in the vehicle, were not signed. And even if they were, their contents would be of no assistance to the Plaintiff's allegations. The said statements confirm the Defendant's allegation that the vehicle was not on hire at the time of accident. Both occupants of the vehicle in the said statements had asserted that they borrowed the vehicle to go to the beach.
30. Similarly, I am not satisfied that the Plaintiff's allegation that the Defendant concealed material facts has been demonstrated. I have perused the claim form as presented by the Defendant to the Plaintiff's agent. The Plaintiff's and occupants' statements therein were merely a description of what happened or the facts leading to the accident and the actions the Defendant took thereafter. The Police abstract apportioning blame to the Defendant was equally attached to the claim form. The Plaintiff cannot now be heard to honestly claim that the Defendant concealed material facts.
31. The Plaintiff's argument that the Defendant failed to produce ownership documents is neither here nor there. This is because the Plaintiff agrees that the Defendant indeed purchased the vehicle from the former owner and paid for a comprehensive cover with the Plaintiff. The other allegation that the driver was unauthorized suffers the same fate. A copy of the driver's driving license was part of the Plaintiff's documents. The Plaintiff did not demonstrate to this court why or how the driver was unauthorized.
32. It follows therefore that the state of affairs is disconcerting and not in favour of the Plaintiff's case. In the circumstances I find that the Plaintiff has failed to prove its case to the required standard in law.
33. In any event and although raised in the submissions, the Interested Party alleged that the suit is statute barred by virtue of section 10 (4) of the *Insurance (Motor Vehicle Third Party Risks) Act* Cap 405 which provides as follows: -

“(4) 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.”

34. The Plaintiff attached copies of pleadings filed by the Interested Party in Malindi CMCC E45 of 2020 which reveal that the primary claim for compensation was instituted sometime in September 2020. The present suit was filed in April 2021 outside the statutory period. It is apparent that this suit was destined to fail from the onset. Further, the Interested Party admitted and I agree with him that the Plaintiff had already settled the decretal sum and that the present suit is a waste of judicial time.
35. The upshot is that, there is no merit in the Plaintiff's case and the same is hereby dismissed with costs to the defendant.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 22<sup>ND</sup> DAY OF DECEMBER, 2023.**

.....

**S.M. GITHINJI**

**JUDGE**

In the presence of: -

Ms Osewe for the Plaintiff

Ms Nyambuto for the Interested Party

Mr Kariuki is for the Respondent

Ms Osewe; - I pray for stay for 45 days because of the Holidays.

Court; - 45 days stay is declined. There is nothing to stay.

