



**Mugo v British-American Insurance Company (K) Limited (Civil Appeal  
63 of 2015) [2022] KEHC 3347 (KLR) (22 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 3347 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 63 OF 2015  
MN MWANGI, J  
APRIL 22, 2022**

**BETWEEN**

**JOHN MARTIN MUCHIRI MUGO ..... PLAINTIFF**

**AND**

**BRITISH-AMERICAN INSURANCE COMPANY (K) LIMITED ... DEFENDANT**

**JUDGMENT**

1. An amended plaint dated the 21<sup>st</sup> November, 2015, was filed by the plaintiff where he averred that at all material times he was the beneficial owner of motor vehicle registration No. KBX 711C, Mercedes Benz Actros (herein after referred to as “the motor vehicle”) and trailer registration number ZE 5315 (herein after referred to as “the trailer”), and had on or about the month of October 2014 taken out a comprehensive insurance policy No. 571/807/1/003718/2014/10 with the defendant on or about 23<sup>rd</sup> November, 2014, in consideration of Kshs. 344,293.00, in exchange of indemnifying the plaintiff against all risks and liabilities and/or loss which the plaintiff would have incurred or suffered through or in connection with the use of the motor vehicle or the trailer.
2. The plaintiff averred that on or about the 23<sup>rd</sup> November, 2014, during the currency of the said policy, the motor vehicle was involved in a self-involving accident when it lost control and rolled at Naivasha when the plaintiff’s authorized driver was transporting transit goods from Mombasa to Kampala. The plaintiff further averred that the motor vehicle was badly damaged, and rendered a write-off and/or uneconomical to repair. The plaintiff claimed to have suffered loss and damage of a total of Kshs. 15,952,962.60 and that he continues to incur loss of user at a weekly rate of Kshs. 250,000.00. The plaintiff averred that vide the insurance policy, the defendant became and was liable to indemnify him in respect of the loss occasioned by virtue of the said accident.
3. The suit herein is for damages and the plaintiff prays for Judgment against the defendant for:
  - (a) Payment of the said sum of Kshs. 15,952.962.60 (through 23.02.2018;



- (b) In the alternative payment of the Pre-accident value of the motor vehicle of Kshs. 5,858,000.0 and loss of user at the rate of Kshs. 250,000/= per week from 23.11.2014 until full and final settlement hereof;
  - (c) Costs of and incidental to the suit herein;
  - (d) Interest on (a), (b) & (c) above at court rates from the date of filing suit herein till payment thereof; and
  - (e) Any other or further relief.
4. The defendant filed a statement of defence on 16<sup>th</sup> July, 2015, denying all the allegations in the plaint, save for the descriptive paragraphs 1 and 2. In the said defence, the defendant stated that a premium of Kshs. 318,117.00 was paid on the plaintiff's behalf to the defendant and that it was an express term of the contract that certain losses and liabilities were excluded from the Insurance Policy Cover. The defendant maintained that the motor vehicle the subject of this suit was still repairable and therefore, there was no basis of the plaintiff claiming the pre-accident value for a serviceable and repairable motor vehicle and that the plaintiff would be put to strict proof of any evidence to the contrary on the condition of the motor vehicle
5. The plaintiff adduced evidence and called two witnesses to prove his case. They were John Maina (PW2) a motor vehicle assessor, and Raymond Ochieng Oloo (PW3) a CPA holder. The defendant on its part relied on the evidence of its motor assessor, Mr. Pius Gathimba Kagocha (DW1). All the witnesses relied on and adopted their respective witness statements as evidence in chief and then produced the bundles of documents filed as exhibits.

#### **The plaintiff's case**

6. PW1, John Martin Muchiri Mugo, testified that he owned the subject motor vehicle and he had taken out an insurance cover from the defendant and in the policy document, it was agreed that in case of an accident, the defendant would repair the vehicle or pay for replacement, and that the defendant's decision was dependent upon an assessor's report. PW1 stated that the insured vehicle was involved in an accident during the currency of the policy and he duly completed a claim form. He also stated that he travelled to Nakuru and instructed an assessor who inspected the motor vehicle and found that its engine could not be repaired.
7. PW1 stated that the Court ordered for a joint valuation of the motor vehicle but the valuation could not be undertaken because the vehicle was never availed by the defendant. PW1 further stated that he had since lost the vehicle and the income from it at the rate of Kshs. 250,000/= per week.
8. On being cross-examined, PW1 confirmed that after the accident, he completed the claim form, he made a claim that the vehicle was dented on the passenger side and there was failure in ignition and that it would be up to the mechanic to decide if the same was repairable. PW1 also confirmed that there was correspondence between the defendant and him wherein it was communicated that the motor vehicle was repairable.
9. PW1 confirmed that his consent was sought to move the vehicle to a more specialized garage, but he did not give his consent and he had no document to show that he responded to the said e-mail of 24<sup>th</sup> March, 2015. PW1 also confirmed that under section I clause 4 (of the insurance policy document), he was to give authority to repair and that the contract clearly said that any consequential loss was not payable. He stated that he was seeking for consequential loss due to failure by the defendant to repair the motor vehicle and his inability to use the said motor vehicle. PW1 also confirmed that he



was claiming a sum of Kshs. 1,000,000/= per month totaling to Kshs. 15,952,962.00 according to the amended plaint.

7. PW1 also confirmed that he had un-deposited funds in the sum of Kshs. 10,800,000/= which was enough to buy another vehicle as a way of mitigating losses. PW1 also confirmed that he had not paid the due premiums but he later on paid within a week. He stated that he had nothing to show that he notified the defendant about having concluded the issue of payment with the bank.
8. In re-examination, PW1 stated that Section I clause 4 (of the insurance policy document), that required the giving of consent was not mandatory since he visited the defendant's offices and had given a quotation and the defendant's assessor had recommended the buying of a new engine, which was never bought by the defendant.
9. PW2, John Maina, stated that he has over 25 years' experience in motor vehicle assessment and that he received instructions from the plaintiff in February 2015 to assess a truck, which had been involved in an accident and stored at a garage in Nakuru. He was paid Kshs. 40,500/= for the assessment. He indicated that during the assessment, PW2 established that the truck had rolled on its passenger side and that its cabin and engine had been damaged. He arrived at the conclusion that the damage was about Kshs. 4,000,000/=. He stated that it was agreed by the garage owner that the recommended repairs would cost Kshs. 3,900,000/=.
10. On being cross-examined, PW2 confirmed that he was instructed by the plaintiff even though he did not have his letter of instruction with him. PW2 also confirmed that he prepared the report filed in Court but he forgot to sign the said assessment report. He further confirmed that in his opinion, his report was based on his experience. He indicated that the motor vehicle was manufactured in the year 2008 and at the time of the accident it had done at least six years and that the value of the parts required for repair as tabulated, was obtained from a repairer since PW2 does not sell spare parts and or operate a garage.
11. PW3, Raymond Ochieng Oloo, is a CPA holder of Part 3 Section 6. He stated that in the financial statement he prepared, there was a contract for transport which the plaintiff was projected to earn Kshs. 250,000/= per week from Coast Profession Freighters Ltd, had the accident not occurred.
12. In cross-examination, PW3 confirmed that he had not exhibited any source document of income and he could not recall the duration of the contract with Coast Professional Freighters Ltd. PW3 further confirmed that SGR does not affect all the transport businesses.
13. PW3 also confirmed that on the balance sheet, the item called un-deposited funds was actually the money earned and not deposited and that it was an estimation of what could have happened if the accident did not happen. PW3 also confirmed that the un-deposited sum then grew to 20,000,000/= in 2016 and 30,000,000/= in 2017. He indicated that the same were estimates without any hard evidence but the income from the transport remains Kshs. 9,600,000/= for all the 4 years. PW3 also confirmed that he had not exhibited any document to show that the Plaintiff earned Kshs. 250,000/= per week.
14. In re-examination, PW3 stated that he used the transport agreement between the plaintiff and Coast Professional Freighters Ltd which was to earn the plaintiff Kshs. 250,000/= per week.
15. On being questioned by the Court, PW3 confirmed that the plaintiff only traded for 3-4 weeks in 2014, and by basis of the estimates, the accident made the motor vehicle inoperative.



## The defendant's case

16. DW1, Pius Gathimba Kagocha, is a Mechanical Engineer holding a Diploma in Automotive Engineering. He stated that he was in the employment of the defendant as a motor vehicle assessor. His evidence was that during the pendency of the insurance in issue and in particular, on the 26<sup>th</sup> November, 2014, the plaintiff herein reported to the defendant that the subject motor vehicle herein had been involved in a self-involving accident at Naivasha town along Naivasha - Nakuru Road while negotiating a roundabout. The subject motor vehicle was then towed to Seas Motor Garage in Nakuru town for repairs. DW1's evidence was that in honouring its obligations under the Insurance Policy, the defendant commissioned Paramount Assessors Limited to inspect and assess the extent of damage caused to the subject motor vehicle. He stated that in their assessment, Paramount Assessors Limited concluded that the parts damaged on the motor vehicle were indeed repairable and quoted the repair costs at Kshs. 1,589,692/=. The engine of the motor vehicle, which was also inspected, was deemed to be repairable.
17. DW1 stated that Seas Motor Garage also inspected the damage on the subject motor vehicle and concluded that the engine of the motor vehicle was extensively damaged and as such, it ought to be replaced as opposed to being repaired, contrary to the findings of Paramount Assessors Limited who had concluded that the engine was indeed repairable. He stated that both the proposals were communicated to the plaintiff severally and that the defendant then informed the plaintiff and sought his consent in order for the repairs to commence, but none was forthcoming. He indicated that several reminders sent to the plaintiff herein did not also yield any response from him.
18. DW1's testimony was that the insured's consent was necessary because he had stated that he was sourcing for a replacement engine, was entitled to choose where his motor vehicle would be repaired, and he had raised a dispute regarding the repairs. DW1 indicated that it was therefore prudent that his informed consent be sought before any repairs commenced. He further stated that the defendant's obligation to the plaintiff was to restore his motor vehicle to its pre-accident condition and that the defendant did not at any time decline to indemnify the plaintiff for his loss. He stated that indemnity had been offered in the form of restoration of the insured's motor vehicle to its pre-accident condition, and repeatedly, the insured had turned down that offer. He expressed the view that this suit is purely a means to compelling the defendant to pay for a loss that had not occurred.
19. In cross-examination, DW1 confirmed that he had not filed any document to confirm that he was in the defendant's employment. He indicated that he was not in the defendant's employment at the time of the accident. He confirmed that the plaintiff is a beneficiary of the policy insured under Policy No. 571/807/1/003718/2014/10 which was valid from 18<sup>th</sup> October, 2014 to 17<sup>th</sup> November, 2014 and the same was extended from 18<sup>th</sup> November, 2014 to 17<sup>th</sup> December, 2014 and that the plaintiff reported the accident on 26<sup>th</sup> November, 2014 to the defendant during the validity period of the insurance.
18. DW1 confirmed that there was correspondence between the plaintiff and the defendant about the repair of the motor vehicle but the plaintiff never authorized a request for repair and that the plaintiff's intention was to rewrite the policy after the accident. DW1 also confirmed that the plaintiff's vehicle was a commercial one and he was unable to use it after the accident.
19. DW1 confirmed that there were conflicting reports from Paramount Motor Assessors and Seas Motor Garage with one recommending that the motor vehicle was written off, while the other report recommended repairs. It was DW1's evidence that there was an independent assessment report in the defendant's bundle of documents on repair estimates done by K. Raphael, an Assessor working for



the defendant. DW1 also confirmed that the Court appointed an independent assessor to undertake assessment but the assessment was never done and the defendant did not avail the truck to be assessed by an independent assessor. DW1 also confirmed that he had produced documents made by other parties.

20. In re-examination, DW1 stated that the plaintiff was required to confirm the repairs but he never undertook to do so and that the defendant is still willing and ready to repair the motor vehicle.

### **Analysis and Determination**

21. The parties by consent on 13<sup>th</sup> October, 2016, agreed on the following issues for determination-
- (i) Whether or not the motor vehicle Reg. No. KBX 711C/ZE5315 is repairable or is a write-off. If repairable, what is the cost thereof?;
  - (ii) Whether or not the consequential losses pleaded and prayed for are recoverable or excluded by the policy of insurance. If the same are recoverable, what is the quantum thereof?; and
  - (iii) Who should pay the costs of the suit.

### **Whether or not the motor vehicle Reg. No. KBX 711C/ZE5315 is repairable or is a write-off. If repairable, what is the cost thereof?**

22. Mr. Tolo, learned Counsel for the plaintiff submitted that there were two conflicting opinions by the defendant's assessors. M/s Paramount Loss Assessor recommended repairs of the motor vehicle, while Sea Motors Garage recommended replacement of the motor vehicle because of the extensive damage. He further stated that the plaintiff's instructed Assessor arrived at a finding that it would not have been economical to repair the motor vehicle and recommended for the same to be declared a write-off.
23. Mr. S. Weloba, learned Counsel for the defendant on the other hand submitted that under section 1 of the Insurance Policy Contract the defendant has the discretion of either paying cash, undertaking or replacing a vehicle or part of it or its accessible spare parts to cover the amount of loss or damage. He submitted that parties are bound by terms of their contracts unless duress and or coercion is proved.
24. He also submitted that with the view to honour its obligation, the defendant sought the plaintiff's consent to enable the facilitation of repairs, but the plaintiff failed to give consent to have the motor vehicle repaired thereby causing delays in the repair of the motor vehicle. He also submitted that the assessment report by Paramount Assessor Limited confirmed that the suit motor vehicle could be repaired as it did not consider the motor vehicle a write-off. He contended that in total breach of the insurance policy, the plaintiff instructed his own independent assessor and thereafter demanded payment of the pre-accident value of the suit motor vehicle.
25. I have considered the submissions of the parties on the issue of whether the motor vehicle ought to have been repaired or replaced. In order to determine the said issue, it is necessary to consider the Insurance Policy that governed the relationship between the plaintiff and the defendant, in doing so, I am minded that parties are bound by the terms of their contracts and that a Court of law cannot purport to rewrite a contract that was voluntarily executed by parties. That was the holding in *Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited* [2017] eKLR, where the Court of Appeal stated thus-

“We are alive to the hallowed legal maxim that it is not the business of the courts to rewrite contracts between parties. They are bound by the terms of their contracts unless, fraud, coercion or undue influence are pleaded and proved.”



26. Section I clause 1 of the comprehensive insurance policy document No. 571/807/1/003718/2014/10 between the plaintiff and defendant stipulated as follows on loss or damage-

“we will pay for the loss of or damage to the vehicle(s) or its /their accessories and while in or on the vehicle.

We may choose to pay cash, repair or replace the vehicle or part of it or its accessories spare parts to cover the amount of the loss or damage.”

27. The report by Rally Motor Assessors relied on by the plaintiff shows that the estimated costs of repair to restore the vehicle back to its pre-accident condition amounts to Kshs. 4,073,804.00. PW2 placed the pre-accident market value of the vehicle at Kshs 5,700,000/- and indicated that the salvage was worth Kshs 1,500,000/=. It was PW2’s opinion that it was uneconomic to embark on repairs. He urged the defendant to consider the motor vehicle a write off.

28. The report by C. Wasike of Paramount Assessors Ltd produced by DW1 shows that the the estimated costs of repair to restore the vehicle back to its pre-accident condition was Kshs. 1,587,692.00. He further stated that the motor vehicle was repairable. He gave a pre-accident market value of 5,600,000/-.

29. The status of opinion evidence was dealt with in *Shah and another vs. Shah and others [2003] 1 EA 290* where Court stated as follows-

“One of the special circumstances when witnesses may be called to give evidence of opinion is where the situation involves evidence of expert witness and this is an exception to the general rule that oral evidence must be direct... However as a rule of practice, a witness should always be qualified in court before giving his evidence and this is done by asking questions to determine and failure to properly qualify an expert may result in exclusion of his testimony... The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so...If there is a conflict of expert opinion, with experts appearing for both parties, resolution of conflicting evidence or the acceptance of the evidence of the expert in preference to the opinion of the other, is the responsibility of the court...Properly grounded expert evidence of scientific conclusion will be extremely persuasive in assisting the court to reach its own opinion.”

30. Similarly, in *Amosam Builders Developers Ltd vs Betty Ngendo Gachie & 2 others [2009] eKLR*, the Court of Appeal stated as follows -

“In the case before us, there is a conflict of opinion by the experts called by both sides. It was the responsibility of the trial court to come to a decision one way or the other after analyzing all the evidence before it.....”

31. It is worth noting that the plaintiff with leave of the Court filed an amended plaint on the 5<sup>th</sup> March, 2018. In the amended plaint, the plaintiff introduced paragraph “9A” which reads thus-

“The plaintiff avers that on the instruction of the defendant’s employees the aforesaid motor vehicle was taken to Sea motor & Spare Co. Ltd Nakuru for repair however the same has since gone missing. The plaintiff’s efforts to locate the motor vehicle have been futile.”

32. The defendant did not file an amended statement of defence to deny the contents of paragraph 9A that was introduced vide the amended plaint. Consequently, this Court arrives at the conclusion that



the subject matter of the current suit has gone missing, a fact that was confirmed on the 28<sup>th</sup> February, 2017, when the defendant's Counsel on record Mr. Mulama, informed this Court that sometime in the year 2016, the motor vehicle was attached by a firm of Auctioneers from the yard it was kept for repairs, and that the said attachment was pursuant to a decree by Gulf Africa Bank Ltd.

33. On 5<sup>th</sup> April, 2017, Ms. Nasimiyu, learned Counsel for the plaintiff confirmed that indeed the motor vehicle had been sold. She sought leave to amend the plaint.
34. Having found that the subject matter of the suit has already been sold, it is my finding that the determination of whether the suit motor vehicle is reparable has been overtaken by events and is otiose, since the suit vehicle was lost in the custody of the defendant. I therefore hold that the plaintiff is entitled to the pre-accident value of the lorry that is Kshs. 5,600,000/= as per the report by Paramount Assessors Ltd and I hereby award the plaintiff the said amount.

**Whether or not the consequential losses pleaded and prayed for are recoverable or excluded by the policy of insurance. If the same are recoverable, what is the quantum thereof?**

35. Mr. S. Weloba for the defendant cited the case of *Madison Insurance Company LTD v Solomon Kinara T/A Kisii Physiotherapy Clinic* [2004] eKLR, where the Court of Appeal held that ordinary or standard form policies or contracts of insurance do not cover consequential loss unless the parties specifically contract that such loss would be covered.
36. It was also submitted that Section I(5(a)) of the policy document provided as follows on the issue of consequential loss.

“...we will not pay for : consequential loss...”

Further, the said section of the policy document provides as follows on the issue of consequential loss:

“We will not be liable in respect of: any accident, loss or damage to any property or any loss or expense arising therefrom or any consequential loss.”

37. The plaintiff's Counsel submitted that the suit motor vehicle was a commercial lorry and that the plaintiff was making Kshs. 250,000/= per week from the motor vehicle.
38. In *Madison Insurance Company Limited Vs Solomon Kinara T/A Kisii Physiotherapy clinic (supra)*, the Court of Appeal stated thus;

“.....ordinary or standard form policies or contracts of insurance do not cover consequential loss unless the parties specifically contract that such loss would be covered...The policy of insurance between the Appellant and Respondent was an ordinary or standard form contract and as such there was nothing to import into that policy the element of consequential loss. The Respondent's claim was that the loss was occasioned by the Appellant's wrongful repudiation or refusal to pay for the loss of the items the policy covered, but we do not think this takes the matter any further. The parties could have covered such an eventuality in their policy of insurance and in the absence of such a provision, the Respondent was not entitled to claim consequential loss of profits. That was what this Court rejected in the case of *Corporate Ins Co Ltd Vs Loise Wanjiru Wachira* to which we have already referred.” emphasis added.

39. When the parties to this suit appended their respective signatures to the insurance contract, it can only be interpreted and applied as they desired. Their desire was that in their dealings pursuant to their



insurance contract, there would be no liability by way of consequential loss. The plaintiff's claim is for loss of user at the rate of Kshs. 250,000/= per week as from 23<sup>rd</sup> November, 2014 until payment in full because the defendant did not indemnify him by replacing his motor vehicle as it was obliged to do under the contract of insurance. I hold that the plaintiff cannot be awarded anything under the said claim because he bound himself to a contract that did not cover liability arising from consequential loss. The said loss can only be awarded by the Court if the parties herein had specifically contracted that such loss would be covered by the insurer. The rationale behind it is simple, in that insurance contracts are not entered into with the intention of profit making.

40. In the result, it is my finding that the plaintiff has proved his case against the defendant on a balance of probabilities in respect of his claim for the pre-accident value of motor vehicle. I enter Judgment in his favour as against the defendant in the following terms-

- (i) That the defendant shall pay the plaintiff Kshs. 5,600,000/= being the pre-accident value of the motor vehicle registration No, KBX 711C Mercedes Benz Actros together with interest from the date of the Judgment until payment in full; and
- (ii) That the defendant shall pay the plaintiff costs of the suit. Interest on costs shall be from the date of the Judgment until payment in full.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 22ND DAY OF APRIL, 2022.**

In view of the declaration of measures restricting Court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the then Chief Justice on the 17<sup>th</sup> April, 2020 and subsequent directions, the Judgment herein has been delivered through Teams Online Platform.

**NJOKI MWANGI**

**JUDGE**

**In the presence of:**

No appearance for the plaintiff

Mr. S. Weloba for the defendant

Mr. Oliver Musundi – Court Assistant.

