



**Heritage Insurance Company Limited v Nyamwaya (Civil Suit
86 of 2016) [2022] KEHC 3261 (KLR) (19 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 3261 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL SUIT 86 OF 2016
TM MATHEKA, J
MAY 19, 2022**

BETWEEN

HERITAGE INSURANCE COMPANY LIMITED PLAINTIFF

AND

WILLIAM NYAMWAYA DEFENDANT

JUDGMENT

1. The Plaintiff, Heritage Insurance Company Limited, by a Plaint dated September 7, 2016 sought the following reliefs against the Defendant, William Nyamwaya
 1. A declaration that it is not bound to pay/or satisfy judgment in Nakuru CMCC Nos 1437-1438, 1440-1441 of 2015 and/or indemnify the Defendant against any claim in respect of death, bodily injury to any person, damage to property or satisfy any claim whatsoever arising out of the accident which allegedly occurred on 1August 8, 2015 along Nairobi- Nakuru Highway involving the Defendant’s Motor Vehicle Registration Number KCD 942 W Toyota Noah.
 2. Costs of this suit.
 3. Interest on (b) above at court rates.
 4. Any other or further relief that this Honourable Court may deem just, expedient and fit to grant.
2. The Plaintiff’s case is that following a proposal by the Defendant it issued an insurance policy cover for his motor vehicle registration number KCD 942 W Toyota Noah. According to the proposal, the motor vehicle was for the Defendant’s private use and business dealings. The insurance cover was for a period of month year commencing on 3rd August 2015 and ending on 2nd September, 2015. That it



- was a term of the policy that the plaintiff would indemnify the defendant in the event of an accident arising out of the use of the motor vehicle for private business but not for reward or hire.
3. On or about the August 18, 2015, the Defendant's said motor vehicle was involved in a road accident along Nairobi-Nakuru Highway. As a result the defendant was sued in Nakuru CMCC Nos 1437-1438,1440-1441 all of 2015.
 4. The defendant filed a Memorandum of Appearance and Statement of Defence on March 3, 2017 through the firm of Kenduiwa & Co Advocates.
 5. The plaintiff's claim is the Police records namely the Police Abstract indicated that the plaintiffs in the Molo Case namely Sabet Mmbone Agiza, Margaret Udise Mulonya, Elvis Osoba, Kevin Maganya & Simon Otieno Achar, were aboard the defendant's motor vehicle as fare paying passengers and therefore the subject motor vehicle was being used contrary to the terms of the insurance policy.
 6. In view of the above, the plaintiff contends that it is not liable to compensate claims for bodily injuries sustained by the aforementioned plaintiffs.
 7. In his defence the Defendant denied the particulars of breach of the policy terms and maintained that he has never breached any of the terms. He admitted that there had been an accident involving the said motor vehicle but he put the plaintiff to strict proof that he had been sued as alleged, and that the passengers in the motor vehicle at the material time were fare paying passengers, and that the policy did not cover 3rd party risks involving passengers aboard the said motor vehicle. At the hearing the defendant though served did not appear. The plaintiff called PW1, Stephen Muturi Mwangi, as its witness.
 7. He testified that he was Branch Manager with the Plaintiff. He relied on his Witness Statement, the pleadings and the documents filed. He testified that insurance policy number 101577002695 was issued to the Defendant for the period 2015/2016 for motor vehicle registration number KCD 942W and that a policy document was issued of which clause M055 prohibited the use of the motor vehicle as a matatu. He produced the policy document as P.Exhibit 1. That according to their investigator the motor vehicle was not ferrying the insured's relatives to a funeral, but fare paying passengers contrary to the terms of the policy. He produced copies of the pleadings of the suits that were filed against the defendant.

Submissions

9. The plaintiff submitted on two issues:-Whether the defendant breached the terms of the policy of insurance;Whether the Defendant is bound to satisfy judgement in Nakuru CMCC Nos 1437-1438, 1440-1441 all of 2015.
10. The plaintiff submitted that it issued the defendant with policy number 101577002695 which was valid between August 3, 2015 to September 2, 2015 and that the said policy was for private use and in connection with the defendant's business dealings and did not cover third party risks involving passengers aboard the subject motor vehicle.
11. It was the plaintiff's Submissions that the Police Abstract and the Investigation Report revealed that on the material date the defendant's suit ferried Sabet Mmbone Agiza, Margaret Udise Mulonya, Elvis Osoba, Kevin Maganya & Simon Otieno Achar as fare paying passengers in the subject motor vehicle contrary to the policy terms.
12. The plaintiff submitted that it is not obligated to indemnify the defendant for the accident, loss, damage or liability caused or sustained whilst the subject motor vehicle was used for hire and reward.



12. The plaintiff argued that at all material times it was entitled under Section 10 (4) of the *Insurance (Motor Vehicles Third Party Risk Act) Cap 405*, to avoid and/or repudiate the said policy on grounds that the same was obtained by non disclosure and or misrepresentation of one or more material facts.
14. The plaintiff made reference to the case of *Paul Mutsya v Jubilee Insurance Company of Kenya Limited* [2018] eKLR where the Honourable Court dismissed the plaintiff's case which sought for orders to compel the defendant to pay the claimants who had sued him for compensation for the injuries they sustained in a road traffic accident while travelling as fare paying passengers in his car for the reasons that the subject motor was used contrary to the terms of the policy.
15. On the second issue, the plaintiff submitted that from the foregoing it is sufficient that it has proved on balance of probability that the defendant breached the terms and conditions of the insurance. For this proposition the plaintiff relied on the case of *Monarch Insurance Company Limited v Swaleh Moi Juma* [2020] eKLR. The facts of this case are similar to the facts herein. The court found that the defendant's motor vehicle was being used contrary the terms of the insurance policy and therefore the plaintiff was entitled to repudiate the policy on account of misrepresentation and non disclosure of material facts.
16. The plaintiff also relied on the case of *British American Insurance Company Limited vs Daniel Amoth Owino* [2021] eKLR. Similarly the facts of this case are same with the facts in the instant case. The court found that the defendant used the motor vehicle contrary the terms of the policy and proceeded to issue a declaration that the insurance was not liable to satisfy the judgement or indemnify the plaintiff for a claim arising in respect of bodily injury or damage to property brought against the defendant for compensation as a result of a road traffic accident involving the defendant's motor vehicle which was insured by the plaintiff for private use only but was involved in an accident while transporting fare paying passengers for reward as a public service vehicle.
17. The plaintiff urged this court to hold that it is not bound to satisfy judgement in Nakuru CMCC Nos 1437-1438, 1440-1441 all of 2015.

Issues for Determination

18. The only issue for determination is whether the plaintiff has established that the defendant breached the insurance policy herein, thus, entitling the plaintiff to repudiate liability herein under section 10(4) of the Insurance Third Party Risks Act.
19. Section 10 (4) of the Insurance (Motor Vehicles Third Party Risk Act) Cap 405 Laws of Kenya. 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 the 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.”

20. It is trite law that he who alleges must prove. Section 107 of the *Evidence Act* provides that: -
- “Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”
21. I have carefully considered the evidence on record, the Pleadings, the documents supporting the plaintiff’s case and the Submissions by counsel.
22. The authorities and the law clearly state that where there is breach of the terms of the insurance policy the default clause will fall into place with respect to the insurer’s liability to indemnify the insured. In this case that clause is M055.
23. It is the duty of the plaintiff to prove that the defendant breached the terms of the insurance policy. I have perused the bundle of documents relied upon by the plaintiff.
24. The police abstract bears a list of five persons. They are indicated as ‘pass’ I believe to mean passenger. I have not seen anywhere on the Police Abstract dated September 3, 2015 where it states that the five were fare paying passengers.
25. The Investigating Report appears to have been made by Invespot Insurance Investigators. In it are statements alleged to have been obtained from some of the passengers in the said motor vehicle who claim to have paid fare while travelling in the said motor vehicle. Surely their statements, recorded by an unknown person cannot amount to evidence.
26. The defendant though not present in court required of the plaintiff to strictly prove its case on three (3) accounts as set out herein above.
27. The pleadings relied upon by the plaintiff are not the defendant’s pleadings. In fact, it is evident from the bundle of documents that the plaintiff avoided annexing the defendant’s defence in the subordinate court. The mere fact that the plaintiffs in the cases in that court have pleaded that they were fare paying passengers does not make them such. It was the burden of the plaintiff to prove that the passengers were fare paying passengers. It appears from what is placed before me that that fact is disputed by the defendant who gave a different set of facts in his pleadings herein. Hence the fact is disputed and the plaintiff has not placed evidence before me to prove the same.
28. This whole set is set on the allegation that passengers in the plaintiff’s motor vehicle on the material date were fare paying passengers. Without proof, the suit must fail.
29. The suit is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 19TH DAY OF MAY 2022.

MUMBUA T MATHEKA

JUDGE

CA Edna

M/S Murimi, Ndumia, Mbago & Muchela, for the plaintiff

Defendant - Wiliam Nyamwaya

