



REPUBLIC OF KENYA



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Britam General Insurance Company (Kenya) Limited v Musila; Muli & Others (Interested Party) (Civil Suit 19 of 2017) [2022] KEHC 12036 (KLR) (27 July 2022) (Judgment)

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL SUIT 19 OF 2017
GV ODUNGA, J
JULY 27, 2022**

BETWEEN

BRITAM GENERAL INSURANCE COMPANY (KENYA) LIMITED PLAINTIFF

AND

STEPHEN WAMBUA MUSILA DEFENDANT

AND

PATRICIA MBITHE MULI & OTHERS INTERESTED PARTY

JUDGMENT

1. In this suit which was commenced by way of a plaint dated 8th September, 2017, the Plaintiff sued the Defendant, its insured, substantially seeking the following orders:
 - 1) A declaration the motor vehicle KBG 613G was not to be used by the defendant for ferrying fare paying passengers.
 - 2) A Declaration that it 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 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.
 - 3) A declaration that the plaintiff is not liable to indemnify the defendant in respect of the injuries sustained by the said passengers 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 9/2/2016 underpolicy number THK/MCOM/POL/2112825
 - 4) Such other and further relief that this Honourable court may deem fit to grant
 - 5) Cost of and incidental to this suit.



2. According to the plaint, at all material times relevant to this suit, the Defendant was the registered owner and user of motor vehicle registration number KBZ 613G the Defendant's said motor vehicle had been issued with a certificate of insurance for use as a Commercial Vehicle motor vehicle by the Plaintiff Company under certificate of insurance for use as a motor Commercial cover own goods by the Plaintiff Company under policy number THK/MCOM/POL/2112825 which policy was to commence on 26th November 2015 and expire on 25th November 2016.
3. It was pleaded that by the policy document taken out by the defendant with the plaintiff, the motor vehicle insured was a Nissan Vannete and the insurance cover taken was for purposes of carrying small luggage like clothes with limitations as to use which does not involve the cartage of fare paying passengers.
4. It was further pleaded that as per the claim form dated 12/2/2016 It is alleged that on or about 09/02/2016, while driving along Matuu –Thika Road at Iviani Area, the Defendant allegedly had a tyre burst, lost control of his said motor vehicle registration causing injuries to the passengers. As per the Police abstract dated 12/2/2016 and the various plaints the Defendant was allegedly carrying fare paying passengers in his said motor vehicle yet his Policy which stated that the vehicle was not permitted for use in in connection with ferrying fare paying passengers, neither was the said motor vehicle licensed to be used as a matatu (Public Service Vehicle for fare paying passengers).
5. According to the plaint, the Plaintiff has later learnt that from the accident documents on the 9th of February 2016 the motor vehicle that is described as being insured was that of motor vehicle registration number KBZ 613G a Mitsubishi Van is a completely different vehicle from Nissan Vannette the one that the Policy holder was given by the Plaintiff thereby exhibiting proof of misrepresentation by the defendant at the inception of the cover.
6. According to the Plaintiff, the Defendant misrepresented himself by obtaining the certificate of Insurance from the Plaintiff without full disclosure of all material facts in particular the make of his motor vehicle registration number KBZ 613G and the purpose to which the motor vehicle is being used and has in his actions obtained the certificate of Insurance from the Plaintiff by Misrepresentation of a material fact and without good faith particulars whereof were pleaded.
7. In addition, it was pleaded that the defendant by his answers to the proposal form and by taking the cover failed to disclose material facts relevant to the request for the policy, to the plaintiff on or about the subject matter of the policy which would have dictated the type of cover offered and the amount of premium duly charged by the plaintiff. Further, the plaintiff avers that suits by the fare paying passengers in motor vehicle KBG 613G who were allegedly injured on 09/02/2016 have been made against the defendant on the ground that the injuries to the said passengers was caused by the negligent driving of the driver of the said motor vehicle being claims in respect of such liability as is covered by the terms of the said policy. The suits (being Kithimani PMCC NO 400, 212, 221, 207, 233, 235, 372, 367 & 232, 238-Patricia Mbithe Muli, James Nziuko Kii, Stelamaris Mumbua Mutinda, Hannah Muthoni Wanderi, Jonathan Makau Mbindyo, Joseph Mutual Mwetha, Joshua Mutual Mbatha, Ngunga Matheka, Francis Muthini Mwanza Christine Mumbua Musyoka vs. Stephen Masila Wambua) have been filed by reason of the matters aforesaid and any other suits, or claims arising from the subject accident, the Defendant cannot claim for compensation from the Plaintiff.
8. The plaintiff therefore, claims that apart from any provisions contained in the said policy, it is and at all material times was entitled to avoid the same pursuant to Section 10(4) of the *Insurance (Motor Policy Third Party Risks) Act* on the grounds that the said policy was obtained by the Defendant by non disclosure and or misrepresentation of the material facts. By reason of the matters aforesaid, the plaintiff contends that it has no legal or contractual obligation or duty to satisfy any judgement that



- may be obtained by any party against the defendant or to compensate the defendant for any claim, loss or damage arising from the alleged accident of 09/2/2016 under the said policy of insurance number THK/MCOM/POL/2112825.
9. The defendant did not defend the suit and although the interested parties who were the victims of the accident were joined to these proceedings, they did not adduce any evidence.
 10. In support of its case, the Plaintiff called as PW1, Edinah Masanya, its Assistant Legal Officer in charge of claims department who testified and adopted her witness statement dated 8th September 2017. According to her, she was well versed with the facts of the accident the subject of this suit which occurred on the 9th of February 2016 along the ThikaMatuu Road involving motor vehicle registration number KBZ 613G. After the said accident, the Defendant reported the accident to Matuu Traffic Base and the police marked the matter as pending under investigation.
 11. It was averred that the Motor Vehicle Policy commenced on 26th November 2015 to 25th November 2016. Upon this accident being reported to the Plaintiff herein, a routine investigation was commissioned to establish the circumstances surrounding the said accident and it was established that while the accident did occur the Insurance Cover afforded under Policy Number THK/MCOM/POL/2112825 was for a motor vehicle KBZ 613G Nissan Vannete make. It was however revealed that as at the time of the said accident on 9th February 2016, the Defendant was carrying fare paying passengers in his motor vehicle against the Policy which excluded the said usage. It was noted that the Defendant stated that the motor vehicle was to be insured for carrying small luggage of clothes which was not true to the findings.
 12. According to PW1, it was established that the Defendant caused the said accident on the 9th February 2016 and misrepresented himself in his proposal as to the make and purpose of which the motor vehicle registration number KBZ 613G was being insured against. Since there was no cover, the defendant was informed when he purported to serve the Plaintiff with court papers. In view of the fact that the passengers were very many and several suits were filed, the Plaintiff instructed the firm of M W Muli and company advocates to file this suit for the declaration that the defendant had no valid insurance cover with the plaintiff.
 13. It was averred that under the terms of the Insurance Policy with the Defendant which is a relationship that is based on uttermost good faith, it is clear that the Defendant in the Proposal form compilation was not of good faith and such the Plaintiff is entitle to avoid the claims arising out of the accident against the Defendant.
 14. The Plaintiff therefore prayed for a declaration that it is entitled to avoid any claims by the Defendant under the Insurance Certificate and policy number THK/MCOM/POL/2112825 for the period starting 26th November 2016 to 25th November 2016 following the alleged accident on 9th February, 2016 involving KBG 613G.
 15. PW2, Wilson Mwangi Maina, testified as the investigating officer who investigated the accident and also recorded statements from the defendant and some of the passengers including one Stellar Marris Mumbua Mutinda. The defendant in his statement admitted that at the time of the accident he was carrying 11 passengers including fare paying passengers he had picked at Kithimani matatu stage while Stella Marris Mutinda in her statement stated that she boarded the defendant's vehicle at Kithimani matatu stage and she was charged Kshs. 50 as fare from Kithimani to Matuu.
 16. Since the Defendant did not defend the suit the evidence of the two witnesses was not controverted.



17. In its submissions the Plaintiff cited Section 10(4) of the *Insurance (Motor Vehicles Third Party Risks) Act*, Cap 405 Laws of Kenya (hereinafter referred to as “the Act”) and submitted that the superior court has been very bold in making declaratory orders in favour of insurers in cases where their insureds have violated express terms and conditions of insurance policies including contravening stipulation not to carry fare paying passenger in commercial vehicle policies. It referred to Nairobi HCCC No. 9 of 2004 - *Gateway Insurance Co. Ltd -vs- Albert J. N. Njagi* , Nairobi HCCC No. 666 of 2004 - *Gateway Insurance Co. Ltd -vs- Musyoka Muthengi* and Nairobi HCCC No. 569 of 2003 - *Gateway Insurance Co. Ltd -vs- Kaboykek Farmers Co-operative Society Limited* and submitted that in this case, the defendant breached an express term on limitation of use. His vehicle was limited to social, domestic, pleasure purposes and for the defendant’s business or profession and carriage of passenger in connection with his business but not for carriage of fare paying passengers. There was also a misrepresentation that his vehicle was a Nissan Vannet while the vehicle involved in the accident was a Mitsubishi van.
18. It was therefore submitted that the plaintiff is entitled to avoid the policy of insurance by reason of the defendant violation of express terms and condition and obtaining his insurance policy through non-disclosure of a material fact and representation of facts which were false in material particulars. Accordingly, the plaintiff is entitled to a declaration that it is not liable to make any payment under the policy of insurance with the defendant.

Determination

19. In this case the Defendant neither appeared nor filed a defence. The interested parties, the victims of the accident in question, similarly did not adduce any evidence. Accordingly, the only evidence on record is the evidence of the Plaintiff based on the witness statement and the documentary evidence which I have considered. According to the policy document “Limitations as to use” the policy was restricted to “use for social, domestic and pleasure purposes and for your business or profession; or use for the carriage of passengers in connection with your business”.
20. The evidence on record, is that the passengers in the said motor vehicle were travelling in the said vehicle as fare paying passengers. Accordingly, it would seem that the Defendant used the said vehicle for the carriage of passengers for hire or reward which was not a class of the persons covered by the policy in question.
21. In cases of this nature the standard of proof is said to be on a balance of probabilities hence what is required is that it must carry a reasonable degree of probability, but not so high as is required in a Criminal case. If the evidence is such that the tribunal can say: “we think it more probable than not,” the burden is discharged, but if the probabilities are equal, it is not”. See *Miller vs. Minister of Pensions* [1947] 2 All ER 372.
22. How then is this standard achieved? Kimaru, J in *William Kabogo Gitau vs. George Thuo & 2 Others* [2010] 1 KLR 526 stated that:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”



23. What are the consequences of a party failing to adduce evidence? In the case of *Karuru Munyororo vs. Joseph Ndumia Murage & Another* Nyeri HCCC No. 95 of 1988, Makhandia, J (as he then was) 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.”

24. In *Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya)* Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in *Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter* Civil Appeal No. 23 of 1997 held that:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence.”

25. Similarly, in the case of *Interchemie EA Limited vs. Nakuru Veterinary Centre Limited* Nairobi (Milimani) HCCC No. 165B of 2000, Mbaluto, J. held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted.

26. If one is still in doubt as to the legal position reference could be made to the case of *Drappery Empire vs. The Attorney General Nairobi* HCCC No. 2666 of 1996 where Rawal, J (as she then was) held that where the circumstances leading to the deliveries of goods are not challenged and stand uncontroverted due to the failure by the defendant to adduce evidence, the standard of proof in civil cases (on the balance of probabilities) has been attained by the plaintiff.

27. Accordingly, based on their evidence the said vehicle was being used for hire and/or reward at the time of the accident. That was contrary to the terms and conditions of the policy. 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. vs. 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 vs. 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."

28. Ringera, J (as he then was) in *Gateway Insurance Company Limited vs. Sudan Mathews* Nairobi HCCC NO. 1078 of 2000 held that:

"Under Section 5 of the Insurance (Motor Vehicle Third Party Risks) Act, Cap. 405 the Statutory third party cover is not required to extend to the risks of death or bodily injury to employees of the insured arising out of or in the course of their employment; or to the death or injury to passengers except in the case of motor vehicles in which such persons are carried for reward or hire or in pursuance of a contract of employment; or to any contractual liability. Where the motor vehicle in question is insured for the purposes of being used for social, domestic and pleasure purposes and not for hire and reward or the carriage of employees the risk of injury or death to a passenger therein is not compulsorily required to be covered under Cap 405 and if such risk is not actually covered the insurance company is not obliged to indemnify the insured against any claim by the passengers."

29. I also associate myself with the view expressed by Fred A. Ochieng, J (as he then was) in Nairobi HCCC No. 9 of 2004 - *Gateway Insurance Co. Ltd -vs- Albert J. N. Njagi* that:

"In so far as the vehicle had been put to use other than that for which it was insured, I hold that the defendant did obtain the policy of insurance through non-disclosure of a material fact. And, to the extent that the vehicle was used to carry passengers whilst it was only supposed to carry the defendant's own goods, the defendant is deemed to have made representations of fact which were false in material particulars. Accordingly, the plaintiff cannot be under an obligation to honour its part of a contract of insurance which had been founded on material non-disclosure. I therefore grant the declaration that the plaintiff is not liable to make payment under the policy of insurance, in respect to any claim by any passenger in the motor KSW 814, arising from an accident on 29th October 2001"

30. It is therefore my finding that the Defendant violated the terms and conditions for which the suit vehicle was insured. What then, in those circumstances are the options available to the Plaintiff insurer?
31. In this case the policy expressly provided for the use for which the vehicle was covered. As the Defendant's vehicle was clearly employed for the use for which it was not insured by the Defendant, it is my holding that the Plaintiff is not under a legal obligation to honour and/or satisfy the claims arising from and/or to indemnify the Plaintiff for the bodily injuries sustained by the passengers who



at the time of the accident were in the Defendant's said motor vehicle should have been covered as a third party by the policy.

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

- a) A declaration the motor vehicle KBG 613G was not to be used by the defendant for ferrying fare paying passengers.
- b) A Declaration that the Plaintiff was entitled to avoid number THK/MCOM/POL/2112825 apart from any provision contained therein on the ground that 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 passengers 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 9/2/2016 under policy number THK/MCOM/POL/2112825.
- d) There will be no order as to costs.

33. Judgement accordingly.

READ, SIGNED AND DELIVERED AT MACHAKOS THIS 27TH DAY OF JULY, 2022.

G V ODUNGA

JUDGE

Delivered in the absence of the parties

CA Susan

