



**British American Insurance Co. Ltd v Kanyi (Civil Suit 274 of 2013)
[2022] KEHC 16790 (KLR) (Civ) (22 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16790 (KLR)

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

CIVIL

CIVIL SUIT 274 OF 2013

CW MEOLI, J

DECEMBER 22, 2022

BETWEEN

BRITISH AMERICAN INSURANCE CO. LTD PLAINTIFF

AND

JOSHUA NDIRITU KANYI DEFENDANT

JUDGMENT

1. British American Insurance Co. Ltd, (hereafter the Plaintiff) sued Joshua Ndiritu Kanyi (hereafter the Defendant) seeking *inter alia* a declaration that the Plaintiff is entitled to avoid or repudiate Policy No 590/080/0002/Comp. It was averred that on or around June 25, 2012, the Defendant approached the Plaintiff through its agent M/s Equity Insurance Brokers Limited and completed a proposal form for a comprehensive insurance motor policy to cover risks arising from use of his motor vehicle registration number KAV 084T lorry (hereafter suit motor vehicle); that the Plaintiff accepted to cover the risks and issued the Defendant with a cover vide Policy No 590/080/0002/Comp.
2. It was further averred that the Defendant had indicated in the proposal that the suit motor vehicle would be covered for general cartage or for commercial purposes; that on or about the March 9, 2013 during the currency of the said policy, the suit motor vehicle had an accident while ferrying passengers destined for campaign rallies; that on account of the foregoing, the Plaintiff is not bound to indemnify the Defendant on any claim arising from the said accident on as the policy was procured through material misrepresentation; and that the Plaintiff is entitled to repudiate the policy for breach of a policy condition.
3. The Defendant despite being served with summons herein, failed and or neglected to enter appearance or file defence and interlocutory judgment was entered.



4. The suit proceeded for formal proof hearing during which Gibbon Onyango testified as PW1 on behalf of the Plaintiff and was the sole witness in the matter. He identified himself as a claim analyst at the Plaintiff Company and adopted his witness statement as his evidence in chief. He went on to produce documentary evidence marked as P. Exh.1-7. It was his evidence further that while the Defendant was the Plaintiff's insured under a motor commercial policy, the suit motor vehicle was for cartage of goods and not fare paying passengers.
5. He further stated that the suit motor vehicle on the date of the accident was carrying more than twenty passengers in violation of the terms of the policy, and who were injured in the accident. He stated that under the said policy of insurance a maximum of three persons were authorized to be aboard the vehicle at any given time. In conclusion he urged the court to allow the Plaintiff to repudiate the contract and to be freed from any liability in respect of the accident involving the suit motor vehicle.
6. Upon the close of its case, the Plaintiff's counsel filed submissions in respect of the matter. He called to aid the provisions of Section 10(4) of the *Insurance (Motor Vehicles Third Party Risks) Act* cap405 Laws of Kenya, the decisions in *Pan Africa Insurance Co. Ltd v Pine Top Insurance Co Ltd & another* and *UAP Insurance Company Limited v Nancy Wakuthi Kago* [2017] eKLR. Counsel submitted that the Plaintiff has demonstrated reasonable grounds to justify repudiation or avoidance of any claim that may be brought against its insured as a result of the road traffic accident. That an insurer is not obligated to indemnify an insured for an accident, loss or damage or liability caused or sustained whilst the insured's motor vehicle is used for purposes outside the purpose for which the vehicle was insured.
7. Secondly, citing the decisions in *UAP Insurance Company Limited (supra)* and *James Kamau Kimani v Corporate Insurance Co. Limited* [2020] eKLR he argued that the Defendant took out a comprehensive general cartage policy and was aware of the conditions and limitations but nevertheless used the vehicle to ferry passengers. Counsel asserted that the Defendant had misrepresented material facts as he used the suit motor vehicle as a public service vehicle while fraudulently paying a premium reserved for comprehensive general cartage which is a cheaper insurance product. Which is evidence of bad faith. He concluded by stating that on the facts presented before the court, the Defendant had breached the terms of the insurance policy and the court ought to declare that the Plaintiff has a right to avoid or repudiate the policy as prayed.
8. The court has considered the pleadings by the Plaintiff as well as the submissions filed in respect of the matter. The sole issue for determination is whether the Plaintiff has established on a balance of probabilities that the Defendant was in breach of the policy agreement and whether the Plaintiff is entitled to repudiate or avoid the policy concerning any liability arising from the accident involving the Defendant's motor vehicle.
9. In *Karugi & another v Kabiya & 3 others* [1987] KLR 347 the Court of Appeal stated that:

“ [T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”
10. The Plaintiff's claim is founded on alleged misrepresentation and breach of the policy of insurance. At the hearing, (PW1) adopted his witness statement whose key assertions are;-

“ The representation by the insured was that he would use the insured vehicle for commercial purposes only not to carry passengers and not for hire and reward or PSV.



On or around March 9, 2012 the insured motor vehicle was ferrying passengers when it was involved in an accident wherein one passenger died and over thirty (30) others were injured.

In the ordinary course of business the plaintiff commissioned insurance investigators to establish the circumstance leading to the accident. The insurers reported that the accident occurred when the insured's motor vehicle was carrying passengers who were celebrating the announcement by the Independent Elections and Boundaries Commission results of 2013 Presidential Elections.....The investigations also learned that the insured motor vehicle had been carrying over thirty (30) people while the defendant had proposed for cartage of goods only.

From the foregoing the plaintiff came to the conclusion that the defendant misrepresented the use of the motor vehicle at the time of taking the insurance cover. Further, after getting the cover he continued to use the vehicle in disregard of the terms and conditions of the policy.”

11. That an accident occurred with respect to the Defendant's suit motor vehicle is evidenced by the Police Abstract that was produced as P. Exh.5. The Plaintiff's evidence was that following the accident the Plaintiff commissioned insurance investigators to establish the circumstances of the accident. That the investigator discovered that at the time of the accident, the suit motor vehicle was being used contrary to the purpose declared in the proposal form. The Plaintiff therefore asserts that the Defendant was in breach of the policy agreement and or materially misrepresented the intended usage of the suit motor vehicle to the Plaintiff. The policy schedule produced as P. Exh.3 expressly provides that the suit motor vehicle was comprehensively insured under a cover for “General Cartage for non-financed EBL Clients”.
12. The Court of Appeal in *Co-operative Insurance Company Ltd v David Wachira Wambugu* [2010] eKLR stated that:

“The learned authors of Bullen & Leake, Precedent of Pleadings, 14th Edition, Vol. 2 states at page 908:

“Contracts of insurance are contracts of the utmost good faith. This gives rise to a legal obligation upon the insured, prior to the contract being made, to disclose to the insurer all material facts and circumstances known to the insured which affect the risk being run. Lord Mansfield's words in *Carter vs Boehm* (1766) Burr. 1905 have stood the test of time:

“Insurance is a contract of speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist and to induce him to estimate the risk as if it did not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void; because the risk run is really different from the risk understood and intended to be run at the time of the agreement... The policy would be equally void against the underwriter if he concealed... The



governing principle is applicable to all contracts and dealings. Good faith forbids either party, by concealing what he privately knows to draw the other into a bargain from his ignorance of the fact and his believing the contrary...”

13. The proposal form and risk note (Motor Accident Claim Form) executed by the Defendant, and which were produced as P. Exh.1 and P. Exh.2 respectively, indicated that the suit motor vehicle was to be used for “General Cartage”. However contrary to the said information the the investigation report dated 31.05.2013 (P. Exh.6) contains a finding that the suit motor vehicle at the time of the accident ferrying passengers to an unknown destination in contravention of the policy conditions. PW1’s evidence was therefore that the Defendant misrepresented facts relating to the use of the motor vehicle at the time of taking the insurance cover and continued to use the suit motor vehicle in complete disregard of the terms and conditions of the policy.
14. The Plaintiff’s evidence is uncontroverted. The particulars of breach as pleaded have been demonstrated in the investigation report (P. Exh.6) which indicated that on the date of the accident more than thirty-two passengers where aboard the suit motor vehicle being ferried to an unknown destination to celebrate the announcement of the 2013 presidential election results. There was no material to indicate that the suit motor vehicle was hired for reward to a third party for purposes of ferrying passengers to the unknown destination. However, it can be deduced from the said report that the said passengers were not aboard the suit motor vehicle for purposes connected to those for which the suit motor vehicle was insured.
15. Contracts of insurance are contracts of the utmost good faith and the insured, prior to the contract being made, is obligated to disclose to the insurer all material facts and circumstances known to the insured which affect the risk being assumed. The Plaintiff insured the motor vehicle on the misrepresentation by the Defendant that its usage would solely be for general cartage. As the investigation report (P. Exh.6), shows, when accident occurred the motor vehicle was ferrying unauthorized number of passengers and was equally overloaded in contravention of the terms of the policy.
16. Having reviewed the evidence on record, the court is satisfied that the Plaintiff has on a balance of probabilities established its case against the Defendant. Consequently, the court will enter judgment for the Plaintiff against the Defendant as sought in the plaint.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 22ND DAY OF DECEMBER 2022

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: Ms. Maina h/b for Mbigi

For the Defendant: N/A

C/A: Adika

