REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CIVIL SUIT NUMBER 2 OF 2019

BRITISH AMERICAN INSURANCE COMPANY LIMITED....PLAINTIFF

VERSUS

DANIEL AMOTH OWINO.....DEFENDANT

JUDGMENT

Introduction

1. This suit was filed in 2019 and had to be dismissed for non-attendance to prosecute by the plaintiff. However, the plaintiff approached the court and sought reinstatement of the suit which the court granted with conditions that the same be heard expeditiously without any further delay.

2. This plaintiff herein **BRITISH AMERICAN INSURANCE COMPANY LIMITED** instituted this suit against the defendant seeking a declaration that it was not bound to pay or satisfy judgement or indemnify the defendant DANIEL AMOTH OWINO, arising out of any claim brought against the defendant for compensation as a result of a road traffic accident involving the defendant's motor vehicle registration No. KBQ 854B Toyota Probox which was insured by the plaintiff for private user only but is said to have been involved in an accident while transporting fare paying passengers for reward as a public service vehicle. The plaintiff also sought costs of the suit.

3. The plaintiff's case is that the defendant requested to be issued with an insurance policy cover for his motor vehicle registration number KBQ 854B, which insurance cover was to be for a private motor vehicle for the defendant's private use. It is the plaintiff's case that it issued the defendant with the cover sought under policy number **COMP/NKU/MPRV/POL/2051602** which cover was to expire on 27TH January 2013. The plaintiff further states that the policy did not cover Third Party risks involving fare paying passengers.

4. It is the plaintiff's case that on the 15th August 2012, while the said cover was still in effect, the defendant's motor vehicle was involved in a road traffic accident along Siaya-Luanda Road at Sigana area as a consequence of which the defendant was sued in a series of suits arising therefrom. The plaintiff states that despite the defendant reporting the said accident to the plaintiff, he concealed material facts and/or misrepresented information therefore wilfully breaching terms of the policy.

5. Despite service of summons to enter appearance being served on the defendant, he neither entered appearance nor filed defence hence interlocutory judgment was sought and entered against him. The case therefore proceeded to hearing by way of formal proof hearing.

6. PW1 Edinah Kerubo Masanya, the plaintiff's Legal Officer testified that according to the Accident Report Form, as reported by the defendant, the motor vehicle's use was indicated as for Private use whereas the Investigators who investigated the accident found that the vehicle was being used for hire and reward, carrying passengers contrary to the policy. She further testified that the Policy at page 4 strictly gives limitation as to use of the insured motor vehicle.

7. PW2 Charles Kariuki an Insurance Investigator and the Chief Investigator at Party Loss Assessors testified that on the 13/9/2013 he received instructions from the plaintiff to investigate an alleged accident that occurred on the 15.8.2012 involving motor vehicle Registration No. KBQ 854B on its general use and circumstances under which the accident occurred, the user and details of the injured, degree of injuries and hospitals where the injured were taken for treatment.

8. It was PW2's testimony that the insured and the driver refused to meet him and so he prepared his report from the details availed by the police. He testified that their investigations confirmed that the vehicle was involved in an accident on 15.8.2012 along Siaya Luanda Road at Sigana and that at the time of accident, the driver was one Wilson Oduor Oyamo. He further testified that he established that the vehicle had ten fare paying passengers going to Kodiaga from Siaya despite the said motor vehicle being a probox, having the capacity to carry only 4 passengers.

9. It was his testimony that from their investigations, the accident occurred when the driver of the subject motor vehicle encountered another Toyota Probox which was trailing him from behind trying to overtake him and as they competed for passengers, the driver of the suit vehicle swerved to the left to avoid being hit so he lost control and fell into a fence of a nearby homestead resulting in injuries to himself as well as 7 passengers.

Plaintiff's Submissions

10. The plaintiff's counsel timeously filed written submissions the same day of the hearing. It was submitted that the plaintiff had proved its case on a balance of probabilities that the defendant was in breach of the terms of the policy of insurance issued to him and as such should not benefit from the provisions therein. Reliance was placed on the case of **Monarch Insurance Company Limited v Swaleh Moi Juma [2020] eKLR** where Nyakundi J. reiterated that provisions of section 10 of the Insurance (Motor Third Party Risk) Act Cap 405 that provides that the insurer can obtain a declaration that although the policy apparently covered the liability, it would be repudiated by non-disclosure of a material fact, in the case where the motor vehicle was being used for hire and reward as opposed to private use.

Analysis & Determination

11. I have considered the pleadings, the evidence and submissions filed by the plaintiff herein. The following fall for determination in this suit:

> **a. What was the nature of the policy between the Plaintiff and the Defendant?**
>
> **b. Whether at the time of the accident, motor vehicle Reg. No. KBQ 854B was being used for the purposes outside the terms of the policy.**
>
> **c. Whether the plaintiff is liable to honour any claims related to the aforesaid accident or to indemnify the insured under the policy.**
>
> **d. Who should bear the costs of the suit?**

12. Before delving into the said issues, it is essential to appreciate the nature of contracts of insurance. According to **Newsholme Bros. vs. Road Transport and General Insurance Co. Ltd [1929] All ER 442 at 444** as cited in the case of **Paul Mutisya v Jubilee Insurance Company of Kenya Limited [2018] eKLR:**

> **"…The contract of insurance requires the utmost good faith; the insurer knows nothing; the assured knows everything about the risk he wants to insure and he must disclose to the insurer every fact material to the risk."**

13. The Court of Appeal in **Co-Operative Insurance Company Ltd v David Wachira Wambugu [2010] 1 KLR 254** held that:

> **"The learned Judge was right in saying that a contract of insurance is one of uberrimae fidei. The insurer is entitled to be put in possession of all material information possessed by the insured. In policies of insurance, whether marine insurance or life insurance, there is an understanding that the contract is uberrimae fidei, if you know any circumstances at all that may influence the underwriter's opinion as to the risk he is incurring, and consequently as to whether he will take it, you will state what you know. There is an obligation there to disclose what you know, and the concealment of a material circumstance known to you, whether you thought it material or not, avoids the policy…Contracts of insurance are contracts of utmost good faith and 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. Insurance is a contract of speculation and 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. 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 risqué run is really different from the risqué 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."**

14. On the nature of the policy in question, the Motor Accident Report filled by the defendant following the material accident stated that the car was in ***"PRIVATE USE"*** when the accident occurred. Accordingly, the employment of the vehicle for a use other than the one for which it was insured, if the accident occurs at that particular time, may justifiably lead to repudiation of the claim.

15. PW2, the accident investigator testified that the details of the accident as adduced from the Police at Siaya Police Station where the accident was reported under OB number 3 of 15/08/2012 indicated that the vehicle was being used for hire and reward, carrying passengers contrary to the policy.

16. Accordingly, based on the evidence adduced, 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.

17. It is the Plaintiff's case that at the time of taking out the policy, it knew that the vehicle was going to be used for the private use only and not for hire and/or reward. The defendant did not disclose that he was going to use the motor vehicle for hire and reward as a different policy

for public service vehicles would have been applicable. That failure to do so clearly amounted to the failure on the part of the defendant insured to disclose to the insurer a fact material to the risk.

18. On the other hand, if the Plaintiff 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 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** 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:**
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> **"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."**
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> **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."**

19. It is therefore my finding that the Defendant violated the terms and conditions for which the suit vehicle was insured. As the Defendant's vehicle was clearly employed for the use for which it was not insured by the Plaintiff, the Plaintiff is not under any legal obligation to honour and/or satisfy the claims arising from and/or to indemnify the Defendant for the bodily injuries sustained by the passengers who at the time of the accident were in the Defendant's motor vehicle Reg. No. KBQ 854B or to compensate any person for any damage to property as a result of the said accident. I note that the plaintiff's final prayers in the plaint erroneously refer to an accident along Narok-Bomet road which is a minor error and which I hereby rectify as the documentary and oral evidence all refer to Siaya-Luanda road.

20. Accordingly, I allow the plaintiff's claim against the defendant and order that:

> **A declaration is hereby issued to the effect that the plaintiff herein British American Insurance Company Limited is not bound to pay or satisfy judgement or indemnify the defendant DANIEL AMOTH OWINO arising out of any claim in respect of bodily injury or damage to property or satisfy any claim whatsoever brought against the defendant for compensation as a result of a road traffic accident on 15th August 2012 along Siaya-Luanda Road at Sigana area involving the defendant's motor vehicle registration No. KBQ 854B Toyota Probox which was insured by the plaintiff for private user only but was involved in an accident while transporting fare paying passengers for reward as a public service vehicle.**

21. As regards costs, it is trite that costs follow the event. See **Republic v Rosemary Wairimu Munene, Ex-Parte Applicant v Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review Application No 6 of 2014.** Accordingly, it is my opinion that the plaintiff should be awarded costs.

22. In the end, I allow the plaintiff's claim against the defendant and order that the defendant shall pay costs of this suit to the plaintiff. Decree to issue forthwith.

23. Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 26TH DAY OF APRIL, 2021

R.E. ABURILI

JUDGE

In the presence of:

Mr. Muchela Advocate for the plaintiff virtually

N/A for the defendant

CA: Modestar and Mboya