



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL & TAX DIVISION**

**HCCC NO. 339 OF 2016**

**REUBEN MUSYOKI MULI .....PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED .....1<sup>ST</sup> DEFENDANT**

**UAP LIFE ASSURANCE LIMITED.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The dispute herein revolves around a Group Mortgage Protection Policy issued by UAP Life Assurance Limited (UAP or the 2<sup>nd</sup> Defendant) in favour of mortgagors of Kenya Commercial Bank (KCB or the 1<sup>st</sup> Defendant).
2. One such mortgagor was Rueben Musyoki Muli. Out of no disrespect, I propose to refer to him as Muli or the Plaintiff. Muli is the beneficiary of various facilities granted to him by KBC. A mortgage protection policy being policy Number 700/1/0/0344 was issued by UAP to cover any outstanding loan amount in the event of his death or permanent total disability due to an accident or a sickness rendering him totally unable to follow any occupation for which he was reasonably suited by virtue of his training or experience and not following any other occupation for remuneration, compensation or profit.
3. The night of 14<sup>th</sup> August 2015 was an unfortunate night for Muli. Whilst driving along Nairobi – Machakos road, he was attacked by unknown persons who shot him leaving him with serious injuries. Those injuries required Muli to be hospitalized for a period of 8 days.
4. Muli’s case is that the injuries left him with permanent disability and unable to undertake his normal day to day duties. He states that he became unproductive and was unable to service his loan with KCB. As I understand it is, Muli’s contention that he was eligible to full protection under the mortgage scheme but that has not been forthcoming.
5. He prays for Judgment against both Defendants jointly and severally for:-

*a) A declaration that there exists a valid Mortgage Protection Policy between the Plaintiff and/or the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant in respect of the mortgage facility advanced to the Plaintiff by the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant is legally obligated to settle the Plaintiff’s claim in the sum of Kenya Shillings Thirty Million Six Hundred Thirty Two Thousand Seven Hundred Ninety Nine and Sixty Five Cents(Kshs.30,632,799.65).*

*b) An order to issue compelling the 2<sup>nd</sup> Defendant to deposit into the Plaintiff’s Mortgage loan account Number 1111105820 held with the 1<sup>st</sup> Defendant the sum of Kenya Shillings Seventeen Million Three Hundred Forty Two Thousand Six Hundred Seventy Five and Five Cents (Kshs.17,342,675.05) and interest thereon till payment in full in accordance with the Mortgage Protection Policy.*

*c) An order of permanent injunction to issue restraining the 1<sup>st</sup> Defendant, its agents and/or persons or legal entities claiming and/or acting under its authority from demanding, recovering and taking action whatsoever against the Plaintiff in respect the sum of Kenya Shillings Seventeen Million Three Hundred Forty Two Thousand Six Hundred Seventy Five and Five Cents (Kshs.17,342,675.05) together with interest thereon or any part thereof payable under the Mortgage Protection Policy.*

*d) A declaration that any payments made by the Plaintiff to the 1<sup>st</sup> Defendant, particularly from the 14<sup>th</sup> August 2015 were specifically the repayment as part of the Plaintiff’s loan balance amounting Kenya Shillings Thirteen Million One Hundred Twenty Eight Thousand Three Hundred Forty Two and Seventy Cents (Kshs.13,128,342.70).*

e) General damages for breach of contract, pain and suffering and mental anguish.

f) Costs of this suit with interest (e) above.

g) Any other order and/or relief which this Honourable Court may deem fit and appropriate in the circumstances to grant.

6. KCB thinks that no cause of action is disclosed against it and states that Muli was indebted to it in the sum of Kshs.39,510,308.80 as at August 2015. That this debt remained even after an award of Kshs.13,290,124.63 was made by UAP in settlement of the Plaintiff's claim.

7. As for UAP, it contends that the cover was for permanent total disability extended to situations where KCB's debtors are totally unable to follow any occupation for which they are reasonably suited by virtue of their training or experience. It further contends that Muli was a businessman in transport/real estate and the injury to his one hand would not "majorly" affect his occupation as a businessman.

8. UAP states that it determined a level of 35% disability and paid to KCB a sum of Kshs.13,290,124.63 being 35% of Kshs.37,971,784.65 which was the sum outstanding from Muli at the date of the incident, on 14<sup>th</sup> August 2015. UAP's defence is that it has discharged its obligation under the policy.

9. From the evidence of Muli (PW1), Simon Wang'ang'a (DW1) and Edward Karani (DW2), the facts of the case are not controversial.

10. After the incident, Muli was treated by his doctor, Dr. P. Kamau Njoroge who prepared a medical report dated 20<sup>th</sup> January 2016 (P. Exhibit 12) in which he returned an opinion that Muli had suffered a permanent disability of 50%.

11. Muli was also seen by Dr. Prof. Paul G. Kioy at the request of NIC Bank (P. Exhibit 13). Although Muli says that Dr. Kioy made a prognosis that he was permanently disabled with a degree of 100%, that may not be entirely accurate because Dr. Kioy's prognosis was as follows:-

"From the above, recovery of the radial nerve appears unlikely and it is expected to be partial and incomplete in the median nerve. Ulnar nerve functions were the least affected and carry the best outlook. In the absence of the stabilizing functions of the radial nerve controlled muscles however, the arm is rendered completely unusable and technically carries 100% loss and disability".

12. That at request of CIC Insurance, Dr. Fredrick S. Kinama examined him on 13<sup>th</sup> January 2015 and made a report (P. Exhibit 14) where the doctor assessed a permanent disability of 60%.

13. Muli's testimony was that, vide a letter of 15<sup>th</sup> February 2016 (P. Exhibit 15), UAP requested him to undergo a medical examination with their appointed doctor, Professor Erastus O. Amayo. Professor O. Amayo prepared a report dated 16<sup>th</sup> February 2016 (P. Exhibit 16) in which he concludes:-

"Flexion at the wrist was grade ¾.

He could not be able to extend wrist.

My assessment is the hand is not fully functional. The integrity of the radial nerve is in question. He may have some recovery with growth of the nerve.

I would put his percentage loss to 70%".

14. Muli states that UAP prepared two discharge vouchers both of which he refused to execute. That of 23<sup>rd</sup> March 2016 (P. Exhibit 17) for Kshs.2,500,000/= and that of 5<sup>th</sup> May 2016 for Kshs.13,290,124.63 (P. Exhibit 18).

15. Wang'ang'a, an underwriting and claims manager with KCB, testified that although UAP had made an initial award of Kshs.2,500,000/=, it subsequently increased it to Kshs.13,290,124.63. He explained that the initial award was revised after the Bank learnt that Muli had gone for medical examination.

16. UAP defended the sum paid and its witness, Karani, told Court that medical opinion of a doctor is just one factor in arriving at the amount to compensate.

17. The parties did not submit an agreed set of issues, but there appears to be a few issues to be determined:-

i. What factors were to be considered in arriving at the amount to compensate?

ii. Can the compensation made by the UAP be faulted?

iii. If so, did KCB collude in reaching a wrong compensation?

iv. Is Muli entitled to the prayers sought?

v. What is the appropriate order as to Costs?

18. Muli's case is that on the basis of the medical reports, the average degree of permanent disability was 70% and this should have been the basis for compensation.

19. UAP's position on the other hand is that other than the medical opinion, other factors considered were; the disability suffered by Muli was on his right hand and not the entire body; Muli was still able to pursue his occupation; the source for repaying of the loan was not disrupted by injuries and lastly, industry practice.

20. What constitutes the contract is described in Section 3 part 5 of the Policy which reads:-

“[5] Contract:

This policy, the application by the Creditor and application by the Debtor shall constitute the entire contract between the parties. All statements made by the Creditor or by the Debtor insured shall be deemed representations and not warranties.

It is agreed that this policy shall be interpreted in accordance with the laws of the Republic of Kenya. It is agreed that 12.01am Standard Time in Kenya shall be deemed to be the Effective Time with respect to any date referred to in the Policy.

Wherever in its Policy a personal pronoun in the masculine gender is used or appears, it shall be taken to include the feminine gender also, unless the context clearly indicates the contrary”.

21. The Policy is divided into three sections. Section 1 is the Schedule of Benefits. Section 2 contains the Special Provisions of the Policy, while Section 3 are the General Provisions of the Policy. As the duration of the Policy at inception was 12 months, it was renewed annually. At the time of the incident, that is 14<sup>th</sup> August 2015, the Policy was in force having been renewed on 1<sup>st</sup> February 2015 for a duration of 12 months. The renewal document has the following preamble:-

“Notwithstanding anything stated to the contrary contained herein, it is hereby declared and agreed that with effect from 1<sup>st</sup> February 2015 Group Mortgage Protection Insurance Policy Number 700/1/0/0344 is deemed under the following terms and conditions”.

The effect is that the Policy itself, together with the renewal document, forms the terms of the contract for the 12 months period commencing from 1<sup>st</sup> February 2015.

22. Part 14 of Section 3 provides that in the event of total and permanent disability, the company will pay the outstanding loan balance to the insured. Total and permanent disability is then defined as:-

Definition

“Total and permanent disability shall mean in respect of the Insured, the inability by reason of an accident or illness to follow and occupation for which he is qualified by reason of education, training, or experience provided that the Insured was employed in full time remunerative occupation at the time of the accident or illness”

23. In the renewal schedule one of the scheme benefits is;

**“Permanent Total Disability due to accident or sickness rendering a debtor totally unable to follow any occupation for which they are reasonably suited by virtue of their training or experience and not following any other occupation for remuneration, compensation or profit.”**

24. Read together, UAPs had an obligation to Muli to pay the entire outstanding loan if the incident rendered Muli totally unable to follow any occupation for which he was reasonable suited by virtue of education, training or experience and second, if he was not following any other occupation for remuneration, compensation or profit.

25. So as to process such a claim for permanent and total disability the following was required:-

a) A letter from the member's personal Doctor confirming the member's disability claim form with details of disability. The Doctors shall append any other detail not captured in the claim form on a separate report.

b) Independent opinion of UAP Life's appointed doctor to validate disability.

c) Member's Loan Repayment Statement from inception.

d) A complete claim form.

e) Identification document

26. It is common ground that Muli was examined by four doctors who returned their opinions. Of the four, one was his doctor and the other a UAP appointed doctor.

27. Although the factors to be considered in deciding the existence of a permanent and total disability were not expressly set out in the contract, it can be gleaned from the policy and the renewal document that not only must the medical opinion of the doctors be taken into account but any other factor which may inform whether the accident or sickness suffered by the debtor has rendered him totally unable to follow the occupation for which he is reasonably suited by virtue of his education, training or experience. Another consideration is that, the debtor is not following any other occupation for remuneration, compensation or profit. The Court therefore agrees with UAP that, other than the medical reports, it was entitled to consider other factors that would help it make that call.

28. So has the Muli proved that the decision by UAP not to pay his entire debt to KCB was wrong or unreasonable? Put differently, was the decision by UAP not to consider that Muli had not suffered a permanent and total disability wrong and unreasonable?

29. This Court starts by examining the medical reports. Dr. P. Kamau Njoroge returns the following opinion of the state of his patient as at 3<sup>rd</sup> November 2015:-

“The radial nerve fallout/palsy is not likely to recover and there may be residual permanent disability”.

Yet it seems clear enough that the opinion on disability is made in a context, only in respect to his right arm.

30. About two and a half months later, in 20<sup>th</sup> January 2016, the same doctor renders the following opinion:-

“Mr. Musyoki has what clinically is evidence of poor prognosis Radial nerve recovery. He will most likely need a surgical procedure to give him wrist and hand function namely TENDON TRANSFER SURGERY at a future date. He is at present assessed to have a permanent disability of 50% (fifty percent).”

It is not clear whether the opinion on permanent disability is in respect to the arm or the entire body.

31. On 8<sup>th</sup> January 2016 Prof. Paul G. Kioy opinion is more pointed. He states that Muli’s arm is rendered completely unusable and technically carries a 100% loss and disability. The opinion is in respect to the arm, more precisely the right arm.

32. The last is UAPs own doctor. Dr. Fredrick Kinama states:-

“He now has a functional permanent disability of the right upper limb and being right handed the total permanent disability incurred during this incident is assessed at sixty percent (60%)”.

The doctor derives his opinion on Muli’s overall disability from the permanent disability of his right upper limb and the fact that he is right handed.

33. It is therefore seems that in respect to the overall (not limited to the arm) permanent disability, there are two opinions; one of 60% and another of 50%.

34. Yet to decide whether Muli suffered a permanent and total disability in the context of the policy, the clinical disability needed to be considered alongside other factors.

35. At trial, it emerged that Muli was a businessman owning a hotel business and property that generated rental income. Indeed, from the five facilities granted to him the purpose of three of them was to assist Muli to complete construction or finishing of commercial properties. See letters of offer (D. Exhibit 2, 3, and 4).

36. The Plaintiff testified:-

“Before the business I had a hotel and rental income assigned to KCB for loan repayment. After the incident the hotel business still runs and the rental income still goes to KCB. The hotel business is running but not 100%”.

37. While conceding that the source of his repayment of the facilities being hotel and rental income still serviced the facilities even after he sustained the injuries, he laments that the hotel business has suffered. The trouble is that he did not provide any documentary proof of the downward turn in business. This should not have been difficult.

38. On a balance of probabilities, this Court holds that the injuries suffered by Muli, serious as they were, did not render him totally unable to follow the occupation for which he was reasonably suited by virtue of experience. He therefore did not suffer permanent and total disability in the contemplation of the policy document and UAP was not under an obligation to pay his entire outstanding debt to KCB.

39. The Court is unable to fault UAP and much less KCB who had no role in deciding whether or not Muli had suffered permanent and total disability.

40. The upshot is that the entire suit is dismissed with costs to the Defendants.

**Dated, Signed and Delivered in Court at Nairobi this 30<sup>th</sup> Day of June 2020**

**F. TUIYOTT**

**JUDGE**

**ORDER**

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 Chief Justice on 17<sup>th</sup> April 2020, this Judgment has been delivered to the parties through virtual platform.

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

**Makau for the Plaintiff.**

**No appearance for the Defendant.**