



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 50 OF 2015

IN THE MATTER OF: MOTOR VEHICLE INSURANCE ACT CAP 405 LAWS OF KENYA

AND ANY OTHER ENABLING PROVISIONS OF THE LAW

IN THE MATTER OF: DELIVERY BY THE DEFENDANT OF

CASH FOR COMPENSATION OF INSURANCE POLICY

BETWEEN

RAYMOND MUINDI SIMON.....PLAINTIFF

VERSUS

TAKAFUL INSURANCE OF AFRICA.....DEFENDANT

JUDGMENT

1. The plaintiff filed this Originating summons against the defendant on the 09th April 2015. The defendant in turn filed a Notice of Preliminary Objection (PO) on the 26th May 2015, its memorandum of appearance together with a replying affidavit on the 4th June 2015. In the said Originating Summons the plaintiff seeks the following orders:-

- a) That the defendant as the insurer of the written off plaintiff's motor vehicle KBY 700D delivers compensation in cash to the plaintiff herein;
- b) That the defendant compensates the plaintiff the monies paid for hire of a car since 4th September, 2014 to date;
- c) That the defendant complies with the court order within 14 days from the date of issue and in default judgment be entered in favour of the plaintiff; and
- d) That the costs of the application be borne by the defendant.

2. This Notice of Preliminary Objection was determined through the ruling delivered on 24th May, 2017. This Judgment being the final decision of this court on the subject matter, the applicant is hereinafter referred to as the plaintiff and the respondent as the defendant. The parties agreed to dispose of the Originating summons through written submissions which they thereafter highlighted.

The plaintiffs' case

3. The plaintiff's case reveals various facts and may be summarized as follows:-

- (i) The plaintiff contends that his motor vehicle registration No. KBY 700D which was comprehensively insured by the defendant was involved in a road accident and was later declared written off;
- (ii) He further avers that he reported the accident to the defendant and filled a claim form but to date he is yet to receive any compensation; and

(iii) The plaintiff further contends that he was forced to hire a motor vehicle at a cost of Kshs.2,500/= per day, due to the negligence on the part of the defendant.

The defendant's case

4. The defendant contends that:-

- (i) There was a contradiction between the version of facts as narrated by the insured and the insured's Driver on the events prior to the accident;
- (ii) It was indicated that there was an ownership dispute in relation to the insured motor vehicle herein;
- (iii) They instructed an investigator to look into the circumstances surrounding the accident and it was established that the motor vehicle was being used contrary to the insurance policy document for purposes which it was not insured to undertake;
- (iv) It was not indebted to the plaintiff as a result of the breach of the insurance policy;
- (v) The claim by the plaintiff for the sum of Kshs. 2,500/= as an expense for hiring a taxi daily is not practical and is unsupported by any evidence.

Submissions

5. Mr. Muganda Advocate held brief for Mr. Mwarandu, for the plaintiff. He submitted that both parties were in agreement that the plaintiff was insured by the defendant as per the insurance policy document attached as annexure 3, to the plaintiff's affidavit, in support of the Originating Summons. A copy of the motor vehicle certificate which confirms that the plaintiff was insured by the defendant was also attached as annexure 2 to the said affidavit. It was thus contended that the insurer has a contractual duty to fulfill the legal and statutory obligation.

6. With regard to the ownership of motor vehicle registration No. KBY 700D, it was submitted that ownership was proved by attachment to the plaintiff's affidavit of a copy of the log book, marked as annexure 1. He stated that the logbook is evidence of proof of ownership of the said motor vehicle as per the provisions of Section 8 of the Traffic Act, Cap 403 and that the defendant had failed to prove that the plaintiff is not the owner of the motor vehicle.

7. As to whether an accident occurred, Mr. Muganda submitted that the police abstract attached to the plaintiff's affidavit and that Ms Nur who swore an affidavit on behalf of the defendant in paragraph 15 of the same proves that an accident happened on 3rd August, 2014. As such, the occurrence of the accident remains an uncontested issue.

8. In concluding his submissions, Counsel for the plaintiff submitted that it had not been refuted that the defendant was the insurer. In relying on the provisions of Section 120 of the Evidence Act, he asserted that the defendant was stopped from denying liability.

9. Ms Machuka for the defendant indicated that the plaintiff was issued with motor vehicle policy No. MSA/2014/101/006211 for motor vehicle registration No. KBY 700D. She added that the policy had clauses and a schedule to be adhered to by the plaintiff. She stated that the accident occurred on 3rd August, 2014 but the plaintiff reported the accident on 4th August, 2014.

10. She further submitted that on receiving the said report, the defendant noted that there was a discrepancy between the statement written by the Driver and the policy holder and therefore decided to investigate the different versions. She stated that investigations revealed that the vehicle was not being used for personal purposes but for commercial purposes as a taxi, yet clause 2 of the motor vehicle insurance policy annexed to the defendant's replying affidavit, provides that the vehicle was to be used for leisure.

11. The defendant therefore concluded that the motor vehicle was being used for hire. Counsel stated that in addition, the plaintiff was under obligation to satisfy the defendant on how the accident occurred. She urged the court to consider the contents of the annexure to the defendant's replying affidavit to form a decision. She prayed for the application to be dismissed.

12. Ms Machuka relied on the **Law of Insurance by R. Colinvaux**, 5th Edition at paragraph 5.01 at p.92 to reinforce her submissions. She also cited **March Cabaret Club and Caseno Ltd vs The London Assurance**, Llyods Law reports [1977] Vol.1, at p. 169.

13. In response to the foregoing, Mr. Muganda submitted that good faith had been demonstrated by the applicant who narrated to the insurer the facts surrounding the occurrence of the accident. Counsel clarified that the accident happened on 3rd August, 2014 as per the police abstract and not as reflected on the investigation report that it occurred on 4th September, 2014. He further submitted that the defendant had not filed a suit to void the policy, thus the plaintiff was entitled to indemnity.

ANALYSIS AND DETERMINATION

14. The issues for determination are:-

- (i) Whether the plaintiff is guilty of non-disclosure of a material fact;

(ii) Whether at the time of the accident, motor vehicle registration No. KBY 700D was being used for the purposes outside the terms of the insurance policy; and

(iii) Whether the plaintiff is entitled to loss of user?

If the plaintiff is guilty of non-disclosure of a material fact.

15. The issue of ownership of the motor vehicle does not fall under the failure to disclose a material fact for the reason that the plaintiff availed a log book in his name as evidence of ownership of the motor vehicle. The issue of ownership has not been rebutted by the defendant. In the case of **Joel Muga Opinja v. East Africa Sea Food Ltd** [2013] eKLR, the court restated the issue of ownership of a motor vehicle as follows:-

“We agree that the best way to prove ownership would be to produce to the Court a document from Registrar of Motor Vehicles showing who the registered owner is but when the abstract is not challenged and is produced in Court without any objection, the contents cannot later be denied”

16. On the issue of the narratives of the insured and the insured's Driver not tallying, this court has gone through the police abstract, the motor accident claim form and the supplementary investigation report dated 29th October 2014 prepared by Smartrace Loss Assessors. The foregoing documents clearly indicate that the accident occurred at around 2.00 a.m., on the 3rd August 2014 and that allegations by the defendant on the issue of a different narrative on the date of the accident is not only unsupported by evidence but is also misleading. This is for the reason that the plaintiff disclosed accurate information as evidenced in his motor accident claim form. The plaintiff can therefore not be accused of being guilty of non-disclosure of material facts.

Whether at the time of the accident motor vehicle registration No. KBY 700D was being used for purposes outside the terms of the policy.

17. Looking at the supplementary investigation report dated 29th October 2014 prepared by Smartrace Loss Assessors, one Brian Chirunje Mweni who was a passenger on board motor vehicle registration No. KBY 700D at the time of the accident stated that the plaintiff gave out the said motor vehicle to the insured Driver on a friendly basis. This position has not been rebutted by the defendant but instead the defendant's case is hinged on the fact that the said Brian Chirunje Mweni gave the insured Driver Kshs.1,000/=. However looking at Brian's statement, he states that the money was for fueling of the said motor vehicle in order to facilitate them to reach the wedding ceremony which they were to attend.

18. It is my finding that it would be unreasonable to argue that the sum of Kshs.1,000/= was given as a reward to the insured's Driver yet it is the testimony of Brian Chirunje Mweni that he was a friend of the said Driver who offered to take him and other friends to a wedding. The facts on record reveal that it was the insured who handed over the motor vehicle to his Driver.

19. The insurance policy document does not prohibit the insured from lending the vehicle to a friend for a social purpose. It is clear and I am convinced by the plaintiff's averment that he lent his motor vehicle to his Driver for a social purpose and not for reward.

20. In the case of **Ziwa vs. Pioneer Gen. Assce. Soc. Ltd**, [1974] EA 141, while citing **Albert vs. Motor Insurer's Bureau**, [1971] 2 All ER 1345 and **Motor Insurer's Bureau vs. Meaned**, [1971] 2 ALL ER 1372, **Musoke J** held that:-

“There is no evidence before the Court to show that the insured, before the accident, was in the habit of carrying passengers in his motor vehicle so as to make it “a vehicle in which passengers are carried for hire or reward, within the meaning of section 99(b)(ii) of the Act. However, the use of a motor vehicle even on an isolated occasion to carry persons for hire or reward makes that vehicle one in which passengers are carried for hire and reward.”

21. The issue of the insured's Driver taking a detour from his initial destination does not in any way entitle the defendant to repudiate the policy since the vehicle was being driven with the express authority of the insured and not for reward.

Whether the plaintiff is entitled to loss of user?

22. The plaintiff has prayed for the sum of Kshs. 2,500/= as loss of user of the motor vehicle registration No. KBY 700D from 4th September, 2014 to date. In order for a court to award loss of user, the same has to be specifically pleaded and proved. The plaintiff herein has not annexed any receipts at all as evidence to show that indeed he hired another motor vehicle as a result of his motor vehicle registration No. KBY 700D being written off and due to the delay by the insurance in settling him claim. In **Linus Fredrick Msaky v Lazaro Thuram Richoro & Another** [2016] eKLR, it was held thus:-

“Starting with loss of user, of kshs. 25,000 it is important to note that the claim was a special damage which must not only be specifically pleaded, but it must be strictly proved by evidence. In this case, the appellant conceded in his evidence that he had no evidence of loss of user and that being the case, I need not delve further other than to find that there was no proof of loss of user hence the claim could not have been awarded as pleaded. See Douglas Odhiambo Apel & another vs Telkom (K) Ltd, CA 115/2006; Patife V Evans [1892] 2 QB S 24; Kampala City Council vs Nakaya [1972] EA 446 & Hahn V Singh [1985] KLR 716.”

23. **From the** foregoing in the absence of any evidence of the costs incurred by the plaintiff in hiring another motor vehicle, the prayer for loss of user fails. Secondly, where a vehicle has been declared to be a write off, a claim for loss of user ought not to be entertained since an

insured is supposed to be returned to the position he was in, before the accident. Therefore, granting a prayer for loss of user would amount double compensation. **In Permuga Auto Spares & another vs Margaret Korir Tagi** [2015] eKLR, the court stated thus:-

“It is the court's view that once a vehicle has been written off, the only compensation is the per-accident value, less salvage value as assessed and other reasonable consequential expenses that are subject to prove. There would ordinarily be assessment charges, towing charges, excess but not loss of user. The payment of the pre-accident value is made to bring the owner to as near as possible to the state he would have been in if not for the accident and loss. In the court's view, to award damages for loss of user as well as the pre-accident value and other consequential losses would be to award double compensation. The claim for loss of user is disallowed.”

Having considered the facts of this case, the applicable law as well as the submissions made by the Counsel on record alongside the authorities cited by Counsel for the defendant, I hereby make the following orders:-

- (i) That the defendant as the insurer of the written off plaintiff's motor vehicle registration No. KBY 700D delivers compensation in the sum of Kshs.1,250,000/= in cash to the plaintiff herein;
- (ii) That the defendant complies with this court order within 30 days from the date of this Judgment; and
- (iii) That the costs of the Originating Summons shall be borne by the defendant; and
- (iv) Interest is awarded to the plaintiff at court rates.

DELIVERED, DATED and SIGNED at MOMBASA on this 25th day of January, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-

No appearance for the plaintiff

Mr. Kiti holding brief for Ms Machuka for the defendant

Mr. Oliver Musundi - Court Assistant