



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 163 OF 2011**

**THE JUBILEE INSURANCE COMPANY**

**OF KENYA LIMITED.....PLAINTIFF**

**- V E R S U S -**

**RONALD GATHUKU KIWIRI.....1<sup>ST</sup> DEFENDANT**

**JOHN WANJIRU MUKUNDI.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1) The Jubilee Insurance Co. (K) Ltd, the plaintiff herein filed this action against Ronald Gathuku Kiwiri and John Wanjiru Mukundi, the 1<sup>st</sup> and 2<sup>nd</sup> defendants respectively vide the plaint dated 2<sup>nd</sup> May 2011.

2) In the aforesaid plaint the plaintiff sought for the following orders:

*a. A declaration that the plaintiff is entitled to avoid the policy number P/NRB/2010/2009/34281 being a policy issued by The Jubilee Insurance Company Limited to the 1<sup>st</sup> defendant, Ronald Gathuku Kiwiri in respect to motor vehicle registration number KAR 947C Toyota DX Station Wagon.*

*b. A declaration that the plaintiff is NOT liable and/or bound to satisfy any claims, judgments, decrees and/or awards of any nature whatsoever that may be obtained by the 2<sup>nd</sup> defendant and/or claim for judgment, contribution and/or indemnity by the 1<sup>st</sup> defendant or any person seeking to enforce policy number P/NRB/2010/2009/34281.*

*c. The sum of ksh.33,062,00 together with interest thereon at 12% per annum from the date of filing suit until payment in full.*

*d. The costs of this suit together with interest thereon at court rates from the date of judgment until payment in full.*

*e. Such other and further relief that this honourable court may deem just and fit to grant.*

3) The defendants filed a defence to deny the plaintiff's claim.

4) When the suit came up for hearing, the plaintiff summoned two witnesses to testify in support of its claim. The first to testify is **Collins Nyaema (PW1)**, the plaintiff's legal officer. PW1 told this court that the 1<sup>st</sup> defendant took out an insurance policy with the plaintiff in respect of motor vehicle registration no. KAR 947C Toyota DX station wagon for the period covering between 25<sup>th</sup> January 2010 and 24<sup>th</sup> January 2011. PW1 stated that the 1<sup>st</sup> defendant represented to the plaintiff that the aforesaid motor vehicle would be solely used for private purposes.

5) It is PW1's further evidence that the insurance policy issued to the 1<sup>st</sup> defendant limited the use of the aforesaid motor vehicle so that the policy would not cover if the motor vehicle is used for racing, competitions, rallies, hire, reward or for commercial travelling.

6) PW1 stated that the 1<sup>st</sup> defendant informed the plaintiff that the motor vehicle was involved in a road traffic accident on 26.9.2010 while being driven by a friend who was injured as a result. The 1<sup>st</sup> defendant is said to have lodged a claim form on 29.9.2010.

7) PW1 further told this court that the plaintiff engaged Invesport Insurance Investigators to conduct independent investigations over the accident.

8) It is also the evidence of PW1 that the investigator submitted a report which revealed that the insured motor vehicle was used as a taxi within Bellevue area, South C, Nairobi at the time of the accident thus breaching the terms of the Insurance Policy.

9) The second witness who testified in support of the plaintiff's case is **Reuben Mwangi (PW2)**. He told this court that he is the investigation manager of Invesport Insurance investigators. PW2 told this court that the company investigated the accident involving motor vehicle registration KAR 947C and produced before this court as an exhibit in evidence the investigation report dated 28.2.2011.

10) PW2 also stated that the aforesaid motor vehicle was at the time of the accident being used as a taxi which was not covered by the insurance policy.

11) Two witnesses were summoned to testify in support of the defence. Ronald Gathuku Kiwiri (DW1) told this court that he was issued with an insurance cover over his motor vehicle registration no. KAR 947C which did not allow him to use the same for hire and commercial purposes. He stated that he used the motor vehicle for personal errands and to transport his children to and from Soweto Revelation and St. Patrick's Academies.

12) DW1 also stated that the motor vehicle was involved in a road accident on 26.9.2011 while it was being driven by his driver Peter Mwangi Mugwe (DW2). DW1 further stated that on the fateful day DW2 had borrowed the motor vehicle to attend a birthday party of his child. DW1 further stated that the policy did not bar him from lending his car to his employee or friend to use hence he did not breach any of the conditions of the policy as alleged.

13) Peter Mwangi Mugwe (DW2) confirmed that he was employed by DW1 as a driver. He averred that he used transport's DW1 children to and from school and at times he would be sent to take orders for DW1's shop. DW2 confirmed that on 26.9.2010 he borrowed from DW1 the aforesaid motor vehicle to use it to attend his child's birthday party in Muranga. DW2 also stated that the car was involved in a road traffic accident.

**14)** At the close of evidence, learned counsels were invited to file and exchange written submissions. I have considered the evidence and the rival submission together with the authorities.

The following facts are not in dispute. **First**, that a self involving accident occurred on 26.9.2010. **Secondly**, that there was in existence an insurance policy over motor vehicle registration no. KAR 947C. **Thirdly**, that the aforesaid insurance policy expressly states that the policy does not cover use for racing, completion, rallies, trial, hire, reward, commercial travelling, carriage of goods in connection with any trade or business or use for any purpose in connection with the motor trade.

**15)** The main issue which has arisen for determination is **whether or not the insured motor vehicle was used in breach of terms of the policy thus entitling the insurer to repudiate the policy.**

16) It is the submission of the plaintiff that it carried out investigations which showed that the 1<sup>st</sup> defendant used the insured motor vehicle as a taxi thus breaching the terms of the insurance policy. The plaintiff heavily relied on the Insurance Investigators report prepared by Invespot in which it is stated that the insured vehicle was at the time of the accident being operated as a taxi which was its regular use.

17) The 1<sup>st</sup> defendant denied this assertion. It is important to restate that the date of the accident is stated as on 26<sup>th</sup> September 2010. At page 8 of the report the investigators stated that they conducted numerous taxi operators at Bellevue and Akila Estates and were informed that the insured's driver was their colleague in taxi business and that he was known to use the insured's motor vehicle as a taxi.

18) With respect, this piece of evidence cannot stand because the source of the information is not named therefore the information is basically that of hearsay which carries no weight in evidence. In an attempt to prove that the insured's car operated taxi business the investigators further stated in their report that they set up the insured's driver by calling him to transport them from Bellevue to Signode and back. They attached receipt no.54988 issued to them to the report.

19) A careful perusal of the aforesaid receipt will reveal that the receipt was issued on 22.2.2011, long after the accident had taken place. It is also a receipt in respect of motor vehicle registration no. KBF 517B which is obviously not the insured motor vehicle.

20) After a careful analysis of the evidence tendered by the plaintiff, I have come to the conclusion that the plaintiff failed to establish on a balance of probabilities that the insured's motor vehicle was used as a taxi. The evidence tendered is not credible nor reliable. I am convinced by the evidence presented by the defence that the insured motor vehicle was used within the limits set up by the policy document. In the circumstances the plaintiff has no justification to repudiate the contract of insurance it entered with the 1<sup>st</sup> defendant.

21) In the end, this suit is found to be without merit. The same is dismissed with costs to the defendant.

**Dated, Signed and Delivered in open court this 28<sup>th</sup> day of February, 2019.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant