



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 111 OF 2018

KENYA ALLIANCE INSURANCE COMPANY LIMITED....APPELLANT

VERSUS

AUTO EDGE LIMITED.....1ST RESPONDENT

FESTUS KIOGORA.....2ND RESPONDENT

RUTH MWANARI NKARI (suing as administratrix of the estate of the

late PETER MWOBODIA NKARI (deceased).....3RD RESPONDENT

(Being an appeal from the Judgment and decree of the Honourable H. Ndungu (C.M.) in CMCC No. 337 of 2015 delivered on 4th October 2018)

J U D G M E N T

1. The appellant was the defendant in the subordinate court whereas the respondents were plaintiffs. The respondents had sued the appellant for a declaration that the appellant was obliged to satisfy and indemnify the respondents in respect of the decree in HCCC No. 60 of 2009 under policy No. 01/MV080667.
2. After the hearing, the trial court ruled in favour of the respondents and entered judgment accordingly. Being aggrieved by that decision, the appellant has lodged this appeal setting out three (3) grounds of appeal.
3. This being a first appeal, it behoves this court to re-evaluate the evidence afresh and draw its own independent findings and conclusions. The caveat being that, the court that it neither saw nor heard the witnesses. **(See Williamson Diamonds Ltd v Brown [1970] EA 1.**
4. The respondents' case in the lower court was that, the 1st respondent was the registered owner of motor vehicle registration no. KAW 013T driven by the 2nd respondent. The 3rd respondent was the administratrix of **Peter Mwobobia Mkari** who had perished as a result of an accident involving the said vehicle.
5. The said vehicle was insured under Policy No.01/M0080667 under which Policy the appellant had undertaken to indemnify the 1st respondent in respect of any loss of bodily injuries to 3rd parties as required under the provisions of the **Insurance (Third Party Risk) Act Cap 405 law of Kenya.**
6. The respondents contended that on 10th July, 2017, during the pendency of the said policy, the said vehicle was involved in a road accident while being driven by the 2nd respondent along Meru-Nkubu Road with Motor vehicle Registration KAL 644E. As a result of the said accident, one **Peter Mwobobia Nkari** sustained serious injuries from which he succumbed.
7. The 3rd respondent filed **Meru HCCC No. 60 of 2009** against the 1st and 2nd respondent whereby a judgment of Kshs. 1,672,556/= plus costs and interest was made in favour of the 3rd respondent. The respondents therefore brought a declaratory suit against the appellant that the latter was obliged to settle the said judgment.
8. The appellant defended the claim vide an amended defence dated 22nd February, 2017. It contended that the 2nd and 3rd respondent had no cause of action against it. That the 1st respondent had declined to avail the motor vehicle for inspection and assessment by loss assessors; that the respondents had misrepresented facts to the appellant in breach of utmost good faith and that they also denied the appellant opportunity to investigate the alleged loss.

9. At the hearing, the respondents called two witnesses whereas the appellant called one witness. **PW1 Andrew Arimi**, the assistant executive officer Meru Law Courts appeared and produced the original record in **HCCC No. 60 of 2009**. He confirmed that there was a judgment and decree in the matter.

10. **PW2 Ruth Mwarania Nkari** testified that she was the Plaintiff in **CMCC No. 60 of 2009**. That the motor vehicle was insured by the appellant. She produced the Police Abstract (**Pexh1**), decree (**Pexh2**), Judgment (**Pexh3**), Notice to Insurance dated 14th January 2009 (**Pexh4**), Notice dated 17th February 2016 (**Pexh5**) and the Court File (**Pexh6**).

11. The appellant's witness was **Elizabeth Waithira Karigu**, the appellant's claims supervisor. She confirmed that the appellant had covered the 1st respondent with **Policy No.01/MV080667**. That during the period in question, the 1st respondent's subject vehicle had a valid cover. That the appellant had declined to admit the 1st respondent's claim because the insured had reported the claim outside the contractual period. That it took over one year before the accident was reported. That the insured had also presented different information concerning the driver. She stated that the motor vehicle was being driven by one Mutethia Mwita whereas the police abstract stated the driver to be Festus Kiogora.

12. In cross-examination, she conceded that the claim was made 3 days after the accident. That the appellant appointed an advocated upon receipt of the claim. She admitted not having filed any suit for a declaration that the appellant was entitled to avoid liability under the policy. Receipt of all necessary notices was likewise admitted.

13. The appeal was argued globally on the basis that the trial court erred in finding for the respondents against the weight of evidence. It was the appellant's submission that the trial court failed to consider its reasons for avoiding liability. That the insurance policy being a contract, each party is required to disclose material facts and not to misrepresent to the other party. That the respondent produced contradictory information with that on the police abstract hence breaching the terms of the policy. The cases of **Catter v. Boehm 17663 Burr 1967**, **Charles Momanyi Mageto v. Cooperative Insurance Co. (k) Ltd** and **Heritage Insurance Ltd v. Alex Mogire [2009] Eklr** were relied on in support of those submissions.

14. The respondents submitted that the appellant did not commence or file to avoid liability under the policy. That in the circumstances, the appellant was lawfully bound to satisfy the decree. The cases of **Andriano Munyua M'Ikiugu v. Invesco Assurance Co. HCCC No. 22 of 2015(UR)**, **Blueshield Insurance Co. Ltd v. Raymond M'Rimeris CA No.107 of 1997(UR)** and **Julius Anampiu vs Blueshield Insurance Co. Ltd Meru HCCA No. 44 of 2006(UR)** were relied on in support of those submissions.

15. It is not disputed that the appellant issued the subject policy in respect of the subject vehicle and that the said policy was in force as at the time of the accident. It is also not denied that an accident occurred as a result of which one Peter Mwobobia Nkari perished for which a suit was lodged and a judgment and decree entered. That judgment and decree is still in force. The same has not been challenged.

16. In **Halsbury Laws of England 4th Edition pg.373**, it is observed: -

"...A motor policy is not void as being contrary to public policy to cover the driver against consequences of his own negligence; indeed as evidenced by the relevant legislation public policy seems to demand that compensation should be available to the victims of the negligent use of motor vehicles. Accordingly, the indemnity under the policy is valid and enforceable whether the result of the negligence is bodily injury or death, whether the negligence established is that of an employee or of the insured himself and even though the negligence where it results in the death of a third party, is so gross as to amount to manslaughter. However, where injury to a third party is caused by a deliberately calculated act the insured cannot obtain indemnity from his insurers. The mere fact that a vehicle is being used illegally does not invalidate an insurance policy taken out in relation to the vehicle in so far as the policy insures the owner of the vehicle against the consequences of the vehicle being negligently driven as distinct from the consequences of illegal use." (Emphasis added)

17. In **Mohammed Ali Ahmed v Blue Shield Insurance Limited [2019] Eklr**, the Court of Appeal opined that, the test of 'material information' is that "every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk."

18. In that case, the Court cited the case of **Co-operative Insurance Company Ltd v David Wachira Wambugu [2010] eKLR**, wherein it was held:-

"a contract of insurance is a contract of utmost good faith. A proposer has a legal obligation, prior to the contract of insurance being made, to disclose to the insurer all material facts and circumstances known to the insured which affect the risk being run. An insurer can avoid a contract of insurance on the grounds of misrepresentation and non-disclosure of material information on the part of the insured."

19. The appellants contention was that the 1st respondent submitted a name of a driver who was different from that submitted by the police. I have looked at the list of documents attached to the appellants defence. The appellant attached the claim form and the police abstract. The police abstract lists Festus Kiogora as the driver whereas the claim form was filed by Muteitha Mwitii as a director of the 1st respondent and driver.

20. Looking at the wording of the claim form, the section apportioned to "driver" shows that it may be filled by someone else other than the actual driver of the motor vehicle at the material time of the claim. The questions set out therein are in past continuous tense and making reference to a 3rd party e.g. *Did he admit to the liability. Has he had any previous accidents? Does he hold a full or provisional license to drive this vehicle?*

20. Further to the foregoing, the policy document was not produced to establish whether or not it had a provision limiting the driving of the motor vehicle to the insured himself, or limited to a class of people.

21. My view therefore is that, Muteitha Mwiti must have filed the claim form as director of the policy holder and on behalf of the driver.

22. As for the contention that the motor vehicle hit an electric post, the statement in the claim form was that another motor vehicle approached and hit the subject vehicle whereby the driver veered off the road and hit an electric post.

23. In this regard, I agree with the trial court that the claim herein is a 3rd party claim as opposed to a material damage claim. The need for assessment of the motor vehicle would not arise in a claim for a 3rd party claim. The investigative approach therefore ought to have been the cause of death and whether or not the driver of the motor vehicle was to be blamed.

24. The delay in availing the necessary documents was considered by the trial court when it considered the distinction of the claim as a third party claim as opposed to material damage. The appellant's own witness admitted that the claim was made 3 days after the accident. The trial court was therefore correct in holding that the aspect of lack of utmost good faith on the part of the 1st respondent was not proved. Further, the elements of concealment, fraud and/or misrepresentation were not established.

25. In the premises, the appeal is unmeritorious and the same is dismissed with costs.

It is so decreed.

DATED and DELIVERED at Meru this 20th day of June, 2019.

A. MABEYA

JUDGE