



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 653 OF 2010

PATRICK GUKURA MURAYA PLAINTIFF

VERSUS

CO-OPERATIVE INSURANCE CO. OF KENYA LIMITED..... DEFENDANT

JUDGMENT

1. Patrick Gukura Muraya (Muraya or the Plaintiff) challenges the decision by the Co-operative Insurance Company of Kenya Limited (The Insurer or the Defendant) to repudiate a claim arising from policy Number 001/080/1/016677/2007/02 (The Policy or Insurance Contract).

2. By an insurance contract issued on 26/02/2007 by the insurer, Muraya comprehensively insured his motor vehicle registration number KAT 896L Isuzu Lorry for the sum of Kshs.6,000,000.00. It is common ground that it was an express and or implied term of the contract that the insurer would indemnify Muraya to the said sum in the event of a total loss of the motor vehicle. This, of course, would be subject to conditions endorsed in the contract.

3. Muraya avers that on or about 26th October 2007, the said motor vehicle was stolen while at Mai Mahiu and was never recovered. He assails the insurer for failing to pay the claim and accuses it of failure in its obligation under the terms of the policy and in breach of the contract. Muraya therefore claims the sum of Kshs.6,000,000.00 and general damages for breach of contract. He also seeks costs and interest.

4. In his evidence, Muraya reiterates the above and told Court that the theft happened on the night of 26th October 2007 by unknown people and a report thereof made at Mai Mahiu Police Station. He also told Court that at the time of the theft the vehicle was in possession of his driver Duncan Mwangi Gacheru and turnboy Alex Ndungu Wangui.

5. On a different aspect, the testimony of Muraya was that the theft happened as the motor vehicle was headed from Nairobi to Narok to collect his wheat. He denied that the vehicle had been hired by a third party.

6. As to the policy requirement that the vehicle be fitted with an anti-theft device. The Plaintiff told court that the vehicle was fitted with a gear shift lock by Uchumi Electric Limited. On this Bilihah Muringi Muindia (PW2) a partner in the said firm produced a certificate of installation dated 18th February 2005.

7. By way of defence, the insurer filed an amended statement of Defence dated 14th February 2014 and filed on 19th February 2014. It avers that its duty to compensate or indemnify Muraya was pegged upon terms and conditions in the contract, breach of which would lead to repudiation. It is the case of the Insurer that it was justified in repudiating the claim because Muraya was complicit and party to the alleged loss. The Insurer gives the following as the particulars of breach:-

- a) Dishonestly lodging an Insurance Claim based on untruths.**
- b) Falsely representing to the Defendant that the subject motor vehicle had been stolen.**
- c) Participating in concert with third parties to defraud the Defendant.**
- d) Being complicit to the alleged loss of the subject motor vehicle.**
- e) Using the subject motor vehicle for a purpose that had not been insured for.**

f) Placing an Insurance cover without utmost Good Faith by unreasonably overstating the value of the motor vehicle insured.

g) Failing to disclose a material fact that he had a valid contract with the Defendant as at the time of placing a new cover.

8. The Insurer accuses Muraya of further fraudulent misrepresentation. It asserts that he rendered a false installation certificate in respect to an anti-theft gadget when he knew or ought to have known it to be false. Also, that he failed to contact one James Mwangi who was part of the crew when the alleged theft occurred to record a statement with the police.

9. In support of the Defence case, the insurer called two witnesses being Joseph Karanja (DW1 or Karanja) and Police Constable Fidelis Munyoki Kavii (DW2).

10. Karanja is a legal officer in the claims department of the Insurer. His evidence was that Muraya failed to mention that at the time of the incident one James Mwangi was with his driver and turnboy. That the said Mwangi, who was to lead the crew to the wheat at Narok, was the mastermind of the disappearance of the vehicle.

11. Secondly, that the certificate of the anti-theft gadget rendered to the investigation hired by the Insurer showed that the certificate was issued on 24th January 2008, two months after the alleged theft.

12. On the user of the vehicle, the testimony of Karanja was that the Muraya had insured his motor vehicle for purposes of local delivery of his goods but instead put it to third party use. That it was used to fetch a customer's goods from Narok.

13. On the insured value of the motor vehicle, the evidence by Karanja was that Muraya overstated the value. So as to demonstrate this, the witness stated that for the year preceding the subject insurance period, Muraya had insured the motor vehicle with UAP insurance for a sum of Kshs.5,000,000. The witness took the view that the increase of value to Kshs.6,000,000 was unsupported and unexplained. He theorized that this showed that the loss was premeditated.

14. As for P. C Kavii, the highlight of his evidence is that at the time of the theft, the vehicle had three occupants being the driver, turn boy and customer. He then points to what he says where contradictions in the statements given to the police. That in his statement, the turn boy gives his name as Alex Ndungu Wangui, but Muraya calls him David Ndungu .He also stated that Muraya did not cooperate in the investigations alleging that the matter was already before Court. This civil suit.

15. Although there was no unanimity between the parties on the issues to be determined, the Court has looked at the pleadings and considered the proposal of issues made by the rival parties and culls out the following as requiring resolution:

i) What reasons were put forward by the Insurer for the repudiation of the claim?

ii) Was the Insurer justified in taking that position?

iii) If not, should the Plaintiff's claim succeed and to what extent?

iv) What is the appropriate order as to costs?

16. Before I delve into the issues, there is a preliminary matter taken up by Muraya in respect to the statement of Defence by the insurer. It questions the efficacy of the statement .

17. It is common cause, and this emerges quite clearly from the evidence, that the contract that is the subject of the controversy herein is Policy No. 001/080/1/016677/2007/02. This is the policy whose breach is pleaded in the Plaint. However, in responding to the claim the Insurer pleads to the existence of an insurance contract between it and Muraya under Policy No. 001/080/1/016677/2007/02 (paragraph 4 of the Amended Defence). On casual observation this policy number differs from that which is the subject matter of the claim. Because of this, Muraya submits that the Defence does not qualify to be a defence in respect to the Plaintiffs suit as it fails to respond to the facts and averments contained in the plaint.

18. Muraya seeks the aid of the decision of **Independent Electoral and Boundaries Commission & Another –vs- Stephen Mutinda Mule & 3 others [2014] Eklr** in which the Court of Appeal held:

“As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score”.

19. This Court takes the view that nothing much turns on this misadventure by the Defendant because in the impugned paragraph it admits the existence of the contract of insurance referred to in paragraph 4 of the plaint. To that extent, and other than the error on the policy number, there is concurrence as to the contract that forms the subject of the claim. This concurrence is indeed firmed up by the evidence in which both sides refer to the contract as that in the Plaintiffs Bundle (P. Exhibit Page 3-12). What is in contention is clear and on which there is joinder of issue.

20. There is then the submission by counsel for Muraya that what the Insurer repudiated was the claim and not the policy and pointing to the

decision in West –vs- National Motor and Accident Insurance Union Ltd Aller 1985 at Page 800 argues that in so far as the insurance policy has not been repudiated then the claim cannot be repudiated.

21. It is common cause that the repudiation was contained in two letters. The first is of 6th May 2008 (P. Exhibit Page 18) which reads;

The Co-operative Insurance

Company of Kenya Limited

Tuesday, 06 May, 2008

Banafa Insurance Brokers Ltd.,

P. O. Box 56846,

NAIROBI.

Dear Sir,

RE: LOSS OF MOTOR VEHICLE REG. NO. KAT 896L

INSURED: PATRICK GUKURA MURAYA

The above subject matter refers.

We have received the final investigation report on the loss of the above motor vehicle detailing the circumstances under which the said vehicle disappeared.

It is very clear from the report that the circumstances under which the vehicle disappeared are contrary to what was reported to us and we therefore regret that the claim is declined in total.

Please advise the insured accordingly.

Yours faithfully,

Dickson Ireri

CLAIMS MANAGER - GB

22. The next is the letter of 10th November 2008 (P. Exhibit 21 & 22) which amplified the reasons for repudiation and reads:-

The Co-operative Insurance

Company of Kenya Limited

10th November 2008

Kanyi Ndurumo & Co. Advocates,

NAIROBI.

Dear Sir/Madam

RE: OUR CLAIM NO. 001/080/9/002616/2007/12

YOUR REFERENCE: KTN/001/678/2008/GL 678

INSURED: PATRICK MURAYA

The above matter and your demand letters dated 20/08/08 and 30/9/08 refer.

The reasons for the repudiation of this claim are well within your client's knowledge. We instructed two investigators to investigate this claim and the information gathered led us to conclude that there was fraud involved.

We took into consideration the following factors among others in arriving at our conclusion:

- a) The insured glaringly omitted to mention the name of James Mwangi to both our investigators yet this James Mwangi seems to have been deeply involved in the theft. This is a breach of the principle of *uberrimae fidei*.
- b) There is no question that the insured knew this James Mwangi well. He actually states in his statement to the police that he (the insured) is the one who introduced him to his turnboy and the driver.
- c) Both the turnboy and the driver also seem to be covering up the identity of this James Mwangi. An indication that they were also accomplices in the theft. Both the turnboy and the driver omitted to mention the name of James Mwangi in their statements to probe investigators. They actually stated that they were joined by a male stranger in a bar at Mai Mahiu where they were taking a drink.
- d) This James Mwangi seems to have disappeared into thin air with no one willing to talk about him and/or his whereabouts. He did not even make a statement to the police.
- e) The driver claims that he did not know his turnboy's name. This is quite unbelievable and implies another cover up. How could it have been possible for two people to work together and travel all the way to Mai Mahiu without knowing each other's names?
- f) The manner in which the insured varied the insured value of the motor vehicle is suspect. He insured the vehicle for Kshs.8,000,000 with UAP Insurance upto 24/02/2006. For the period between 24/02/06 – 23/02/07 he took a cover with us for a sum of Kshs.5,000,000 instead of renewing the policy in the next period, he took out a new cover for a sum of Kshs.6,000,000. There was no explanation for these shifts in the value of the vehicle.
- g) The claim by the turnboy that he was drugged and then found himself the following day at Salama is suspect. Neither of the guards manning the building where vehicle was parked saw anyone being carried to vehicle. The fact that he waited two days to go to the hospital after he found himself at Salama indicates a lack of concern which would be expected of any reasonable and prudent man.

Given the foregoing, we are maintaining our position that this claim is not payable. You are therefore at liberty to take any course of action you may consider necessary. Be guided however that any suit by yourselves will be defended strenuously.

Yours faithfully,

KAREN NJAGI

LEGAL ASSISTANT

23. From both letters it is unequivocal that what is declined or repudiated is the claim and not the policy. As I understand the law, repudiation of an insurance contract differs from repudiation of a claim or as sometimes referred to repudiation of liability under the contract. In the former the substratum of the contract being the policy is disowned and in that event any liability under the policy or insurance contract is resisted. In the latter the policy is accepted as good or valid but for some reason or other arising out of post-contact circumstances, the insurer declines to accept a particular claim.

24. This then leads the discussion to a critical matter. In the two letters in which the Insurer declines the claim, the Insurer states the reasons for the stance taken. What the Insurer repudiates is not the policy but the theft claim itself. However, in the Defence the Insurer not only seeks to expand the scope of repudiation but also the reasons. First, it seeks to repudiate the entire policy and gives such reasons like, that the value of the vehicle was overstated at the time of entering the contract. Then it seeks to add other reasons for repudiating the claim. For example, it asserts that, at the time of the accident, the vehicle was been used for a purpose other than for which it was insured.

25. As a general rule an insurer will not be allowed to defend its justification to repudiate a policy or claim other than on the basis of the reasons tendered at the time of repudiation. In this regard the following holding of the Court of appeal in **Kimwa Holding Limited –vs- Occidental Insurance Company Limited [2018] eKLR** is not without significance;

“The letter is clear that the reason for repudiation was the use specifically of KAL 922M for hire or reward. Despite this, the respondent advanced other reasons for its refusal to settle the claim such as, the failure to report the theft immediately after its occurrence, the failure to pay the insurance premium, and the usage of motor vehicle KAE 299D which was also covered under the same policy, for hire and reward. The assertions notwithstanding, there was no evidence showing that the policy was repudiated, or cancelled for the aforestated reasons. Hence the repudiation was not done in accordance with the terms of the policy. Again, no import was sought from the appellant before the cover was repudiated and/or cancelled. The law as we understand is that a party is entitled to be given an opportunity to answer or rebut allegations against him before a decision against him is arrived at. That was not done, which in our view was violation of the rules of natural justice. In the premises we are not satisfied with the reasons advanced for the repudiation of the substance cover. We also consider the process to have been violation of the rights of the appellant.

As a consequence, since the reason for repudiation of the policy was for the alleged utilization of KAL 922M for hire and reward, and having found as we have that the motor vehicle was not so utilized at the time of its theft, we find that the respondent was not entitled to repudiate the policy on this basis”.

26. This Court will not permit the character of the repudiation to metamorphosis from repudiation of a claim to repudiation of a policy and

reasons not contained in the original repudiation to be advanced. No reason has been proffered for justifying such an expansion.

27. I now turn to consider the Plaintiff's contention that the repudiation made by the insurer was unlawful and unjustified. This is considered within the confines of the reasons in the two letters and what was pleaded.

28. In the letter of 6th May, 2008, the Insurer informed Bafana Insurance Brokers Limited that it had declined the claim because circumstances under which the vehicle disappeared was contrary to what was reported to them. The reasons are then elaborated in the letter of 10th November 2008 (see paragraph 22 above). As the Court turns to evaluate these reasons, the parties are in agreement as to the validity of the following statement in respect to insurance contracts:

“It is well established that a contract of insurance is uberrimae fidei and therefore requires that utmost good faith from both parties during the making of it. Nondisclosure of a material fact or a representation of fact false in some material particular renders the contract voidable. Non disclosure of a material fact as such may not by itself be a ground for damages; the only remedy available would appear to be the avoidance of the contract. The contract being uberrimae fidei the insurer is entitled to be put in possession of all material information possessed by the insured. The contract of life insurance is one uberrimae fidei and 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, that, if you know any circumstance 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 therefore 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. There is, therefore, something more than an obligation to treat the insurer honestly and frankly, and freely to tell him what the applicant thinks it is material he should know.”

AS was the view of Sir Udo Udoma, CJ in Jubilee Insurance Co. Ltd vs. John Sematengo [1965] EA 233.

29. In the evidence before Court, Karanja speaking for the Insurer stated that the Insurer doubted the authenticity of the claim on the basis of an investigation commenced by them. And whilst the investigation report dated 3rd April 2008 was produced in support of that decision (D. Exhibit Pages 4- 62), for some reason, the Defence did not call the maker of that report. A consequence would be, as correctly pointed out by counsel for Muraya, to considerably corrode the probative value of report (see Wizar Virani t/a Kisumu Beach Resort –vs- Phoenix of East Africa Assurance Company Ltd [2004] Eklr)

30. What then is to be made of the rest of the evidence? In the letter of 10th November 2008, the Insurer takes issue with the failure of the Muraya to mention one James Mwangi as being one of the persons who was with his driver and turn boy at the time of the theft. The Insurer suspects this person to be a participant in the theft. The Insurer takes issue with the fact that James Mwangi was not even made to record a statement with the police.

31. In cross-examination Muraya was confronted with a statement he allegedly made. To this he first reacted;

“I cannot remember whether this is my statement”.

Of that same statement he said as follows in re-examination.

“I do not know of any 3rd party who accompanied my driver or who masterminded the theft. The statement shown to Court was interfered with. It is not my handwriting, I never gave the statement to the police or insurance”.

32. The statement which Muraya sought to deny was part of the investigation report that was filed in the Defendant's Bundle of Document on 9th December 2014. Upto the time of giving testimony, about 30 (thirty) months later, Muraya had not complained as to its authenticity or accuracy. He only took issue with it at the time of hearing but even then he did not produce any evidence that would challenge it. This Court has no reason to doubt that this was the statement he made to the police.

33. That statement has some significance because in it Muraya says:-

“I do recall the 26th October 2007 at about 4.30pm when I assigned my driver Mr. Duncan Mwangi alias Njege to go and fuel my vehicle Reg. KAT 896L Make Isuzu Lorry full tank and proceed to Narok to ferry wheat from one Mr. Ole Toang. I introduced them to one Mr. James Mwangi who was to lead them to where they were to load wheat in Narok.

34. That indeed there was a third person who accompanied the driver on his trip to Narok is borne out by the initial report made by the driver to the Police on 2nd October 2007. The excerpt of the Occurrence Book of the day produced by PW2 states:

Stealing of motor vehicle: To police is one male adult namely Dancun Mwangi of Box 315 Karatina Tel. 0727849222 and a driver of motor vehicle KAT 896L Lorry that yesterday 26/10/2007 they left Nairobi for Narok together with a customer and his newly employed turnboy. On reaching Mai-Mahiu they decided to spend the night at 22 lodge and parked the motor vehicle and paid the watchman. They spent a room three of them, on waking up at around 0500 hours, the driver found nobody in the room and he had been locked in by the turn boy and a customer. On calling the watchman to break the padlock he found the vehicle missing. When the watchman was asked about the vehicle he told the reportee that it went in Nairobi direction with three occupants. Now needs assistance.

35. In his own bundle of documents Muraya produced a report by Probe Investigations Limited who initially investigated the circumstances surrounding the loss of the vehicle. In that report of 16th November 2007 is a statement of Muraya (P. Exhibit Pages 36 – 37). This is what he says:

“On the material date at around 5.00pm, I instructed my authorized driver and turn boy, Duncan Mwangi Gacheru and Alex Ndung’u Wangui to proceed to Narok Town where I intended to purchase wheat grain following day and have them loaded and transported to Pembe Flour Mills”.

36. Nowhere in that statement does Muraya mention James Mwangi. This is confounding because in his statement to the police he stated that it is James Mwangi who led the driver and turn boy in the trip and that he (Muraya) was the one who introduced Mwangi to the two. The presence of this third party is corroborated by the report made to the police by his driver. Perhaps even more curious is that in his testimony to Court, Muraya categorically denies knowing the said James Mwangi.

37. This Court finds it strange that Muraya attempts to disown or to distance himself from someone who he had, in his first statement to the police, mentioned as accompanying his driver and turn boy on the trip. This Court finds that Muraya was less than candid in the statement he made to the investigators mandated by the Insure to investigate the circumstances of the alleged theft. That lack of candour persisted in his testimony to Court.

38. Without difficulty, this Court finds that the Insurer was justified in taking the position that Muraya was in breach of his duty to act in utmost good faith at the time of reporting the incident and through the process of making the claim. This Court also finds that Insurer pleaded the lack of honesty on the part of Muraya (see paragraph 6(a) of the amended plaint) and has by overwhelming evidence proved the allegation.

39. The insurer was entitled to repudiate the claim and the Plaintiff’s suit must fail.

40. If however I had found the Defendant liable, I would have entered judgment in his favour for the loss of the vehicle being Kshs.6,000,000. I would make no award for damages for breach of contract as the same was not proved.

41. Otherwise, because of failure to establish liability on the part of the Insurer, the entire suit is dismissed with costs to the Defendant.

Dated, delivered and signed in open Court at Nairobi this 27th day of September 2019.

F. TUIYOTT

JUDGE

PRESENT:

Mwangi for Plaintiff

Malulu for Defendant

Court Assistant: Nixon