REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 543 OF 2012

LION OF KENYA INSURANCE COMPANY LIMITED.....APPELLANT

VERSUS

EDWIN KIBUBA KIHONGE.....RESPONDENT

JUDGMENT

The Respondent herein instituted a suit in the Lower Court, claiming a declaration that the defendant was under an obligation to indemnify him, or in the alternative, the sum of Kshs.2,500,000/-.

It was pleaded that at all material times, the plaintiff was the owner of motor vehicle registration number KAV 238L which was comprehensively insured by the defendant under policy number Comp/111/20601096 which policy covered the said vehicle from 21st March 2006 to 20th March 2007.

That during the currency of the said policy, the vehicle was stolen by unknown people. The plaintiff averred that pursuant to the said policy, the defendant was liable to indemnify him for the loss of the vehicle which the defendant, it was pleaded, had failed or neglected to do, hence the suit before the lower court.

The defendant filed a defence under protest, dated the 18th day of December 2007, in which it denied each and every averment in the plaint. In particular, the defendant put the plaintiff to strict proof of the ownership of motor vehicle KAV 238L.

The defendant averred that the policy was fraudulently procured by the plaintiff acting in collusion with his agent, through material non disclosure and misrepresentation in the proposal form. It was further averred that the plaintiff was in breach of the terms and conditions of the policy, the particulars whereof are contained in paragraph 8 of the plaint. The defendant contended that it was a term of the said policy that any differences arising out of the policy would be referred to an Arbitrator within 12 months of the defendant's disclaiming liability and for that reason, it was pleaded that the Honourable court lacks jurisdiction to adjudicate the matter and without prejudice to the aforegoing, it was averred that the plaintiff's suit is bad in law and ought to be struck out.

A reply to defence was filed on 23rd January 2008 in which the plaintiff joins issues with the defendant in its statement of "defence under protest" save where the same consists of admission. The allegations contained in paragraph 8 of the defence were denied. The plaintiff maintained that the court has jurisdiction to hear the matter.

The matter proceeded before the trial Court as CMCC Number 9835 of 2007 and in a judgment delivered on the 21st September 2012, the learned magistrate entered judgment for the plaintiff as prayed in the plaint. The defendant being dissatisfied with the said judgment filed the Appeal herein against the whole judgment and has listed twelve grounds of Appeal in his memorandum of Appeal dated 18th day of October, 2012.

The Appeal was disposed off by way of written submissions which this court has duly considered. In its submissions, the Appellant contended that the Respondent was not the actual owner of motor vehicle registration number KAV 238L and thus he did not have any insurable interest in it. That the Respondent did admit in the proposal form that he had no interest in the said vehicle as the same had been bought by his father for his father's use as well as for other members of the family. The Appellant further submitted that the Respondent can only be said to have an insurable interest in the said vehicle if the existence, survival and safety of the same was paramount to him and would be prejudiced by its loss, and by the Respondent admitting that he did not contribute to the acquisition of the said vehicle and secondly that, the said vehicle was driven mainly by his father, he cannot be said to have had any insurable interest in the survival and safety of the said vehicle.

It was further submitted that the information contained in the proposal form was misleading and that it was meant to mislead the Appellant to accept the proposal form as presented. The said information is that; the vehicle was meant for the sole use by the Respondent's father, that the Respondent did not intend to drive it, the Respondent admitted that he submitted the proposal form after the loss had occurred which

information was crucial in acceptance of the risk. The Appellant urged that this misleading information went against the principle of "utmost good faith" and contended that the information in the proposal form was full of half truths and lies in that it failed to present the risk as it actually was.

It was the Appellant's case that there was misrepresentation as well as non disclosure of material facts. It relied on the provisions of Section 18(2) and 20(2) of the Marine Act Cap. 390 Laws of Kenya which defines what material circumstance is, and the circumstances under which a representation is said to be material, respectively. In support of this submission, the Appellant relied on the case of **Gateway Insurance Company Limited V. Albert Njagi (2006) eKLR** where the learned Judge held that the defendant did obtain the policy of insurance through non disclosure of material facts as the vehicle was put to use other than that for which it was insured.

The Appellant urged that it must not be demonstrated that full and accurate disclosure would have led a prudent underwriter to a different decision on accepting the risk. The case of **Pan Atlantic Insurance Company Limited Vs. Pine Top Insurance Co. Limited (1995) IAC 501** was relied on, in that regard, in which the learned Judge stated;

> ***"reference to influence the judgment of a prudent insurer in determining "whether to take the risk clearly denotes an effect on the thought process of the insurers in weighing the risk."***

The appellant further submitted that the trial court erred in finding that the Appellant had failed to plead particulars of fraud and misrepresentation yet, in paragraph 7 of the defence, the particulars of fraud and misrepresentation are set out and that in his evidence, the Respondent admitted that he was 20 years old and that he did not intend to drive the said vehicle. The Appellant averred that its evaluation of the risk could only be done via the proposal form and the trial court's holding that the evidence of DW2 could not controvert the assertions by the Respondent and his witnesses fails to consider the admissions by the Respondent and therefore, the trial court erred in describing the evidence of DW1 and DW2 as hearsay evidence yet their evidence fell within the exceptions to the hearsay rule in section 62 of the evidence Act Cap. 80 Laws of Kenya.

On the people who stole the subject motor vehicle, it was submitted that, the actions of PW3 and that of the alleged thieves are not consistent. That, failure by PW2 to seek medical help but to immediately drive off to Tanzania in pursuit of the stolen vehicle, it was submitted, points towards a real likelihood that the vehicle was taken by persons known to him.

On the part of the Respondent, it was submitted that the Respondent had proprietory interest in the said motor vehicle and therefore had insurable interest in the same in that, it had been bought by his father but was registered in his name though it was bought for family use. This intention, it was submitted, was demonstrated as long before as 11th March 2006 when the Respondent filled the insurance proposal form and paid the premium for the cover and that in this case, there was an agreement between them from the inception of the transaction that the Respondent herein was the owner of the vehicle and hence he had insurable interest in it. Reliance was made on the case of **Insurance Company of East Africa Vs. Wellington Omodho (2005) eKLR.**

On the issue of misrepresentation and non disclosure, and the effect they have on the contract between the parties, it was submitted that the Respondent answered the 2 questions in the proposal form truthfully since he never drove the vehicle and the same was always driven by PW3, and that he correctly stated that the vehicle would not be driven by any person under the age of 25 years.

It was submitted that the Appellant is estopped from alleging material non disclosure and misrepresentation as it had already issued a cover to the Respondent even before it received the proposal form which was forwarded to it on the 12th April 2006 after the loss had occurred, and notwithstanding the alleged non-disclosure, the Appellant proceeded to issue the policy dated the 23rd August 2006. It was contended that in their letter dated 20th June 2006 addressed to Ms. Prime Movers Insurance Brokers Limited, the Appellant did not indicate that it was disclaiming liability on the basis of the alleged non-disclosures. The case of **Mbuguru Vs. Fidelity Shield Insurance Company Limited (2001) IEA. 190** was relied on.

On failure to plead the particulars of fraud and misrepresentation, it was contended that though fraud was pleaded, it is not particularized as required under Order 2 rule 10 (1) of the Civil Procedure Rules.

On the weight of evidence to be attached to the evidence of DW1, it was submitted that it was hearsay evidence as it was based on interviews conducted on various people none of whom recorded any witness statement and none of them was called as a witness. It was also submitted that the report had some glaring errors which watered its credibility e.g. the person who investigated the case at Muthangari Police Station in that, DW1 stated she dealt with one Sergeant Njuguna yet the matter was investigated by P.C. Wambua who testified as PW1.

On the circumstances leading to the theft of the subject vehicle, the Respondent averred that it was stolen by people who were unknown him contrary to the insinuation by the Appellant that the people were known to him. He urged that the version of events as narrated by PW3 is also corroborated by some findings in the investigation report and in particular that he was drugged and lost his senses. That the insinuation by the Appellant that he was merely drunk could not be true as the effect of alcohol would not have had such devastating effect on him. It was averred that the conduct of PW3 was not consistent with that of a person who was out to arrange with thieves to steal his own son's vehicle so as to make a claim for compensation.

It was submitted that, since the policy document was issued well after the loss had occurred, and the Respondent was never supplied with a copy of the same even after it was issued, he could not have been expected to comply with a document he had never seen. That, no evidence was adduced to show that he was supplied with a copy of the same. The Respondent relied on the case of Mburugu (supra) where the court held that the policy was issued well after the incident and the appellant could not have read it before the incident so as to comply with it.

On the Arbitration clause, it was averred that if the Appellant wanted to avail itself of the arbitral process, it should have complied with Section 6 of the Arbitration Act and apply for it to be referred to arbitration and that the time set in the arbitration clause is illegal in view of express provisions of the limitations of Actions Act which sets the period of instituting contractual claims at six years. The case of **Bahari**

Transport Company Vs. APA Insurance Co. Limited, Mombasa HCC No. 71 of 2006 was relied on to support that submission. The court was urged to dismiss the Appeal.

The court has carefully reconsidered and re-evaluated all the evidence which was adduced before the trial court. I have also considered the submissions that were made before the trial court and before me, as well as the authorities which were cited.

The grounds of Appeal can be collapsed into six grounds as follows:

1. Whether the Respondent had an insurable interest in the subject vehicle.

2. Whether the Respondent was in breach of the insurance contract by his failure to disclose material facts.

3. whether the respondent was the registered owner of the subject motor vehicle.

4. whether the Appellant pleaded the particulars of misrepresentation in its defence.

5. whether the evidence of DW1 contained in the investigation report is hearsay evidence.

6. Whether the failure by the Respondent to refer the matter to arbitration ousted the jurisdiction of the court.

Insurable interest is a basic requirement of any contract of insurance unless it can be and is lawfully waived. At a general level this means that the party to the insurance contract who is the insured or policy holder must have a particular relationship with the subject matter with the insurance whether that be "a life or property or a liability to which he might be exposed. Every insurance contract requires an insurable interest to support it, otherwise it is invalid. This was the holding in the case of **Anctol Vs. Manufacture Life Insurance Company (1899) AC 604.**

Insurable interest is essentially the pecuniary or proprietary interest which is at stake or in danger should the insured opt to take out an insurance policy on the subject matter. It is the interest that the insured stands to lose if the risk attaches. This classical definition of insurable interest was given by Lawrence J in **Lucena Vs. Crawford 1806 2 BOS PNR 269 at 302.**

This definition was partially adopted in the marine insurance Act 1906 in which a person is deemed to have an insurable interest in the subject matter if he is likely to suffer prejudice in the event of its loss, damage or destruction. Courts of law have abstracted the following rules as the determinants of insurance interest.

a. A direct relationship between the insured and the subject matter.

b. The relationship must have arisen out of a legal or equitable right or interest in the subject matter.

c. The interest bears any loss or liability arising in the event the loss or risk attaches.

d. The insured's right or interest in the subject matter must be capable of pecuniary estimation or quantification.

As a general rule, insurable interest must have a pecuniary value. A right to a future interest of possession is insurable. See the case of **Halford Vs. Kymer (1930) 10 B.C. 724**.

Section 5 of the Marine Act, Cap. 390 Laws of Kenya define insurable interest "as existing when a person stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof.

In his evidence, the Respondent stated that the vehicle is registered in the name of Shahzad Motors Limited from whom it was bought. However, there is a copy of the transfer form signed by Shahzad Motor Limited but the name of the transferee is not shown. It was his evidence in cross-examination that the vehicle was bought for him by his father for use by the family but at the time of theft, it was being used by his father. He further stated that in the proposal form he had indicated the vehicle is his, but he did not disclose that he was his father's nominee. In his further evidence the father to the Respondent stated that the motor vehicle was his, a fact that was confirmed by the Respondent. The evidence on record is that, it is the Respondent's father who paid insurance premiums.

In view of that piece of evidence, can the Respondent be said to have been the owner of the vehicle and did he have insurable interest in it? In my considered view, he did not. Having admitted that the vehicle was bought by his father and that, it was in his father's possession and that he was not driving the same, one would then wonder what loss he suffered after the vehicle was stolen. In as much as he was the insured, he did not have any insurable interest in the subject vehicle. To the contrary, it was his father who had insurable interest because in the event of loss, as it happened, it is him who lost the money that he used to purchase the vehicle and also the possession thereof.

The father to the Respondent who testified as PW3 stated that he bought the vehicle on 20th April 2006. He further stated that he was the owner of the motor vehicle but he registered it in the Respondent's name to secure his property. This therefore means, he did not buy the vehicle for the Respondent but only insured it in the name of the Respondent for his own personal interest in safeguarding his property, no wonder he stated that he signed the sale agreement for the vehicle and not his son, the Respondent. In view of the aforegoing, my considered view is that the Respondent did not have any insurable interest in the vehicle. This is a unique case in which though the Respondent is the

insured on paper, he did not have any legal or equitable interest in the vehicle, but he is just a conveyor belt used to claim the money for his father. Looking at the history of PW3 through the eyes of an insurer, it was not impressive and he knew or had every reason to believe that no insurer would have agreed to cover him and that may explain why he had to insure the vehicle in the name of the Respondent.

On whether the Respondent was in breach of contract for non-disclosure of material facts and misrepresentation, I have carefully perused the proposal form dated the 11th day of March 2006 which was produced as Defence Exhibit 2. The name of the proposer is Edwin Kibuba, the Appellant herein. In the said form, he indicated that the vehicle was his property yet in his own evidence he stated that the vehicle was his father's.

Under clause 12(a), in the proposal form, the Respondent indicated that, to his knowledge, no person under the age of 25 years will drive the subject vehicle yet in clause 12 (b) he has listed down his name as one of the people who would drive the same. This, clearly, was a misrepresentation of material facts because at all material times, he knew very well that he was 20 years of age. Further, under Clause 12(b), the Appellant was supposed to give information regarding any person (including himself) who to his knowledge, would drive the vehicle. In his evidence, he was categorical that the motor vehicle would be used by his father yet he did not list his father's name as one of the drivers who would drive the vehicle.

The particulars given by the Respondent in clause 12 of the proposal form clearly shows that there was non-disclosure of material facts. By reason of his failure to disclose those facts, the Respondent was in breach of the contract. Though the Respondent contends that the Appellant is estopped and is not entitled to rely on the alleged material non disclosure and misrepresentation to avoid the policy for the reason that the Appellant issued a cover to the Respondent even before it received the proposal form and notwithstanding the alleged non disclosure, it proceeded to issue the policy, under the doctrine of "utmost good faith" the Respondent has an obligation to give correct answers while presenting the risk to the insurer.

Under Section 18(2) of the Marine Act, a circumstance is said to be material if it would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk.

Under Section 20(2) of the same Act

> **"A representation is material if it would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk"**

As testified by DW3, non disclosure of the proposer's age and the identity of the individuals who would drive the vehicle and their past claim history was information that was material to the Appellant in determining whether to accept the risk or not. The test for what is material in Section 18(2) and 20(2) is the judgment of a prudent insurer and therefore an objective test. In view of the aforegoing, I find that the Respondent was in breach of the insurance contract for non disclosure of material facts and for mis-representation.

As to whether the Respondent was the registered owner of the vehicle, this is a straight forward issue. He was not. The registered owner was Shahzad Motor Limited as per the copy of records which form part of the documents filed in court. The Appellant was neither the registered owner nor the beneficial owner. The transfer form shows the date of transfer to un-identified transferee as 29th May 2006 which was long after the vehicle had been stolen. Therefore, by the time the vehicle was stolen on 8th April 2006 it had not been transferred but it was still in the name of Shahzard Motors Limited. No connection has been shown between the Respondent and the subject vehicle regarding ownership.

On whether the Appellant pleaded the particulars of misrepresentation in his defence, I have looked at paragraph 7 of the defence wherein the issue has been raised. I note that, though the particulars are not specifically itemized, the paragraph has set out some of the particulars aforesaid. My considered view is that failure to set out all the particulars is not fatal to the claim. The learned magistrate therefore erred in her finding with regard to this issue.

On whether the evidence of DW1 and DW2 contained in the investigation report was hearsay evidence, the evidence Act Section 63 states that all oral evidence must be direct evidence. However, in section 62 there is an exception. The said section provides

> **"All facts; except the contents of documents, may be proved by oral evidence."**

I have perused the investigation report that was prepared by DW1 following the instructions by the Appellant. In that report, he has referred to a number of people that he interviewed in the course of his investigations. It is noted that some of them testified in the case while others were mentioned by PW3 among the people he met or dealt with hours before the vehicle was stolen. Some of the evidence contained in that report is in tandem with what PW3 himself told the court. To the extent that such evidence is the same, it cannot be said to be hearsay evidence. This court, however, would have a problem with the evidence obtained from the people who were interviewed but did not testify at the trial.

The investigation report produced as an exhibit cannot fall with the exception in section 62 as it was authored by DW1 and some of what is contained therein is hearsay as it cannot be verified without calling the people whom he interviewed.

On the issue of Arbitration clause, Section 6 of the Arbitration Act provides for stay of proceedings in a matter which is the subject of an arbitration Agreement. The section gives the discretion to any of the parties to the agreement, to apply for stay of proceedings and refer the matter to Arbitration. Such an application should be made not later than the time when a party enters appearance. If no such application is made by any of the parties, the proceedings are supposed to continue before the court.

The Appellant in its paragraph 9 of the defence, averred that the Respondent's claim was deemed to have been abandoned when he failed to

refer the matter to arbitration within 12 months of the defendant's disclaiming liability which disclaimer is contained in the Appellant's letter dated the 31st July 2006. As rightly submitted by the Respondent and which I do concur with, the arbitration clause in my view, is illegal as it is contrary to the provisions of Act Cap 22 Laws of Kenya which sets out the period within which a claim based on contract should be filed. In this regard, I fully associate myself with Justice Sergon in **Mombasa HCCC No. 71 of 2006 Bahari Transport Company Vs. APA Insurance Company Limited** where he held;

> **"Even if there was an express proviso ousting the jurisdiction of the court it will be of no effect because that will be against the provisions of the limitation of Actions Act which sets the limitation period to institute a claim based on contract to 6 years".**

In the upshot, I find that the learned magistrate erred in entering judgment against the Appellant for the reasons that I have given above. The Appeal herein is allowed and the decision of the trial court is set aside and replaced with an order dismissing the Respondent's case.

The costs of the Appeal and that of the original suit are awarded to the Appellant.

Dated, Signed and Delivered at Nairobi this **21st** Day of **June 2018.**

…….

L. NJUGUNA

JUDGE

In the Presence of

…….. *For the Plaintiff*

…….. *For the Defendant*