REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCA NO. 7 OF 2017

DIRECT LINE ASSURANCE CO. LTD.....APPELLANT

VERSUS

PETER MICHENI MUGUONGA.....RESPONDENT

(Being an appeal against the decree emanating from the Judgment

of the Hon. M. Sudi Senior Resident Magistrate delivered

on the 6th April, 2017 Chuka SPM 's CC No. 44 of 2012)

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J U D G M E N T

1. This is an appeal lodged by Directline Assurance Co. Ltd, the appellant herein against Peter Micheni Muguonga the Respondent. The appeal arose from a decision delivered by Hon. Ms M. Sudi -Senior Resident Magistrate in ***Chuka Principal Magistrate's Court Civil Suit No.44 of 2012*** which decision was delivered on 6th April, 2017. The decision or Judgment was about the declaratory suit that the appellant had filed against the Respondent in the lower Court.

2. A brief summary of the summary of the declaratory suit filed before the lower court by the appellant shows the appellant sought declaratory orders against the Respondent with a view to repudiating liability arising out of a road traffic accident which had occurred on 14th August, 2011 along Meru- Chuka road. It was the appellant's case that while it had insured the Respondent's motor vehicle against all risks to third parties, at the material time, there was material non disclosure and breach of the insurance policy by the Respondent. The particulars listed against the Respondent for the breach were as follows namely:-

a. Failing to disclose that he was not a holder of a valid driving license.

b. Failing to disclose that he was not licensed to drive public service vehicles and that prior to and/or after the making of the said proposal and declaration and/or issue of the policy he had been using and/or intended to use or did use the insured motor vehicle when he knew that he was driving an un-authorised class of motor vehicle contrary to **Section 30(1)** of the **Traffic Act Cap.403 Laws of Kenya.**

c. Failing to disclose that prior to and/or after making of the said proposal and declaration and/or issue of the policy he had been operating and/or intended to operate or did operate the insurance motor vehicle without a P.S.V license contrary to **Section 98(1**) of the **Traffic Act.**

d. Failing to disclose that prior to and/or after making of the said proposal and declaration and/or issue of the policy he had been operating and/or intended to operate or did operate the insured motor vehicle without a valid TLB license contrary to **Section 14** as read with **Section 21** of **Transport Licensing Act Cap 404** Laws of Kenya.

e. Failing to disclose that prior to and/or after the making of the said proposal and declaration and/or issue of the policy he had been using and/or intended to use or did use the insured motor vehicle. When he knew or ought to have known that it was unroadworthy.

f. Carrying excess passengers contrary to **Section 100 (2)** of the **Traffic Act Cap 403** Laws of Kenya.

g. Driving or causing a defective motor vehicle to be driven contrary to the terms of the insurance policy.

h. Failing to ensure that the insured motor vehicle complied with all current laws and regulations imposed by the Traffic Act and the National Transport Safety Authority (N.T.S.A).

3. On the basis of the above the appellant sought the following reliefs from the trial court namely:-

a. A declaration that the appellant herein was entitled to avoid the insurance policy No.7001109 and any provision contained thereon, on the ground that the Respondent herein obtained the said policy by:-

(i) The non-disclosure of material fact or facts.

(ii) Misrepresentations of material facts

(iii) Both of the above (i) and (ii)

b) A declaration that the appellant herein is not liable to make any payment under the said policy of insurance (No. 7001109) in respect of any claim against the Respondent herein arising out of the fatal and other injuries sustained in the accident of 14th August, 2011 involving motor vehicle Registration No. KAW 351E.

c) A declaration that motor vehicle Registration No. KAW 351E was being used in an unroadworthy condition on 14th August 2011 and therefore the appellant was not liable to pay any claim arising of the accident that occurred that date (14th August, 2011) as the Respondent breached the terms of insurance policy.

d) A declaration that the appellant was driving motor vehicle KAW 351 E on 14th August, 2011 without requisite driver's license and/or classification of driver's license and therefore the appellant is not liable to pay any claim arising out of the accident on 14th August 2011 as the appellant is entitled to avoid the policy of insurance No.7001109 on account of the said breach of terms of the policy.

e) A declaration that the appellant is entitled to recover any monies costs and/or interests incurred in settling any judgment arising out of the policy of insurance No. 7001109 in Chuka Principal Magistrate Civil Case No.11 of 2015, Chuka Principal Magistrate Civil Case No.12/2015, Chuka Principal Magistrate Civil Case No.13/2015, Chuka Principal Magistrate Civil Case No.14 of 2015, Chuka Principal Magistrate Civil Case No.15 of 2015, Chuka Principal Magistrate No.133 of 2015, 134/2015, 135/2015, 136/2015, 144/2015. 145/2015 and 146/2015.

4. The Respondent on the other hand defended himself stating inter alia that the appellant did not provide him with a proposal form and that he did not sign any insurance contract detailing the terms and conditions listed by the appellant. He further pleaded that his motor vehicle Registration No. KAW 351E was roadworthy and that he was not asked to provide a valid PSV License or TLB License prior to being issued with the certificate of Insurance. His defence hinged on the fact that he had a valid insurance from the appellant at the time his motor vehicle got an accident and that the appellant was liable to indemnify or pay the claims that arose from the accident.

5. The Respondent did further deny ever making misrepresentations when acquiring insurance cover from the appellant and opined that the appellant failed to prove his case.

6. In her judgment, the learned trial magistrate upon evaluating the evidence tendered found that the appellant having issued a valid insurance cover could not void the same on claims of breaches noting that both parties needed to have exercised due diligence went entering into a contractual relationship. The court further determined that that the policy in question was a standard document prepared by the appellant whose contents may not have been read properly or comprehended by the Respondent herein. The appellant's suit on the basis of the above was dismissed with costs.

7. Aggrieved by the said decision the appellant preferred this appeal raising the following grounds namely:-

(i) That the learned magistrate erred in law in failing to find that the Respondent obtained the policy of insurance through non- discloser of material facts.

(ii) That the learned magistrate erred in fact and in law to find that the Respondent had breached the terms of the policy by driving the injured motor vehicle without being a holder of a valid Driving License , PSV and/or TLB License.

(iii) That the learned magistrate erred in law and in fact in concentrating on the issue of excess passengers which was neither submitted on by the appellant and was effectively abandoned hence concentrated on irrelevant factors.

(iv) That the learned magistrate erred in law and fact in finding that the evidence of PW1 and the court proceedings in Chuka Traffic Case No.406 of 2011 Republic -vs- Peter Micheni Muguongowere hearsay when the same was produced by the consent of the parties herein.

(v) That the learned magistrate erred in law in failing to find that the appellant was entitled to indemnity and/or to recover any monies, costs and/or interest incurred in settling any judgment arising out of the policy of insurance No.7001109.

(vi) That the learned magistrate erred in law and in fact in finding that the appellant failed to carry out due diligence before issuance of the policy of insurance and failed to take into account the doctrine of uberima fides imposed on the Respondent.

(vii) That the learned *magistrate erred in law and fact in finding that the policy was a standard document prepared by the appellant and the Respondent was never accorded an opportunity to comprehend the same hence applied the contra proferentem rule against the appellant.*

(viii) That the learned magistrate erred in law and in fact in failing to strictly apply the terms of the policy agreement between the parties and in effect re-wrote the terms of the contract and arrived at erroneous conclusion.

(ix) That the learned magistrate erred in law in failing to properly consider the provisions of the Insurance (motor vehicle Third Party Risks) Amendment) Act 2013 in arriving at the determination.

***(x) That the le*arned magistrate erred in law in disregarding the rules of evidence and admitting evidence that was not formally produced in court.**

(xi) That the learned magistrate erred in law in finding that the provisions of Civil Procedure Rules and the rules of evidence are mere technicalities which can be disregarded.

(xii) That the appellants submissions and authorities were not considered.

(xiii) That the learned magistrate erred by not upholding the doctrine of precedent.

8. In its written submissions done through its learned counsel ***Mohammed Madhani & Co,*** the appellant has canvassed grounds 1, 2, 8 and 9 of the memorandum of appeal together. The appellant contends that the Respondent breached the insurance policy but that the learned magistrate failed to consider the evidence adduced. The appellant has given the particulars contained in the proposal form tendered as P Exhibit 1 during trial and reiterated that the Respondent breached the terms therein and has highlighted to the lack of valid driver's license or PSV license on the part of the Respondent which in its view was a clear breach entitling the appellant to repudiate liability.

9. The appellant's counsel has cited the decision in ***National Bank of Kenya - vs- Pipeplastic Samkolit (K) Ltd & Another*** where they submit that the court held that a party should not be allowed to escape from a bad bargain. In its contention parties should be bound by the terms of the contract and that courts should not intervene in the freedom of parties in a contract.

10. It is submitted that the Respondent covenanted through insurance contract that only authorised driver as defined in the policy would drive the insured motor vehicle and that by driving said motor vehicle without valid license the Respondent breached the law and the terms of the policy by not adhering to the principle of ***uberima fides***. (utmost good faith). The appellant has relied on the decision in ***JUBILEE INSURANCE C0. LTD -VS- OMBAKA [1972] EA*** and submitted that they were entitled to repudiate liability as held in the above case because the driver was unlicensed and unauthorised . It is contended that the policy extended only to authorised driver and the exception excluding liability under the law did not operate to extend the policy to cover what was not agreed.

11. The appellant further contends that that the Respondent failed to disclose material facts when entering into insurance contract with it and has contended that it is entitled to avoid the cover by virtue of **Section10(6**) of the Insurance (Motor Vehicle Third Party Risks) Act. The appellant on this ground is seeking a declaration that it was entitled to avoid the policy due to non-disclosure and misrepresentation.

12. The Respondent has not directly responded to the above issues in the cited grounds of appeal. Instead he as reiterated that as far as he is concern this court should simply determine whether or not there was a valid insurance contract between him and the appellant at the material time (14th August 2011) when the accident occurred.

13. The Respondent has contended that the appellant failed to prove the allegations of policy breaches during trial as the sole witness called to testify in his view did not witness the signing of the proposal form or the policy document. The Respondent contends that the appellant's witness one **JOAN OBURU** merely gave evidence on what she was told or read on the proposal form and policy document and that her evidence was admissible and cited the decision in ***MINET ICDC INSURANCE BROKERS LTD -VS- CLETO KITHURE (NBI HCCC NO. 5042 OF 1989)*** to back up his contention.

14. The Respondent has further contended that the proceedings in a traffic case ***No. CHUKA CMC TR CASE NO. 406 of 2011*** were not admissible as in his view the same did not satisfy the conditions specified under **Section 34** of the **Evidence Act**. He has contended that the appellant at the trial did not lay foundation to rely on the traffic proceedings before tendering them in evidence.

15. Before I delve on the other grounds and issues in this appeal, it is convenient, for ease of reference, to delve on them and determine them as framed in the appellant's submissions. Grounds 1, 2, 8 and 9 of the appeal in my considered view raises two issues;

(a) whether the Respondent breached the insurance policy terms through non disclosure of material facts.

(b) Whether the appellant tendered sufficient evidence to demonstrate that it was entitled to repudiate liability.

(**a) whether the Respondent breached insurance contract**

16. There is no dispute that an accident occurred on 14th August, 2011 involving the Respondent's motor vehicle Registration No.KAW 351E and at that material time the Respondent had a valid insurance cover issued by the appellant and which cover a period of between 19th July, 2011 and 18th August 2011 as per the policy document tendered during trial. The contested issue is that the Respondent breached the terms of the contract through non disclosure of material facts and more specifically that he failed to disclose that he did have a valid driver's licence, PSV and TLB hence all of which were statutory requirements. While the appellant has faulted the trial magistrate for not finding that there was material breach, a court of law makes its decisions based on the evidence tendered and the law.

17. This court has perused through the evidence tendered in respect of the alleged breaches by the Respondent I have noted from the proposal form contained in the documents marked P Exhibit 1 in specifically in the column headed ***"particulars of authorized driver"*** and noted that in the space provided for details of the authorised driver's PSV licence and drivers licence it is marked ***"A.A.D".*** The appellant at the trial did not adduce evidence or explained what ***"A.A.D"*** indicated in the proposal meant. It is a matter of conjecture in my view to contend that on the basis on the information provided in the proposal form, the Respondent failed the ***uberima fides*** rule. The appellant was under an obligation to place before the trial court evidence that meets the legal threshold (on a balance of probabilities that the Respondent was guilty of non disclosure of material facts when entering into the insurance contract.

18. I have further re-evaluated the evidence tendered in regard to the alleged breaches during trial and noted firstly that the appellant's witness was simply relying on secondary or indirect evidence in regard to the alleged policy breaches by the Respondent. When put to task during cross-examination to establish that the Respondent did not have driving licence, the witness stated;

> **" According to Kenya Revenue Authority, he (Respondent) was licenced to drive heavy commercial vehicles of classes B C & E. He was also required to have A and/or J as well as the P.S.V. In the proposal form he only talks of the PSV licence."**

The above clearly shows that the witness was relying on hearsay evidence because no evidence was tendered from K.R.A to establish the facts.

19. Secondly the appellant's sole witness majorly relied on traffic proceedings against the appellant in ***Chuka CM Traffic Case No.406 of 2011*** where the Respondent faced 10 various counts of traffic offences. The Respondent has contended that the evidence was inadmissible in law by virtue of **Section 34** (1) of the **Evidence Act.** I have looked at the provisions of **Section 34 (1)** of the **Evidence Act** which relates to admissibility of evidence given in a previous proceedings. The cited provisions states;

> **"34(1) Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding, or at a later stage in the same proceeding, for the purpose of providing the facts which states, in the following circumstances-**
>
> **(a) where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable....."**

The evidence tendered regarding the traffic proceedings appears to have been improperly tendered as the appellant did not state why an officer attached to the traffic court's registry could not be summoned to tender the evidence. The Respondent was also robbed of an opportunity to cross examine the court officer who could have properly tendered the evidence. The evidence tendered as a result failed to meet the admissibility threshold and was of no probate value to the appellant.

20. Thirdly and more importantly is the fact that even if I was to find that the traffic proceedings were properly tendered and were admissible in law, the final decision of the traffic court was not tendered to show, if at all, the respondent was found guilty of any of the counts the Respondent faced. The offences upon which the respondent was charged, related to causing death by dangerous driving contrary to **Section 46** of the **Traffic Act** (Cap 403 Laws of Kenya). I have perused through the copy of the charge sheet attached to the proceedings from the lower court and in particular the amended plaint and I have not seen the counts relating to Respondent's lack of driving licence or TLB as alleged by the appellant. In sum this court finds that the evidence tendered at the trial did not meet the legal threshold in proving that the Respondent was guilty of any breach in the terms of insurance policy or any material non disclosurer that misled the appellant to issuing a cover for him. The trial magistrate was correct to find that the traffic proceedings were not properly tendered in evidence and the evidence tendered by appellant's witness was mere hearsay. The appellant simply failed to prove its case in respect to claims of breaches of contract and/or non disclosure of material facts by the Respondent.

21. b) **whether the appellant tendered sufficient evidence to demonstrate that it was entitled to repudiate liability.**

The appellant has cited the provisions of **Section 10 (c)** of the insurance **(Motor Vehicle Third Party Risks) Act Cap 405** Laws of Kenya) and stated that they are entitled to repudiate liability on account that the Respondent failed to rule of ***uberima fides*** when applying for insurance cover. It is however a rule of evidence that whoever alleges must prove. The Respondent states that he sought for insurance cover and obtained one through an insurance agent upon paying the requisite charges/premiums. So while I agree that **Section 10 (4**) of the **Insurance Act** provides for instances where an insurer can validly and legitimately avoid an insurance policy, the insurance has an obligation to prove that the exceptions provided under the cited section apply. In this instance however the appellant failed to place sufficient evidence before the trial court that it was entitled to repudiate liability. The learned trial magistrate correctly found that the appellant should have been diligent enough. The ***contra proferentem*** rule in my view though not expressly stated at the trial court was nevertheless applied. It is the appellant who prepared the policy document and the proposal form which the trial court correctly stated, are

ordinary standard forms filled as a formality at the time an insurer is paying the insurance premiums. It is upon the insurer who at that time obviously occupies an advantageous position to exercise due diligence. If it fails to do so then he cannot be expected to turn back and say it is avoiding responsibility because of a hidden clause in the insurance policy especially if an insurer paying was oblivious about the clause. Accepting premiums without much ado and later failing to provide the cover when the need arises owing to hidden clauses or looking for excuses to avoid the policy in not fair or equttable.

22. The appellant has submitted that the learned magistrate failed to adhere to rules of evidence and civil procedure and delved on irrelevant factors thereby arrived at erroneous determination. This contention covers ground 3, 4, 10 and 11 of the memorandum of appeal herein.

This court has already rendered itself on the provisions of **Section 34** of the **Evidence Act** particularly in regard to the traffic proceedings against the Respondent herein. Those proceedings in my view are incomplete and inclusive in so far as what the Respondent had been charged with in the traffic case. The appellant states that the traffic proceedings were produced by consent and therefore admissible but even if they were admissible of what probative value are they in relation to what the respondent was charged with? The answer is not much and even if I was to be pursuaded by the decision in ***EUNICE AYUMA ONYANGO -VS- SALIN AKINYI OLUCH [2015] eKLR*** a decision relied on by the appellant, I would still arrive at the same conclusion for the aforesaid reasons. The traffic case in the cited decision had been concluded and a determination made unlike the situation in instance where this court has not been told with certainty the nature of traffic charges preffered against the appellant and whether he was found guilty or not. The court finds that the grounds 4, 10 and 11 for the aforesaid reasons cannot hold any water.

23. The learned trial magistrate has also been faulted by the appellant for placing too much weight in her judgment on the issue of excess passengers. I have however noted that the issue of excess passengers was pleaded by the appellant in its pleadings before the trial court and it was one of the grounds upon which the appellant sought repudiate liability to compensate the victims of the accident. The trial court found that the issue of excess passengers had not been proved because the investigating officer did not give evidence about the motor vehicle having carried excess passengers. The trial court analysed the evidence placed before it in regard to the issue of excess passengers and came up with a conclusion which in my view was correct. I do not find any evidence that the issue had been abandoned because it is well captured even in the amended plaint. The trial magistrate cannot be faulted for making a finding on an issue that is clearly pleaded.

24. The appellant has also faulted the trial court for giving weight to a drivers licence exhibited by the Respondent when the same was expunged from the record. I have looked at the evidence tendered by the Respondent at the trial and he appears to have relied on the documents which included his driving licence for classes BCE of motor vehicles. The Appellant's claim against the Respondent however was that he was not authorised to drive PSV motor vehicle and that he did not have a valid PSV licence and TLB licence. It is a rule of evidence that whoever alleges existence of fact must prove that fact if he/she wants the court to rely on the alleged fact and rule in his/her favour as provided under **Section 109** of the **Evidence Act**. As I have already observed above though the appellant stated that the Respondent was in breach of the law and terms of insurance policy, there was no sufficient evidence placed before the trial court to support that contention. The decision in the cited case of ***DELTA HAULAGE SERVICES LTD -VS- COMPLAST INDUSTRIES LTD & ANOTHER (NBI HCC NO. 1058 of 2006)*** has been considered by this court and I find that the same does not take away the obligation by the plaintiff to prove his case to the required standard.

25. This court also finds that the appellant's contention that the learned trial magistrate erred by relying on Respondent's documents which had been expunged from record is not supported by the proceedings. The proceedings from the trial court on 20th September 2016 show that the Respondent (who was the defendant) was allowed;

> **"to retain the defendant's statement dated 19th September 2016."**

In that statement the appellant stated that he was a holder of a valid driving licence. At the defence hearing he told the trial court, ***"I had a driving licence No.1845354. I obtained it on 2nd April , 1997 classes BCE (Refer to letter dated 26th August, 2011 from Kenya Revenue Authority by Plaintiff - DLJ read out) allowed to drive class BCE in 1997."***

It is true that the motor vehicle driven by the Respondent and involved in the accident was a matatu and **Section 4** of the **Traffic Act Cap 403** clearly states that matatu are in a different classification grouped under ***"J"*** in that section. However the question or the issue before the trial court was not whether or not the Respondent held a valid drivers licence to drive a matatu as framed by the appellant but rather whether it was erroneous for the trial magistrate to hold that the issue should have been addressed prior to issuance of the insurance cover which is an issue I have already rendered myself on here above. The trial court held that due diligence on the part of the appellant being the insurer was to ensure that all conditions were met prior to issuing the insurance cover and this court has upheld the trial court's determination that having issued the cover the ***"contra proferentem"*** rule kicked in to stop the appellant from turning back.

26. The provisions of **Section 10(4)** of Insurance Act of course provides exception to the above rule as it provides that;

> **"No sum shall be payable by an insurer under foregoing provisions (which dictates duty of insurer to satisfy judgments against persons insured) of this section if in an action commenced before or within 3 months after the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provisions contained a declaration that, apart from any provisions contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact that was false in some material particular, or if he has avoided the policy on that ground, that he was entitled so to do apart from any provisions contained in it."**

If you proceed to **subsection 6** of the same section, the law goes ahead to define what is meant by the word ***"material"*** and it is stated it is something of ***"a nature to influence the Judgment of a prudent insurer in determining whether he will take the risk, and if so, at what premium"***. This in my considered view is what the learned trial magistrate considered in determining that an insurer cannot go back on his word. The provisions of **subsection 6** gives an exception to only situations where the insurer is entitled to avoid or cancel a cover or has

avoided or cancelled a policy and **Section 10(2) a, b** and **c** gives a prescription of those situations. Those situations did not obtain in respect to the appellant herein at the time of trial and do not obtain even at this stage. This court is pursuaded by the decision of ***MINET ICDC INSURANCE BROKERS LTD -VS- CLETO KITHURE***