



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL SUIT NO. 16 OF 2010

REHEMA KORIOMAT INVESTMENT LIMITED.....PLAINTIFF

VERSUS

REAL INSURANCE COMPANY LIMITED.....DEFENDANT

JUDGMENT

1. The plaintiff craves *five* reliefs in the *amended plaint*. First, for a *declaration* that *Real Insurance Company Limited* (the defendant) should indemnify the plaintiff for loss of motor vehicle registration number KAY 018F; secondly, the sum of Kshs 6,976,400 being the value of the vehicle; thirdly, Kshs 692,000 being loan installments due to NIC Bank from 28th October 2009 till full payment; fourthly, loss of profits of Kshs 200,000 per month from the same date; and, lastly for costs and interest.

2. The original suit was filed on 3rd February 2010. An *amended plaint* was filed with leave of court on 6th April 2011. The facts of the case are fairly straightforward. The plaintiff was the owner of a *Mitsubishi* lorry registration number KAY 018F (hereafter *the suit vehicle*). On 28th October 2009, the vehicle was *stolen* while in the custody of the plaintiff's driver, *Isaac Rono*. It was never recovered.

3. On 21st May 2007, the defendant had insured the vehicle against loss. The *terms* of the policy are however in dispute. The plaintiff asserts that it was a commercial policy covering *all* risks to the vehicle and its cargo. The defendant contends that the policy *only* covered the conveyance of *farm related goods* belonging to the *plaintiff*; and, not for *hire* or carriage of goods belonging to *third parties*.

4. By an *amended defence* dated 7th February 2012, the defendant denied the claim *in toto*. In particular, the defendant accused the plaintiff of fraud or misrepresentation; ferrying unauthorized goods; and, hiring out the vehicle against the terms of the policy. The *misrepresentation* is for failure to disclose the intended use. The *fraud* is for paying a lower premium than the one due for the risks. The defendant asserts that it is *not* bound to indemnify the plaintiff or meet the other claims in the plaint.

5. The plaintiff called one witness, *Barnabas Kiprono* (PW1). He is a director of the plaintiff. He relied on a witness statement dated 27th February 2012. He also produced a list of documents filed on 29th February 2012 (exhibit 1). He stated that the suit vehicle was bought through a hire purchase loan from *NIC Bank* in 2007. The consideration was Kshs 6,976,400. The chattels mortgage required the vehicle to be insured. The plaintiff took out comprehensive cover from the defendant. The premium was Kshs 315,391 per annum. He testified that the plaintiff faithfully paid the premium and the hire purchase installments of Kshs 138,000 per month. He said the net profits were Kshs 200,000 per month.

6. The witness stated that on 29th October 2009, the lorry was stolen in Eldoret town. A report was made

to the police. The lorry was not recovered. The plaintiff gave notice to the defendant and the bank. The defendant refused to indemnify the company. The plaintiff was forced to repay the bank arrears of Kshs 690,000. The plaintiff thus claims for the value of the lorry of Kshs 6,976,000; the bank charges; and, loss of profits as particularized in the plaint.

7. Upon cross examination, PW1 replied as follows-

“The lorry was stolen. It had been parked.....at Total Petrol Station in Town Centre Eldoret at night.....Mr. Ruto Isaac was my driver that day. My driver in his statement said he was robbed at gun point. In the insurance proposal, use of vehicle [is] to carry “farm related goods”. I am a farmer. I did not notify the insurer that I had a contract with Unga Limited for carrying their goods. I would buy maize from them and sell the maize. I did not have a contract. Benjamin Tallam wrote to REAL disclosing the contract. I am aware of the letter. This is his signature. It says “we were contracted by Unga since 2000”. The nature of my business required a contract to buy or to sell them maize. I confirm I made a full disclosure. When I delivered goods to Kakamega for Unga, I was paid. It was in tandem with the insurance.”

8. The witness clarified that he was transporting maize from *Unga Limited* to Kakamega. He emphasized that he stated in the proposal form that the lorry would ferry “farm related goods”. In his understanding, this was a “commercial or business” policy. That marked the close of the plaintiff’s case.

9. The defendant’s sole witness was *Leonard Onsare (DW1)*. He is a *claims supervisor* in Britam General Insurance, the successor to the defendant. He relied largely on a witness statement dated 22nd March 2017. He said that the plaintiff misled the defendant to believe that the vehicle would be used to “ferry own farm related goods”. He referred to page 1 of the proposal. He said the plaintiff’s answered question (e), whether the vehicle was for hire, as “N/A”. He said that on the strength of that answer a *normal commercial policy* was issued.

10. Upon cross examination, he said that he did not have the report made by their investigator. But he referred to a letter addressed to the defendant’s claims manager by Benjamin K. Tallam. Benjamin confirmed that the goods in the stolen lorry were for hire. DW1 said the name of the person who filled in the proposal form was not indicated; but it was by the plaintiff company. He said the claim form states the vehicle was parked at the petrol station. It is not stated whether the vehicle was loaded or not. He said the driver stated that the lorry was parked after making deliveries.

11. He clarified that the letter dated 22nd December 2009 from Benjamin Tallam was a demand letter. It was on the letter head of Koriomat Investment Limited. He said that if the plaintiff had disclosed that the lorry would be hired for reward, the cover would have been different and attracts a higher premium.

12. All the parties have filed written submissions. Those by the plaintiff are dated 10th April 2017; those by the defendant were filed on 26th April 2017. I have paid heed to the pleadings; the evidence; and, the rival submissions.

13. From the pleadings and the evidence, the issues for determination are on a four-strand-

i. Whether the plaintiff obtained the policy of indemnity by misrepresentation or fraud;

ii. Whether the plaintiff is entitled to indemnity under the policy issued by the defendant; Paraphrased, whether the defendant is entitled to avoid the policy;

iii. Whether the plaintiff is entitled to further indemnity for loss of profits or recovery of loan payments on the lorry; and,

iv. Who will meet the costs of this suit?

14. I will begin by making *three* general propositions on the law of *contract*: Parties are bound by commercial agreements; and, they must keep their part of the bargain. Secondly, it is *not* the true province of the courts to rewrite contracts for parties. See Morris & Company Vs Kenya Commercial Bank [2003] 2 E.A 605 and National Bank of Kenya Limited Vs Pipeplastic Samkolit and another [2001] KLR 112.

15. Thirdly, the contract in the present case is one of *indemnity*. It is between an *insurance company* and a *policy holder*. It thus a contract *uberrimae fidei*. It is one of *utmost good faith*. See Margaret Nduta Kamithi & another v Kenindia Assurance Co. Ltd, High Court, Milimani, Nairobi Commercial case 37 of 2000 [2001] eKLR, Co-operative Insurance v David Wachira Wambugu, Court of Appeal, Nyeri, Civ. Appl. 66 of 2008 [2010] eKLR, Joel v Law Union & Crown Insurance (No. 2) [1908] 2 KB 883. The interpretation of the rights of the parties in this dispute must be underpinned by those *three* general legal principles.

16. The insured is required to give *true* and *full* information in the *proposal form* to enable the insurer gauge the *risk* it is undertaking. I have closely studied the *commercial vehicle insurance proposal form* for the period 21st May 2007 to 20th May 2008 (exhibit 1 [iii]). There is no contest that the plaintiff made the proposal. Never mind that the name of its employee, director or agent is not indicated. The insured is clearly stated to be *Rehema Koriomat Investment*. The motor vehicle is *KAY 018F*. The proposal form was the *basis* of the policy of indemnity issued by the defendant.

17. Question 4 (a) in the policy was: state fully the purpose for which the vehicle will be used. The plaintiff's answer was: *carrying goods; farm related goods*. Question 4 (e) was as follows: is the vehicle or trailer to be used for the carriage of passengers for hire or reward? The answer is indicated as *N/A*. I take that to be the abbreviation or short for *not applicable*.

18. When PW1 was under cross examination, he conceded as follows-

"In the insurance proposal, use of vehicle [is] to carry "farm related goods". I am a farmer. I did not notify the insurer that I had a contract with Unga Limited for carrying their goods. I would buy maize from them and sell the maize. I did not have a contract..."

19. I readily find that the lorry was ferrying goods under a contract for *Unga Limited*. The policy issued did *not* cover hire for reward. Again, in cross examination, the plaintiff's witness stated: *"The nature of my business required a contract to buy or to sell them maize. I confirm I made a full disclosure. When I delivered goods to Kakamega for Unga, I was paid. It was in tandem with the insurance."*

20. I stated that this contract is *uberrimae fidei*. It is one of *utmost good faith*. In the proposal form, the plaintiff was categorical that the vehicle would *not* be used for *hire or reward*. I have reached the conclusion that the plaintiff *misled* the insurer. True, wheat is a *farm related* produce. But the goods were being transported for a *third party* for *reward*. The defendant's witness was categorical that had the plaintiff disclosed that the lorry would be hired for *reward*, the cover would have been different; and, would attract a *higher* premium. The plaintiff was guilty of material non-disclosure. The vehicle was ferrying goods in breach of the proposal made to the insurer; and, the resultant policy of indemnity.

21. My answers to issues number i) and ii) that I framed above are as follows: The plaintiff obtained the policy of indemnity by *misrepresentation*; and, is accordingly *not* entitled to indemnity for the loss of the vehicle under the policy issued by the defendant. Paraphrased, the plaintiff *breached* the policy of indemnity; and, the defendant is entitled to *avoid* the policy.

22. Having so found, it follows as a corollary that my answer to issue number iii) that I framed above is in the *negative*: The plaintiff is not entitled to further indemnity for loss of profits of Kshs 200,000 per month; or, recovery of loan payments on the lorry amounting to Kshs 692,000. The upshot is that the plaintiff has failed to prove the claim on a balance of probabilities. The suit is *dismissed*.

23. Costs follow the event and are at the discretion of the court. In the interests of justice; and,

considering the predicament that has befallen the plaintiff, I order that each party shall bear its own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 23rd day of May 2017.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Mr. Aseso for the plaintiff instructed by Gicheru & Company Advocates.

Mr. Isiji for Ms. Nasimiyu for the defendant instructed by Mukite Musangi & Company Advocates.

Mr. J. Kemboi, Court Clerk.