REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 925 OF 2009

CANNON ASSURANCE (K) LIMITED……...PLAINTIFF

VERSUS

ALKASON TRANSPORTERS LIMITED……...……DEFENDANT

AND

MARTIN MWANGI NYUTHO……....1ST INTERESTED PARTY

SHADRACH RUTHERFORD AMBICHE.….2ND INTERESTED PARTY

BEATRICE WAMBUI NAURU……...…..3RD INTERESTED PARTY

JUDGEMENT

1. Cannon Assurance (Kenya) Limited (**The Plaintiff**) asserts that Alkason Transporters Limited (**the Defendant or insured**) obtained from it a Policy of Insurance being Policy No.02/08/010350/07 (the policy) by non-disclosure of a material fact or facts or representation of fact which were false in material particular. The Plaintiff seeks to avoid the terms of the said policy.

2. In a Plaint presented to Court on 21st December, 2009, the Plaintiff avers that by a Proposal Form and Declaration dated 22nd March 2007, the Defendant requested the Plaintiff to issue to it a Commercial Vehicles Policy of Insurance against Statutory Liabilities under the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 (hereinafter the Act) in respect to two Motor vehicles registration numbers KAX 784N and KAX 694N.

3. Amongst the questions in the form to be answered by the Defendant was question No. 7 which required the Plaintiff to state fully the purpose to which the vehicle would be used and the general nature of goods to be carried. To this question the Defendant answered 'own goods'. The Defendant signed a declaration contained in the proposal to the effect that the Statements and Particulars stated therein were true and that the proposal and Declaration shall be the basis of the proposed Contract between the parties.

4. Pursuant thereto to and in reliance upon the truth of the Representations contained in the form and in consideration of payment of the requisite premium, the Plaintiff issued the Policy to the Defendant for a period of 12 months from 27th March, 2007. In terms of the Policy, the Plaintiff would indemnify the Defendant, inter alia, sums which the Defendant would become legally liable to pay in the event of an accident caused by or arising out of the use of the vehicles in respect of the death or of bodily injury to

any person being a liability as it is required to be covered by a Policy of insurance under Section 5(b) of The Act.

5. On or about 6th December, 2008, the Defendant's Motor vehicle registration Number KAX 784N was involved in an accident along Nairobi-Mombasa Road with Motor vehicle KBB 232F in which at least 8 passengers in the latter motor vehicle sustained fatal injuries. At the time of the accident the vehicle was carrying goods in transit belonging to SDV Transami (k) Ltd.

6. The Plaintiff seeks to avoid the said Policy on the grounds that the Defendant intended to use or did the insured vehicle for carriage of goods for hire and reward which was contrary to, and in contravention of the Policy terms and conditions.

7. The Plaintiff prays for judgement as follows:-

a) A declaration that the Plaintiff is and has at all material times been entitled to avoid the aforesaid policy of Insurance No.02/08/010350/07 apart from any provisions contained therein on the ground that the said policy of insurance was obtained by:-

i. The non-disclosure of a material fact or facts or

ii. Representation of fact which were false in material particular(s) or

iii. Both (1) and (2) above.

b) A declaration that it is not liable to make any payment under the aforesaid policy of Insurance No.02/08/010350/07 in respect of any claim or claims against the defendant herein arising out of injuries sustained in the accident which occurred on/or about 8th December, 2008 involving Motor Vehicle Registration Numbers KAX 784N and KBB 232F.

c) Costs of this suit.

8. The insured has resisted the Claim and avers that the proposal form was for a 'Commercial Vehicle Proposal Form' for vehicles used for Commercial and Businesses. The contention by the Defendant is that any policy that was to be issued by the Plaintiff was to cover the Defendant's vehicles for Commercial and Business purposes. It denies obtaining the policy by non-disclosure of material fact or facts as alleged by the Plaintiff.

9. The Defendant asserts that the Plaintiff is legally liable to indemnify it for any third party risks provided for in the Policy for the period covered therein it being the Defendant's case that the issue of whether it was carrying its own goods or Clients goods was not a material factor which would have induced the Plaintiff or any reasonable insured to decline to issue the said Policy or increase the premium.

10. In a sum, the Defendant states that the suit does not disclose any material non-disclosure or misrepresentation within Section 10(6) of The Act and the Plaintiff is therefore not entitled to avoid the Policy under Section 10(4) thereof.

11. The Defendant further avers that the Plaintiff has not issued the mandatory Notice required under Special Condition 7 of The Policy.

12. The hearing of this matter was not involved and the evidence was straightforward.

13. Lawrence Mutinda (PW1) is a Senior Claims Supervisor of the Plaintiff Company. In his evidence in chief he reiterated the Plaintiffs case as set out in the Plaint. His evidence was that had the Defendant been candid, then the Plaintiff would have issued it with a General Cartage Policy. He explained that a General Cartage Policy is in respect to transporting of goods for hire and reward as opposed to Commercial Own Goods Policy. That the General Cartage Policy is more expensive because the risks are

bigger.

14. Answering questions in cross-examination, PW1 clarified that the period of cover for Motor vehicle KAX 784N was from 27th March 2007 for a period of 12 months whereafter it was renewed upto March 2009. No other documents were signed at renewal.

15. The witness stated that a 3rd Party Policy covers 3rd Party injuries to property or persons.

16. His evidence was that risk determined premium and that the material consideration is the exposure/risk. His evidence was that while Third Party risks are the same whether the vehicle was transporting Owners goods or Third Party goods, the exposure in two would be different as there would be a hurry in transporting Third Party goods.

17. It was only after investigations were carried out that the Plaintiff learnt that the vehicle was carrying 3rd Party goods. However the Investigation Report was produced in Court. The Notice of Repudiation dated 9th October, 2009 was issued to the Insured Agent, Muko Insurance Agency (Plaintiff Exhibit page 23). Thereafter this suit was filed on 21st December 2009.

18. Mohammed Abubakar is the Managing Director of the Defendant Company. Just as the witness for the Plaintiff, he too reiterated the contents of Defendants pleadings.

19. His evidence is that he could not recognize the signatures on the Proposal Form. That the signature was neither his nor of any of the Directors of the Company.

20. His evidence was that the Plaintiffs issued to his Company with a Commercial vehicle Policy. In his understanding 'own goods' meant the vehicle was not being leased to a 3rd Party or contracted out. In cross-examination the witness was referred to schedule of the Policy Document. Under Limitations as to use it read,

> **'as per the attached Limitations as to use clause CARRYING OWN GOODS'.**

He admitted that at the time of the accident, the goods under transport belonged to SDV Transami and that the goods were for hire and reward.

21. It was his testimony that the space provided for in the proposal called for a short answer and his understanding of '***own goods***' was, goods belonging to 3rd Parties as the Defendant Company was a Transporter. That the name of the Company suggested that it was a Transporter.

22. Questions were put to the witness in respect to the Motor Accident Report Form (P Exhibit Page 20) that was filled out by Defendants after the accident. In the space provided for the Name of the Owner of goods being carried at the time of the accident, the Company stated '*OWN GOODS'*.

23. The witness informed Court that the Company had take out other Insurance Policies with the Plaintiff and this included a separate Goods in Transit Policy which insures goods transported on behalf of the Clients.

24. At the close of hearing, both sides filed written submissions which the Court shall discuss as it evaluates the evidence before it. The parties herein had agreed that the issues to be determined are as follows:-

> 1. Did the Defendant obtain the Policy of Insurance No.02/08/010350/07 from the Plaintiff by non-disclosure of material information and/or by misrepresentation of facts?
>
> 2. Was the proposal form and declaration contained therein the basis of the material contract for insurance between the parties herein?

3. Did the policy of Insurance referred to in(1) above cover carriage of goods for hire and reward as carried in the Defendant's motor vehicle registration number KAX 784N when it was involved in a collision with motor vehicle registration number KBB 232F on 6th December 2008?

4. Did the Defendant use the vehicle in (3) above for the carriage of goods for hire and reward on the material day of the accident?

5. Whether the Plaintiff is liable to cover all third party claims arising out of use of the motor vehicle for commercial and business purposes and indemnify the Defendant for any loss suffered as a result of any accident that occurred during the period of cover?

6. Whether the Plaintiff is entitled to avoid the Commercial Vehicle Policy under Section 10(4) of the Insurance (Motor Vehicle Third Party Risks) Act/

7. Whether the Plaintiff is entitle to avoid the contract of Insurance?

8. Whether the Plaintiff has any grounds to avoid the policy without issuing the mandatory notice required under special Condition 7 of the Commercial Policy?

9. Is the Plaintiff entitled to the reliefs sought herein?

10. Who should bear the costs of this suit?

On my part, I do not think that the resolution of this matter requires a determination of all these issues. This decision will turn on one or two issues that the Court considers as decisive.

25. An enduring feature of a Contract of Insurance is that it is a Contract *uberrimae fidei*, that is, of utmost good faith. For that reason each party is required to disclose material facts and not to misrepresent any before the Contract is concluded. The rationale for this expectation was well set out in the often quoted passage by Lord Mansfield in the case of **Carter Vs. Boehm** 1766 3Burr 1965:-

> **"Insurance is a contract upon speculation. The special facts upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the underwriter trusts to his representation, and proceeds upon the confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risque as if it did not exist".**

26. Once there is non-disclosure or false representation of facts then the Insured is entitled to avoid the whole Contract. And it need not matter whether the non-disclosure of material facts or the misrepresentation was deliberate or through mistake. However, and generally, so as to be entitled to avoid the Contract, the Insurer must meet two criteria as set out in **Pan Atlantic Insurance Co. Ltd and another vs. Pine Top Insurance Co. Ltd** [1994] 3 ALL ER 581, at page 638:-

> **"If your Lordships accept this conclusion, the position will be as follow. Whenever an insurer seeks to avoid a contract of insurance or re-insurance on the ground of misrepresentation or non-disclosure, there will be two separate but closely relate questions. (1) Did the misrepresentation or non-disclosure induce the actual insurer to enter into the contract on those terms? (2) Would the prudent insurer have entered into the contract on the same terms if he had known of the misrepresentation or non-disclosure immediately before the contract was concluded? If both questions are answered in favour of the insurer, he will be entitled to avoid the contract, but not otherwise".**

27. The Policy in question was issued under the Provisions of the Insurance (Motor vehicle Third Party Rules) Act Cap 405 Laws of Kenya. Section 10 of that Act imposes a duty on an Insurer to satisfy third party judgements against persons insured. However ,Section 10(4) provides instances when an Insurer is entitled to avoid that duty and reads:-

"No sum shall be payable by an insurer under the foregoing provisions of this section if in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy <u>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 which 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 provision contained in it</u>:

Provided that an insurer who has obtained such declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto". *(my emphasis*)

28. The all important term 'material' for purposes of Section 10 is defined as follows in Section 10(6);

"In this section, "material" means of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk, and, if so, at what premium and on what conditions; and "liability covered by the terms of the policy" means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel, or has avoided or cancelled, the policy".

The observation that needs to be made is that this statutory test of materiality is similar, if not the same, as the criteria set out in **<u>Pan Atlantic Insurance co. Ltd</u>** Supra (see paragraph 26 of this decision).

29. The gist of the Plaintiffs case, as I understand it, is that the answer to question No. 7 of the proposal form was material. The question was as follows,

"State fully the purpose to which the vehicle will be used and the general nature of the goods to be carried".

To this the Defendant answered, "Own Goods".

30. The Defendant concedes that it was a Transporter and that the insured vehicle would be used to carry goods for hire on behalf of third parties as a Commercial Transporter. Indeed, at the time of the Accident the vehicle was carrying goods belonging to SDV Transami, a third party. DW1 explained why the Defendant gave the answer 'OWN GOODS". He testified,

"clause 7 'OWN GOODS' means the vehicle is not being leased to a 3rd party or contracted out".

Later,

My understanding of "OWN GOODS" is Goods belonging to 3rd parties as I am a Transporter"

31. In my own assessment, the Defendant gave a misleading answer either deliberately or by mistake because as a matter of common sense and parlance, "OWN GOODS" cannot mean goods belonging to third parties. In addition the Defendant already maintained a 'Goods in Transit' Policy which insured goods transported on behalf of Clients. Surely, the Defendant would know the difference between 'Own goods" and "3rd party goods". That answer can amount to non-disclosure if one considers that the Defendant would also be transporting third party goods or misrepresentation if taken that the Defendant would be solely carrying third party goods.

32. Yet that would not be sufficient for the Plaintiff to avoid the Policy because the Plaintiff is required by the express provisions of Section 10(4) of The Act to establish that the non-disclosure is material or the misrepresentation is in respect to a material particular. And in doing, as said earlier, so one must bear in mind the meaning of 'material' as assigned to it Section 10(6). It also has to be remembered that the inclusion of the question in the proposal form is not *ipso facto* a demonstration that it is material. For the matter at hand, the test is set out in Section 10(6), that is whether the information given by the Insured was of such a nature as to influence the Judgment of a prudent Insurer in determining whether he will take the risk and if so, at what premium and on what conditions.

33. The evidence of the Plaintiff's witness was that had the Defendant made a candid and full disclosure then it would have issued it with a General Cartage Policy. He explained that a General Cartage Policy is in respect to transporting of goods for hire and reward as opposed to a Commercial owns Goods Policy. He further explained that the exposure under the two Policies is different because the risk in carrying third party goods is higher because of the hurry in transporting them.

34. My understanding of this evidence is that in the absence of the non-dis-closure or misrepresentation, the Plaintiff would have taken up the risk albeit under a different type of Policy which attracted a higher premium. What the Plaintiff failed to do was produce a sample of the General Cartage Policy so as to demonstrate that it actually exists and its distinction from the Commercial Owns Goods Policy. The Plaintiff never led any other evidence or credible evidence to establish the alleged dissimilarity of the two Policies. Further, other than his word of mouth, that the General Cartage Policy would be more expensive, PW1 failed to provide any documentary evidence that would back this assertion and give some specifics on the pricing Policy.

35. In a sum, the Plaintiff failed to establish that, had the Defendant disclosed that it would be carrying third party goods, then it would have issued the Defendant a Policy required under the Act but on different premium and conditions other than those in the subject policy.

36. In closing this Court makes two observations. It had been pleaded by the Defendant that the Plaintiff had not issued the mandatory Notice required under Special Condition 7 of the Policy. Special Condition reads:-

> **"The Company may cancel this Policy by sending seven days' notice by registered letter to the Insured at his last known address and in such event will return to the Insured the premium paid less the pro-rata portion thereof for the period the Policy has been in force or the policy may be cancelled at any time by the Insured on seven days' notice and (provided no claim has arisen during the then current period of Insurance) the Insured shall be entitled to a return of premium less premium at the Company's Short Period rates for the period the Policy has been in force".**

This Condition is in respect to cancellation of policy in the normal cause of business and not on account of breach of contract. This may not be relevant here because the Plaintiff did not purport to cancel the Policy, it intended to avoid the policy.

37. In the course of the hearing and at submission the Defendant made the argument that the Plaintiff could not avoid liability in respect to third party claims because of its failure to give the notice required under the proviso to Section 10(4) of The Act. It provides:-

> **"No sum shall be payable by an insurer under the foregoing provisions of this section if in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision 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 which 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 provision contained in it:**

Provided that an insurer who has obtained such declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto"

38. In the Defence, mention of Section 10(4) of the Act is made in this limited sense,

"The Defendant states that the Plaintiff is not entitled to avoid the Commercial vehicle Policy under section 10(4) of The Act as alleged in paragraph 14 of the Plaint".

Non-issuance of the Notice is not set up as a Defence. The provisions of Order 2 Rule 4 of The Civil Procedure Rules requires that a Defence of this nature be specifically plead. The Defendant would therefore not be entitled to rely on this defence.

39. Otherwise for reasons stated earlier the Plaintiffs case fails with costs to the Defendant.

Dated, Signed and Delivered in Court at Nairobi this 22nd day of June, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Mwalimu h/b for Mshila for Plaintiff

Agwara h/b for Issa for Defendant

Alex - Court clerk