



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 105 OF 2012

THOMSON KERONGO.....APPELLANT

VERSUS

KENYA ORIENT INSURANCE CO. LTD.....RESPONDENT

JUDGMENT

1. The appellant herein Thomson Kerongo was the plaintiff in CMCC. At Kisii Civil suit No. 324 of 2010. In an amended plaint dated 18th August, 2010 he filed a suit against the respondents claiming:
 - a. A declaration that motor vehicle registration No. KAE 379V is a total loss and should be declared a write off.
 - b. A declaration that the defendant is bound to indemnify the plaintiff with the pre-accident value of motor vehicle registration No. KAE 379V, to with kshs.355,000/- three hundred and fifty five thousand only.
 - c. Cost of towing motor vehicle registration number KAE 379V from the site of the accident to Ogembo Police Station kshs.10,000/-.
 - d. Cost of hiring alternative means of transport at kshs. 3,500 per day since 21st December, 2009 until payment thereof in full (and this continues to accrue at this rate till payment in full).
 - e. Assessors fees of kshs. 5,220.
 - f. Costs of this suit.
 - g. Interest on (b), 9c), (d), (e) & (g) above at court rates from the date of filing suit till payment thereof in full.
 - h. Any other and/or further relief that this honourable court may deem just and expedient to grant.
2. The cause of action is captured from paragraph 4 of the amended plaint where the appellant averred.

“At all material times, the plaintiff’s motor vehicle registration Number. KAE 397V was insured under a comprehensive insurance policy with the Defendant’s company, vide policy No. NKU/101/014999/2009, for which the plaintiff has fully paid premium of kshs. 15,000 through the defendant’s agent known as MAKI INSURANCE AGENCY.

MAKI INSURANCE AGENCY being the agent of the defendant with full instructions received and or acknowledged kshs.15,000 on 29th September, 2009 and issued the defendant’s policy No. NKU/101/014999/2009CON. POR MOTOR VEHICLE REGISTRATION NO. KAE 379V HONDA CIVIC from the plaintiff.

It was an express and/or implied term of contract of insurance between the plaintiff and the defendant aforesaid that in the event of a motor vehicle being damaged as a result of the accident, overturning, theft, malicious act, burglary, house breaking, while in transit by road, rail, lift or inland water way external explosion, self-ignition, lighting, theft and/or fire, the defendant herein would pay and or ensure that appropriate repairs were made to the motor vehicle to restore it as far as possible to its pre-accident condition.

On or about the 21st day of December, 2009 and during the currency of the insurance over here the plaintiff's motor vehicle registration No. KAE 379V HONDA CIVIC had self explosion and/or fire along Kisii-Ogembo-Sengera road near Omoringamu whereby his motor vehicle burnt down to shell as a result of which it was extensively damaged and became a total constructive loss'.

3. The appellant particularized particular as breach on the part of respondent as follows:

Failing to honour the terms and conditions of the policy contract.

- a. *Failing to release policy documents in time as per the policy contract.*
 - b. *Failing to access the motor vehicle KAE 379V*
 - c. *Failing to compensate the plaintiff in time of per the policy terms.*
 - d. *Failing to repair the plaintiff's motor vehicle to acceptable standards as per the policy terms and conditions.*
4. The respondents in turn filed an amended defence dated 6th September, 2010 whereby they denied the above contents of the plaint specifically denying the fact that they ever insured motor vehicle registration No. KAE 379V (hereinafter referred to as the suit motor vehicle) owned by the appellant under policy insurance No. P/NO. NKU/104/044999/2009 or that the said policy comprehensively covered motor vehicle registration No. KAE 379V within the meaning of Cap 405 of the laws of Kenya as alleged or at all.
 5. Alternatively, without prejudice the respondents contended that if there was any accident which they still denied, then the same was fully compensated to the plaintiff by the said insured and there exists no further liability thereon.
 6. The matter then proceeded to trial. PW1 was Thomson Kerongo the plaintiff. He told the trial court that he bought the suit motor vehicle from Donald Siko on 10/7/2009 at a consideration of kshs. 335,000/-. He produced the said sale agreement drawn by M/s Ombati & Ombati Co. Advocates which was witnesses by Ombati Advocates as PExhibit.1.
 7. Subsequently the suit motor vehicle was registered in his name and he in turn produced a log book as P.Exhibit.2. He also produced a copy of his driving licence No.0457532/OXM613 as PExhibit.3. He explained that he went to MAKI Insurance Agency on 29/9/2009 and took insurance cover for the suit motor vehicle by paying Kshs. 15,000 and thereafter being issued with a receipt No. 1159. He proceeded to produce the said receipt which was marked as PExhibit.4. Afterwards, he was issued with a certificate of insurance No. C6390796 valid from 29th September, 2009 to 28th October, 2009. However, he explained to the trial court that the proprietor of Naki Insurance Co. informed him that they were to issue him with one month's insurance cover pending valuation of his motor vehicle.
 8. Consequently on 24th October, 2009 the suit motor vehicle was valued by one Timothy who informed him that he had been sent by M/s Maki Insurance Co.(the agent). After the suit motor vehicle was valued by Maki, they issued him with an insurance certificate No. C6478420 valid from 29th October, 2009 to 28th September, 2010. He produced the said certificate of insurance as PMFI.6 which was a comprehensive cover.
 9. However, he contended that he was never supplied with any insurance policy documents. On 21st December, 2009 he was driving the suit motor vehicle from Kisii to his home in Kenya. He then left Kenya at 8.00p.m. and on reaching Omoringamu the suit motor vehicle developed mechanical problems i.e. the head lights went off abruptly. Immediately, he stopped the suit motor vehicle, opened the bonnet and checked the engine but could not detect the problem. At

- that point he was in the company of his friend George Otero. The said George and himself then entered the suit motor vehicle with an intention to start it but it did not start.
10. That notwithstanding, they managed to seek the assistance of some pedestrians who in turn agreed to push the suit motor vehicle with himself inside in an attempt to jam start it but suddenly they heard an explosion inside the bonnet and a fire ensued. He immediately alighted the motor vehicle as neighbours and pedestrians attempted to extinguish the fire with water and soil. Apparently the motor vehicle was totally burned.
 11. On the same night, he proceeded to Ogembo Police Station where he reported the matter and was issued with a police abstract dated 19th August, 2010. The following day he proceeded to Ogembo police station with George Otero and they both recorded their statements. In addition to this the O.C.S. Inspector Obiero telephoned a photographer who came with the OCS and the photographer accompanied him to the scene where the photographer took photographs of the burned shell of suit motor vehicle. He produced the said three photographs of the shell as PMFI.-8(a)(b) & (c).
 12. The said shell of the suit motor vehicle remained at the scene from 21st December, 2009 to 6th January, 2010 whereby the said shell was towed from the scene to Ogembo police station by Babu Motors. That he paid kshs. 10,000 to Babu Motors who issued him with a receipt No. 3810 for kshs. 10,000. Consequently, on 28th August, 2010 the suit motor vehicle was valued by the Automobile Association of Kenya (AA) and assessed the pre-accident value at kshs. 305,000. He produced the technical inspection report by (AA) and that he paid AA kshs. 5,568 for valuation vide receipt No. 596698 of kshs. 4068 which he produced as PMFI.11 (a) & (b).
 13. On 22nd December, 2009 he reported the accident to Maki Insurance Agency who promised to forward his claim to respondent Headquarters in Nairobi. However, the agent in Maki Agency told him to travel to Nakuru (the respondent's company branch) to fill out a claim form. Thus on 21st December, 2010 he travelled to Nakuru to the respondent's office and found a Mr. Obiero who assisted him to fill all claim forms. On filing the forms, he promised to forward his claim forms to the respondent's headquarters in Nairobi.
 14. Thereafter, he contended that he wrote several letters to the defendant which remained unanswered. Later, he engaged his advocate M/s Sagwe to send demand notice to respondent which were marked as PMFI-12 and PMFI.13. Lastly, he contended that since 21st December, 2009 he had been hiring a motor vehicle from Steden Agencies whenever he needs it at kshs. 3,500 per day. He produced 22 receipts from Steden Agencies PMFI. 14(a)-(l). He reiterated that the names were Thomson kerongo alias Osoro and that on 2nd September, 2010 he swore an affidavit to that effect which he produced as PExh. 15. He prayed that the court enters judgment per the prayers in the plaint.
 15. On cross-examination he revealed the following:
 - *PExhibit 1 shows the Engine No. as D13D2212180,*
 - *PExhibit 2 shows the Engine No. as 2306051.*
 - *PMFI. 10 shows the engine No to be 23366051.*
 16. He admitted that the chassis number in the log book (PExhibit.2) and AA Assessment Report (PMFI.10) are different i.e. P.Exhibit 1 shows the Engine No. as D13B2212180 while PExhibit.2 shows the engine No. as 2306051 and PMFI.10 shows the engine Number to be 23306051. He was supposed to pay 10% excess of the sum insured Kshs. 335,00 which is Kshs. 35,500. He thus admitted that he did not pay the kshs. 35,000/- to the defendant. He was not supplied with the policy document by the defendant. He read the policy document while in the defendant's Nakuru office thus he did not have evidence of the terms and conditions of the insurance contract.
 17. PW2 was No. 85716 police constable Andrew Mwangi of Ogembo police station performing crime duties. He recalled that on 21st December, 2009 at about 10.35p.m. PW1 reported vide OB. 82 that he was driving suit motor vehicle when the suit motor vehicle got burned for unknown reasons. He then proceeded to produce a certified copy of the Extract of OB NO.82 dated 21st December, 2009 produced as PExhibit.16.
 18. Also, he brought along original OB.NO. 17 dated 1st September, 2010 which showed that motor vehicle KAE 376V make Honda Civic scraps shell was handed over to the owner under

- instructions of the OCS and the shell was handed over to PW1 who in turn signed the remark column of the original OB indicating that he had received the same. He produced a certified copy of an extract of OB.NO.17 dated 1st September, 2010 as PExhibit. No. 17.
- 19.He also produced a report compiled by Morris Odawa of scenes of crime (PMFI-4) dated 13th May 2011. Whereby he had visited ogembo police station on 11th May, 2011 in which time the scrap shell of the suit motor vehicle had long been released to the owner on 1st September, 2010.
- 20.On cross-examination, he revealed that the carp shell was released on 1st September, 2010 after a representative of insurance company came and assessed the motor vehicle scrap shell at Ogembo police station.
- 21.PW3 was Henry Makini Nyaberi an insurance Agent of trading by the name Maki Insurance Agency. He recalled that on 28th September, 2009 a lady by the name of Mercy was sent to his office by PW1 seeking insurance for the suit motor vehicle. The said Mercy then paid him kshs. 14,000 in cash on 28th September, 2009. The following day, they cancelled the receipt of kshs. 14,000 and issued a receipt of kshs. 15,000 for insurance. The said receipt was marked MFI.4. He also forwarded the said kshs. 15,000 to the defendant.
- 22.On 29th September, 2009 he issued insurance certificate No. 6390796 for a period of one month in respect of suit motor vehicle. He produced the said certificate of insurance as No.6370796 in evidence as PExhibit.No.5.
- 23.Later, he issued certificate No. 6478420 for the completion of the Annual insurance running from 29th September, 2009 till 28th September, 2010. He produced the said certificate as PExhibit.No.6.
- 24.Lastly, he indicated that PW1's insurance was comprehensive in the sense that the Insurance compensates the suit motor against accident, fire and theft.
- 25.On cross-examination he revealed that:
- *He never saw the suit motor vehicle before insuring it and to date he has never seen the suit motor vehicle.*
 - *They required the suit motor vehicle be availed for valuation but PW1 did not avail it to them for valuation.*
 - *He relied on Mercy's word of mouth to issue insurance certificate.*
 - *He did not write any letter to defendant's informing them that PW1 had failed to avail the suit motor vehicle for valuation.*
- 26.This marked the end of plaintiff's case . However, a consent was recorded by the parties as follows:
1. *The police abstract dated 19th August, 2010 from Ogembo police station (MFI.7) be and is hereby produced as evidence.*
 2. *The bundle of photographs (PMFI.8(a)(b) & (c) be and are hereby produced as PExhibit.8(a)(b) and (c).*
 3. *The receipt from Babu Motors dated 6th January, 2010 (PMFI.9) be and is hereby produced as PExhibiti.No.9.*
 4. *The Technical Inspection Report from the Automobile Association of Kenya (PMFI.10(be and is hereby produced as PExhibit No.10.*
 5. *The receipt from Automobile Association of Kenya (PMFI.11(a) & (b) be and are hereby produced as PExhibit. No. 11(a) & (b).*
 6. *The letter dated 5th may, 2010 from M/s Sagwe & Co. Advocates (PMFi-12) and is hereby produced as PExhibit.No. 12.*
 7. *Certificate of posting (PMFI. 13 be and is herby produced as PExhibit.No. 14.*
- 27.DW1 was Mrs. Karen Wambura Njagi an Assistant claims manager at the defendant company. She told the court that PW4 was insured with defendant company with effect from 29th September, 2009-28th October, 2010. That PW1 took a private comprehensible insurance cover policy No. NKU/101/014999/2009/CO but he did not meet the requirements for issuing the cover

- during the extension which ran from 29th October, 2009-28th September, 2010.
28. She further explained that the essence of a one month cover is for the insured to take his car for valuation to establish the vehicle exists and its features. That after one month cover PW3 did not extend the cover, he (PW1) complained at their Nakuru branch and was given an extension before the motor vehicle was taken for valuation.
29. However on 17th February, 2010 their Nakuru office received a claim from (PMFI-1) from PW1 stating that the vehicle has been involved in a fire accident on 20th April 2009 Ogembo-Sengera road. She produced the said form as PExhb.No.4 which indicated that the suit motor vehicle had no passengers. That the said claim form was accompanied by a police abstract (DMF.13) which indicated that the accident occurred on 21st December, 2009. She produced police abstract as PExhibit.No.3.
30. In contrast to the information availed by PW1, when their Nakuru office forwarded documents to their Nairobi office it was discovered that the suit motor vehicle had not been valued, his (PW1's) claim was made after 2 months and not immediately and there was a discrepancy of the date of accident on claim form and police abstract.
31. On appointing Limit Enterprises to investigate the circumstances under which the accident occurred, they submitted their report dated 17th March, 2010 (PMFI.2) From the report the following emerged:-
- *There was a passenger in the vehicle at the time of the accident.*
 - *The said passenger George Morara Oteoro claimed he was PW1's good friend.*
 - *He claimed that PW1 had owned the vehicle for one year while plaintiff claimed he had owned the vehicle for 3 months.*
 - *The suit motor vehicle had been insured by Amaco insurance through Policy No. ANC/70/01/001052/08 which was expiring on 2nd April, 2010 under the name of David Kipkoech.*
 - *During investigation PW1 failed to avail log book, car sale agreement to the investigator therefore it was not possible to establish with any certainty the owner of suit motor vehicle.*
 - *She produced assessors report at DExhibit No.5.*
32. Later their advocate obtained a pre-fire valuation by AA (PExh.No.10), containing the sale agreement(PExh.No.4) log book(P.Exh.No.2) and stated that the three documents referred to different chassis number for the same motor vehicle. Hence she stated this was a clear indication that PW1's indemnification for loss of vehicle was not genuine.
33. As a consequence of the above report by AA they instructed their advocate to obtain a chemical analysis of the car who in turn engage Moris Odawa the in charge of scenes of crime in Kisii who prepared a report dated 13th May, 2011 (DMFI.4).
34. Moreover, she contended that AA's report (PExh.10) gave a pre-fire value of kshs. 305,000 which the plaintiff should claim and not kshs. 355,000, PW1's form did not indicate that the suit motor vehicle exploded and contended that PW1 had never made any claim for towing his vehicle. In addition to this, she indicated that the insurance cover between PW1 and defendant company did not include the component of providing alternative means of transport when the insured's vehicle was involved in an accident thus PW1 was not entitled to compensation for loss of user.
35. Lastly, she stated that if one took a motor pack cover which was a comprehensive cover it includes loss of user, towing for free by AA or Auto assured, a high medical limit and a rescue by E-plus by Ambulance or Aircraft minimum premium for motor pack cover is kshs. 30,000 or 85% of the value of the vehicle and the rate is 85% but the minimum premium of kshs. 30,000. She thus contended that if the insurance does not take the vehicle for valuation the policy cover is reduced to a third party according to their operating manual for their under writers. She prayed that this case be dismissed with costs to them.
36. On cross-examination she revealed:-
- *The plaintiff's policy was valid as at the time of the incident.*
 - *They cannot repudiate the policy due to failure to value the vehicle that the policy with the plaintiff was not repudiated and they cannot punish the plaintiff because of their officer's mistake.*
 - *The plaintiff's claims is not payable because the dates of the incident differ, failure by the plaintiff*

- to take the vehicle for valuation, double insurance, four different chassis numbers and engine number for the same vehicle contradicting information by the plaintiff and his passenger. In the vehicle and time within which the insurance claim was lodged.*
- *An insured does not need to establish ownership at the time of taking insurance policy as this is requirement when he/she makes a claim or indemnity.*
37. DW2 was Mwaura Karuga the private investigator hired by the defendant firm. He recalled that in early January, 2010 he received instructions from the defendant in respect of suit motor vehicle on allegations that it had caught fire while being driven by PW1. Hence his instructions were to verify whether the fire incident occurred and prepare a report whether the claim for compensation was genuine or fraudulent.
38. On requesting PW1 to provide proof that he ever owned the suit motor vehicle he failed to produce a log book, service records from the suit motor vehicle and sale agreement. Afterwards, they visited the scene of alleged fire incident and did not see any material evidence at the scene to confirm there was any remnant of the fire incident. He then proceeded to Ogembo police station where PW1 and police showed them a fully burnt shell of motor vehicle. However, there was no identification on the shell that could show the make, registration number chassis number and engine number.
39. He then requested the police to issue them with a police Abstract for traffic accident and on perusing O.B he confirmed that there was a report of the fire accident incident. Later, PW4 gave them a copy of sale agreement dated 10th July, 2009 which showed that the colour of suit motor vehicle was blue and found that the engine Number of the Sale Agreement and copy of log book he had availed to defendant were different. On concluding a search at Registrar of motor vehicle, they obtained a search certificate dated 3rd March, 2011 that the suit motor vehicle had always belonged to John K. Nganga. Also he noted that the copy of log book showed a fake stamp for Registrar and it was not signed.
40. As a result of their investigations they established that:
- *Mr. David Kipkoech had been the insured of the suit motor vehicle for the year, 2007, 2008 and 2009 with Amaco as 3rd party thus the motor vehicle was insured twice in breach of insurance policy but they were unable to obtain the insurance policy from Amaco. On approaching pW1's friend one George Otero he informed them that he knew the suit motor vehicle had belonged to PW4 for over one year. He (George) further revealed that PW1 had a fire incident in July 2009 it did not know if he had been compensated. This meant that PW4 had only owned the suit motor vehicle for three months. Therefore he concluded that there were two different cars carrying two different numbers but the suit motor vehicle genuinely existed through it belonged to John Nganga but insure by David Kipkoech. He therefore concluded that the real car did not belong to PW4 and he had never owned it and that the fire incident did not involve his car at all.*
41. Lastly PW2 reasoned that if indeed PW1 purchased the suit motor vehicle on 9th October, 2009 and the car burnt on 21st December, 2009 the search showed that by 3rd March, 2011 the said motor vehicle belonged to John K. Nganga which only means that he (PW1) sold the suit motor vehicle to John K. Nganga after it was involved in a fire incident. He also noted that through search the motor vehicles have same registration but bear the different engine number thus he concluded that the claim was fraudulent and was not possibly payable. He thus recommended repudiation of the claim. He produced the report in evidence as PMFI.2.
42. This marked the end of defendant's case. A consent was consequently entered into stating that:-
- The chemical analysis report dated 13th May, 2011 be produced as DExhibit.No.4.
 - In his judgment, the trial court framed questions as issues of determination.
 - Whether or not the plaintiff owned suit motor vehicle.
 - Whether or not insured by the defendant.
 - Whether or not and accident occurred involving suit motor vehicle damaging it beyond repair.
 - Has the plaintiff proved his case on a balance of probability.
 - Is the plaintiff entitled to the prayers sought in the amended plaint.

43. With regard to the first issue the trial court held that the discrepancies in documents produced by the plaintiff meant that plaintiff did not prove that he owned suit motor vehicle. With regard to the search issue the trial court found that the suit motor vehicle was indeed insured comprehensively by the Defendant.
44. On issue No. 3 the trial court held that the existence of suit motor vehicle is doubtful as the plaintiff had not proved on a balance of probability that an accident involving suit motor vehicle occurred and damaged it beyond repair.
45. On the fourth issue the trial court held that the existence of suit motor vehicle is doubtful and plaintiff had not proved the occurrence of fire accident on balance of probability. Lastly on whether plaintiff is entitled to the prayers sought in a mended plaint, the trial court held that the plaintiff was not entitled to the reliefs sought in the amended plaint.
46. The above judgment triggered this appeal by the plaintiff who is now the appellant. In his Memorandum of Appeal dated 30th July, 2012, the appellant herein Thomson Kerongo has appealed against the entire judgment of the trial court on the following grounds:-

1. *That the learned trial magistrate erred in law and in fact in finding that the appellant had not proved ownership of motor vehicle registration number KAE 379V.*
2. *That the learned trial magistrate erred in law and fact in dismissing the appellant's suit even after establishing that indeed the respondent had insured the appellant's motor vehicle registration number KAE 379v and that the vehicle was damaged beyond repair in an accident.*
3. *That the learned trial magistrate misdirected himself in relying on a chemical analysis report dated 13th May, 2011 for an examination that was done on a record that the Appellant's vehicle had been released from Ogembo police Station on 1st September, 2010.*
4. *That the learned Trial Magistrate erred in law and in fact in wholly disregarding the plaintiff's submission, evidence and authorities cited in support thereof.*
5. *That the learned trial magistrate erred in law and in fact in failing to appreciate and understand that there is a valid contract between the parties herein that is still subsisting.*
6. *That the learned trial magistrate erred in law and in fact in taking into account factors he should not have taken into account and failed to take into account factors which he ought to have taken into account.*
7. *That the learned trial magistrate erred in law in not stating the amount the appellant should have been awarded had his case succeeded.*
8. *That the trial magistrate erred in law and in fact by failing to find that the plaintiff had proved his case on a balance of probability having held that the suit motor vehicle was insured comprehensively by the defendant.*
9. *That the learned trial magistrate erred in law and in fact by relying on the hearing on the hearsay evidence of the investigator (DW2) at arriving in his decision.*
10. *That the learned trial magistrate's decision albeit, a discretionary and was plainly wrong.*

47. When the matter came before me on 12th November, 2014 it was agreed amongst other directions that the appeal be argued by way of filing and exchanging written submissions. Both advocates representing both parties have filed their submissions and I have read them. This court in this first appeal has duty and obligation to re-analyze and evaluate the evidence made by the lower court before coming to its independent decision in this appeal.

48. Upon analyzing the evidence adduced by witnesses in the trial court, the grounds of appeal and submissions by respective counsels the following are issues to be determined by this court?

The first leg of the question is was there a binding insurance contract between the appellant and the respondent; and the second leg is was the insurance contract between the appellant and the respondent enforceable?

49. With regard to the first leg it was the appellants testimony in the lower court as PW1 that he paid kshs. 15,000 to PW3 who was an insurance agent to the respondent's firm to comprehensively insure his vehicle between the months of 29th October, 2009 to 28th September, 2010. This evidence was corroborated by PW3 who was the respondent's agent who forwarded the kshs.

15,000 and later he issued insurance certificate No.6478420 for the completion of the Annual Insurance running from 29th September, 2009 till 28th September, 2010. The said certificate was produced in evidence as pExhibit.No.6. However, PW3 contended that he never got to see the suit motor vehicle thus he issued the said insurance cover without conducting a valuation on the said suit motor vehicle.

50.DW1 who was the Assistant claims Manager also indeed confirmed the fact that the appellants policy was valid as at the time of the incident and the appellant's insurance policy was comprehensible. She however, contended that accordingly to their operating manual for their underwriters if the insurance does not take the vehicle for valuation, the policy cover is reduced to a third party.

51.In **Sita Steel rolling Mills Ltd v. Jubilee insurance Co. Limited [2007] eKLR Maraga J,held:-**

'Waiver is a form of election in insurance claims an insure which has a right to avoid liability may elect not to do so or may be deemed to have so elected, provided that it has knowledge of the breach and either expressly so elects or act in such a way as would induce a reasonable insured to believe that it is not going to insist upon its legal rights. This kind of waiver requires a conscious act by the insurer or its agent but it does not require the insured to act in response in any way'.

52.In the instant case according to the evidence of PW3 and DW1 it was condition in the insurance contract that the appellant (PW1) submits the suit motor vehicle for valuation by a valuer approved by the respondent and he was actually given a month to do so before he paid a comprehensive cover. However the appellant failed to do so, but did infact pay the full amount for comprehensive cover to PW3 and in turn the respondents firm accepted the same payment as a comprehensive cover from 29th September, 2009 to 28th September, 2010 of the suit motor vehicle. Therefore this only means that the respondent despite knowing the fact that the appellant had failed to submit the suit motor vehicle to valuer, by accepting his money they represented to the appellant into believing that they were not going to insist upon the valuation being made and thus the trial court was right in deciding that a valid insurance contract existed between the appellant and respondent.

53.Then we turn to the second leg of the question dealing with the enforceability of the insurance contract. It is an undisputed fact that the plaintiff testified that he had brought the suit motor vehicle at kshs. 359,000/- as per the agreement (PExhibit.No.1) that the said sale agreement showed that the chassis Number is JAMEG892005311892 and engine No.D13132212180. On the other had the log book to the suit motor vehicle (PExhibit.No. 2) showed that the chassis No. is 311892 and the Engine Number is 2306051. Thus the Engine and chassis numbers in the two documents (PExhibit No.1 and 2) are at variance and therefore do not seem to refer to the same motor vehicle.

54.Furthermore, the plaintiff (Appellant) produced an AA technical Inspection Report (PExhibiti.No.10) showing the chassis No. JAME68892005300892 and Engine Number 230051. All these documents proving ownership of the suit motor vehicle by the appellant clearly showed different Engine and Chassis numbers in respect of suit motor vehicle. Furthermore, the plaintiff did not offer any valid explanation as to why the suit motor vehicle possessed different Engine numbers and chassis number in the log book and sale agreement.

55.Furthermore, according to DW2 the investigator hired by the respondent, he testified that the search certificate issued on 30th March, 2011 showed that the suit motor vehicle was owned by John K. Nganga as at 2nd December, 2009. He (DW2) stated that the copy of the log book bore a fake stamp for the Registrar and it was not signed. Thus DW2 concluded that the genuine suit motor vehicle did not belong to the plaintiff.

56.Moreover the chemical analysis report dated 13th may, 2011 produced by consent of the parties (DExhibit No.4) showed that the motor vehicle that was allegedly owed by the plaintiff before the fire incident was different from the one that remained as a shell.

57.From the above facts, it cannot be denied the fact that the appellant paid a premium amount to kshs.15,000 to the appellant as a comprehensive cover for the suit motor vehicle. However, the fact that the suit motor vehicle his sale agreement, the log book and even a valuation report

concluded on the said suit motor vehicle on his own instigation by AA pointed or indicated the fact that the vehicle had different Engine and Chassis numbers. Without a reasonable explanation as to why one vehicle had different chassis and engine numbers reflecting in the sale agreement, log book and valuation report one a balance of probability one can easily conclude that we cannot be referring to the same vehicle but to a different vehicle.

58. In addition to this, the fact that a search was carried out on 30th March, 2011 showing that the suit motor vehicle was owned by John K. Nganga as at 21st December, 2009 whereas the copy of the log book according to DW2 bore a fake stamp for the Registrar which was not signed and the chemical analysis report produced by consent of parties showed that the motor vehicle that was allegedly owned by appellant before the fire incident was different from the one that remained as a shell all point to the fact that there was indeed fraud as to the existence of the suit motor vehicle the appellant had insured.

59. It is monthly note role that the insurance contract between the appellant and the respondent was one based on good faith. The appellant having demonstrated lack of good faith and his report that the suit motor vehicle had been burnt being suspicious and there being no evidence that he had any insurable interest in the subject vehicle, means that the appellant was in breach of the contract and the respondent was justified in disclaiming liability under the contract. In the circumstances the respondent was not liable to pay the appellant any amount.

60. Accordingly, I dismiss this appeal and uphold the judgment of the lower court. I award costs of the suit in the lower court and costs of this appeal to the respondent.

Dated and delivered at KISII this 13th day of March, 2015

C.B. NAGILLAH,

JUDGE.

In the presence of:-

Ochoki(absent) for the appellant

Mutiria holding brief for Omwenga for the respondent

Edwin Mongare Court Clerk.