



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NUMBER 337 OF 2008**

**TAUSI ASSURANCE COMPANY LIMITED. .... APPELLANT**

**VERSUS**

**FIDELITY COMMERCIAL BANK LIMITED. .... RESPONDENT**

***(From the Judgment and orders of Hon. Muchelule, Chief Magistrate (as he then was) In Nairobi  
CMCC No. 5723 of 2003)***

**J U D G M E N T**

This appeal arises from the Judgment of the lower court dated 28<sup>th</sup> May, 2008. The facts leading to the filing of the suit are as follows relying on the appeal file record: -

A firm called Mytrade limited took up a comprehensive insurance cover over a Motor Vehicle registration Number KAH 518L for a sum of Ksh.600,000/-. Under the insurance policy, the Appellant – Tausi Assurance Co. Limited – indemnified the insured – My trade Limited – against loss of the motor vehicle either by theft or burglary for a period of a year commencing with 1<sup>st</sup> April, 1998 and ending on 31<sup>st</sup> March, 1999. The policy contained, inter alia, clauses to the effect that, on the policy taking effect the vehicle must be fitted with approved anti-theft device, proof of which should be produced to the insurer, otherwise the insurance cover for theft or burglary would be deemed deleted from the scope of the policy. The insured was also obligated in case of theft or burglary, to give immediate notice to the police and to the insurance company with whom he would also co-operate in securing the conviction of the offender. The insured, Mytrade Limited, apparently assigned the insurance policy benefits aforesaid to the Respondent herein, Fidelity Commercial Bank Ltd on 25<sup>th</sup> January 2001.

The facts from the Appellant, which are not contraverted, show that the abovementioned assignment was neither endorsed on the insurance policy in question nor reported to the Insurance Company in question by the Respondent.

The Appellant also in its evidence at the lower court averred that insured, Mytrade Limited, failed: -

- a. **To pay the relevant premium for the insurance cover.**
- b. **To fit the insured motor vehicle with the anti-theft device as required.**
- c. **To report to the insurer and to the police the alleged theft within a reasonable period as required under the policy.**

In its judgment, the trial court found that the motor vehicle registration number KAH 518L, was

registered in the names of Mytrade Limited and Fidelity Commercial Bank Ltd. It found that by a letter dated 25<sup>th</sup> January, 2001 the benefits of the insurance policy issued was, therefore valid if not cancelled before expiry. The lower court also found that the motor vehicle was as a fact, stolen on 27<sup>th</sup> January, 1999 since the Appellant did not deny that fact but merely sought proof that it was thereafter not recovered. The court also found that the reason why the appellant was denying liability was because the Plaintiff/Respondents interest in the motor vehicle, was not disclosed to the insurer as required, and was not, therefore noted on the policy to allow the Appellant to claim.

The lower court accordingly had concluded that the Plaintiff/Respondent had an interest in the motor vehicle and that the interest was known to the Defendant/Insurer. That the interest was actionable since the full benefits of the policy were assigned to it by the insured although then in receivership, for the whole insured sum of Ksh.600,000/-

The above conclusions aggrieved the Appellant who appealed in this appeal.

I have carefully perused the lower court record containing the plaint, the defence, the submissions by the parties, the evidence and judgment, the grounds of appeal and the submissions thereto. I have no doubt in my mind that the Defendant/Appellant, herein had issued an insurance policy cover No. POL/1799/070/1/98 to one Mytrade Limited. This was as a result of a proposal form filled and signed by the said Mytrade Limited earlier. It is clear from the perusal of the form and admissions from PW I, that Mytrade Limited had not disclosed in the form that Fidelity Commercial Bank Limited was a co-owner of the motor vehicle in question or that it was also being covered. As a result, the insurance policy aforesaid did not also show Fidelity Commercial Bank Limited's interest if any, in the policy. It is, therefore not difficult to see why the Tausi Assurance Ltd argued that the cover related to Mytrade Limited alone and that Fidelity Commercial Bank Limited cannot be heard to claim any benefit arising under that insurance cover. Indeed evidence shows that Mytrade Limited had shown in the form that it was the registered owner, and that the motor vehicle was not a subject of a hire purchase.

Furthermore, it is clear from the evidence and admission of PW I, again, that Mytrade Limited did not report the alleged theft of the motor vehicle to either the insurer nor the police as obligated under the insurance policy in question. Nor were claim forms after the alleged theft was committed, filled and presented to the insurance company as was required under the said policy as admitted by PW I. In addition to the above, PW I also admitted in his evidence that the motor vehicle was particularly at the time of the alleged theft, not fitted with an anti-theft device.

It is not denied and indeed it was conceded by PW I who testified for the Plaintiff/Respondent, that fitting the motor vehicle with anti-theft device, reporting the theft to the police and the insurer immediately the same occurred and was known, were conditions precedent to the honouring of the insurance cover by the insurer. Indeed as PW I put it, it meant that clauses covering theft would automatically be deleted from the policy once the proposer defaulted.

I have considered the grounds of appeal. I am in agreement that the insurance did not cover Fidelity Commercial Bank Limited who cannot accordingly directly purport to claim benefits thereof as if it was the insured. It could only probably claim under the assignment made two years later on 25<sup>th</sup> January, 2001.

I also find that even if Mytrade Limited was in my view, properly covered under the policy notwithstanding failure to pay the relevant premium, its failure itself or by its agent, to fix the motor vehicle with anti-theft device; failure to report theft of the vehicle within reasonable time; its failure to fill a claim as necessary, authorized and legalized the Defendant/Appellant to lawfully avoid the claims to Mytrade Limited who was the insured and probably to any lawful assignees.

I have looked at the defence filed by the Appellant/Defendant. It sufficiently denied the Plaintiff's claim. The trial courts conclusion that the Defendant did not deny theft of the motor vehicle is not supported by the defence pleadings and the defence evidence of DW I. The defence had taken, inter alia, the position that the insured had failed to report the theft and the recovery of the motor vehicle. Furthermore, the

defence of the Appellant did not hinge on whether the motor vehicle was stolen or not only, but had multiphased defences most of which the trial court failed to consider and each of which could alone give it full defence as already analyzed hereinabove.

In the circumstances, and for the reasons given above, this appeal should fail.

The court observes that even if the appeal were to fail, the court would uphold the lower courts award of the amount covered under the insurance of Ksh.600,000/- less the outstanding premium, excess contribution and any other discounts recognized in the insurance practices.

This appeal is however, dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi this 17th day of September, 2014.

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**D A ONYANCHA**

**JUDGE**