



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT KISII**  
**CIVIL CASE 124 OF 2001**

**MOSES ODHIAMBO KOKELO ..... PLAINTIFF**

***VERSUS***

**APOLLO INSURANCE ..... DEFENDANT**

**JUDGMENT**

The plaintiff MOSES ODHIAMBO OKELO insured his motor vehicle Reg. No.KAL 673N a Toyota Station Wagon with the defendant Co. Apollo Insurance Co. Ltd. The Insurance was for a comprehensive cover to run from 15<sup>th</sup> June 1999 to 20<sup>th</sup> April 2000. He took the cover through AGRAVAT INS. AGENCIES of MOMBASA.

By then he was working with Barclays Bank at their Narok Branch but the vehicle was based in Migori where his family was. The cover was for private use.

On 21<sup>st</sup> May 1999 while the Insurance cover was still in force the insured vehicle hit a Pedestrian one Khalid Khalif in Migori. It was being driven by the plaintiff's driver. Khalif sustained injuries and consequently filed Migori SPM CCC.NO. 837 of 1999 against the plaintiff. The Plaintiff duly informed the defendant of the accident and the case. He filed claim forms. Defendant appointed an advocate to handle the case, on behalf of the plaintiff. The case was however ruled in favour of Khalif and plaintiff ordered to pay shs.497,380/- as damages. Costs and interest took the award to shs.629,800/=. This amount was not paid and Khalif instructed an auctioneer who attached the plaintiff's vehicle No.KAL 673 N. Plaintiff made several efforts to have the defendant pay the amount but they refused telling him he refused to send his witness to testify in Migori Court. Eventually the Plaintiff's car was sold for shs.120,000/=.

Soon thereafter the defendant paid shs.503,810/- to satisfy the Migori case. By then the plaintiffs car had been sold. The plaintiff consequently brought this suit claiming the loss of the car which was valued at shs.305 at the time it was sold. He also claimed loss of user for 54 days at shs.3000/= per day.

The defendant filed a defence on 30<sup>th</sup> August 2001 and denied claim. Though he admitted insuring the plaintiff's vehicle he said the contract was voided. When the plaintiff failed to testify in the Migori case.

On 30<sup>th</sup> May 2003 the defendant filed an amended defence and a counterclaim.

It stated that the contract was rescinded for misrepresentation. It counterclaimed the amount of shs.503,840/= it paid toward the settlement of Migori Case.

When the case came up for hearing before Justice Wambilyangah (as he then was) the plaintiff

abandoned the prayer for loss of user. He told the court that vehicle hit a pedestrian on 21<sup>st</sup> May 1999 as it was going home with his family. It was being driven by one Odhiambo his driver. He reported the accident to his insurers. After he was sued he passed the summons and other documents to the Insurance Company who appointed

M/S Behan Singh to act for him in that cause. After judgment was passed against him his vehicle was attached by Victoria Auctioneers. He again wrote to the insurers asking them to pay the decretal amount. He paid them excess money asked. However they did not pay and eventually the vehicle was sold. It was after the sale they paid the decretal amount. By then he had lost his vehicle. The vehicle's value was assessed by Ministry of Works as shs.305,000/=. He had insured it for shs.400,000/=.

The plaintiff said that he was never asked by the advocate to send a witness in court to testify in the Migori case.

He was never informed by the advocate of the hearing dates. He further said that apart from the Insurance Certificate he did not receive the Insurance Policy. He worked in Narok up to Dec. 1999 when he moved to Migori.

He informed the defendant's agents of his change of address. He first saw the Insurance Policy when it was first produced in court.

The defendant called one SAMSON MUSEMBI (DW1) as a witness. He told court that when the accident occurred it was reported to their agent AGRAVAT INS.

BROKERS of MOMBASA. They asked him to fill the necessary form and pay excess charges. He filled claim forms using Box 55 Narok. He did not pay the excess charges. They did not know that he had changed his address and as such they continued to communicate with him through the Narok address. The Migori Case was set down for hearing five time but he did not attend. Judgment was therefore passed against him.

They later paid the decretal sum which he asked the court to order they be refused.

DW2 further said the vehicle was not insured to be used as a taxi.

There is no dispute that the defendant insured the plaintiff's motor vehicle Reg No.KAL. 673N. It was a private motor car policy starting from 25<sup>th</sup> April 1999. It is also not in dispute that the vehicle knocked a pedestrian on 21<sup>st</sup> May 1999 hardly a month after the parties entered into the Insurance Contract. The Defendant was to indemnify the plaintiff for any loss from an accident. The plaintiff was sued and the Defendant failed to pay till after the plaintiff's car was attached and sold. The plaintiff suffered loss of his car. The defendant later paid shs.503,880/= to the person injured in the accident. The issue is who was to blame for breach of their contract. Each party blames the other.

The plaintiff said he kept his part of the contract. He paid the premium and informed the defendant of the accident. He paid excess charges as decided.

On the other hand the defendant claim that the plaintiff breached the contract. He stated that the insurance contract was voided when the plaintiff and his agent failed to testify before the Migori Court. He further stated the contract was automatically rescinded for misrepresentation.

I have thoroughly evaluated all the evidence and find that the plaintiff did not breach the Insurance Contract. In the first place he told court that he never received the Insurance Policy from the defendant and as such he was not expected to know all the clauses in it. DW1 told court that Insurance Policy was signed in Mombasa in August 1999. That was 3 months after the accident had already taken place. He did not say if the said documents was ever sent to the plaintiff or if he signed it. If it was sent there must have been a forwarding letter but no copy of such a letter was produced. It is clear therefore the plaintiff did not receive the policy which was the basis of the said contract.

Even if the plaintiff had received the document there was no evidence to show that he breached it. He told court that he was never told of the hearing date by the advocate to go and testify. The advocate who handled the Migori Case was never called to testify to the effect that he informed him. What was produced was a copy of a letter by Rajani K. Somaia Advocates dated 14<sup>th</sup> April 2000 addressed to the plaintiff informing him of the hearing date of 27<sup>th</sup> April 2000. The address used was c/o Barclays Bank, Box 55 Narok. The plaintiff had told the court that he had left Narok for Migori in 1999 and informed Agravat Insurance Agencies who were the agent for the defendants.

Nobody from Agravat Ins. Agencies was called to deny that they were informed of the change of address. Again it is clear that he did not receive that letter and his claim that he was not aware of any hearing date is well supported. It is therefore not right for defendant to state that he refused to Co-operate and thus voided the contract.

As for the use of the vehicle as a taxi this indeed had been pleaded in plaint in support of the claim of damages for non-user. However when the vehicle hit Khalif it was not being used as a taxi. It was being driven home carrying his family. Khalif was not a fare paying passenger in the vehicle at the time of the accident. The defendant cannot therefore hide behind the cloth of misrepresentation. When the accident occurred the vehicle was being used for private means and the cover was exactly for that.

This even if the plaintiff may have used the vehicle as a taxi at times when the accident occurred it was being used properly and for the purpose insured for.

The plaintiff therefore was not in any breach.

It is vain for the plaintiff to claim that the contract was voided and rescinded automatically after the accident. Its behaviour after the accident shows clearly it was aware that the contract was still in force. Once the plaintiff passed the summons from Migori Court to them they appointed a lawyer to defend the suit. It was only after judgment was entered against the plaintiff they told him they won't pay.

Even after that they eventually paid the decretal sum. They did not say why they appointed a lawyer, paid him and also the decretal sum if they believed the contract had automatically been rescinded.

They were aware of their obligations but acted too late when the plaintiff had lost his vehicle. He did not force them in any way to pay the decretal sum and therefore there is no basis to claim refund of the same from the plaintiff.

They are instead bound to pay for the loss the plaintiff suffered.

I therefore find the plaintiff has proved his case on balance of probabilities and

enter judgment for him against the defendant as prayed in the plaint. I find the defendants counter claim has no merit and dismiss the same with costs to the plaintiff.

Dated this 15<sup>th</sup> day of April 2005

**KABURU BAUNI**

**JUDGE**

c.c Mobisa

Mr. Ombati H/B for Mr. Marwa for Plaintiff.

N/A for Defendant.

