Insurance
Theft of motor vehicle
repudiation of insurance policy

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1549 OF 1994

CREDIT KENYA LTD..... PLAINTIFF

VERSUS

GATEWAY INSURANCE C OMPANY LTD..... DEFENDANT

JUDGEMENT

According to the evidence before me, the plaintiff a limited liability company was the owner of a motor vehicle registration number KAC 788X Mitsubishi Lancer. This vehicle had been recently purchased by them on 19.3.93 at a price of Kshs 1.3 million. It was insured by the defendants (an insurance company) from 18.3.93 to 31.8.93. This was in accordance with a policy described as private car policy No 10/05 348.

The brief facts of the case are as follows:

Mr Shah, a Director of the plaintiff company was given the said motor vehicle KAC 788X as a company car to use in the course of his employment. On the material day of the 10th of August 1993 he arrived at work in the vehicle and parked it in the parking bay.

He then gave the keys to the office driver one Peter (PW3) to do office errands as requested by one of the other managers. The said driver returned and handed him the car keys late morning at around 12.30 pm. He rushed to go for lunch. He went to the parking bay and found the car missing.

The matter was reported to the police and the insurance company (defendant in this case).

Investigations were commenced under directions of Mr Njuguna Kabugu, a Loss Assessor and Operations Manager of “Taa Repossession and Investigations Ltd”, a company he operates.

He prepared a report dated 10.9.93 (30 days after the theft). In his report he gave the summary of how the

incident occurred and also took the statement of all the relevant witnesses.

What he reported was that the parking bay in the Cannon Assurance House was infact almost exclusive to the plaintiff company. That it was served and manned by guards. He established that the car was driven out by one Peter a driver with the plaintiff company. That according to Peter he returned the car late morning, put on the alarm and gave the keys to Mr Shah.

The guard at the gate on the other hand (he was not called as witness) stated that the said vehicle had been driven out of the parking bay. Peter the official driver did not return the vehicle alleging that the parking bay was full.

Peter had infact given evidence that he took another vehicle and did not return until after the vehicle KAC 788X was stolen.

Mr Kabugu the Loss Assessor concluded in his report that there was fraud. He claimed that the car on being bought was sold and serviced by Simba Colt. That there was a term within the invoice policy that an alarm must be fitted to the said vehicle. There was only an invoice issued. No alarm was fitted. No payment of Kshs 24,000/- was made. It thus meant that there was collusion between Simba Colt and the plaintiffs to steal the vehicle.

It therefore meant that as there was no alarm to the vehicle, it was simple to steal the vehicle.

The movement of the vehicle by Mr Shah to Kisumu and back was also suspect. The fact that Simba Colt was owned by Asians, the plaintiff company had Asian directors, seems to imply deceit on the part of the plaintiffs to intentionally steal the said vehicle. They were suspects; the driver Peter was also a suspect – together with the other driver named John Kituku.

Police investigation revealed, the arrest of the security guard and his release. The police case is pending investigations.

The Loss Assessor advised against paying the claim for the vehicle. The defendants by their letter dated the 28th of September 1993 repudiated liability and refused to pay the insurance claim for the vehicle which is to have been comprehensively insured.

The plaintiff filed suit against the defendant. They claimed the value of the vehicle at Kshs 1,375,000/-. They nonetheless abandoned the prayer for the costs of hiring a vehicle for the director at Kshs 3,500/- per day.

They also abandoned the prayer for general damages for breach of contract. The reasons given being that they had failed to prove these two prayers.

They nonetheless relied on the authority text book of E R Hardy Ivamy. *General Principles of Insurance Law* 4th Edition pages 439-446, 282-287 and *Chitty on Contract* 25th Edition pages 839-840.

The point brought out is that the burden of proof, where fraud is claimed, lies with the defendants. All the plaintiff requires to prove is that of “a *prima facie*” case, namely that a theft occurred.

The defendants in their submissions stated through their advocate, that there was no evidence from the plaintiff strictly, that the motor vehicle was stolen. It was not enough to allege the theft. It was not enough to state the value of the vehicle was Kshs 1,375,000/- without producing a receipt as proof of purchase of the said vehicle. The plaintiff failed to make a follow up of the said theft. From the report it clearly shows that there was a deliberate plan to steal the car by the plaintiffs themselves.

The defence had not been replied to by the plaintiff as such it is a conclusion that no reply had been made. It was filed without leave of the court.

The defence also relied on the plaintiff's authority on this matter.

The agreed issues can therefore be addressed as follows:-

The terms of the insurance policy No 10/05348 in respect of a private motor vehicle registration number KAC 788X duly issued on 8.3.93 is that of comprehensive insurance policy cover.

One of the requirements is that the motor vehicle be fitted with at least two alarm systems. If it was not so fitted, then any theft from the vehicle not exceeding Kshs 2,000/-would not be paid.

I understand this clause to mean that it is advisable to fit an alarm to the vehicle but it was not compulsory.

I found from the evidence that the said vehicle was stolen from the premises.

All the plaintiff require to show is that of a *prima facie* case that a vehicle had been stolen. If fraud is alleged then this must be proved by the defendants strictly.

Chitty on Contract 25 Edition states on fraudulent claim.

"A consequence of the principle that a contract of insurance is one *uberrimae fidei* is that a fraudulent claim by the assured entitled the assured to avoid the contract. Mere exaggeration is not conclusive evidence to fraud through it affords strong evidence of fraud if the claim is out of all proportion to the true loss as does gross negligence.

The burden of proving that the assured caused the loss deliberately ie on the insurance; but the assured has to establish an accident he will of course fail if the evidence is equally consented with wilful misconduct."

ER Hardy Ivamy (*supra*) dealing with the conduct of the assured in the case of *Show v Rabbles* [1837] 6 Ad & EA 75 at pag 84.

"There is no doubt that one of the objects of assurance against fire is to guard against the negligence of servants and others, and therefore the simple fact of negligence lies has never been held to constitute a defence. But it is argued that there is a distraction between the negligence of servant or points and that of the assured himself.

We do not see any ground for such a distraction and are of the opinion that in the absence of all fraud the proximate cause of the loss only is to be looked into."

(Emphasis my own)

Further the burden of proving that the insured did not cause the loss himself does not lie on the insured.

The burden of proving fraud lies with the defendant in this case. It is they who have to strictly prove fraud on the part of the plaintiff.

I expected there to be thorough police investigations of this matter with the assistance of the Loss Assessor. This should have come to the arrest of both suspects who should have been duly charged in a Court of law under a criminal offence. Where there is a conviction preferred by a Court of law, it is conclusive evidence that theft and or fraud did occur.

The report written by the Loss Assessor (PW3) has made several allegations that are grounded on suspicion. It was imperative that the suspects were charged.

The proceedings of the lower court criminal case are then presented to the High Court under section 34 of

the Evidence Act and the witnesses in the lower court need not be called to give evidence again.

This has not been done. A person is innocent until proved guilty in the eyes of the law. I find that the plaintiff did not breach the policy. That they have made out their case against the defendant. I enter judgment for the plaintiff against sum of Kshs 1,375,000/-. I award interest from the date of this judgment and costs of this suit to the plaintiff.

Dated at Nairobi this 13th day of October, 2000.

M.A. ANG'AWA

JUDGE