KK Lodgit Limited v Geminia Insurance Company Limited & another (Civil Suit E126 of 2018) [2025] KEHC 1498 (KLR) (Commercial and Tax) (12 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1498 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT E126 OF 2018

A MABEYA, J

FEBRUARY 12, 2025

BETWEEN

KK LODGIT LIMITED ..... PLAINTIFF

AND

GEMINIA INSURANCE COMPANY LIMITED ..... 1ST DEFENDANT

AFRO-ASIAN INSURANCE SERVICES LIMITED ..... 2ND DEFENDANT

JUDGMENT

1. Vide the Amended Plaint dated 17/6/2021, the plaintiff claimed that on or about August 2013, the 2nd defendant, through its agents Christian Ramanonjiarisoa and Lawrence Njore, solicited an insurance brokerage agreement from the plaintiff, presenting itself as a licensed and authorized insurance broker.

2. That trusting these representations, the plaintiff appointed the 2nd defendant as its exclusive broker on /9/2013, to procure a cash-in-transit insurance policy. The 2nd defendant obtained a policy from the 1st defendant and arranged international reinsurance, despite the Plaintiff clearly disclosing that its vehicles were not armored.

3. The plaintiff relied on the 2nd defendant's expertise and duty of care to ensure proper insurance coverage. However, although required to complete a proposal form specifying vehicle armoring, the plaintiff left the relevant section blank, having consistently informed the 2nd defendant that none of its vehicles were armored.

4. The plaintiff consistently informed the 2nd defendant that its vehicles were not armored, making this fact clear. Despite this, the 2nd defendant requested the plaintiff to complete a proposal form for armored car operators. The plaintiff left the section requiring details of vehicle armor blank, as it had repeatedly stated that its vehicles were not armored.

5. Subsequently, the plaintiff suffered four losses under Insurance Policy M/33/1330814/1, none linked to their vehicles being unarmored, these were:-

    a. 13/1/2014: Loss of Kshs.12,972,603/- during transit from Nakuru to Nairobi. Jubilee Insurance paid Kshs.8,112,000/- after a deductible, leaving Kshs.4,860,603/- for the 1st defendant;

    b. 14/3/2014: Loss of Kshs.21,737,500/- during air transit from Mombasa to Nairobi;

    c. 11/4/2014: Loss of Kshs.21,705,684/- during air transit from Mombasa to Nairobi;

    d. 30/6/2014: Loss of Kshs.68,833,075/- during vehicle transit to the Central Bank of Kenya, caused by a diversion by the Administration Police escort. ICEA Lion paid Kshs.8,167,500/- after a deductible, leaving Kshs.60,665,575/- for the 1st defendant to pay.

6. On escalation of the above outstanding claims to the 1st defendant and the Re-insurer, the said claims were rejected and the 1st defendant refused and/or failed to settle the same alleging a misrepresentation by the plaintiff that its vehicles were armored when in fact the plaintiff had never done so and had negotiated its premiums through the 2nd defendant on the basis that its vehicles were unarmored.

7. Further and in any event without prejudice to the foregoing, two (2) of the claims by the plaintiff relate to losses that occurred on air and therefore have no relation whatsoever with the plaintiff's vehicles at all.

8. The plaintiff prayed for judgment joint and severally against the defendants for: -

    a. A sum of Kshs.108,969,362/- on account of the claims under the subject cash in transit policy;

    b. General and punitive damages for fraud, misrepresentation and breach of contract;

    c. In the alternative, a refund sum of Kshs.14,332,491.10 being the premium paid by the plaintiff to the 1st defendant under the subject cash in transit policy;

    d. Interest on (a), (b) and (c) at commercial rates from the date of filing this suit until payment in full.

    e. Costs of the suit.

9. The 1st defendant filed a Further Amended Defence and Counterclaim dated 1/7/2021. The defendant contended that the policy questionnaire was not completed by the plaintiff as required particularly question 55. The proposal was not signed or dated by the plaintiff.

10. Further, that an insurance contract is a contract of utmost good faith. Accordingly, the plaintiff was under a duty, before the Contract was entered into, to disclose to the 1st defendant all material particulars known to the plaintiff or which in the ordinary course of its business ought to have been known to it.

11. It was the defendant's contention that no policy was ever issued in respect of unarmored cars based on the plaintiff's clear admission that the cars were unarmored. That if there was a valid contract between the plaintiff and the 1st defendant (which is denied), the plaintiff was in breach of conditions 6 and 12 of the Contract. Both conditions were precedent to the 1st defendant's liability and the 1st defendant was thereby entitled to reject the four claims and rescind the Contract regardless of whether the breach was causative of the losses in question.

12. The 1st defendant therefore prayed that the plaintiff's suit be dismissed with costs and that judgment be entered for the 1st defendant as pleaded in the Counterclaim.

13. In the Counterclaim, the 1st defendant contended that if it was the plaintiff's intention to enter into a contract for insurance for unarmored vehicles as pleaded by the plaintiff then the plaintiff and the 1st defendant were not ad idem as to the terms of the contract they entered into at all.

14. Further, that it was induced by the non-disclosure to underwrite the contract in that had it known of the said material facts it would have considered whether to underwrite it at all and on what different terms.

15. Wherefore, the 1st defendant prayed for judgment against the plaintiff for: -

    a. A declaration that the Contract Policy was lawfully repudiated by the 1st defendant.

    b. Costs of the Counterclaim.

16. In response to the Counterclaim, the plaintiff denied the entire content of the counterclaim and put the 1st defendant to strict proof and prayed that it be dismissed with costs.

17. In the amended statement of defence dated 8/3/20/22, the 2nd defendant stated that it is a Lloyds' accredited broker focusing only on international placement of reinsurance. It contended that it is not and has never been registered to offer or provide local insurance brokerage services under the *Insurance Act*. That at all material times subject to this suit, it never intimated the contrary to the plaintiff or held out itself as such.

18. It contended that the retainer service sought from the plaintiff was specifically for international placement of reinsurance of the plaintiff's risks and none other. Further, that in the course of its dealings with the plaintiff, the Plaintiff sought its advice on local insurance placement of its risk, having full knowledge and understanding that the 2nd defendant was not a local broker, which advice was rendered to the plaintiff recommending the 1st defendant.

19. At all material times relevant, the advice sought was given and or understood to be given on a without prejudice basis, independent of the contract of 6/9/2013 and with no intention to bind the 2nd defendant legally, contractually or howsoever otherwise.

20. The 2nd defendant contended therefore that any disclosures made to the it for purposes of the advice sought did not vitiate the plaintiff's duty to the 1st defendant to disclose and declare in its application proposal form for insurance cover, the fact that its vehicles were not armored.

21. The contents of paragraph 11of the Amended plaint were admitted in so far as it conceded that the plaintiff had failed, omitted and/or neglected to stipulate, declare and/or disclose in the proposal form whether the plaintiff's vehicles were armored or not and the risk attached thereto.

22. At the trial, Pw1 James Omwando relied on his witness statement dated 18/9/2018 and produced the plaintiff's bundle of documents as PExh1. His testimony rehearsed the contents of the Amended plaint. In cross-examination, he admitted that the plaintiff deliberately failed to fill the part of the proposal form that was in respect of Armor specification. He further admitted that the plaintiff never raised any issues with the wording of the Form.

23. He also admitted that there was no contract between the plaintiff and the 2nd defendant for provision of local insurance brokerage services and that neither was any payment made in respect thereof. That

its contract with the defendant was for re-insurance. In re-examination, he stated that there was an attempt to settle the claim for the air loss if the plaintiff abandoned the loss on land.

24. The 1st defendant called two witnesses. Lawi Kariuki Kamura (D1w1) adopted his witness statement dated 30/10/2010 which rehearsed the contents of the 1st defendant's defence and produced its bundle of documents as D1Exh1. He told the Court that the 2nd defendant sought a quotation for a protective Insurance Policy for the plaintiff which was for a Cover for Armored Vehicles Money in transit. That since the 1st defendant did not have capacity, it sought support from the international market.

25. In cross-examination, he stated that the first two losses were reported to the 1st defendant while the last two were not. That there had been misrepresentation by the plaintiff at the commencement of the cover. He admitted that the cover included both air and land cover. That there were two air losses on 14/3/2014 and 11/4/2014 for Kshs.21,737,500/- and Kshs.21,705,684/-, respectively. That the same could not be paid because the contract was invalid from inception for misrepresentation. He admitted that the primary insurance cover was issued without seeing the proposal form.

26. The 2nd defendant called Leah Kirira (D2w1). She adopted her witness statement dated 14/12/2020 which mirrored the defence of the 2nd defendant and produced its bundle of documents as D2Exh1.

27. The parties filed their respective submissions which have been considered. In its submissions, the plaintiff reiterated that at the commencement of the subject insurance business, it was categorical that its vehicles were not armored and this information was communicated to the 2nd defendant's representatives. That it did not complete the important column (3) of clause 55 regarding specification of armored vehicles which made it crystal clear that its vehicles were not armored. In the circumstances, all the losses that were incurred by the plaintiff during the subsistence of the policy are payable.

28. That the 1st defendant demanded and accepted premiums before even seeing the Proposal Form in respect of the subject insurance policy. That in view of the 1st defendant's conduct in the entire transaction, the plaintiff was entitled to a refund to the premiums paid in the event that the Court was not convinced that the claims are payable.

29. That the claim on the two losses on air transit had been admitted by the 1st defendant and the Re-insurance company and were therefore automatically payable in view of the release vouchers which were not contested by the 1st defendant during the trial.

30. In submission the 1st defendant maintained that the plaintiff breached a condition precedent in the Policy, Condition Precedent 12 entitling it to decline all four claims. That the plaintiff had, through its agent Afro-Asian, misrepresented the true nature of the vehicles (the risk to be insured) and upon which the 1st defendant and its re-insurers relied and were entitled to rely when entering into the contract. As a result, the 1st defendant was entitled to avoid the Policy in its entirety. The 1st defendant was thus entitled to repudiate the Policy. No binding contract was formed as the parties were not ad idem on the nature of the risk to be insured.

31. The 2nd defendant submitted that there was no contract between itself and the plaintiff for provision of local brokerage insurance services and no representation was made to that effect. It merely introduced the plaintiff to the 1st defendant. That the 2nd defendant did not therefore act in the capacity of a local broker. There was a contract for provision of international brokerage services between the plaintiff and the 2nd defendant. The sole and exclusive brokerage services were for international reinsurance placement and none other.

32. Both defendants took the position that the plaintiff's claim was in tort for economic loss/refunds of the premium was barred by the *Limitation of Actions Act* of Kenya. In any event, the claim for the premium refund was not merited as the 1st defendant was well within its contractual rights to avoid the Policy.

33. The Court has considered the pleadings, evidence adduced and submissions for and against the claim. The issue for determination is whether the plaintiff is entitled to its claim as sought in the Amended plaint.

34. It is undisputed that there was an insurance contract between the plaintiff and the 1st defendant. The plaintiff duly paid for the premium and a receipt was issued by the 1st defendant having purchased insurance policy reference number B 1160X 04911DK 2013.

35. It was the plaintiff's case that the outstanding claims of four incidents of loss made to the 1st defendant and the re-insurer were wrongly rejected on the allegation of misrepresentation by the plaintiff that its vehicles were armored when in fact the plaintiff had never done so and had in fact negotiated its premiums through the 2nd defendant on the basis that its vehicles were un-armored.

36. On the other hand, the 1st defendant held the position that the 2nd defendant had indicated that the plaintiff sought an Armored Car Operations Cover and gave the 1st defendant instructions to place such a cover on the plaintiff's behalf. That the policy contained several conditions precedent which the plaintiff was required to comply with as a mandatory condition to the re-insurers liability.

37. It was Dw1's testimony that the plaintiff was mandated to use only armored vehicles and could only use soft-skinned vehicles in the event of an emergency and breach of this condition entitled the insurer to decline the claims irrespective of how the risk attached.

38. Pw1 testified that the plaintiff fully relied on the 2nd defendant through its agents as the broker for the subject cash in transit insurance policy. He produced several email correspondences between it and the 2nd defendant to support its contention that the 2nd defendant was its agent. That the plaintiff did not complete a column in clause 55 of the proposal form which required 'specification of armor' since its vehicles were unarmored.

39. It is common ground that the plaintiff's vehicles were not armored as admitted by the plaintiff both in its plaint and evidence. The evidence on record shows that the Cover that was being sought was for cash-in-transit. What was offered by the 1st defendant through the re-insurer was Cover for Armored Vehicle Cash-in-Transit.

40. The policy that was issued contained a condition precedent which the plaintiff was required to comply with. On whether the vehicles were required to be armored or unarmored condition 12 of the Policy provided: -

> " The assured must use armored vehicles for all transits. These must be properly maintained. However, in the event of an accident or breakdown of an armored car, the assured may use an unarmored vehicle solely in order to protect the insured property by completing the delivery or removing it to a secure strong room. In the event an unarmored vehicle has to be used, an extra guard must be used."

41. The policy is a contract between the parties. It remains valid and binding unless it is set aside. The threshold for setting aside a contract is the existence of any or all or the vitiating factors including mistake, misrepresentation, coercion and/or undue influence.

42. It was the 1st defendant's contention that it was misrepresented to it that the plaintiff's vehicles were armored and that this was the basis on which the armored car operations cover was offered yet the Plaintiff's vehicles were soft-skinned.

43. In ICEA Lion General Insurance Company Limited v Noble Merchants Shipping Limited & another [2023] KECA 1061 (KLR), it was stated: -

> " The issue of non-disclosure of ownership, if there was such non-disclosure and insurable interest ought to be determined in light of the opinion of Lord Lloyd in Pan Atlantic Insurance Co. Ltd v Pine Top Insurance Co. Ltd [1993] 3 All ER 581 where it was held that:
>
> > " Whenever an Insurer seeks to avoid a contract of insurance on the ground of misrepresentation or non- disclosure, there will be two separate closely related questions
> >
> > 1. Did the misrepresentation or non-disclosure induce the actual Insurer to enter into 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.'"

44. The plaintiff contended that prior to entering into the agreement with the 1st defendant, the plaintiff was given a chance to disclose all relevant information pertaining to its engagement vide the proposal form titled Questionnaire – Armored car operators, which it admitted that it did not fill out the part requiring specification of armor on its vehicles.

45. That by failing to fill that portion of the questionnaire, there was no misrepresentation and/or material non-disclosure made to the 1st defendant regarding armored vehicles before the issuance of the policy. That on the basis of Dw1's evidence that the proposal form was seen for the first time in August 2014 when the cover was about to lapse the 1st defendant did not rely on the information given by the plaintiff in the proposal form in order to issue the policy.

46. It is undisputed that the plaintiff received the Proposal Form from the re-insurers. That the 1st defendant issued the primary insurance so that a re-insurance could be placed. Indeed, it came out that the 1st defendant itself had no capacity to issue the Cover sought by the plaintiff. That is why the plaintiff sought the services of a reinsurance broker, the 2nd defendant. The proposal form itself disclosed that the cover sought was for Cash in transit in armored cars.

47. It is notable that the plaintiff proceeded to provide details of the vehicles and only left out the column on "specification of armor" blank. It was incumbent upon the plaintiff to be candid in respect of that column on question 55. If the plaintiff was being bona fide, it should have expressly indicated in that column 'No Armored vehicles". By leaving it blank, that per se did not mean that it had communicated to the defendants that it did not have armored vehicles.

48. In addition, despite leaving the said question 55 incomplete, the plaintiff answered questions 11(b), 12, 13, 17, 19, 45 and 49 of the questionnaire all of which related to the use of armored vehicles. All through the plaintiff did not disclose that its vehicles were not armored.

49. Dw2 in her testimony also admitted that the risk details regarding the policy stated that the type of cover of the insurance was for an armored operations cover.

50. Further to the above, the proposal form having constituted the policy provided that: -

> " The Assured warrants and represents that the information contained in the proposal form and all other application documents (the "Proposal form") for this insurance is complete, true and correct. The proposal form constitutes part of this insurance and is incorporated herein. Any misrepresentation, omission, concealment or any incorrect statement of a material fact in the proposal form, or otherwise, shall be grounds for the rescission of this insurance."

51. The conclusion the Court arrives at is that the plaintiff misrepresented as having armored cars when it had soft-skinned vehicles. It is the Court's view that there was misrepresentation by the plaintiff. There was no contract between it and the 2nd defendant as claimed in the plaint. Had the 1st defendant been aware about the misrepresentation before the contract was concluded, it is unlikely that it would have entered into the cover.

52. The plaintiff claimed that the loss on air should be settled as it was not loss in armored vehicle yet it was covered. The position is that the entire policy was one. It was not severable. The moment there was misrepresentation on one part, the same vitiated the rest of the contract.

53. Misrepresentation being one of the grounds for rescission of a contract, the 1st defendant was well within its right to repudiate the policy. As a consequence, the plaintiff cannot claim for refund of the premium. With regard to the 2nd defendant, the 2nd defendant was only a broker. Once it placed the business with the re-insurer, its role ended and no liability attached to it thereafter.

54. In the premises, the plaintiff has not proved its case to the required standard and its suit is hereby dismissed with costs. The counterclaim therefore succeeds.

It is so decreed.

SIGNED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2025.

A. MABEYA, FCI Arb

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF FEBRUARY, 2025.

F. GIKONYO

JUDGE