Saham Assurance Company Limited v Mburu (Civil Appeal E108 of 2023) [2025] KEHC 1039 (KLR) (4 March 2025) (Judgment)

Neutral citation: [2025] KEHC 1039 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E108 OF 2023

TA ODERA, J

MARCH 4, 2025

BETWEEN

SAHAM ASSURANCE COMPANY LIMITED .... APPELLANT

AND

FRANCIS KABERA MBURU .... RESPONDENT

JUDGMENT

1. The respondent filed Kisii CMCC E017 of 2021 in the lower court seeking judgment against the appellant in the sum of Kshs. 572,00/= being costs of repairs and towing charges of motor vehicle registration number KBS 448D which was insured by appellant vide policy no. MGL/08/080/xxxx/2018 and damages for breach of fiduciary duty. The appellant's case was that the vehicle was being used for hire against the conditions of the policy and that a declinature letter was issued after the repairs had already been done.

2. The learned trial magistrate found that Dw1 testified there was nothing to shop that the vehicle was being used for hire and reward and he also admitted that the payment receipts preceded the declinature letter. Also, that the respondent went through all the due process for the claim and the appellant could not turn around last minute and refuse to pay the repair costs. Further that the cover was not repudiated.

3. This is a first appellate court and the duty of this court is to re-evaluate the evidence on record and arrive at its own conclusion bearing in mind that it neither saw the witnesses nor heard their testimony as was held in the case of Sielle vs Associated motors EA 1968 EA 123.

4. I have carefully re-evaluated the entire evidence on record together with the submissions and I find that the issues arising for determination are as follows:

    a. Whether Ion Minet the Insurance broker was an agent of the Insured and not the Insurer.

b. Whether the learned trial magistrate erred in failing to appreciate that the respondent neither called the insurance broker as a witness and nor was it enjoined as a party.

c. Whether the vehicle was used for hire and reward against the policy.

d. Whether special damages were proved.

e. Whether the respondent fraudulently accessed the insurance policy rolled out for East African Breweries Limited (EABL)) employees.

f. Whether the trial magistrate erred in deciding the case in favour of the respondent yet he was in clear breach of the insurance contract.

g. Whether special damages were proved.

Determination

Whether Ion Minet the Insurance broker was an agent of the Insured and not the Insurer.

5. The appellant submitted that a broker is an agent for the insured and not the insurer. Section 2 of the *Insurance Act* defines a broker as -

> “ broker" means an intermediary involved with the placing of insurance business with an insurer or reinsurer for or in expectation of payment by way of brokerage commission for or on behalf of an insurer, policyholder or proposer for insurance or reinsurance and includes a medical insurance provider;

6. In the case of Pan Africa Insurance Company Ltd & 2 Others v Clarkson & Southern Limited[1993] KEHC 8 (KLR)

   It was held that: “The plaintiffs have to prove a contract with an identifiable ambit to which identifiable terms can be implied. As it was said in that case, it does not follow that because the underwriters pay brokerage that the broker is undertaking to perform any obligations in favour of the underwriter and that the mere carrying out of functions by the brokers during their normal course of his business for the benefits of underwriters does not itself establish any contract to carry out those functions.”

7. A broker is thus a go- between the insured and the insurer and in the insurance business and he is paid commission for the same. A broker is the one who meets a proposer issues, a proposal form which is filled by the proposer and then issues the risk note to him and then liaises with the insurer to issue an insurance cover upon confirming that the premium has been paid. He is not an agent of the Insurer but the insured as rightly submitted by the appellant.

   On Whether the learned trial magistrate erred in failing to appreciate that the respondent neither called the insurance broker as a witness and nor was it enjoined as a party.

8. The respondent’s case in the lower court was that he relied on instructions given to him by the broker to take the vehicle to the garage for repairs. The appellant denied giving such instructions and submitted that the respondent ought to have enjoined the broker in the suit or called its representative as a witness to support his case. I note that the respondent used the broker to obtain the cover which fact is not denied. The respondent adduced evidence that he relied on the advise of one Juliet of Minet to take the vehicle to the garage for repairs. This court takes judicial notice that according to the insurance practice a broker is the one who receives the proposal form from the proposer and generates a risk note upon assessing the same. The respondent had the burden of proof to establish is allegations against

the respondent. A broker is not an agent of the insurance and thus the Insurer cannot be held liable for its acts. Therefore, the broker should have been called as a witness to confirm what the respondent proposed in the claim form under the user head and to produce the risk note which forms the basis for issuance of the insurance policy. Since the broker was not called this court can safely infer that had he been called them his evidence would have been adverse to the respondent. This issue was not dealt with by the Lower court. In the upshot, I find that the Learned Trial Magistrate erred in failing to appreciate that the respondent neither called the insurance broker as a witness and nor was it enjoined as a party.

whether the vehicle was used for hire and reward.

9. The appellant's case in that their investigations revealed that vehicle was used for hire and reward and hence they repudiated the claim. The appellant submitted that the respondent and his driver admitted that the vehicle was used for hire and reward as per their statements in the investigations report -Dexh 3. This was denied by the respondent who said he was using the vehicle to transport a fridge for a friend at the material time. In the case of Carter v Boehm 97 ER 1162 it was held that:

> "Insurance is a contract based upon speculation. The special facts, upon which the contingent chance is to be computed, like most commonly in the knowledge of the insured only; the underwriter trusts to his representation and proceeds upon the confidence that he does not help back any circumstances in his knowledge, to mislead the underwriter into a belief that the circumstances does not exist, and to induce him to estimate the risk as if it does not exist...Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact, and his believing the contrary".
>
> In the case of Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co. Ltd & Another , the House of Lords held as follows:
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> "...Whether an insurer seeks to avoid a contract of insurance or reinsurance on the ground of misrepresentation or non-disclosure, there will be two separate but closely related questions:
>
> 1. Did the misrepresentation or non-disclosure induce the actual insurer to enter into the contract on there 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, not otherwise.

10. I have seen the private Motor Insurance Policy Schedule (Dexh 2) which has the limitation of use clause which the appellant relied on in its defence and the Investigations report. The said limitation clause restricts the use of the vehicle by stating that the vehicle shall not the used for hire and reward. The respondent disputed this. The appellant also pleaded that it never authorized the cash in lieu agreement on 18.6.19 and taking of the vehicle to North West Garage as alleged. The trial magistrate found that the appellant out to have adduced better evidence to exonerate itself and that it did not repudiate the cover. In their evidence respondent and his witness denied that the vehicle was used for hire and reward. However, in the Investigations report there were statements alluded to them which indicate that the driver told the investigator that the vehicle was used for hire and reward. I have seen the driver's statement in the investigations report and it says the vehicle was for hire and not previously used for hire as submitted by the respondent. This contradicts the evidence of Pw1 that the son has dropped his friend's fridge using the pickup.

11. The respondent submitted that Dw2 told the court that he is the one who took he statements of the driver and respondent and yet the report indicates that Martin Mwangi is the one who took the statements. I have seen the evidence of Dw2 in which he said we met the insured and his son, recorded their statements”. My understanding of this statement is that the witness was working with his team during the recording of the statements and not that he was acting alone as submitted. Though the declinature letter was issued on 3.9.2019, and the accident was on 17.6.2019, there are no set timelines for repudiating a policy save that it has to be within a reasonable time. Considering that investigations had to be done and decisions made thereafter and thus the repudiation was within a reasonable time.

    From the foregoing, I find that the respondent breached the principle of Utmost good faith by using the vehicle for hire against the policy. The appellant was thus right in avoiding the policy.

Whether special damages were proved

12. Had the case passed the test of validity of policy the court would have proceeded to determine the issue of special damages. It is trite law that special damages must be specifically pleaded and strictly proved. The respondent produced receipts in the sum of Kshs 572,000/= for the repairs. In this case the broker is the one who allegedly instructed the respondent to take the vehicle to the garage for repairs. No assessment reports were produced to show that the vehicle was assessed after the accident to show the extent of the damage and estimated costs of repairs and after the repairs to confirm whether the same was actually repaired as per the practice in the insurance Industry. This information was not produced in court and thus no basis was laid the said receipts. Special damages was thus not proved.

Whether the respondent fraudulently accessed the insurance policy rolled out for East African Breweries Limited (EABL)) employees.

13. This was the contention of the appellant in its evidence and pleadings and was denied by the respondent. I have perused the defence and I note that this issue was not pleaded it is trite law that parties are bound by their pleadings and a party cannot introduced what he had not pleaded in evidence as was held in the case of Independent Electoral & Boundaries Commission v Stephen Mutinda Mule & 3 others) [2014] eKLR. The alleged fraud was thus not proved.

    On whether the learned Trial Magistrate erred in finding in favour of the respondent

14. In the upshot, the respondent failed to prove his case in the lower court and the trial magistrate erred in his finding that the respondent proved his case on a balance of probability. The learned Trial magistrate thus erred in finding in favour of the respondent

Conclusion

15. I find merit in the appeal and it is allowed that the Judgment of the lower court is set aside.

    Costs to the appellant.

T.A ODERA

JUDGE

4.3.25

DELIVERED VIRTUALLY VIA TEAMS PLATFORM ON THIS 4TH DAY OF MARCH 2025 IN THE PRESENCE OF:

Gemo for Appellant

Okanga for Respondent

Court Assistant - Oigo