



**APA Insurance Company Limited v James Wanyoike Njoroge t/a Come Juu Premier Academy
(Civil Case 182 of 2011) [2024] KEHC 8674 (KLR) (Civ) (10 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8674 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL CASE 182 OF 2011**

**AN ONGERI, J
JULY 10, 2024**

BETWEEN

APA INSURANCE COMPANY LIMITED PLAINTIFF

AND

**JAMES WANYOIKE NJOROGE T/A COME JUU PREMIER
ACADEMY DEFENDANT**

JUDGMENT

1. The plaintiff APA Insurance Limited filed this suit against the defendant James Wanyoike Njoroge t/a Come Juu Premier Academy seeking the following declaratory orders;
 - a. A Declaration that the Plaintiff be and is hereby not liable to the Defendant under the repudiated Insurance Policy No. P/30/080112007/51 1;
 - b. A Declaration that the Plaintiff be and is hereby not liable for any claims arising out of the accident on 1 December 2010 involving motor vehicle registration number KAU 392S;
 - c. Costs of this suit;
 - d. Such further or other relief as this Honourable Court may deem fit.
2. The plaintiff averred as follows in the plaint dated 19/5/2011 at all material times the Defendant was the owner of Motor Vehicle Registration Number KAU 392S.
3. That on or about the 3rd of November 2007 the Plaintiff issued a Comprehensive Motor (Commercial) Insurance Policy number P/30/0801/2007/511 to the Defendant for the said motor vehicle registration number KAU 392S for the period 3rd November 2007 to 2nd November 2008.



4. That the Defendant subsequently renewed the said Insurance Policy for the periods 2008 to 2009; 2009 to 2010; and 2010 to 2011 on the same terms and conditions as initially provided.
5. That it was a term of the said Policy pursuant to clause CVI (limitation to use) that its scope only extended to the use of the Insured Motor Vehicle registration number KAU 392S solely for social domestic and pleasure purposes by the insured and/or its employees in the course of its business; specifically excluding the carrying of passengers for hire or reward or letting of the insured vehicle for hire or reward.
6. That on or about the 18th day of December 2010 the said motor vehicle registration number KAU 392S was involved in a motor accident along Sagana - Kenol Road at Maragua River Bridge.
7. That at the time of the accident the Defendant had lent out the said motor vehicle registration number KAU 392S to a Third Party contrary to the terms of the Insurance Policy issued by the Plaintiff whereby the said motor vehicle was to be used for the carriage of school children for the Defendant's school.
8. That pursuant to the said insurance policy the Plaintiff was entitled to and proceeded to repudiate any claim by the Defendant and the Policy as motor vehicle KAU 392S had been used outside the scope of the Plaintiff's cover thus extinguishing any liability on its part.
9. That on the 3rd day of March 2011; the 1st day of April 2011 and thereafter on the 21st day of April 2011 the Plaintiff was served with Statutory Notices by the families of Samuel Kinuthia Karanja and Mary Wambui Kinuthia; Joan Wanjiru Ng'anga, Ruth Wangari Kibe, Michael Ndungu Kahia, Jeremiah Kariuki Njoroge, Grace Gathoni Ng'anga and Josphine Waithera Maina; Elizabeth Wanjiru Mukoma, Lucy Wanjiru Mukoma and John G. Mukoma, the Administrator of the Estates of Hannah Wanjiku Mukoma and Benjamin Mukoma Njeru respectively, which notices conveyed their intention to institute suits against the Defendant herein in respect of claims arising out of the accident on 18th December 2010 involving the said motor vehicle registration number KAU 392S.
10. That the Plaintiff stands to suffer loss and damage in the event that suits are filed against the Defendant and thereafter declarations sought against it to satisfy judgments, if any, made against the Defendant herein on the basis of the repudiated insurance policy.
11. The defendant filed a statement of defence dated 22/8/2011 denying the plaintiff's claim.
12. The defendant stated in the said statement of defence that the scope of the insurance policy extended only to the use of the said motor vehicle for social domestic and pleasure purposes.
13. Further, that the use was extended only to the insured and/ or its employees within the course of duty and that the policy specifically excluded carrying of passengers for hire or reward or letting of the vehicle for hire or reward.
14. Further, the Defendant stated in their defence that the motor vehicle was used within the terms of the insurance policy and was used by a parent of one of the school students who is a member of the Parents Teachers Association and the school facilities like the motor vehicle is available for use by a member of the PTA.
15. The Defendant denied that it lent out the motor vehicle to a third party or to any other party at all and that it was in contravention of the terms of the insurance policy or any part of the policy thereof.
16. The defendant further stated that the Plaintiff was in breach of the policy terms of the insurance cover provided by the Plaintiff.



17. It was the Defendant's further averment that the Plaintiff did not issue any policy even after the Defendant had paid for the same and this was issued only after the alleged accident had occurred and the Plaintiff rushed to ensure that the same is not honoured.
18. The Defendant further states that the Plaintiff purported to issue the said policy almost a year after the alleged accident had occurred and this was done in an attempt to breach the terms of the original policy between the Plaintiff and the Defendant.
19. It was also a further averment by the Defendant that the policy document issued by the Plaintiff later was never signed and or stamped with the school stamp and the documents issued by the Plaintiff are not binding as that was not the original agreement by the defendant when the Defendant purchased the policy.
20. Further, that the Plaintiffs repudiation of the claim was in total breach of the terms of the said policy and it is upon the Plaintiff to honour the terms of the said policy.
21. The defendants counterclaimed for the following declaratory orders;
 - a. The Plaintiff is in breach of the insurance policy and its terms stipulated therein.
 - b. The Plaintiff is liable for all claims arising out of the policy involving motor vehicle registration number KAU 392 S
 - c. The Plaintiff do settle all claims arising out of the insurance policy as and when they fall due involving motor vehicle registration number KAU 392 S.
 - d. Costs of the suit
 - e. Interest thereon
 - f. Any other relief this Honorable Court may deem fit to grant
22. The plaintiff called two witnesses PW 1 Pual Kariba Kibiku and PW 2 John Machugu Mukigi who produced an investigations report dated 27/1/2011.
23. PW 1 produced his witness statement dated 8/6/2015 in which he stated that he is the legal officer of the plaintiff company. The plaintiff company insured motor vehicle registration number KAU 392S under a commercial motor policy No. P/30/0801/2007/511 from 3/11/2007. The said policy was subsequently reviews for 2008-2009, 2009-2010 and 2010-2011 on identical terms, conditions and warranties.
24. On or about 7/1/2011 the plaintiff company was informed by the defendant that there was an accident involving KAU 392S. the company commenced investigation and instructed Rapid Investigation Services to investigate the circumstances of the accident. on 28/1/2011 the plaintiff received a report which stated that the motor vehicle had been lent out to a third party and at the material time of the accident was not used as per the terms of the policy.
25. The plaintiff company received several demand letters and in taking the circumstance into account the plaintiff wrote a letter to the defendants broker repudiating liability on the basis that there was breach of the use of the policy.
26. PW 2 produced the investigation report of which stated that the defendant was using the motor vehicle for a personal function for one of the parents of the school.



27. The defendant who testified as DW1 called 2 witnesses DW 2, Stephen Maina and DW 3 Alexander Karani.
28. DW1 stated that on 16/11/2010 Mr. Alexander Karani one of the school parents asked him to allow him and his friends and relatives to utilize the vehicle to travel to Mwea for dowry payment function to take place on 18/12/2010. Since Mr Karani was a parent and also served as a volunteer counselor at the school he allowed the request.
29. On 18/12/2010 at around 7:45 pm Mr. Maina a colleague of Alexander called him and informed him that the vehicle was involved in an accident and that there were some fatalities and injuries. The following day he went to makuyu police station and made enquiries about the accident as well as paid 50,000 as towing charges.
30. DW2 Stephen Maina and DW3 Alexander Karani reiterated the same int their statements.
31. The evidence of the defendants was that the motor vehicle was rent to DW 3 to use because he was a parent of the school and a volunteer counselor.
32. The parties filed written submissions as follows; the plaintiff submitted that the terms of the policy document apply in this claim. Noting that the payment if the insurance premium is not disputed and the information filled in the proposal came from the defendant, it is therefore certain that the policy document ant its terms exist and apply and it is upto the defendant to follow up on receiving the policy document once the insurance policy is issued. In the case of *Silverstar Automobiles Limited v Fidelity Shield Insurance Co. Ltd* [2014] eKLR, the court held that:

“...As regards the Court of Appeal case of *Madison Insurance Company Ltd v Solomon Kinara* (2004) eKLR, the Defendant submitted that the proper reading of the finding of the Court of Appeal was that the rights of the insured were limited to the terms of the Policy and the Court would not go outside those terms. The answers supplied by the Plaintiff to the Proposal were in the nature of representations to the Defendant and confirmation that the risk was being undertaken by the Defendant strictly on the basis of the information provided by the Plaintiff.

.....It was not necessary for the Defendant to get in touch with the insured when the Plaintiff had a broker as its agent... Quite apart from perusing the Policy, I have had an opportunity of examining the Proposal completed by the Plaintiff (or perhaps its broker PW 2) dated 29th April 2004... As to Issue No. 2, I do find that the Plaintiff did sign a Proposal and Declaration form dated 29th April 2004.”

33. The plaintiff argued that the policy document included a clause on limitation of use which provided;
 - “Use in connection with insured’s business. Use for carriage of passengers in connection with insured’s business. Use for social domestic and pleasure purposes. This policy does not cover:
 - (1) Use for racing competitions rallies or trials (or use for practice for any of them) or use for hire or reward.
 - (2) Use while drawing a trailer except the towing (other than for reward) or any one disabled mechanically propelled vehicle.”



34. It was argued that the words “connect with the insured’s business is only in relation to education and for the purposes of carrying students as declared in the proposal form by the defendant. That further by virtue of being a parent the defendant was benefitting from a reward.
35. Secondly, the fact that fuel for the use of the school did not come from school funds but rather was catered for by third parties, was a form of reward. Therefore, the definition and interpretation of reward must include the prospect of a benefit, in this case, through school fees and the avoidance of a charge or direct funds flowing from the insured (which is a saving), in this case in the form of fuel catered for by third parties.
36. That the Defendant only stood to gain and not lose any funds whatsoever at any period. This is the reward for the use of the bus contract to the insurance policy and therefore the school bus was indeed hired out.
37. It was therefore the plaintiff argument that that the school bus was hired out for temporary use and in the alternative the Defendant did receive a reward in the form of school fees and/or a saving by having the bus fueled by third parties, a fact admitted by the Defence.
38. It is the duty of the plaintiff to prove its case to the required standard in civil cases which is on a balance of probabilities.
39. The issues for determination in this case are as follows;
- i. Whether the plaintiff should repudiate the Insurance Policy No.P/30/080112007/511 between itself and the defendant.
 - ii. Whether the defendant has proved its counterclaim against the plaintiff.
 - iii. Who pays the costs of this suit?
40. On the issue as to whether the plaintiff should repudiate the insurance contract, the plaintiff’s evidence was that the bus was insured for school business but at the time of the accident and that it was hired out by the defendant.
41. The plaintiff stated that the policy document included a clause on limitation of use which provided as follows;
- “Use in connection with insured’s business. Use for carriage of passengers in connection with insured’s business. Use for social domestic and pleasure purposes. This policy does not cover:
- (1) Use for racing competitions rallies or trials (or use for practice for any of them) or use for hire or reward.
 - (2) Use while drawing a trailer except the towing (other than for reward) or any one disabled mechanically propelled vehicle.”
42. I find that the defendant disputed the knowledge of their said terms prior to the accident.
43. I also find that it is not in dispute that the motor vehicle was insured by the plaintiff and that the policy was valid.
44. Section 4(1) of the *Insurance (Motor Vehicle Third Party Risk) Act* Cap.405 Laws of Kenya provides that a person may not use or cause or permit a motor vehicle to be used on the road unless there is a policy in force covering the use of such a motor vehicle.



- 45. I find that at the time of the accident, the use of the suit motor vehicle was covered by a valid policy.
- 46. The defendant who is the owner of the suit motor vehicle had taken out a policy of insurance in compliance with the Act and in order to indemnify it in respect of liability to the third parties who may suffer any loss or injury resulting from an accident involving the suit motor vehicle.
- 47. The defendant did not deny that he gave the bus to one of the parents of the school who was also a volunteer counselor (DW 3).
- 48. There is no evidence that the bus was hired out and therefore the plaintiff is liable to settle the claims against it.
- 49. On the issue as to whether the defendant was in breach of the insurance contract, I find that the answer is in the negative.
- 50. There is evidence that DW 3 was not a stranger to the defendant.
- 51. At the time of the accident, the Motor Vehicle was being driven by the defendant’s authorized driver.
- 52. I find that the defendant has proved his counterclaim and therefore the Plaintiff is liable for all claims arising out of the policy involving motor vehicle registration number KAU 392 S.
- 53. The plaintiff is bound to settle only genuine claims arising out of the insurance policy as and when they fall due.
- 54. On the issue of costs, I order that each party bears its own costs of this suit.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 10TH DAY OF JULY, 2024.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant

