



REPUBLIC OF KENYA



**Kenya Alliance Insurance Co Ltd v Kioko (Civil Appeal
E143 of 2021) [2023] KEHC 1819 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1819 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS**

CIVIL APPEAL E143 OF 2021

MW MUIGAI, J

MARCH 2, 2023

BETWEEN

KENYA ALLIANCE INSURANCE CO LTD APPELLANT

AND

JOHN MUTUKU KIOKO RESPONDENT

*(Being an Appeal from judgment of the Hon. Mr. Bernard Kasavuli(P.M) dated
29th July, 2021 in Mavoko Chief Magistrate Court Civil Case No. 1326 Of 2017)*

JUDGMENT

Trial Court Record

1. The respondent instituted in Mavoko Magistrate Court civil case No 1326 of 2017 John Mutuku Kioko v Kenya Alliance Insurance Co Ltd, by way of a plaint dated July 20, 2017 against the appellant who is the insurance company in which the respondent had taken insurance policy No MCV/B1/POL/101643 for the respondent's motor vehicle Reg No KCC 429H.
2. By policy of insurance No MCV/B1/POL/101643 issued by the defendant through its agency, the defendant undertook to comprehensively issue the plaintiff motor vehicle Reg No KCC 429H, an Isuzu lorry with motor commercial general cartage insurance. The policy covered all aspects of loss or damage to respondent's motor vehicle for the sum of Kshs 5,500,000/=.
3. That it was a term of the of insurance that if the vehicle insured was under a financial agreement, the appellant would pay the financier for the total loss and damage.
4. The respondent claimed that during the currency of the policy on December 19, 2016, the lorry was engaged in its normal route of collecting sand at the collection point in Wathini sub location Makueni county and during the currency of the said policy, when it was accosted and razed by the rowdy gang to a write-off and 2 other vehicles and 2 people were killed.



5. The incident was reported at Sultan Hamud police station *vide* OB No December 21, 2016 and an abstract obtained. It was his case that he subsequently reported the matter to the defendant /appellant who refused to pay the sum insured and as a result the respondent suffered loss and damage.
6. The respondent sought orders in the plaint as follows;
 - a. A declaration that the defendant is obligated and duty bound to settle the plaintiff's insured claim of Kshs 5,500,000/- with interest and costs at court rates from February 1, 2017 until payment in full, including penalties therein accrued as a result of non-payment to the lender, being Equity bank; exemplary and /or compensatory damages for the strain stress and suffering caused to the plaintiff and any other order the court may deem fit.
7. The appellant in its defense filed on December 4, 2017 rejected the respondents claim that the policy of insurance covered all aspects of loss and/or damage to the plaintiff's motor vehicle Reg No KCC 429 H. The appellant further stated that the policy insurance was brokered by agent of the respondent and that it was a term of the policy that the appellant was exempted from loss or damage and liability caused while the vehicle was being used for an illegal and/or unlawful purpose. It was understood and agreed and expressly provided by the policy of insurance and schedule that the policy was issued by the defendant based on information provided by the plaintiff in his insurance policy. The appellant /defendant raised issues of breach of insurance contract, non -disclosure and fraudulent misrepresentation as follows; by an agreement dated February 8, 2016 the plaintiff, John Mutuku Kioko sold the vehicle to Ambrose Nthuku Muthini & Sammy Mutua Kamau; on the material day the motor vehicle was used for an illegal and unlawful harvesting of sand which was banned in the area; when the plaintiff/respondent raised complaint with the insurance regulatory authority and both parties were heard, the complaint was dismissed.
8. In defense the appellant denied allegations that the said vehicle was engaged in its normal route of collecting sand from the alleged collection point. According to the appellant the vehicle was on the material day and time being used for an illegal and unlawful purpose, to wit, stealing sand from the said area and contended that it was justified to repudiate liability and reject the respondent's claim. It contended that the suit disclosed no reasonable cause of action against it, the same being frivolous and vexatious and an abuse of the court process the appellant prayed that the respondent's case be dismissed with cost.

Proceedings In Trial Court

9. PW1 Philip Chengo Ndibo, assistant chief Uraleni sub-location testified that on December 19, 2016, 3 lorries were burnt and 2 people killed at Muua river by unknown people. He suspected that the sand harvesting at Chambini – Nduluni was the place of the incident. Sand harvesting had been taking place since 1980 and after this incident it was banned and a police post was established.
10. In cross examination by defendant's counsel, the witness reiterated that sand harvesting was not banned until the incident and there was no war between the community and the harvesters. The ban was from December 20, 2016 and not from December 14, 2016 as shown by letter of March 13, 2017.
11. PW2 PC Jeremiah Mwakavi of Sultan Hamud police station testified that he was summoned to produce the OB related to motor vehicles KCC429 H, KBL 492K, KCG 246V. The report for motor vehicle Reg KCC 429 H was reported December 21, 2016 at 11.02 pm by the driver Michael Mumbua Kinyiri that on the night of December 19, 2016 at around 22.00 hrs-10 pm the motor vehicle was to collect sand at Mangala area. Almost ready to leave point of picking a group of unknown people



- emerged from the surrounding and attacked them while grouped. They ran for safety and motor vehicle was burnt down by group now seek police assistance.
12. The Witness was stood down to obtain the report regarding the 3 vehicles. On recall of the witness PW2 he produced the consolidated report by OCS of Sultan Hamud police station who visited the scene and filed the report of December 20, 2016 as Pwexh 1.
 13. In cross examination the witness stated that there was the report by OCS Sultan Hamud after he visited the scene and other reports made by Michael Mumbua and another by John Kithae both reported on KCC429 H on December 21, 2016 & December 22, 2016 respectively and indicated that the lorry was burnt. PW2 stated he was not the investigating officer and did not know if the vehicle burnt or not and produced reports in court. There was a fray of motor vehicle over sand harvesting between villagers and there were people killed. Later the Makueni county government and senior officers OCS DO DCIO met and stopped the ferrying of sand.
 14. PW3 John Mutuku Kioko owner of motor vehicle Reg KAC 429 H and adopted his witness statement and List of documents of March 15, 2014. He sued the defendant as they refused to pay for motor vehicle KAC 429 H that was involved in an accident. The motor vehicle KAC 429 H was lawfully ferrying sand and he told the defendant the vehicle was to ferry sand and stones and had receipts issued allowing him to ferry sand. At first he made an agreement with Ambrose and Wambua so that they could use the vehicle get work and we would get money to repay the loan. Later, he added Sammy. In February 2016 he decided to sell the vehicle to Ambrose due to the outstanding loan of Ksh 4 million. He wrote the 2nd agreement and the loan was paid from ferrying sand.
 15. In cross examination he could not recall the date of purchase of the vehicle. According to the list of documents filed the motor vehicle was purchased on December 18, 2014 as shown in the Invoice at Ksh 5,500,000/-. The vehicle was registered in his name and Equity bank that gave him the loan. He gave the vehicle to Ambrose Thuku to do business and the driver was Wambua. Various part payments were made by Ambrose; Ksh 400,000/- cash, Ksh 10,000/- and cheque of Ksh 190,000/-. He receipted Ksh 600,000/- Ksh 4,000,000/- was still due and owing. So, if the accident happened the registration of the vehicle was still in his name and the Equity Bank. The bank refused any transfer until payment was made. He wrote another agreement and was made to sign he did not know how to read. They worked with the vehicle and brought the money and it was not recorded anywhere, if the loan was not taken up by the purchasers he remained responsible to pay it.
 16. Further cross examination PW3 admitted that the vehicle was used by Ambrose & Wambua they banked money in his account. At the time of the accident he was still paying the loan. One Nicholas Kimeu asked for Ksh 1,400,000 for the loan to be transferred to Ambrose and Wambua. He took the loan with the defendant he filled forms and signed. The proposal form was issued by Nthenya Mutiso the insurance agent who gave him the form. He stated that he did not sell the motor vehicle to Ambrose & Wambua as the bank refused the sale and he continued to pay the loan. He admitted that when the vehicle was burnt Ambrose & Sammy filled the claim form and appended his signature. Ambrose was a broker and he got work and paid the driver. PW3 informed court that the incident of the vehicle being burnt and the defendant refused to settle the claim was presented before insurance regulatory authority and after hearing he was informed he had no claim against the defendant. He paid Ksh 4,000,000 and the balance of Ksh 2,000,000 remained outstanding.
 17. In reexamination the plaintiff reiterated that at the time of the accident when the lorry /vehicle was burnt , it was registered in his name and the bank that advanced the loan. The bank refused sale of the vehicle to Ambrose and Sammy despite the agreements signed by parties.

The defense called the following witnesses;



18. DW1 Shadrack Munga Tete , area chief of Kasekiu location of Makaa sub county stated that the sand harvesting was banned in Kasekiu as per his letter of September 7, 2018 that the ban was from 2008. In cross examination he admitted that there was no letter to confirm the ban since 2008.
19. DW2 Emily Owuor Elsie, from insurance regulatory authority stated that the complaint by the plaintiff was considered during hearing and the decision was that the plaintiff failed to disclose the truth as to ownership of the vehicle at the time of the accident. The plaintiff did not disclose the motor vehicle accident and addendum as shown by the defendant.
20. DW3 Peter Nderitu the insurance investigator relied on his statement and in a nutshell stated that he met Sammy Mutua & Michael wambua the driver and they gave him the sale agreement. He also met John Mutuku who told him he sold the vehicle to Sammy.
21. By judgment delivered on July 29, 2021, Hon Kasavuli (PM) agreed with and granted the respondent's claims and issued orders as prayed by the respondent in the plaint.

Proceedings In The High Court

22. Dissatisfied by the judgment of the Magistrate Court, the appellant filed memorandum of appeal dated August 23, 2021, and further filed notice of motion dated September 13, 2021 seeking among other orders, an interim order of stay of execution the judgment and decree of the lower court Mavoko CMCC No 1326 of 2017 pending the hearing and determination of the application which vide order issued on September 13, 2021 granted an interim order pending directions of the court.
23. By consent entered and filed in court by parties through counsel of December 3, 2021 to have the decretal amount deposited in a joint interest earning account of both advocates of parties on record within 90 days. The court adopted the consent as an order of the court and the basis of stay of execution.

Appeal

24. In the memorandum of appeal date August 23, 2021, the appellant appeals against the whole of the said entire judgment on the following grounds that:-
 - a. The learned magistrate erred in law and on fact in holding that the respondent was not in breach of the insurance doctrine of utmost good faith requiring full disclosure of all material facts attendant to the insurance contract;
 - b. The learned magistrate erred in law and on fact in failing to hold that the respondent had no insurable interest in motor vehicle registration no KCC 429H at the time of taking insurance with the defendant;
 - c. The learned magistrate erred in law and fact in holding that condition 2 of the policy did not bar the use of the said vehicle for illegal business;
 - d. The learned magistrate erred in law and on fact in finding that the market value of the said vehicle immediately before the loss was Kshs 5,500,000;
 - e. The learned magistrate erred in law and on fact in disregarding the adduced on behalf of the appellant and failing to consider submissions filed by the appellant and authorities cited therein.
25. The appellant prayed for orders that:
 - a. The appeal be allowed.



- b. Judgment of Honorable Bernard Kasavuli (PM) dated July 29, 2021 in Mavoko CMCC No 1326 of 2017 be wholly set aside, reversed or varied.
 - c. The respondent's case against the appellant being Mavoko CMCC No 1326 of 2017, be entirely dismissed with costs to the appellant
 - d. Costs of this appeal together with interest thereon at court rates be borne by the respondent
 - e. Any other order the honorable court deem just to grant.
26. Respondents in their grounds of opposition to the appellant's memorandum of appeal dated September 9, 2022, opposed the appeal by appellant terming it spurious, groundless otiose, unmeritorious, incompetent and a classic case of sour grapes; that the learned magistrate properly analyzed the evidence on record in a proper and judicious manner finding in favor of the respondent; further that the learned trial magistrate did not err either in fact or law as alleged by the appellant on any of the grounds contained in the memorandum of appeal; that the trial court considered all the reasons advanced by the appellant to repudiate the respondent's policy and found the inappropriate. Respondent prayed that the appeal dated August 23, 2021 be dismissed with costs.
27. The appeal was disposed by way of submissions.

Appellant's Submissions

28. On its submission dated October 7, 2022 and filed on October 11, 2022 the appellant submitted on the grounds of appeal in which the ground that, was Josephine Nthenya an agent of the appellant. On this ground reliance was made to the respondent's statement at paragraph 10-14 at page 280 to 282 of the bundle of documents and witness statement at page 13 paragraph 9.
29. It was the appellants case that as evidence given by DW 3 Josephine was not an agent of the appellant asserting that she was the respondent's agent when proposing for insurance (page 305 and 309 of the bundle of documents was referred.
30. They submitted that most of the documents were signed by Josephine on behalf of the respondent and not the respondent himself reference was made to pages 280,281,282,292 and 293 in which it was contended that proposal form was signed by the said Josephine. Further they cited the case of *Granata Ernesto Suing as attorney of Denise Granata v Invesco Assurance Company ltd* (2015) eKLR which authority they opine was not completely ignored.
31. As to the ground that was the appellant's investigator called as witness? it was the appellant's submission that the respondent failed to disclose pertinent details while proposing for insurance. It averred that the finding by the learned magistrate that the investigator did not testify was erroneous as the investigator testified before the learned magistrate as DW4 reference was made to page 317 bundle of documents.
32. In the alternative, as breach of insurance doctrine of utmost good faith and lack of insurable interest, it is the appellants submission that prior to taking out insurance, respondent had sold the said vehicle and at the time of proposing for insurance, respondent had falsely misrepresented that he was the owner of the said vehicle having insurable interest in the said vehicle reference was made to agreement dated February 3, 2016 at page 49 of the bundle documents which indicate that the respondent had sold the vehicle to the said purchasers. That ten months later in his proposal form he claimed the owner of the vehicle and only Equity bank had financial interest reference was made to page 29 bundle documents.



33. It was contended that the investigator DW 4 confirmed that he investigated the matter and established that vehicle had indeed been sold on February 3, 2016 reference was made to page 66. Further the statement of DW3 confirmed that the said vehicle had been sold page 24 and page 304-307.
34. Submitting that the learned magistrate wholly relied on the addendum and found that the sale did not materialize at page 329-330.
35. It was the appellant's case that the learned magistrate wholly fell into error. He completely disregarded important evidential material on record and appellant's submissions and merely relied on addendum and plaintiff's evidence which was solely geared towards negating the obvious sale. That the said addendum was never presented as he stated page 308. Reliance was further made to pages 300 – 303 of bundle documents.
36. As to the ground of violation of policy, it is the appellant case that there was a ban on sand harvesting in the incident area and perennial land wars between neighboring communities and that a claim by PW I the assistant chief that the ban commenced a day after the incident was rebutted by his senior the chief of Kasikeu location and that no document was produced as evidence that there was a ban. That the said vehicle being taken to the scene for sand harvesting was put into an illegal use and the said plaintiff exposed the said vehicle to loss.
37. On the ground the value of the vehicle, it was submitted that there was evidence before the court that in the event of loss and if the claim was admissible, the respondent was obligated under the policy to pay the respondent appellant the market value of the vehicle immediately before the loss or damage as provided in the policy reliance was made to page 36, 34 and 48. That it was the respondent to prove that Kshs 5.5 million was the market value immediately before the loss that in attempt to prove this he produced unsigned report done on instructions from Madison insurance Company reliance was made to page 96 and cited the cases of *Hesbon Onyuro & Another (suing as the administrators of Alice Akoth Okong'o (deceased) v First Assurance Company Limited* (2019) eKLR, *Madison Insurance Co Ltd v Stanely Kinoti Mburugu* (2019) eKLR, *Joseph Macharia Nderitu v Real Insurance Company Limited* (2014) eKLR which authorities the appellant contended that were completely ignored.
38. It was the case of the appellant that in February, 2016 the vehicle was being sold at Kshs 5,435,000 page 49 and the incident was on December 19, 2016 almost a whole year later how could its value be 5.5 million?
39. It was finally submitted that the learned magistrate in his judgment did not consider submissions filed by the appellant that had he done so he would have reference to them and demonstrated his point of departure through analytical reasoning that would have made him arrive at a different conclusion.

Respondent's Submissions

40. The respondent submitted that the appellant reneged on its policy agreement, namely, motor commercial general cartage insurance and failed to compensate the respondent for the loss of motor vehicle KCC429 H that was razed down in a fire as exhibited by the police abstracts produced during the hearing amongst them the one at pg 116 of record of appeal (ROA).
41. Despite being comprehensively insured, the appellant failed to settle his claim and the respondent lodged the claim/dispute before the Insurance Regulatory Authority (IRA) after exchange of various correspondence, documents and meetings, *vide* letter dated May 26, 2017, at pg 138 of record of appeal, IRA found that the respondent failed to make material disclosure to the appellant.



42. On whether the agent Josephine Nthenya was an agent of the appellant or the respondent, the respondent referred to section 2(1) of the *Insurance Act*. motor vehicle proposal form at pg 29 of the record of appeal indicates Josephine as the agent of the Insurer. Similarly, the respondent relied on the letter from the appellant at pg 95 of ROA and motor commercial general cartage insurance schedule at pg 100 of ROA both refer to Josephine as the agent of the Insurer.
43. The respondent paid premium of Ksh 323,238 to the appellant *vide* letter dated December 6, 2016 on behalf of John Kioko Mutuku and a receipt was issued.
44. The respondent signed the vehicle proposal form as evidenced by document at pg 280 & 282 of RoA. The respondent by his statement pg 10-12 roa and testimony in court is that he did not breach the insurance policy, the sale agreement was with an addendum. The policy document did not bar the respondent as the motor vehicle owner from operating the vehicle being commercial in nature through agents.
45. The respondent submitted there was no violation of the insurance contract and at the time the vehicle was burnt among others it was not involved in illegal and unlawful activity of loading and ferrying sand from sand harvesting. PW1 & PW2 did not confirm outlawed sand harvesting. DW1 failed to produce proof of the same.
46. The value of the vehicle insured was proved *vide* letter of December 6, 2016 from the appellant seeking that the motor vehicle KCC 429 H be availed for valuation. Pg 13-14; 95 -96 RoA.

Determination

47. The court considered the pleadings and submissions and the issue(s) that emerge for determination are whether the appeal should be upheld or dismissed on the basis of the following issues raised on appeal.
48. The learned magistrate erred in law and on fact in holding that the respondent was not in breach of the insurance doctrine of utmost good faith requiring full disclosure of all material facts attendant to the insurance contract; failing to hold that the respondent had no insurable interest in motor vehicle registration No KCC 429H at the time of taking insurance with the defendant; in holding that condition 2 of the policy did not bar the use of the said vehicle for illegal business; the market value of the said vehicle immediately before the loss was Kshs 5,500,000; and failing to consider submissions filed by the appellant and authorities cited therein.
49. This court in a 1st appeal is dutybound to reevaluate all the evidence on record and arrive at its own conclusion. This was observed in the case of in the case of *Peters v Sunday Post Limited* [1958] EA 424 where it was held that:

“Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight.”



50. This court relies on section 107 *Evidence Act* cap 80 in essence provides that he who alleges must/shall prove. If a party is in possession of cogent and/or tangible evidence, he who alleges must prove the facts if judgment is to be delivered in their favour.

Section 109 *Evidence Act* cap 80 puts the burden of proof on the party in possession of special facts to adduce them. If the applicant has special knowledge of the matter at hand then such evidence is presented and is subjected to cross examination to test its veracity and/or witness's demeanor and if cumulatively it amounts to the standard of proof of civil cases; on a balance of probability, then judgment would be in their favour.

51. In the instant appeal re-evaluating the evidence this court shall address the following issues;
- a. Was motor vehicle Reg KCC 429 H insured by the defendant/appellant?
 - b. Was Josephine Nthenya agent of/for the insurer or the insured?
 - c. Was there breach of the insurance contract? If so was the appellant entitled to repudiate the insurance contract or not?
 - d. What was the value of the motor vehicle?

Was motor vehicle Reg KCC 429 H insured by the defendant/appellant?

52. The court found in the record of appeal, pg 93-94, the vehicle proposal form in the name of John Mutuku Kioko and Equity Bank for isuzu lorry/truck Reg KCC 429 H with a copy of certificate of insurance signed on December 5, 2016 by John.
53. On December 6, 2016 at pg 95, a letter titled inspection of motor vehicle KCC429H, the insured is John Mutuku Kioko. motor vehicle valuation report issued by Regent Automobile Valuers & Assessors at pg 96 RoA. A letter headed Sambo general supplies of insurance payment of December 6, 2016 by Ambrose Nthuku Muthini on behalf and for John Kioko Mutuku vehicle Reg KCC 429H at pg 97 of RoA and receipt at pg 98.
54. There is the motor commercial general cartage insurance to John Mutuku Kioko by Insurer Kenyan Alliance and it refers to the document at pg 99-116 of RoA as the policy document. The insured was to read it carefully and if there were any questions, the insured was to contact his intermediary if any or the Insurer directly.
55. The totality of the documentary evidence outlined above proves motor vehicle KCC 429 H was insured by the defendant/appellant Kenyan insurance.

Was Josephine Nthenya agent of/for the Insurer or the insured?

55. In '*Principles of Commercial Law*' by K Laibuta JA with reference to the legal nature of agency relationships at pg 286 provides;

An agency relationship is a special contractual engagement which arises when one person called an agent is appointed and authorized to act as a representative of another principal in any of the following undertakings;

1. In the making of a contract; or
2. In the institution of an action; or
3. In the conveyance of immovable or other property; or



4. In the exercise of any proprietary right of the principal under and by virtue of a power of Attorney....

As a general rule, the principal is bound by such acts as are within the agent's authority defined in the deed or other contractual document or in the terms under which he is appointed. The agent's conduct must in every respect be in the course of his employment and within the scope of his authority as conferred to him by the principal, or otherwise presumed or implied in proper cases. Authority is the very foundation or core of every agency relationship and must either be proved or presumed in order to bind the principal. It may be actual or ostensible. Conversely, absence of authority negatives the existence of any purported agency relationship.....

56. In the instant case, the evidence on record specifically, the motor vehicle proposal form at pg 93 of the RoA indicates agent/broker/direct -BH Josephine and the proposal is in the letterhead of Kenyan Alliance Insurance and the declaration is that this proposal is the basis of a contract between the applicant and Kenyan Alliance Insurance Co Ltd and the applicant agreed to accept the company's policy applicable to insurance and signed on December 5, 2016 by John.
57. Also, attached at Pg 98 of RoA is customer copy of receipt of payment number 165216 that indicates received from John Mutuku Kioko Ksh 323,238/- agent/broker Josephine Nthenya Mutiso.
58. The appellant relied on the case of *Granata Ernesto suing as Attorney of Denise Granata v Invesco Assurance Co Ltd* [2015] eKLR where the court held that the agent was acting as agent of the insured and not the insurer.

This court gleaned through the said authority, of importance found the following apt and relevant to the present circumstances and the High Court sitting in Malindi observed;

25. I have looked at the fields and questions in the proposal form. These clearly require the input of the insured as most of the information sought could only be within his knowledge, as for example question 11, seeking the antecedents of the proposer and the section on articles in the building. Finally, at the end of the proposal form is a declaration which terminates with a space provided for the signature of the proposer.

It is crystal clear, from my observation, that the completion of proposal form was the responsibility of the Insured. To suggest that the Insurer takes on the responsibility for the task merely because the form is on its letter head amounts to a non sequitur. But from the facts before me I have no difficulty in finding that in completing the proposal, PW2 was acting on behalf of the Insured whose responsibility it is to complete the form. That is consistent with the decision in *Biggar v Rock Life Assce Co* [1902] 1 KB 516, quoted by the Insurer.

59. The appellant relied on the respondent's statement at pg 13 PW4 stated that Josephine was an agent of the defendant and DW3 denied that Josephine was an agent of the defendant at pg 305-309. The issue remains contested.
60. Whether Josephine Nthenya Mutiso was the respondent's and/or appellant's agent is not germane as the vehicle proposal form was/is just that, a proposal subject to acceptance and/or confirmation by the defendant/appellant which in this case gave the policy of insurance to be accepted by the insured. Secondly, even assuming the said agent was the respondent's agent, any disclosures were by and ought to have been by the insured and not by the agent/broker.



61. Thirdly, if the agent was the respondent's agent as is alleged, where did she get the vehicle proposal form that the insured filled in and how come the defendant's receipt had the agent's names if she was not known involved or authorized by the defendant to source insurance policies for the defendant.
62. To the extent the insurance contract is alleged to be vitiated by breach of material non-disclosure the same would not tilt on the agent but on the insured who would have knowledge information or evidence to disclose and not the agent/broker or underwriter.

Section 2(1) *Insurance Act* defines agent as;

“agent” means a person, not being a salaried employee of an insurer who, in consideration of a commission, solicits or procures insurance business for an insurer or broker;

63. To the extent that Josephine Nthenya Mutiso presented the defendant's insurance motor vehicle proposal form to the respondent, she did so as agent /broker of the defendant as defined in section 2 of *Insurance Act*. And more so she was acknowledged as such in the payment receipt of the defendant. To the extent that she filled the form for PW4 insured/respondent she assisted him, but did not act as his agent, however, the information was from the respondent the insured and he is the only one responsible for any non-disclosure of material facts.

Was there breach of the insurance contract? If so was the appellant entitled to repudiate the insurance contract or not?

64. The appellant /defendant raised issues of breach of insurance contract, non-disclosure and fraudulent misrepresentation by letter of February 1, 2017Pg 118 of RoA as follows; by an agreement dated February 8, 2016 the Plaintiff, John Mutuku Kioko sold the vehicle to Ambrose Nthuku Muthini & Sammy Mutua Kamau. The agreement was produced by the defendant/appellant upon investigations that revealed that at the time of insuring the motor vehicle, the respondent had no insurable interest as the vehicle was sold in February 2016 and insured in December 2016. The appellant submitted the respondent falsely misrepresented that he was the owner of the vehicle at the time he sought insurance of the subject vehicle. The complaint was subjected to IRA for mediation and at the time the agreement was presented, the appellant alleged that there was no addendum and IRA found in favor of the appellant.
65. The respondent submitted that by letters of April 10, 2017 & April 11, 2017 at pg 120 & 121 of the RoA that the motor vehicle was duly insured as supported by documents and premium was paid and acknowledged by receipt of payment from the appellant. The agreement for sale of motor vehicle KCC 429 H of February 3, 2016 between John Mutuku Kioko & Ambrose Nthuku Muthiani & Sammy Mutua Kamau was for sale/purchase of the said vehicle for Ksh 5,435,000/-. The agreement stipulated that the purchasers paid Ksh 400,000/- by cheque on February 3, 2016 and Ksh 10,000/- in cash and gave a postdated cheque of Ksh 190,000/- to be cashed on April 3, 2016. The balance of Ksh 4, 835,000/- was to be paid to Equity Bank the bank that financed purchase of the vehicle.
66. The court finds that from the evidence on record, the plaintiff's revised list of documents, motor vehicle Reg KCC 429 H was purchased through extended financing by Equity Bank, the documents of the credit facility are at pg 2-8 of the plaintiff's bundle, the statement of account by Equity Bank pg 130-139 in RoA of John Mutuku Kioko depict loan recovery and demand letter of May 29, 2017 for settlement of outstanding loan repayments.



67. The circumstances disclose the respondent/insured's financial crisis that necessitated sale agreement of February 3, 2016 to sell the said vehicle to the purchasers who worked with him in the commercial transport business. The agreement was duly executed and part performed by payments outlined above.
68. As the insured testified and relied on his statement, he worked with Ambrose & Wambua on getting work for the vehicle/lorry whereupon they would share profits. He admitted drawing the sale agreement to sell the lorry and part payment was made to Equity Bank. However, the sale of the vehicle did not go through as Equity Bank declined/refused to transfer the loan facility to the purchasers. Therefore, the logbook held by Equity Bank remained in the names of Equity Bank and John Mutua Kioko as was disclosed the motor vehicle proposal form. Secondly, the statement of account did not confirm credit of the full /outstanding purchase price by purchasers. They remained in possession of the motor vehicle as co- workers of/with the insured.
69. So, although the defendant demanded full and honest disclosure of material facts as this was an Insurance contract, contracts of utmost good faith in which full and honest disclosure is obligatory and the insured must show uberrima fides; the court finds he disclosed Q 18 of the proposal form the vehicle was financed by Equity Bank as at December 19, 2016 when the unfortunate incident took place as the proposed sale though set out in a sale agreement it was not fully performed and the log book remained in the name of insured and the bank as was before and the insured had an insurable interest. There was no need/obligation to disclose what did not materialize in February 2016. Thirdly, the addendum to the agreement of February 3, 2016 indicates that the sole purpose for the sale of the motor vehicle was to obtain financing and since it did not materialize the vehicle remained in the name of the insured.
70. The court finds that although in insurance there is obligation to disclose material facts, the sale agreement in question was not performed and did not vitiate ownership of the vehicle. There was no breach of insurance contract and the appellant had no legal basis to repudiate the insurance contract.
71. In *Granata Ernesto suing as Attorney of Denise Granata v Invesco Assurance Co Ltd* [2018] eKLR the Court of Appeal observed;
- ‘the decisions in *Steel Rolling Mills Company Ltd & Another v Pine Top Insurance Company Limited* [1994] All ER 581 and *Sita Steel Rolling Mills v Jubilee Insurance Co Ltd* (2007) eKLR, the appellant submitted that it was entitled to avoid the contract *ab initio* and the respondent's claim should have been disallowed on this ground.
- As earlier mentioned, both authorities were heavily relied on by the appellant, although both authorities incidentally seem to favour the respondent's case. According to the *Steel Rolling Mills case*, for an insurer to avoid liability on account of misrepresentation and/or non-disclosure by the insured, two conditions must be satisfied. The insurer must not only prove the misrepresentation and/or non-disclosure was material, but that the same induced him to contract on the terms agreed. The burden of proving both aspects lies with the insurer.’
72. Secondly, it was submitted that on the material day the motor vehicle was used for an illegal and unlawful harvesting of sand which was banned in the area; the insured attached letters dated March 11, 2017 & March 13, 2017 pg 42& 43 of plaintiff's revised list of documents depicting that sand harvesting was not banned during the incident of December 19, 2016 but thereafter. Secondly, at the time the insured had receipt for payment from Makueni county authorizing sand harvesting pg 44-48 of plaintiff's revised list of documents. The evidence of PW1 & PW2 confirmed the fact of ban of sand harvesting was not on during the incident. On the other hand, DW1 area chief of Kasekiu location, Mukaa sub county claimed that ban of sand harvesting was on since 2008 but did not produce



documentary evidence to confirm the same. To this court this fact was not proved on a balance of probability. Sand harvesting was not banned until the unfortunate incident.

when the plaintiff/respondent raised complaint with the insurance regulatory authority and both parties were heard, the complaint was dismissed.

73. On record was detailed evidence by DW2 from IRA on the conduct of proceedings that culminated with the verdict that the insured failed to disclose material facts and hence vitiated the Insurance contract. It was alleged that the addendum now relied upon was not presented during IRA proceedings. I find by letter of April 11, 2017 by the insured to commissioner IRA pg 40 of plaintiff's revised bundle of documents, the insured at the 2nd last paragraph 1st page states;

It was on the prompting of the financing bank that we drew up the proposed sale agreement and the addendum.....'

74. The addendum was there as at 2017 and was presented to the IRA with the sale agreement. The dismissal on the basis of non-disclosure of material facts as legally required in insurance contracts. However, IRA was not made aware of the fact of the matter is the sale did not pull through and ownership and registration of the motor vehicle Reg KCC 429 H remained in the names of the insured and the financing bank as disclosed in the motor vehicle proposal form.

What was the value of the motor vehicle?

75. The appellant challenged valuation of the motor vehicle and claim at Ksh 5,500,000/- as pleaded in the plaint. The appellant contended that there was evidence before the court that in the event of loss and if the claim was admissible, the was obligated under the policy to pay the respondent appellant the market value of the vehicle immediately before the loss or damage as provided in the policy reliance was made to page 36, 34 and 48. That it was the respondent to prove that Kshs 5.5 million was the market value immediately before the loss that in attempt to prove this he produced unsigned report done on instructions from Madison Insurance Company reliance was made to page 96 and cited the cases of *Hesbon Onyuro & another(suing as the administrators of Alice Akoth Okong;o (deceased) v First Assurance Company Limited* (2019) eKLR, *Madison Insurance Co Ltd v Stanely Kinoti Mburugu* (2019) eKLR, *Joseph Macharia Nderitu v Real Insurance Company Limited* (2014) eKLR which authorities the appellant contended that were completely ignored.
76. This court referred to pg 34 36 & 48 of the RoA and found pg 34 outlines definition 'legal liability', 'market value' and 'pre-accident value' among others but these are relevant herein. Pg 36 outlines what is covered by policy of insurance loss or damage to the vehicle accessories and spare parts, the insurer may choose to pay cash, repair or replace the vehicle or part of it.
77. If the insurer settles the claim on a total loss basis the lost damaged vehicle becomes its property and the maximum payable is the market value of the vehicle immediately before the loss or damage but not more than the value as shown in the schedule. The market value is determined by annual current value of the motor vehicle.
78. Applying these terms of the Insurance contract to the instant case; the terms bind parties to the contract and the Court cannot legally rewrite the terms of the contract.

In *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR

A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.



There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.

79. Therefore, the insured ought to have ensured first and thereafter annual valuation of the vehicle to confirm its current market price according to the terms of the contract. The Insurer pursuant to its terms at pg 95 of RoA by letter of December 6, 2016 gave instruction to the Insured to pursue motor vehicle inspection free of charge at any of the following Kenyan Alliance Insurance approved valuation centers. The insured was to avail log book/Import documents & pin certificate to valuation officer and inspection was to be conducted within 30 days.
80. Curiously, at pg 96 of RoA the vehicle valuation report by Regent Automobile Valuers & Assessors indicates date of inspection as June 3, 2016 clearly before the date of instruction by insurer. Secondly, it was for Madison Insurance not Kenyan Alliance and motor vehicle KCC 429 H was valued at Ksh 5,500,000/-. The client name Sammy Mutua & Ambrose Muthini, the policy was by Madison Insurance expiring on June 4, 2016. Clearly, the valuation herein was not for the insurance policy issued by Kenyan Alliance. Consequently, the market value prior to the accident subject of insurance was not assessed or determined in light of the said valuation report 6 months prior.
81. Ideally, the insured takes insurance cover to spread the risk against accidental loss or damage and in event of such loss or damage recover pre -accident value of his motor vehicle (less value of salvage) in the event of total loss arising from the accident. Herein, after the motor vehicle was burnt down by unknown people, the insured obtained the police abstract and filled claim form for insured sum/value of the motor vehicle.
82. The insured failed to conduct annual inspection to determine current market value and the insurer failed to assess the damage of loss through assessors and instead denied the claim as evidenced by correspondence pg 53-55 of RoA.
83. The justice of the case therefore demands that since no inspection or valuation was conducted as per the terms of the contract and the valuation report relied on was before the letter of instruction and related to a different insurer and insurance contract, the court finds there was an insurance policy covering motor vehicle KCC 429 H and premium paid there was a valid insurance contract and the vehicle was insured comprehensive insurance at Ksh 5,000,000/- In the absence of a report the court finds ½ of the insured sum sufficient compensation for loss and damage.

Disposition

1. The appeal is partly upheld and partly dismissed as follows;
2. The judgment of July 29, 2021 is upheld on liability that the appellant was liable to the insured under the insurance contract but vacated on quantum the value of loss and damage as it was not confirmed to be Ksh 5,500,000/- as the valuation report was not for the appellant insurance company but another Insurer.
3. The amount payable under the contract of insurance in the absence of valuation /inspection/assessors report is ½ insured sum of Ksh 5,000,000/- as shown at pg 33 of RoA therefore Ksh 2,500,000/- with costs and interest at court rates is to be paid to the insured by the insurer.

It is so ordered.

**DELIVERED SIGNED & DATED IN OPEN COURT AT MACHAKOS ON 2ND MARCH 2023
(PHYSICAL/VIRTUAL CONFERENCE)**

M.W.MUIGAI



JUDGE

IN THE PRESENCE OF:

MR. NGUGI - FOR THE APPELLANT

NO APPEARANCE - FOR THE RESPONDENT

GEOFFREY/PATRICK - COURT ASSISTANT(S)

