



**Mua Insurance (Kenya) Limited v Pevin Cabs Limited (Civil Suit
E126 of 2021) [2023] KEHC 1692 (KLR) (Civ) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1692 (KLR)

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

CIVIL

CIVIL SUIT E126 OF 2021

CW MEOLI, J

MARCH 9, 2023

BETWEEN

MUA INSURANCE (KENYA) LIMITED PLAINTIFF

AND

PEWIN CABS LIMITED DEFENDANT

JUDGMENT

1. MUA Insurance (Kenya) Ltd, (hereafter the Plaintiff) have sued Pevin Cabs Limited (hereafter the Defendant) seeking the following reliefs, *inter alia*. First, a declaration that the Plaintiff is and has at all material times been entitled to avoid the Policy no 383/20/08/DT on grounds that the said policy of insurance was obtained by, non-disclosure of a material fact or facts, and representation of facts, which were false in material particulars.
2. Second, a declaration that at the time of accident, there was no insurable interest in respect of the suit motor vehicle registration number KCA XXXC and hence the Plaintiff is not liable to pay any claim arising out of the accident on 28/03/2012.
3. Third, a declaration that the Plaintiff is not liable or bound to make payments or to indemnify the Defendant under the insurance Policy no 383/20/08/DT concerning any claim, in respect of bodily injury or death to any person or passenger in motor vehicle registration number KCA XXXC, that may arise from the road traffic accident which occurred on 28.03.2021 along Yangu Kwa Kuloba , involving the said motor vehicle (hereafter the suit motor vehicle) and motorcycle registration number KMCF XXXY (hereafter third party motor cycle).
4. It was averred that by a contract of insurance stipulating the terms and conditions binding the parties, the Plaintiff issued a cover to the Defendant upon payment of due premium and subject to the terms of insurance Policy no 383/20/08/DT (hereafter the policy); that on 23.03.2021, the suit motor



vehicle for which the Defendant had taken a cover under policy was involved in a road traffic accident with the third party motor cycle. The Plaintiff further averred that upon receipt of the claim and upon investigations, it was discovered that the claim had been lodged in respect of one Augustine Mwaka Kanyanya who had no insurable interest under the policy. That arising from the material non-disclosure or misrepresentation on the part of the Defendant, the Plaintiff is not bound to indemnify the Defendant for any loss or injuries to any party whatsoever on account of the policy issued to the Defendant.

5. The Defendant despite being served with summons failed and or neglected to enter appearance or file defence.
6. The suit proceeded for formal proof hearing during which Christine Ndanu Mutisya testified on behalf of the Plaintiff as PW1 and was the sole witness. She identified herself as a Claims Supervisor at the Plaintiff company and adopted her witness statement dated 27.05.2021 as her evidence in chief. She also produced the bundle of documents attached to the Plaintiff's list of documents dated 02.06.2021 as PExh 1 – PExh 8. The gist of her evidence was that the Plaintiff is not bound to satisfy any claim arising or made in respect of motor vehicle KCA XXXC, which had been sold to a third party at the time of the accident. That as an insurable interest in not transferable, the claim lodged in that regard was by a stranger.
7. Upon the close of its case, the Plaintiff's counsel filed submissions in respect of the matter. He began by rehashing the evidence before the court and condensing his submissions into two (2) cogent issues for determination. Addressing the court on the first issue, he called to aid the Indian decision in *United India Insurance co ltd v M.K.J Corporation* [1996] 6 SCC India 428 to assert that contracts of insurance are contracts of utmost good faith and every relevant material is required to be disclosed. That the Defendant by misrepresenting and giving false and untrue information on material facts while proposing and applying for the subject insurance policy cover with the Plaintiff, breached the contract of insurance and the principle of good faith.
8. Submitting on the second issue counsel invoked the provisions of Section 10(4) of *Insurance (Motor Vehicle Third Party) Act* and cited the decision in *Blueshield Insurance co ltd v Samuel Nyaga Ngurukiri* [2008] eKLR to contend that the Plaintiff has met the statutory threshold for repudiation of the Defendant's claim. That after discovery of the misrepresentation and falsehood by the Defendant, a repudiatory letter was sent to the Defendant setting out the non-disclosure and false representation necessitating avoidance of the policy. In conclusion, counsel relied on the provisions of Section 27 of the *Civil Procedure Act* and the decision in *Party of Independent Candidate of Kenya & Another v Mutula Kilonzo & 2 Others* [2013] eKLR to argue that the Plaintiff has proved its case against the Defendant and therefore costs ought to follow the event.
9. The court has considered the pleadings, evidence, and submissions of the Plaintiff. The sole issue for determination is whether the Plaintiff has established on a balance of probabilities that the Defendant was in breach of the policy of insurance and whether the Plaintiff is entitled to repudiate any claim in respect of the suit motor vehicle.
10. In *Wareham t/a A.F. Wareham & 2 Others Kenya Post Office Savings Bank* [2004] 2 KLR 91, the Court of Appeal stated in this regard that: -

“We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the



parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the *Civil Procedure Rules*. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.”

11. The key averments in respect of the Plaintiff’s pleadings have earlier in this judgment, been captured in part and thus do not require reproduction. At the hearing, PW1 adopted her witness statement whose key assertions are that:

- “3. One essential term of the policy was that the Defendant would only make payment under the policy if the information provided by the Defendant was true and complete.
4. In the proposal preceding the contract of insurance, the Defendant represented that it was the owner of the suit motor vehicle Registration no KCA XXXC.
5. The policy under which the suit motor vehicle was insured also provided that any claim found to be fraudulent would vitiate any rights under the policy.
6. *Vide* a claim form dated 08/04/2021, a stranger to the contract of insurance Augustine Mwaka Kanyanya sought to utilize the cover under the policy after having been involved in a road traffic accident on 28/03/2021.
7. Based on the information that had been provided to the Plaintiff prior to the payment of premium, the Defendant represented to the Plaintiff that it owned the suit motor vehicle on account of which a certificate of insurance no A10594618 was issued in favour of the Defendant as the policy Holder.
8. By an admissions communicated on 29/04/2021, the Defendant through Steve Kimani represented to the Plaintiff that the suit motor vehicle had been sold and transferred to Augustine Mwaka Kanyanya and urged the Plaintiff to fast track the indemnity process and minimize loss of revenue.
9. Sometime afterwards the Plaintiff obtained a copy of the suit motor vehicle registration certificate no K3886XXXN in favour of Augustine Mwaka Kanyanya which further confirmed that under the terms of the Policy, no insurable interest existed in favour of the new owner and that any existing policy had been vitiated for breach of the principle of utmost good faith.
10. By the contents of the said investigation report, correspondence and logbook, investigation report and motor vehicle registration certificate in their entirety, the Plaintiff is entitled to avoid the policy by reason of non-disclosure of material facts, representation of fact(s) which was/were false in some material particular and want of insurable interest.” (sic)

12. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act* which provides that;

“ 107.



(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side....

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

13. In *Karugi & Another v Kabiya & 3 Others* [1987] KLR 347 the Court of Appeal stated that:

“[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”

14. The Plaintiff’s case rests on the Defendant’s alleged material non-disclosure. A contract of insurance or policy agreement prescribes the rights and obligation of the respective parties. The Court of Appeal in *Co-Operative Insurance Company Ltd v David Wachira Wambugu* [2010] eKLR while addressing itself to the nature of insurance contracts held that:

“The learned authors of Bullen & Leake, Precedent of Pleadings, 14th Edition, Vol. 2 states at page 908:

“Contracts of insurance are contracts of the utmost good faith. This gives rise to a legal obligation upon the insured, prior to the contract being made, to disclose to the insurer all material facts and circumstances known to the insured which affect the risk being run. Lord Mansfield’s words in *Carter v Boehm* [1766] Burr. 1905 have stood the test of time:

“Insurance is a contract of speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist and to induce him to estimate the risk as if it did not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void; because the risk run is really different from the risk understood and intended to be run at the time of the agreement... The policy would be equally void against the underwriter if he concealed... The governing principle is applicable to all contracts and dealings. Good faith forbids either party, by concealing what he privately knows to draw the other into a bargain from his ignorance of the fact and his believing the contrary...”

15. The essence of PW1’s evidence was that a stranger to the contract of insurance Augustine Mwaka Kanyanya sought to utilize the cover under the policy whereas based on the information that had



- been provided to the Plaintiff prior to the payment of premium, the Defendant represented to the Plaintiff that it owned the suit motor vehicle. To buttress the same, she produced copies of the Policy of Insurance as (PEXh 1), Policy Schedule as (PEXh 2), Claim Form as (PEXh 3) and the Police Abstract as (PEXh 4). That said, a perusal of the claim supporting documents, being the Policy of Insurance & Schedule and Certificate of Insurance (PEXh 6) the Defendant is indicated to be the insured in respect of the suit motor vehicle.
16. However, in the Claim Form, Police Abstract and Logbook (PEXh 5), one Augustine Mwaka Kanyanya is stated to be the owner of the suit motor vehicle. The Plaintiff's contention is that there was no insurable interest in respect of Augustine Mwaka Kanyanya as an insurable interest cannot be transferred. The repudiatory letter (PEXh 7) stated in part that... "we confirm having received the claim supporting documents as well as carried out assessment. We note that at the time of accident, the motor vehicle had already been sold and ownership transferred to the buyer. Therefore, you do not have insurable interest on it. Further, kindly note insurance contract are not transferable to other parties."
17. Mwilu JA (as she then was) in [*Kenya Alliance Insurance Company Ltd v Parklands Shade Hotel Limited & Another*](#) [2015] eKLR while addressing herself on repudiation in insurance contracts stated that;-
- "As regards repudiation, in law, all contracting parties must act toward one another in good faith. Some contracts, however, require a higher standard than simple good faith. One such contract is that of insurance. A person who completes an insurance proposal form in applying for insurance cover must not only answer truthfully all questions that are asked but must of his own accord disclose all facts relevant to the policy. Failure to do so may entitle the insurer to repudiate the policy and refuse to pay a claim. For an insurer to successfully repudiate a policy, there must be proof of breach of an express or implied warranty, deviation or the like see Halsburys Laws of England at page 49 para 83."
18. It is undisputed that there existed a policy of insurance executed between the parties herein in respect of the suit motor vehicle under policy number Policy no 383/20/08/DT that was to subsist from 03.02.2021 to 02.02.2022. Although the proposal form was not tendered as evidence from the documents before the court, it is apparent that the insured in respect of the suit motor vehicle, at the time of the accident was the Defendant. However, it appears that one Augustine Mwaka Kanyanya lodged a claim in respect of the policy of insurance regarding the accident involving the suit motor vehicle. A preliminary assessment of the claim revealed that the suit motor vehicle had been sold to Augustine Mwaka Kanyanya. The question therefore is whether there existed an insurable interest in respect of Augustine Mwaka Kanyanya as pertains the suit motor vehicle.
19. The Court of Appeal in [*Kinyanjui v Kenya Orient Insurance Company & another*](#) (Civil Appeal 372 of 2017) [2022] KECA 1333 (KLR) had this to say in respect of an insurable interest;-
- "We are guided by the case of *Peters v General Accident Fire & Life Assurance* [1938] 2 All ER which held that there can be no transfer of an insurance policy where the subject insured is transferred. Further, as held in *Smith v Ralph* [1963] 2 Lloyds, a policy of insurance does not extend beyond the time of sale of the insured property as the insurable interest is lost once the insured property is sold
- In the circumstances, we find that the 2nd respondent had a contractual duty to disclose to the 1st respondent that a sale had taken place at the point of reporting the accident as he had at the time, no insurable interest in the motor vehicle."



20. The accident that is the subject of the lodged claim in respect of the suit motor vehicle occurred on 28.03.2021 as per the Police Abstract adduced into evidence. The claim form lodged as at 08.04.2021 by Augustine Mwaka Kanyanya indicates that he was the owner of the suit motor vehicle. Applying the dicta above to the instant proceedings, the contract of insurance was between the parties to this suit and not Augustine Mwaka Kanyanya, a third party. In effect Augustine Mwaka Kanyanya had not contracted the Plaintiff to secure his insurable interest in respect to which he could lodge a claim, whereas the Defendant ceased to have an insurable interest therein upon the transfer of the suit motor vehicle to the third party. Hence none of them could benefit from the policy of insurance.
21. In conclusion, the Plaintiff's evidence stands uncontroverted and the court is persuaded the Plaintiff has established its case on a balance of probabilities. Accordingly, judgment is hereby entered for the Plaintiff as prayed in the plaint.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 9TH DAY OF MARCH 2023

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: Ms. Njoroge h/b for Mr. Ombati

For the Defendant: N/A

C/A: Carol

