



Jubilee Allianz General Insurance (K) Ltd (Formally the Jubilee Insurance Company of Kenya ltd) v Asachi Works Limited (Civil Appeal E150 of 2021) [2023] KEHC 18640 (KLR) (Civ) (8 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18640 (KLR)

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

CIVIL

CIVIL APPEAL E150 OF 2021

JN MULWA, J

JUNE 8, 2023

BETWEEN

JUBILEE ALLIANZ GENERAL INSURANCE (K) LTD (FORMALLY THE JUBILEE INSURANCE COMPANY OF KENYA LTD) APPELLANT

AND

ASACHI WORKS LIMITED DEFENDANT

JUDGMENT

1. This suit is undefended, the Defendant having failed to enter appearance or file defense when served with summons to enter appearance together with the plaint dated 23/06/2021.
2. It is a declaratory suit whereof the plaintiff, Jubilee Allianz General Insurance (K) Ltd (Formerly The Jubilee Insurance Company of Kenya Limited) sought declaratory orders against the Defendant, Asachi Works Limited as follows -
 - a. A declaration that the Defendant has breached fundamental warranties of the Insurance Policy Number P/NRB/2040/2017/197009 thereby discharging the Plaintiff from liability in respect of any claim arising from the accident involving motor vehicle registration number KCN 055G on 9/05/2018.
 - b. A declaration that the Plaintiff is not liable to satisfy any judgment claims out of an accident which occurred on 9/05/2018 involving motor vehicle registration no. KCN 055G.



- c. A declaration that the accident motor vehicle registration No. KCN 055G is not used to carry passengers but cargo goods which was in breach of the warranties of the Insurance Policy Number P/NRB/2040/2017/197009.
 - d. A declaration that the Plaintiff is not liable or bound to make payment or indemnify the Defendant under the Insurance Policy No. P/N NRB/2040/2017/197009 in respect of any claim, bodily injury or death to any person or passenger being carried arising out of the Road Traffic Accident which occurred on 9/05/2018 along Pipeline Elmentaita road at Wanyama area.
 - e. Costs of the suit.
3. The hearing of the suit was by way of formal proof and the Plaintiff called one witness.
PW1 was Beatrice Muriithi, a Legal Officer claims at the Plaintiff's Company. She adopted as her evidence in chief her witness statement dated 23/06/2021, and documents attached to the plaint.
 4. It was her testimony that indeed the plaintiff issued the subject Comprehensive Insurance Policy to *inter alia* cover liability to 3rd party risks in respect of the motor vehicle registration No. KCN 055G that was subject to terms and conditions stipulated in the policy document and that the same was valid upto 30/06/2018; and that the accident occurred during the validity of the Insurance Policy.
 5. Additionally, PW1 testified that it was a fundamental term of the policy that in the event of any occurrence of an accident, the insured would immediately raise a claim with the company with full particulars and any impending prosecution, inquest or fatal injury in connection with any such occurrence.
 6. Further evidence was that on the 9/05/2018, the Defendant in blatant breach of the express terms and conditions and/or warranties in the policy document, caused or allowed the subject vehicle to carry passengers and goods when it was made to carry cargo goods only, and that the Defendant failed to disclose the true facts; which was that at the material time the vehicle was hired out to carry passengers whereof 28 of them were injured.
 7. For that reason, the Plaintiff by PW1 testified that an investigation by its agent Parity Loss Assessors made findings that the vehicle was constructed to carry cargo goods only, but on the material date, it was carrying sand and 28 passengers who were employees of Whitespace Technologies.
 8. In its submissions by its Advocates Ombati Ong'au Co. Advocates dated 13/10/2022, the Plaintiff stated that several suits had already been filed at Nakuru Law Court and particularly Nakuru CMCC No. E248/2021 claiming compensation for bodily injuries arising from the accident.
 9. By the above, the issues that are flagged for determination are:
 - a. Whether the Defendant breached the terms and conditions in the contract subject of the Insurance Policy no. P/NRP/2040/2017/197009.
 - b. Whether the Plaintiff has met the threshold for the grant of the declaratory orders sought.
 10. I have perused the Insurance Policy issued to the Defendant by the Plaintiff as well as the investigation report dated 22/04/2021 that was tendered to the Court by PW1. The Insurance Policy confirms that



indeed the insured was the Defendant, with (8) eight vehicles, among them KCN 055G a Mitsubishi Canter, the subject motor vehicle.

On the claims notification clause, it is clearly stated that the insured must report any accident, injury, loss or damage as soon as possible but not later than 7 days including knowledge of any future prosecution or proceedings in connection with any event for which there may be any liability under the policy.

11. The limits of the amount of the company's liability under the cover shows the cover was for carrying or engaged in the business of the insured and no other for purposes of the insurance.

Further, the policy declared and agreed that the Insurance Policy shall apply to Trailers (which term shall include agricultural implements and machines) whilst connected by any means whatsoever to the motor vehicle for purposes of being operated or drawn.

12. It is therefore clear that the said motor vehicle registration No. KCN 055G was a commercial vehicle, and not a passenger carrier.

At this point, it is important to state that the above claim is not challenged as no defense was filed to controvert any of the facts brought forth by the Plaintiff.

13. No contrary evidence was tendered that at the material time, the vehicle was not on hire, carrying construction materials together with not less than 28 passengers contrary to the express provisions of the Insurance Policy. This fact was not reported to the Insurance Company when the accident occurred.

14. By the investigation report which was not challenged, at the material times, the vehicle had been leased to Whitespace Technologies and was carrying sand and 28 passengers who were employees of the said Whitespace Technologies. The terms of the lease could only have been disclosed by itself, but none of the personnel of the said company testified as the Defendant failed to file its defense.

15. It is trite that a Court of Law cannot rewrite a contract between parties and such parties are bound by their contract, unless fraud or undue influence are pleaded and proved – *National Bank of Kenya Ltd. Vs. Pipeplastic Samkolit (K) Ltd & Another (2001)* eKLR.

In this case, nothing like fraud or duress have been pleaded, there being no defense or at all.

16. In *Blueshield Insurance Co. Ltd vs. Samuel Nyaga Ngurukiri [2008]* eKLR, the court rendered itself that: -

“Under Section 10(4) of the *Insurance (Motor Vehicles Third Party Risks) Act* Cap 405 the appellant was entitled to avoid liability by obtaining declaratory judgment that he was entitled to avoid liability under the policy on the ground that there was non-disclosure or misrepresentation of a material fact.....”

17. In light of the above and the evidence presented to the Court, I am persuaded that the Defendant breached the terms and conditions in the Contract of Insurance subject of this suit. It is a further finding that the Plaintiff has met the threshold for grant of the declaratory orders sought.

18. The Defendant was duly served with the Court process, the plaint and the documents attached to. It did not defend the suit.

The upshot is that the Plaintiff has proved its case against the Defendant to the required standards being upon a balance of probability.



- 19 Judgment is therefore entered for the Plaintiff against the Defendant in terms of the declarations stated in the plaint, and at paragraph 2 of this judgment.
- 20 Costs of the suit are awarded to the Plaintiff.
- 21 Order accordingly.

DELIVERED DATED AND SIGNED THIS 8TH DAY OF JUNE, 2023

JANET MULWA

JUDGE

