



**British American Insurance Co Limited v Kanaari (Civil Case
1 of 2016) [2023] KEHC 21161 (KLR) (18 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21161 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL CASE 1 OF 2016
SN MUTUKU, J
JULY 18, 2023**

BETWEEN

BRITISH AMERICAN INSURANCE CO LIMITED PLAINTIFF

AND

JULIUS MAMALI KANAARI DEFENDANT

JUDGMENT

1. This is an old matter. It was filed in Nairobi on September 22, 2014 as Civil Case No 293 of 2014. It stayed in the system in Nairobi Civil Division without the matter proceeding to trial until February 17, 2016 when it was transferred to Kajiado High Court. The file was given the current number at Kajiado High Court. Again, in Kajiado the matter took a while without the main suit being heard until July 12, 2021 when the Plaintiff called its only witness to the stand before Hon Mr Justice Chacha Mwita. I took over the matter on April 28, 2022 upon my transfer to Kajiado High Court. I took the evidence of the Defendant as the only witness for the Defence and written submissions of the parties.

The Claim

2. This suit relates to motor vehicle insurance policy number 552/800/1/002532/2012/03 in relation to Motor Vehicle No KSZ 300, Isuzu Truck, belonging to the Defendant. The insurance cover, for commercial carrying of own goods purposes only, was issued to the Defendant by the Plaintiff through its agents, M/s Four M Insurance Brokers. The said motor vehicle was involved in a self-involving accident on January 14, 2014 during the pendency of the said policy as a result of which some passengers were injured, some of them fatally.
3. The Plaintiff filed this declaratory suit, through a Plaint dated September 22, 2014, seeking orders that the Plaintiff is not bound to indemnify the Defendant on any claim arising out of the said accident on the grounds that the policy was procured through material misrepresentation and or that the Plaintiff is entitled to repudiate the policy for breach of policy conditions. The Plaintiff particularized the material



representation that the Defendant proposed and paid for an insurance policy to cover motor vehicle for commercial carrying of own goods purposes only when he knew that he would use the insured motor vehicle to carry passengers without a passenger insurance cover.

4. The Plaintiff further particularized the breach of terms of the insurance policy to the effect that the Defendant converted a commercial carrying of own goods purposes only policy into a Public Service Vehicle and ferried random passengers in it and that he allowed the insured motor vehicle to carry unauthorized persons in breach of the terms of the policy.
5. The Plaintiff seeks a declaration that it is entitled to avoid or repudiate policy No 552/800/1/002532/2012/03 and costs of the suit.

The Defence

6. By a Defence dated October 28, 2014, the Defendant admitted taking out an insurance policy named in this suit for the purpose indicated in the Plaint with the Plaintiff, but he denied all the allegations made by the Plaintiff and puts the Plaintiff to strict proof thereof.
7. On a without prejudice basis, the Defendant stated in his defence that the alleged passengers boarded the motor vehicle Registration No KSZ 300 while it was on transit to the quarry along the busy Rongai/Nazarene Road and were therefore illegally on board the vehicle. He stated that the Plaintiff is not entitled to the relief sought and that its suit should be dismissed with costs to the Defendant.

The Evidence

8. The Plaintiff called Gilbert Koross (PW1), the Claims Associate, as its first witness. He was to remain the Plaintiff's only witness since the other expected witness was not available to testify. Gilbert adopted his statement dated July 9, 2021 as his Evidence and testified that the Defendant's motor vehicle Registration No KSZ 300 was insured with the Plaintiff on March 28, 2013; that a policy document (Ex 1) was given to the Defendant; that the policy covered accidental loss or damage to the insured motor vehicle and or death or bodily injury or loss or damage to property of third parties arising out of the use of the insured motor vehicle and that the use was for commercial carrying of own goods purposes only.
9. His witness statement shows that the Defendant reported an accident on January 14, 2014 involving the insured motor vehicle with three fatalities; that the insured touted for passengers along Magadi Road and ferried passengers when the accident occurred. After receiving the accident report, the Plaintiff engaged an investigator, Surefind Investigations Company Limited, who investigated the accident and prepared a report dated August 23, 2014.
10. He testified further that according to the report, the insured motor vehicle was carrying passengers in violation of the terms of the policy; that this caused the Plaintiff to repudiate the policy and communicated the decision to the Defendant through a letter dated September 4, 2014 (Ex 3).
11. On cross-examination Gilbert told the court that he joined the Plaintiff in 2018 and that the information they received was that the Defendant touted for passengers and that the vehicle was carrying passengers. He admitted that the Plaintiff instructed an advocate to represent the Defendant in CMCC No 240 of 2014 in the lower court and that the advocate entered appearance for the Defendant. He however denied that the Plaintiff instructed the advocate to concede liability.
12. The Defendant testified on July 6, 2022 as the only witness for the defence. He told the court that his motor vehicle was insured with the Plaintiff; that his motor vehicle was involved in an accident on January 14, 2014 and upon learning of the accident he informed Four M Insurance Agents who told



him not to admit liability; that he received a demand letter in regard to that accident and he handed it over to the Insurance Agents; that he did not concern himself with the case because the Plaintiff was required to defend the case on his behalf; that after one year Auctioneers followed him to pay Kshs 837,999 and that he filed an application to stay the execution which was allowed.

13. On cross-examination, the Defendant stated that he was not authorized to carry passengers and that it was his responsibility to ensure that no passenger was carried in his motor vehicle. He stated that he had instructed the driver not to carry any passengers. He stated that his motor vehicle was not used as a matatu and that the passengers boarded the motor vehicle illegally.

Submissions

14. In its submissions filed on April 19, 2023, the Plaintiff has submitted that the cover of insurance issued to the Defendant under policy number 552/800/1/2013/03 which is renewed annually was confined to the carriage of goods only and excluded passengers other than those in the employment of the Defendant. It was submitted that the liability to third party risks in the said insurance cover specifically excluded passengers who may be injured while in the defendant's motor vehicle as shown in the exceptions to Section II of the Policy document.
15. It is the Plaintiff's submissions that the Defendant did not deny that there were unauthorized passengers in motor vehicle number KSZ 300 on the material date of the accident; that he gave the explanation that quarry workers usually hitch a ride to the quarry in his vehicle, a fact that he knew and that this was in clear violation of the terms of the policy. The Plaintiff submitted that it is entitled to avoid the said policy on the grounds for breach of the terms of the policy.
16. In response to the Defendant's claim that the Plaintiff denied him the opportunity to mount a proper defence in Kajiado CMCC 248 of 2014 filed on January 14, 2014, the Plaintiff submitted that they were aware of the suit in the lower court and instructed an advocate to come on record on behalf of the Defendant but the Plaintiff thereafter commissioned Surefind Investigators to investigate the accident soon after the institution of the suit whose report is dated August 23, 2014 and that based on that report it became clear to the Plaintiff that there were unauthorized passengers which informed the decision to file this suit in September 2014.
17. It is the submission of the Plaintiff that it is not bound to settle the decree in Kajiado CMCC 248 of 2014 as the plaintiff in that suit alleged that the deceased was a passenger in the defendant's motor vehicle KSZ 300 at the time of the accident. The Plaintiff relied on *Solomon Okeyo Okwama & another v Kenya Alliance Co. Limited* [2009] eKLR.
18. The Defendant's submissions were filed on April 17, 2013. He has narrated the background leading to the present suit. The record of the court shows that the Defendant successfully stayed the execution of the decree of the CMCC 248 of 2014 pending the determination of this case.
19. The Defendant has submitted that the Plaintiff's claim is hinged on the findings of the investigation's report dated August 23, 2014 which was marked for identification but was never produced as an exhibit and therefore has no evidentiary value. He cited *Kenneth Nyaga Mwigie v Austin Kiguta & 2 others* [2015] eKLR on that point. He further submitted that the only witness for the Plaintiff, is the Claims Associate who joined the Plaintiff 4 years after the accident and who based his evidence on the investigation's report that was never produced as an exhibit.
20. The Defendant submitted, further, that the judgment of the lower court is against the insured and that as the insurer, the Plaintiff is liable to satisfy the said judgment by virtue of the insurance policy taken up by the insured; that the Plaintiff as the insurer remains fully liable to the beneficiary of the



lower court judgment. He submitted that the existence of the policy has not been disputed; that the conduct of the Plaintiff to instruct an advocate to represent the Defendant in the lower court points to its liability to the beneficiary of the judgment of the lower court and that had the Plaintiff been sincere about their unwillingness to honour the claim they would have declined to defend him.

21. It is the Defendant's case that the Plaintiff is not entitled to repudiate liability and that given that the Plaintiff's case is anchored on the investigations report which has not been produced as an exhibit, the Plaintiff is liable to satisfy the judgment of the lower court. The Defendant urges that this suit be dismissed with costs to the Defendant.

Determination

22. To my mind, the singular issue for determination in this matter is whether the Plaintiff is liable to satisfy the judgment of the lower court in CMCC 248 of 2014. To my understanding, there is no dispute that the Defendant's motor vehicle registration number KSZ 300 was covered by the Plaintiff through policy number 552/800/1/2013/03 which was valid as at the time of the accident on January 14, 2014. It is not in dispute that the said insured motor vehicle was involved in an accident and resulting from that accident some persons who were travelling in that motor vehicle were fatally injured.
23. It is clear to me, from the policy document and I find no dispute on this, that the motor vehicle was insured for commercial carrying of own goods purposes only. Section I of the policy is clear on what the policy covered. It is clear from the policy document that death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon entering or getting onto or alighting from the vehicle at the time of the occurrence of the event out of which any claim arises, among other exceptions, is not covered under the policy by dint of Section II of the Policy.
24. I agree with the Defendant that the Plaintiff cannot rely on the Investigations Report given that it was not produced as an exhibit but was only marked for identification. The Plaintiff failed to call the maker of the document to produce it. This leaves the Plaintiff exposed in that it cannot rely on that report. That notwithstanding, it is admitted that motor vehicle number KSZ 300 was carrying passengers at the time it was involved in self-involving accident resulting in injuries and death. This is the reason the Defendant was sued in the lower court as a result of which auctioneers visited him with warrants to execute the lower court judgment and decree.
25. While I find no evidence whether the persons who boarded the motor vehicle were charged any fare by the Defendant's driver, said to be still at large after the accident, it is clear to me that there were passengers in that vehicle. The Defendant referred to them as illegal passengers. The Defendant also stated that he had cautioned his driver against carrying any passengers. The right thing for the driver to do was to stop the vehicle and demand that any passenger gets out of the vehicle if indeed they were illegal and had boarded the vehicle without being allowed to board. The fact that people boarded the motor vehicle, illegally or not, makes the driver responsible for allowing passengers in the motor vehicle against the terms of the policy.
26. Has the Plaintiff reached the threshold of proving this case to the required standard? The burden of proof in civil cases is proof on a balance of probabilities. In *Miller v Ministry of Pensions*, [1947] 2 All ER 372 the court stated as follows on the issue of standard of proof:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote



possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

27. Applying my mind to the law and the evidence presented to this court, it is my finding, and I so hold, that the Plaintiff has met the threshold as stated in the above case. Defendant, through his driver, breached the conditions of the policy by carrying persons that are not covered by the terms of the policy. As a result of the action by the Defendant, the Plaintiff seeks relief in the suit under determination.
28. Consequently, I find in favour of the Plaintiff and allow the Plaint dated September 22, 2014 in the following terms:
 - i. A declaration is hereby issues that the Plaintiff is entitled to avoid or repudiate policy No No 552/800/1/002532/2012/03.
 - ii. Costs of this suit are payable to the Plaintiff.

Orders shall issue accordingly.

DATED, SIGNED AND DATED THIS 18TH JULY 2023.

S. N. MUTUKU

JUDGE

