



**Dambe v CIC General Insurance Co. Ltd (Commercial Case 97 of 2015)
[2023] KEHC 23570 (KLR) (Commercial and Tax) (5 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23570 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 97 OF 2015
WA OKWANY, J
OCTOBER 5, 2023**

BETWEEN

OSMAN DADI DAMBE PLAINTIFF

AND

CIC GENERAL INSURANCE CO. LTD DEFENDANT

JUDGMENT

Background

1. The Plaintiff herein, Osman Dadi Dambe, took out a comprehensive motor vehicle insurance cover with the Defendant for his motor vehicle Registration No. KBK 657J Mitsubishi Fuso, (hereinafter “the Suit Motor Vehicle”).
2. The suit motor vehicle was, on or about 30th May 2014, involved in a Road Accident along Nairobi – Moyale Road. The Plaintiff lodged an insurance claim for the loss he suffered following the said accident. The suit motor vehicle was, at the request of the Defendant, towed to a garage in Eastleigh Nairobi pending investigations and settlement of the insurance claim.
3. The Defendant however repudiated the claim after conducting its investigations.
4. The Defendant alleged that the Plaintiff interfered with and/or exchanged the motor vehicle cabin and further, that the said vehicle was at the time of the accident not being used for its intended purpose.
5. The Defendant’s repudiation of the claim resulted in the filing of this suit.

Plaintiff’s Case

6. The Plaintiff sued the Defendant through the plaint dated 27th February 2015 seeking the following orders: -



- i. A declaration do issue that the Defendant, by reason of the default in the discharge of its statutory obligations under the *Insurance Act*, Cap 487 in regard to the Policy No. P012/080/1/040343/2014/02 issued by it and in favour of the Plaintiff, acted mala fides, upon the Plaintiff meeting all the obligations arising under the said policies, and hence became responsible to meet the claim made to it by the Plaintiff pursuant to the said policy.
 - ii. A declaration do issue that the Defendant, by reason of the default in the discharge of its obligations under the *Insurance Act*, Cap 487 in regard to the Policy No. P012/080/1/040343/2014/02 issued by it and in favour of the Plaintiff, to appoint an arbitrator within the requested period breached the said policy agreements, entitling the Plaintiff to seek relief in this court, and thereby the Defendant by its conduct ousted the operation of the *Arbitration Act*.
 - iii. An order for specific performance for the Defendant to pay the value of the truck due to the Plaintiff on the Policy No.2005/102/005009 under claim No. CL2007/102/003.
 - iv. An order for specific performance for the Defendant to pay for KBK 657J Mitsubishi Fuso at its market value due to the Plaintiff on the Policy No. P012/080/1/040343/2014/02.
 - v. Such other or further orders as this Honourable Court may deem fit to grant.
 - vi. Costs of this suit together with interest thereon.
7. The Plaintiff averred that he was at all material times the owner of the suit motor vehicle and policy holder of Policy No. P012/080/1/040343/2014/02 issued by the Defendant in consideration of the received premiums, and that the Defendant undertook and assumed the risk to insure the Plaintiff's said motor vehicle.
 8. The Plaintiff's case is that he paid all the premiums due to the Defendant on account of the said policy in duly informed the Defendant of the accident that took place on 30th May 2014.

The Hearing

9. The case proceeded for hearing before Onguto J. on 13th December 2017 when the Plaintiff (PW1) adopted his witness statement dated 27th February 2015 as his evidence in chief and produced the Bundle of Documents as P Exhibits marked P Exhibit 1 – 26.
10. The Plaintiff testified that his claim is for the payment of Kshs. 3.75 million being the pre-accident value of the suit motor vehicle.
11. On cross examination, the Plaintiff testified that he bought the suit motor vehicle from Simba Colt Ltd. He added that he did not have the vehicle's Logbook as it was held by his financiers, Equity Bank. He stated that after the accident, he learnt that the vehicle had a different chassis and engine numbers from the numbers indicated in the Logbook. He stated that the application for insurance cover did not require him to disclose the vehicle's engine and chassis number.
12. On cross examination, the Plaintiff testified that his driver informed him that the suit motor vehicle overturned after it hit cows that were crossing the road. He stated that the suit motor vehicle was, after the accident, towed from Marsabit to a garage in Nairobi but that the Defendant later claimed that he had changed the vehicle's cabin. He added that the Defendant alleged that the motor vehicle had different chassis and engine number from the number that was indicated in the Logbook.



Defendant's Case

13. The Defendant tendered the evidence of 4 witnesses as follows: -
14. DW1, Mr. Alex Muteti, an Investigator with Uptown Loss Assessors (K) Ltd, investigated the accident and reported that the suit motor vehicle's chassis, engine and model numbers on the cabin plate was different from the numbers in the Logbook and the chassis frame. He formed the opinion that the cabin in the suit motor vehicle was not its original one and that the cabin had been exchanged with a severely damaged cabin.
15. He further testified that he established that the Plaintiff misrepresented the usage of the vehicle as he was informed that the motor vehicle was ferrying goods belonging to persons other than the goods of the insured despite the fact that it was insured to carry own goods.
16. He further stated that his opinion was that the Plaintiff exaggerated the damage to his vehicle thus contravening the insurance doctrine of good faith.
17. On cross examination, he stated that the accident occurred in Moyale after which the vehicle was towed to a garage in Nairobi. He added that the Plaintiff, the Plaintiff's son and driver pointed out the motor vehicle to him at the time he did the investigations. He confirmed that the suit motor vehicle crashed after hitting a cow but added that the damage on the body of the carrier and the cabin were inconsistent with the manner in which the accident was reported to have happened.
18. DW2, Mr. George Henry Matta, a licenced Assessor, inspected the suit motor vehicle at the garage in Eastleigh, Nairobi. He testified that he sought the Defendant's permission to strip the motor vehicle in order to check the damage. He formed the opinion that it was uneconomical to repair the motor vehicle as the cost of repair would outstrip its value. He assessed the motor vehicle's salvage value at Kshs. 1,500,000/=. He stated that he was the first Assessor to handle/assess the suit motor vehicle which was pointed out to him by the Plaintiff. He claimed that the details appearing on the vehicle identification number (VIN) plate were not the same as those appearing on the Logbook and concluded that it was not the same motor vehicle that had been insured by the Defendant.
19. DW3, Mr. Silas Ogori Kangi, was also a motor Assessor hired by the Defendant's instructions to assess the suit motor vehicle. He reported that various components of the suit motor vehicle had been dismantled/stripped under unclear circumstances. He found that the damage on the cabin and rear body were inconsistent with the manner in which the accident was reported to have occurred. He formed the opinion that the cabin on the motor vehicle was not the one that the vehicle had at the time of the accident thus leading to his impression that the cabin had been exchanged. He formed an opinion that the insured grossly interfered with the accident, if indeed it happened. He recommended that the claim be repudiated.
20. On cross examination, he stated that he received the Defendant's instructions on 23rd July 2014. He conceded that the chassis number on the Logbook and the one on the report could have had a typographical error.
21. DW4, Ms. Lydia Wairimu, the Defendant's Claims Manager testified that the Defendant declined to compensate the Plaintiff on the basis of the Assessor's reports. She noted that reports revealed that the claim was not valid owing to the change of the motor vehicle user and the fact that the chassis and engine numbers did not belong to the motor vehicle that they had insured. She confirmed that, Simba Colt Ltd, the manufacturers of the suit motor vehicle, wrote to the Defendant on 15th January 2015 and conceded that the details on the suit motor vehicle at the time DW2 did the investigations belonged



to another motor vehicle Registration No. KBR 510B. She was of the view that the Plaintiff changed the chassis and engine so as to exaggerate the loss and get a write off.

22. On cross examination, she testified that the Defendant's initial assessment of July 2014 stated that there was no tampering with the chassis.

Analysis and Determination

23. I have considered the pleadings filed herein, the evidence presented by the parties and their respective submissions. I find that the main issue for determination is whether the Plaintiff proved his claim against the Defendant to the required standards.

24. The following issues were not disputed: -

- a. That the Plaintiff is the owner of the suit motor vehicle.
- b. That he insured the said vehicle with the Defendant who issued him with a comprehensive cover Number P012/080/1/040343/2014/02.
- c. That the suit motor vehicle was involved in a road traffic accident on 30th May 2014 and the Plaintiff lodged a claim for compensation from the Defendant.
- d. The Plaintiff said the vehicle was damaged following the accident and was grounded at Marsabit Police Station before it was towed, at the Defendant's request, to a garage in Eastleigh in Nairobi.

25. The following are the issues that arise from the main issue for determination: -

- a. Whether the Plaintiff used the said motor vehicle for its insured purpose.
- b. Whether the Plaintiff changed the motor vehicle cabin.

Use of the Suit Motor Vehicle

26. The Defendant submitted that whereas the Plaintiff, had, at the time he was applying for the insurance cover, indicated that he would use the motor vehicle to ferry his own goods, investigations revealed that he was using it for hire/reward to ferry other people's goods. In this regard, the Defendant relied on the evidence by Alex Muteti (DW1) of Uptown Loss Assessors who testified that his investigations revealed that the Plaintiff did not have a Hardware shop in Moyale Town christened Tawakal Hardware. DW1 testified as follows on the usage of the suit motor vehicle: -

“There was misrepresentation of material facts as to the usage of the vehicle where my findings indicated that the motor vehicle was carrying goods belonging to other people other than the insured despite having been insured for carrying own goods.”

27. DW1 stated as follows in his investigation report dated 16th August 2014 concerning the usage of the motor vehicle: -

“According to the driver, the insured and his son on the material date of the accident, the vehicle was transporting the insured's general hardware items to his shop in Moyale from Nairobi at the time. However, the insured's son could not come clear on the nature of the hardware materials inside the vehicle or the actual places where they had been bought in Nairobi despite being the manager and the one who personally bought the goods. He could not even provide any documentary evidence or even receipts to show that the vehicle



had been used to carry the alleged hardware items or concrete evidence to show that the items had actually been bought in Nairobi. Our initial communication with the driver revealed that the vehicle was loaded with general consumable shop goods which belonged to different individuals based in Moyale; claims which correlate with his statement recorded at the police station and which was verbally supported by Abdi Age Baso of telephone numbers 0725561083 who was the first one to reach the scene of the accident after he was informed of the accident by the insured's driver. Our efforts to confirm the same in writing was hampered by the insured who apparently compromised the driver and the said Abdi Age who after revealing to us the information declined to record a statement. The driver only agreed to record the same long after he met with the insured in Eastleigh. This was after we obtained their telephone numbers at the Marsabit Police Station. Note that the insured at first claimed that the driver could not be reached and when we contacted him while in Marsabit, the driver claimed that he was in Kitale and he could not be available to record a statement with us only for us to receive a phone call from the insured on the following day informing us that the driver was in Nairobi and ready to record a statement with us.

On his background, we opine that the vehicle was hardly used to transport the insured's goods as alleged since the insured and his crew could not avail documentation to prove their allegations. The allegations by the insured's son that he bought the hardware items from a friend in Kayole does not make sense since he could hardly tell the names of the shop where he bought them or the actual contacts of the seller or even his full names. Considering the nature and value of the alleged goods in the vehicle at the time of the accident, he (insured's son) ought to have full particulars and organized documents to prove his allegations."

28. The Plaintiff, on the other hand, maintained that the suit motor vehicle was, at the time of the accident, ferrying goods to his hardware shop in Moyale Town.
29. In his report, DW1 stated that he recorded the statement of that Plaintiff's driver who informed him that the insured was a businessman dealing in general business such as hardware and scrap metal dealership. The report filed by DW1 on the driver's statement was that: -

"...He states that the insured owns hardware along Biashara Street in Moyale town trading in names and style of Tawakal hardware and that on the material date of the accident, he was accompanied by a loader by the names Jamal and they were heading back to Moyale to deliver hardware items belonging to the insured from Nairobi. He attributes the cause of the accident to obstruction by about seven cows which entered the road abruptly from the left side crossing towards the right while running after each other..."

30. The Investigator (DW1), made the following findings in his report over the issue of usage: -

"(b) According to the insured and his crew, on the material date of the subject accident, the vehicle was delivering hardware goods to the insured's shop in Moyale. However, there was no clear evidence to prove the allegations as they failed to provide documentary evidence such as the receipts to confirm the same. We reliably established that the insured's vehicle was being loaded with general shop goods as indicated in the driver's statement that he recorded at the police station and as revealed by Abdi Ego who organized for the transportation of the same goods by another lorry after the accident. The contradiction between the insured and his son regarding the names and the



actual location of the insured's hardware in Moyale in reference to their testimonies implies that the hardware is non-existent.”

31. My finding is that while DW1 alleged that he established the Plaintiff's driver recorded with the police where he stated that the insured's vehicle was loaded with general shop goods, no such statement was presented in court as evidence. I further note that the person DW1 named Abdi Ego, who allegedly organized for the transportation of the said goods by another lorry, after the accident, was also not called to testify so as to confirm the owner of the goods in question. In effect therefore, I find that the claim that the lorry was being used for purposes, other than those stated in the insurance proposal form was based on hearsay evidence. I also note that at no point did DW1 state that he actually went to Moyale Town and established that the Plaintiff did not own a shop in the said town. It is to be noted that it is the Defendant who alleged that the Plaintiff was not using the suit motor vehicle for its intended purpose. I find that the burden therefore rested on the Defendant to prove this claim. I am not persuaded that the Defendant proved, on a balance of probabilities, that the Plaintiff was, at the time of the accident, using the motor vehicle for hire or reward.

Change of the Motor Vehicle Cabin

32. The Defendant's case was that it repudiated the Plaintiff's claim for compensation on the basis that the Plaintiff had exchanged the motor vehicle cabin with that of another motor vehicle, so as to exaggerate his loss in order to get a bigger settlement. In this regard, the Defendant tendered the evidence of DW3, Silas Ogori Kangi, who testified as follows: -

“Damages were more evident on the rear body right hand side but we also noted various components had been dismantled/stripped under unclear circumstances Engine dismantled. Front axle beam removed. Front springs stripped.

...from the above, we formed the opinion that the cabin on the motor vehicle could not have been there at the time of the accident.

... This gave us the impression that it had been exchanged...

It was therefore our opinion that the insured grossly interfered with the accident if it was there. We recommended that the claim be repudiated.”

33. On cross examination, DW3 stated that some parts of the motor vehicle had been dismantled at the time he did the assessment. He confirmed that the chassis number on his report was the same as the chassis number on the motor vehicle.

34. I have perused the report made by DW3 (Quality Motor Consultants) and I note that it indicates, at the first page thereof, that the chassis number of the suit motor vehicle was FAVFM6151-9SA00699. The vehicle's engine number is however not indicated. In the said report, DW3 states: -

“From the above it is our opinion that cabin appears to have been changed because of the following reasons: -

1. There were obvious indications on the cabin mounting brackets that they had been interfered with as is illustrated by photographs attached.
2. The cabin tilt holding brackets appear to have been temporarily mounted as is illustrated by photographs attached.



3. Steering coupling bracket appears to have been worked on during the cabin removal.
4. Brake valve also appear to have been worked on during the cabin removal as is illustrated by photographs attached.
5. Head lights appear to have freshly mounted on the damaged cabin as is illustrated by photographs attached.
6. The cabin on the vehicle has excessive body rusts on its chassis numbers implying it had previously been worked on unprofessionally. The cabin condition does not match with the age of the vehicle. The cabin looks older and misused.

We also noted that the steering box had its shaft snapped off. Our further inspection revealed that its mounting bolts had been worked on. This would imply that it could have been exchanged. This was evidenced more by the allegedly missing snapped off drop arm which would have been connected to the drag link but in this case, the drag link was intact. If the steering shaft snapped off as a result of the accident, we would have noted extension damages on the spring hinges and wheel rims. In this case No visible damages were noted on them.

It is therefore our opinion that your insured “grossly” interfered with the accident with the intention of inflating the repair cost. We would therefore recommend the claim be repudiated. However a reputable investigator who would be in a position to visit the scene of the accident would reveal more supportive evidence.”

35. The question that this court has to deal with is whether the Plaintiff interfered with the accident motor vehicle so as to inflate its repair costs as the Defendant alleged. The answer to this question must come from the evidence on the record.
36. It was not disputed that the suit motor vehicle was towed to the police station immediately after the accident before the Defendant had it towed to a garage in Nairobi where it remained even as at the time DW3 conducted his investigations. In effect therefore, at no time was the suit motor vehicle in the sole custody of the Plaintiff so as to justify the claim that he interfered with it.
37. I note that the Defendant did not present the evidence of any witness who saw the Plaintiff tamper with the said vehicle. Indeed, the only evidence tending to show interference with the vehicle came from DW2 George Henry Matta who testified as follows: -

“I was retained as an assessor through telephone instructions on 3rd July 2014 from a claims analyst in CIC.

... We proceeded to inspect the motor vehicle and wrote to CIC to allow us have the motor vehicle stripped to check damage to the vehicle.

The report sums up that it was uneconomical to repair the motor vehicle as the cost of repair would outstrip the value. We advised a salvage value of Kshs. 1,500,000/=....

We were the first assessors to see the motor vehicle.”



38. In my earlier analysis of the testimony of DW3, I noted that he observed that the suit motor vehicle had been dismantled/stripped under unclear circumstances. My take is that since DW2 categorically stated that he sought the Defendant's permission to strip the motor vehicle and that he indeed stripped the said vehicle, interference with the said vehicle cannot be attributed to the actions by the Plaintiff. At no point did any of the witnesses state that they saw the Plaintiff dismantle or strip the said vehicle so as to justify the claim that he changed the vehicle cabin so as to exaggerate his claim.
39. It is noteworthy that while DW2 admits that he was the first to assess the vehicle and stripped/dismantled its parts, at no point did he state that he reattached or reassembled the said stripped parts back to the vehicle. This means that any other person assessing the vehicle after DW2 would not be dealing with one compact vehicle but with parts that are pulled apart.
40. It did not escape the attention of this court that the suit motor vehicle was at a garage that must have had other vehicles and vehicle parts in the yard. In my considered view, in the same way the Defendant accuses the Plaintiff of changing the cabin by stripping of the vehicle, one can also say that the Defendant cannot escape blame for changing the cabin by replacing it with a different one so as to avoid liability for the accident.
41. Looking at the defence mounted by the Defendant in its entirety, one gets the feeling that there was a spirited attempt by the Defendant to repudiate liability at all costs. This attempt is evident in the manner in which the Defendant seemed to suggest that the Plaintiff stage-managed the accident in order to get insurance compensation despite the overwhelming proof to the contrary which included a police abstract report which showed that the accident occurred when the vehicle ran into a herd of cows.
42. My finding is that the claim that the Plaintiff tampered with the vehicle's cabin by changing it with a completely different one so as to inflate the repair costs was not only far-fetched but was also not proved to the required standards.
43. This court has to ask itself what happened to the other vehicle Registration No. KBR 510B whose cabin is alleged to have been exchanged and placed in the Plaintiff's vehicle? Why wasn't the owner of the said vehicle KBR 510B interviewed or called as a witness to shed light on the circumstances of the alleged exchange? Why weren't the police involved in the investigations of the alleged racket/crime of exchanging motor vehicle's chassis?
44. In advancing the theory that the motor vehicle's cabin was exchanged with another one, the Defendant stated that the numbers noted in the vehicles VIN plate to wit, chassis number, engine number and model number were different from the numbers noted on the said vehicle's Logbook. I however note that it came out in the evidence that the sellers of the said vehicle, Simba Colt (K) Ltd, acknowledged that there was a discrepancy in the said vehicle's engine number, which they had intended to correct before the accident occurred.
45. The other question that arises is whether there were other discrepancies in the logbook and the vehicle besides the discrepancy in noted in the engine number?
46. Having found that there was no evidence to prove that the Plaintiff exchanged the vehicle's cabin, having found that the Defendant's witness admitted that he dismantled the suit vehicle and having found that Simba Colt Ltd conceded that there was an error on the suit vehicles engine number, I find that the Defendant was not justified in repudiating the Plaintiff's claim.



Disposition

47. Having regard to the findings and observations that I have made in this judgment, I find that the Plaintiff proved his case against the Defendant on a balance of probabilities and I therefore allow the claim in the following terms: -

- i. A declaration is hereby issued that the Defendant, by reason of the default in the discharge of its statutory obligations under the *Insurance Act*, Cap 487 in regard to the Policy No. P012/080/1/040343/2014/02 issued by it and in favour of the Plaintiff, acted mala fides, upon the Plaintiff meeting all the obligations arising under the said policies, and hence became responsible to meet the claim made to it by the Plaintiff pursuant to the said policy.
- ii. A declaration is hereby issued that the Defendant, by reason of the default in the discharge of its obligations under the *Insurance Act*, Cap 487 in regard to the Policy No. P012/080/1/040343/2014/02 issued by it and in favour of the Plaintiff, to appoint an arbitrator within the requested period breached the said policy agreements, entitling the Plaintiff to seek relief in this court, and thereby the Defendant by its conduct ousted the operation of the *Arbitration Act*.
- iii. An order for specific performance is hereby issued directing the Defendant to pay the Plaintiff the pre accident value of his motor vehicle Reg. No. KBK 657J Mitsubishi Fuso on the Policy No. P012/080/1/040343/2014/02.
- iv. The Defendant shall also pay interest on the pre-accident value stated in order in (iii) hereinabove at court rates from the date of filing this suit till payment in full.
- v. I award the Plaintiff the costs of this suit together with interest thereon.

48. It is so ordered

JUDGMENT SIGNED, DATED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS ON THIS 5TH DAY OF OCTOBER 2023.

W.A. OKWANY

JUDGE

