



**Jubilee Insurance Company Limited v Apollo (Civil Suit 2 of 2020)  
[2023] KEHC 23540 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23540 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL SUIT 2 OF 2020  
REA OUGO, J  
OCTOBER 12, 2023**

**BETWEEN**

**JUBILEE INSURANCE COMPANY LIMITED ..... PLAINTIFF**

**AND**

**CONSTANTIVE ODHIAMBO APOLLO ..... DEFENDANT**

**JUDGMENT**

1. Jubilee Alliance Insurance Company Limited, the plaintiff is a limited liability company. It filed this declaratory suit via its amended plaint dated 15<sup>th</sup> March 2021 seeking the following orders against Constantive Odhiambo Apollo, the defendant:
  - a. A Declaration that it is not bound to pay/satisfy judgment in any suit arising from the said accident and/or indemnify the Defendant against any claim in respect of bodily injury to any person, damage to property or satisfy any claim whatsoever arising out of the accident which allegedly occurred on 24<sup>th</sup> June 2019 along Riverside Road at Riverside area: involving the Defendant's motor vehicle registration number KCS 726M and motor cycle registration number KMDU 270J.
  - b. A Declaration that it is not bound to pay/satisfy judgment in Kisii CMCC No 116 of 2020/ or indemnify the Defendant against any claim in respect to bodily injury to any person, damage to property or satisfy any claim whatsoever arising out of Kisii CMCC No. 116 of 2020.
  - c. Costs of this suit.
  - d. Interest on (c) at court rates.
2. The Defendant's vehicle Reg. No KCS 726M (the vehicle) , was comprehensively insured by the plaintiff for private use by the Defendant vide policy number P/101/1002/2018/006558. It was a term of the policy that the plaintiff would indemnify the Defendant in the event of loss arising from a road



traffic accident from the use of the vehicle within the contractual user which was for private use. The insurance cover did not cover Third-Party Risks or Claims arising out of the subject motor vehicle for hire or reward. In the event of an accident, the defendant was required to report to the plaintiff any accident involving the said vehicle at the earliest opportunity and render all the relevant information to enable the plaintiff process any claims arising there from.

3. The policy commenced on 17<sup>th</sup> January 2019 and was to expire on 16<sup>th</sup> December 2019. On 24<sup>th</sup> June 2019, the defendant's vehicle was involved in an accident along Riverside-road at Riverside area with motor cycle registration no. KMDU 270J. As a result of the accident the rider and two pillion passengers on the motor cycle suffered fatal injuries. The defendant did not report the said accident to the plaintiff as required by the terms of the policy, but concealed material facts and/or misrepresented information and therefore breached the terms of the subject insurance policy cover materially, the use of the defendant's motor vehicle for hire and reward.
4. The plaintiff's preliminary investigations revealed that the vehicle had been hired for use by Wycliffe Olela at a cost of Kshs 5,000/- which action was materially against the insurance policy cover which was for private use. In addition, the said Wycliffe Olale was in control of the Defendant's motor vehicle without the authority of the defendant which was against the subject insurance policy.
5. The plaintiff contends that it is neither legally nor contractually liable to indemnify the defendant or any estate of the fatally injured rider and pillion passenger aboard the motor cycle as this would go beyond the scope of contractual user of the vehicle and beyond the scope of mandatory insurance cover within the meaning of section 4 and 5 of the Insurance (Motor Vehicle Third Party Risk) Act, Cap 405 of the Laws of Kenya.
6. The plaintiff further averred that the defendant by offering his vehicle to the public for hire or reward as he did, he was not only in breach of the law and the contractual arrangement between him and the plaintiff, but that he also did so at his own peril and should bear liability for any claim arising from the said user. The particulars of breach of the insurance policy terms and conditions are pleaded as follows;
  - a. Using the motor vehicle for hire and/or reward
  - b. Wilfully concealing pertinent information regarding the accident
  - c. Providing false information regarding the user of motor vehicle registration number KCS 726M, at the time of the accident.
  - d. Allowing motor vehicle registration number KCS 726 to be driven by an unauthorised and unqualified driver against the terms of the insurance policy.
7. The plaintiff claims that within the confines of the Insurance (Motor Vehicle Third Party Risk) Act, CAP 405 of the Laws of Kenya, it is neither legally nor contractually liable to compensate any claims arising from the use of the defendant's motor vehicle at the time of the accident and is legally not obligated to satisfy any judgment for compensation of such claimants, hence its prayers for the declaratory orders.
8. The suit was opposed by the defendant who filed his amended statement of defence on 20<sup>th</sup> April 2021. The defendant admitted to taking a comprehensive insurance policy with the plaintiff and that indeed an accident occurred on 24<sup>th</sup> June 2019. The defendant averred that on the material day the vehicle was under the control of Kelvin Omondi and had not been in use for hire and reward. He denied hiring the vehicle to Wycliffe Olale at a cost of Kshs. 5,000/-. He denied being in breach of the policy. The defendant further denied that the vehicle was driven by an unauthorized and unqualified driver. He also pleaded without prejudice that the plaintiff had failed to prove that he was in breach of any of



the conditions and terms of the policy. The defendant averred that under the terms of the policy the plaintiff ought to settle any issues that affect the suit vehicle as the same occurred when the policy was active and in operational.

## EVIDENCE AT THE HEARING

9. The Plaintiff called 3 witnesses. Nancy Kasyoka (Pw1) was the legal manager of the Plaintiff. She testified that she had worked for the plaintiff since 2018. She relied on her statement as evidence in chief and the supporting documents were marked as exhibits. She testified that the car was for private use. The accident happened on 24<sup>th</sup> June 2019, the defendant reported the accident but upon preliminary investigations it was found that the vehicle was used for hire and reward. It was hired to Wycliffe Olale, however, the driver as per the claim form was Kevin Omondi but at the time of the accident the former was the driver. A disclaimer letter was issued to the insured. A suit KISII CMCC 116/2020 was filed and notice issued to the Plaintiff but the proceedings in KISII CMCC No. 116/2020 were stayed. She prayed that the court allows the suit and issue a declaration that the plaintiff is not liable for any charges relating to the accident as the defendant was in breach of contract. She testified that Kevin Omondi's licence was valid at the time of the accident and that he was not one of their witnesses. The investigations report shows that the insured breached the contract.
10. Moses Kasera, Pw2, No. 88300 PC testified that he was attached to Kisii Traffic Base. He testified that Rioma Police Station is under Kisii Traffic Base. He testified that the fatal road accident occurred on 24<sup>th</sup> June 2019, at Riverside area along Kisii Oyugis road. The accident involved a vehicle KCS 726M driven by Walter Olale heading from Kisii direction on towards Oyugi's direction and upon reaching the said location the driver failed to keep to his near side and he collided with an oncoming motor cycle KMBU 270J make boxer, which was driven by Benson Juma who was ferrying 2 passengers one Joseph Obado Odhiambo and Eric Okoth Onyango. In the initial the report, it was indicated that Kevin Omondi handed over the vehicle to Walter Oduor Olale, the driver's name was captured as Walter Oduor Olale. After investigations were done and after arresting the suspect the statement under inquiry he was identified as Wycliff Oduor Olale. Wycliffe Oduor Olale wasn't licensed to drive, he was charged with 2 counts of driving without a valid driving licence. Wycliffe Oduor Olale was also charged with 4 counts of causing death by dangerous driving as per the victims. The case was pending before court, scheduled on 19<sup>th</sup> October 2021, before Ct NO. 1. Traffic case NO. TR 885/2019 at Kisii Law Courts, Court NO. 4. The Investigating officer Cpl Ngetich also charged Kevin Omondi for permitting unlicensed person in driving the vehicle and that Kevin was not driving at the time of the accident. On cross examination, he testified that he was not the investigating officer in this matter but was standing in for Cpl Ngetich who had been transferred to Kisumu in 2020. At the time when the police abstract was issued the matter was pending investigations but two persons were eventually charged. The abstract does not indicate any of the driver's name. (Pw2 did not record any statement as the file was handed over to him). In reference to exhibit (J) Kevin Omondi pleaded not guilty on 26<sup>th</sup> June 2019, and was discharged under Section 35 (1) of Criminal Procedure Code. The charge was quashed. This means that Kevin Omondi bears no blame. During re-examination Pw2 testified that both Kevin and Wycliff were charged as the 2 charge sheets and Kevin was found to have permitted Wycliff to drive the vehicle.
11. Anthony Njoroge (Pw3) from Invetech loss assessors testified they received instructions from the Plaintiff on 4.7.2019 to carry out investigations on the circumstances surrounding the accident involving vehicle KCS 726 M and motor cycle KMDU 270J ferrying two pillion passengers. They established that the vehicle belonged to Constantive Odhiambo Apollo who had given it to his sister Mercylyne Odhiambo who was based at Oyugis. They established the vehicle was being driven by Wycliffe Olale. Wycliffe told them that he paid Kshs. 5000/- to Kevin for use of the motor vehicle. They



- contacted Kevin Omondi who informed them that he had been using the subject vehicle as a matatu along Oyugis-Kendu route. They didn't record a statement from Kevin as he switched off his phone. They recorded a statement from Constantine Apollo in Nairobi, which he signed. He testified that they also recorded a statement from Maryline Odhiambo who told them that the driver was Kevin Omondi. They established that Wycliffe was the one driving the vehicle which has been given to him by Kevin, the same confirmed by the police and Wycliffe himself.
12. On cross examination, Pw3 testified that he did not meet Wycliffe or Kevin face to face nor was he at the scene of the accident. The Police informed them that Kevin had been charged but they had no idea whether Wycliffe was charged as well. He also testified that Martin Samburu met the defendant Constantive Odhiambo Apollo and the Mercyline Odhiambo. Mercyline Odhiambo was the beneficial owner using the said vehicle. Wycliffe told them that he paid 5000/- and 2000/- was for fuel, it was like a car hire. He had no receipt for either the Kshs 5000/- or the Kshs 2000/-. Kevin and Wycliffe were interviewed on the phone. Mercyline told them that she was using the vehicle for her personal use. That they have no statement to contradict what the owner and beneficial owner.
  13. The Defendant relied on the testimonies of 2 witnesses. Constative Odhiambo Apollo (Dw1), adopted his statement dated 7<sup>th</sup> July 2021 as evidence in chief. He testified that he had a policy with the plaintiff which was comprehensive. On 26<sup>th</sup> June 2019 he reported the accident to the Plaintiff and recorded a statement with them as well. He was not aware whether the driver, Kevin, recorded a statement with the insurance or whether he was charged. He said that he got a letter of disclaimer. The vehicle was used as per the policy and he didn't go against it. On cross examination he testified that the vehicle was registered in his name and he had undertaken insurance. He knew the driver, Kevin Omondi, whom was used frequently and paid wages. He did not know Wycliffe Olale or that he was the one driving the vehicle at the time. He didn't go to the police station to find out the circumstances of the accident but was in touch with his sister. He talked to Kevin who informed him of the accident and did not know that there was money paid for the use of the vehicle. Dw1 received a letter dated 28<sup>th</sup> August 2019 from the insurance in which it was indicated that they were not obligated to pay because the vehicle was hired out for 5000/-. He did not see the two charge sheets.
  14. Dw2, Mercyline Achieng' Odhiambo, Dw1's sister, testified that her written statements be adopted as evidence in chief. She was the owner of the vehicle but Dw1 bought it for her on loan. The vehicle was still in his name but in her possession. She used it at the market and also for private uses and at times sent Kevin Omondi Odhiambo, her driver, to get goods. She testified that she did not hire out the vehicle. On the material day, she had sent Kevin to buy spare parts. Kevin called her informing her about the accident and she went to the scene of the accident where there were dead bodies and a motorbike. The vehicle was taken to Mosochi police station, then Rioma police station. The vehicle wasn't returned to her. She testified that she was yet to testify in a traffic matter. She maintained that they did not breach the insurance policy. On cross examination, she testified that she paid Kevin Ksh.300/- per day after he took her to the market except on Saturdays. On the date of the accident, she had sent Kelvin to Kisii and gave him the vehicle between 8.00 a.m. to 9.00 a.m. Dw2 returned to the police station the next day and was asked if he knew Kevin, she admitted she did. She also explained that she was not in the vehicle nor at the scene therefore she did not witness anything. Kevin declared that he was in possession of the vehicle and denied any allegations regarding Wycliffe Olale.

## **THE PLAINTIFF'S SUBMISSIONS**

15. The plaintiff submitted that the defendant breached the terms of the policy by giving the vehicle to Kelvin Omondi who in turn gave it to Wycliffe Olale, an unauthorized and unlicensed driver. This was confirmed by Pw2 who testified that Wycliffe Olale was charged with driving without a licence. Kelvin



Omondi was also charged with a traffic offence of permitting Wycliffe Olale to drive the defendant's vehicle on a public road without a driving licence. Pw3 produced an investigation report that noted that at the time of the accident Wycliffe Olale paid Kelvin Omondi Kshs 5,000/- for use of the vehicle. The defendant breached the doctrine of Utmost Good Faith when he failed to make truthful disclosures at the time of reporting the accident to the plaintiff. The plaintiff further submitted that the defendant by failing to call Kelvin Omondi and Wycliffe Olale meant that the plaintiff's case was unchallenged. The plaintiff urged the court to find that it had proved its case on a balance of probabilities. Reliance was placed on *Heritage Insurance Co. Limited v Alex N. Migore* (2009) eKLR where the appeal succeeded where an unqualified driver was in control of the vehicle in clear breach of the terms of the insurance contract. They also rely on *Monarch Insurance Company Limited v John K. Muturi* (2021) eKLR.

16. The Plaintiff also submitted that it is deserving of a declaratory relief as prayed in the plaint because it filed the suit on time, proven its case on a balance of probabilities and produced documents in support of their case. It is clear that it complied with section 107 of the [Evidence Act](#) Cap 80 Laws of Kenya.

### **The Defendant's Submissions**

17. The defendant submitted that the plaintiff failed to prove that the car was being used for hire and reward as alleged. Pw1 was not present when the accident occurred and had no proof that the vehicle was being driven by Wycliffe Olale. According to the police records no one had been charged for the occurrence of the accident.
18. From the testimony of Dw2 it was clear she was the custodian/owner of the suit vehicle and that she had employed Kevin Omondi as its driver. Dw2 testified that she went to the scene of the accident and never saw the said Wycliff Olale. The said Wycliffe Olale faced 4 counts of causing death by dangerous driving, however the case had not been finalized. The defendant also pointed out that Pw2 was not the investigating officer and questioned his role in terms of the investigations. The defendant also challenged the evidence of Pw3 who testified on cross-examination that he had never met Kevin Omondi and Wycliffe Olale.
19. The defendant maintained that the plaintiff had failed to establish that the vehicle was used for hire, as no proof was availed in court. It was prudent and of utmost importance on the part of the plaintiff to call the said two persons, Kevin Omondi and Wycliffe Olale to prove their case. The defendant relied on the case of *Michael Njiru Kariuki vs Ferdinand Ndungu Waititu & 3 others* (2021) eKLR where the judge held that it is trite that if no evidence is tendered to support an averment in a pleading such averments stand as a mere statement and if there is no rebuttal of evidence by a party, that evidence remains uncontroverted. The Defendant maintained that it is not automatic that the evidence of the plaintiff is adequate; they have to prove their case. Reliance is placed on *Peter Ngigi Kigira vs Fredrick Nganga Kigira* (2021) eKLR where the court stated that it is never automatic that where the evidence is not controverted the claimants shall have their way in court; He must discharge the burden of proof however much the opponent has not made presence in the contest.
20. The defendant submitted that the suit was speculative, premature because it seeks orders to be indemnified of the claims that have not been heard and decided. Reliance is placed on *ICEA Lion General Insurance Co. Ltd vs Board of Governors Rioma Mixed Secondary School & 24 others* (2016) eKLR where Justice Okwany held that the suit had been filed pre-maturely, was speculative taking into account that the lower court claims/matters had not been concluded and that it was contrary to section 4, 5, 8 and 16 of the insurance (Motor Vehicle Third Party Risks) Act Cap 405 laws of Kenya. The suit was dismissed.



21. The defendant submitted that it was no dispute that the policy relation existed and was valid as at 24<sup>th</sup> June 2019 and that the Defendant reported the accident in good time to the Plaintiff. The Defendant submitted that the suit be dismissed with costs borne to the Plaintiff and the Plaintiff held liable for any liabilities and obligations under the policy under the dates within which the policy was valid.

### **Analysis and Determination**

22. I have carefully considered the pleadings, evidence and submissions by the rival parties. It is not in dispute that the plaintiff had a valid insurance policy/contract with the defendant. It is also not in dispute that on 24<sup>th</sup> June 2014 there was an accident involving Motor Vehicle Reg. No. KCS 726M and Motor Cycle Reg No. KMDU 270J. The issues for determination are as follows:
- a. Whether the plaintiff proved on a balance of probability that the defendant breached the terms of the insurance policy
  - b. Whether the Plaintiff is deserving of the reliefs sought

#### **a. Whether the plaintiff proved on a balance of probability that the defendant breached the terms of the insurance policy**

23. According to the policy, the vehicle was to be used only for social, domestic and pleasure purposes and by the insured in person in connection with his business or profession. The policy did not cover ‘use for racing competitions, rallies or trials (or use for any of them) or use for hire or reward, commercial travelling, the carriage of goods in connection with any trade or business or in connection with the Motor Trade’. The plaintiff’s case is that the vehicle was hired to Wycliffe Olale who paid Kshs 5,000/- and an additional Kshs. 2,000/- for fuel. Thus, the defendant is alleged to have violated the terms of the policy. Pw1 testified that the vehicle was hired for reward and Pw3 testified that he was informed by Wycliffe Olale that he paid Kevin Omondi Kshs 5,000/-. In my view, the information Pw3 received from Wycliffe Olale that he paid Kevin Omondi need to be proved. Pw3 on cross examination testified that he did not meet Kevin Omondi and Wycliffe Olale but interviewed them on the phone. The plaintiff did not avail signed statements from Kevin Omondi and Wycliffe Olale. Courts are inclined to rely on signed statements as was the case in *Saham Assurance Company Limited v Paul Musee Shimoli* (Civil suit No. 2 of 2018) [2021] eKLR held that stated that:
- 25 ...I find that the investigation report does not add any value to the Plaintiff’s case. I say so because the key supporting documents, being the statements allegedly made by the persons who were passengers in the vehicle, were not signed....
26. In a situation where there are signed and unsigned statements by the same witnesses, the Court is inclined to rely on the signed statements.
24. The only signed statement was that of Dw2 who testified that she received a call from Kevin Omondi concerning the accident but when she went to the scene the vehicle had been towed to Rioma police station. The plaintiff also relied on the charge sheet in respect to Kevin Omondi and Wycliffe Olale. Kevin Omondi was charged with the offence of permitting unlicensed person to drive a motor vehicle on a public road without a driving licence contrary to section 30(2) as read with sub section (7) of the [Traffic Act](#) Cap 403 Laws of Kenya. According to the particulars it was alleged that Kevin Omondi permitted Wycliffe Odwuor Olale to drive the defendant’s vehicle without a driving licence. Pw2 testified on cross examination that Kevin was discharged and the charge quashed. Pw2 also testified that he was not the investigating officer and did not have any statements recorded. He admitted that



the police abstract did not capture the name of the driver. The case against Wycliff in the lower court of causing death through dangerous driving is yet to be heard and determined.

25. The plaintiff was required to prove its case on a balance of probabilities. The legal burden of proof of proving a fact lies upon the party who alleges the fact, in law. Section 107(1) of the [Evidence Act](#) provides as follows:

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.

26. Kimaru, J in *William Kabogo Gitau vs. George Thuo & 2 Others* [2010] 1 KLR 526 stated that:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

27. There was no evidence to prove that the unlicensed driver was in control of the defendant’s vehicle , or that the vehicle had been hired out contrary to the terms of the policy. I am constrained to agree with the submissions of the defendant that the plaintiff did not prove its case to the required standard. In addition, I agree with the defendant’s submission that this suit is premature. The plaintiff should have waited for the 2 traffic cases in the lower court to be heard and determined. Evidence to be adduced in the traffic will establish who was the driver of the subject vehicle on the material day.

**b. Whether the Plaintiff is deserving of the relief sought**

28. The plaintiff has failed to prove its case as per the requirements of section 107 of the [Evidence Act](#). There is no evidence that the defendant breached the terms of the policy and consequently, the suit is hereby dismissed. The defendant shall have the costs of the suit.

**DATED, SIGNED AND DELIVERED AT BUNGOMA VIDE MICROSOFT TEAMS THIS 12<sup>TH</sup> DAY OF OCTOBER 2023**

**R.E. OUGO**

**JUDGE**

In the presence of:

Plaintiff- Absent

Mr. Ondego For the Defendant

**Orwasa/ Wilkister C/A**

