Britam Insurance Company Limited v Njoki & another (Civil Appeal E008 of 2024) [2024] KEHC 14197 (KLR) (14 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14197 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E008 OF 2024

DKN MAGARE, J

NOVEMBER 14, 2024

BETWEEN

BRITAM INSURANCE COMPANY LIMITED ..... APPELLANT

AND

ANNE WAITHERA NJOKI ..... 1ST RESPONDENT

SAMUEL NJUGUNA NJOKI ..... 2ND RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment and decree of subordinate court delivered by Hon. N.W. Wanja (RM) on 26/1/2024 in Othaya PMCCC No. E014 of 2023. The matter is in the nature of a declaratory suit over a contract of insurance. The Appellant was the plaintiff who filed suit as against the insured and the beneficial owner. Unlike other related matters and to avoid lexical ambiguity and at the pain of tautology, it is needless to say that the claim in the lower court was against two separate persons, one of whom is a beneficial owner and another who was the insured.

2. The lower court dismissed the Appellant's suit for failure to prove the case to the required standard, that is on a balance of probabilities. The Appellant being aggrieved filed this appeal. The Memorandum of Appeal dated 22/2/2024 , however, is a classical study on how not to write a Memorandum of Appeal. The Appellant filed a prolixious 9 - paragraph argumentative memorandum of appeal. The grounds are argumentative, unseemly and do not please the eye.

3. The memorandum of appeal anticipated by law is concise with distinct heads stipulating the grounds of objection to the decree or order appealed against, without any argument or narrative. Order 42 Rule 1 requires that the memorandum of appeal be concise. The same provides as doth: -

    1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.

(2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively."

4. It is not edifying for counsel to present extensive grounds of appeal, and end up arguing only one, two or three issues, on the myth that he or she has condensed the grounds of appeal. The Court of Appeal had this to say in regard to Rule 86 (which is pari materia with Order 42 Rule 1) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -

> " We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:
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> > "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

5. The repetitiveness of the grounds of appeal as can be seen in this appeal is inimical to proper drafting of the memorandum of appeal and it is the umpteenth time this court is pointing to this mishap, tirelessly. It is the desire of this court and the drafters of Order 42 Rule 1 that parties would draw concise and non-repetitive grounds. In Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR, the Court of Appeal observed that:

> " Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In *William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013*, this Court stated:
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> > "The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

6. The memorandum of appeal raises only one issue, that is: the learned magistrate erred in law and fact in finding that the Appellant did not adduce sufficient evidence to prove the suit on a balance of probabilities. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time.

Pleadings

7. In the Plaint dated 17/5/2023 , the Appellant sought the following reliefs:

    a. A declaration that the 1st Respondent herein lacked insurable interest in the subject matter.

    b. A declaration that the 1st Respondent had breached the contract contained in the policy bearing number NYLMPRV*POLxxxx*xxx.

    c. A declaration that the Appellant was entitled to avoid liability for any Judgments against the contract of insurance contained in the policy number NYLMPRV*POLxxxx*xxx.

8. The Appellant pleaded policy number NYLMPRV*POLxxxx*xxx between the Appellant and the 1st Respondent, entered through a contract of insurance in which Appellant agreed to insure motor vehicle Registration Number KCR xxxV for social, domestic and pleasure purposes but not bodily injuries sustained by third parties travelling in the motor vehicle for the insured.

9. The insurance is said to have been incepted on 15112019 and a certificate delivered on 12/4/2021 . The said insurance was in respect of social, domestic and pleasure purposes and for the insured's business and profession. The policy did not cover bodily injury sustained by third parties traveling in the said vehicle. The cover was in respect of the 1st Respondent.

10. Though having a valid insurance at the time of the accident, motor vehicle Registration Number KCR xxxV belonged to the 2nd Respondent. In other words the 2nd Respondent was the beneficial owner. It was being driven by his agent along Othaya-Nyeri road at Ndunye river area where it collided with a motor cycle registration No. KMDU xxx H Tigers resulting in fatal injuries to a pillion passenger.

11. The 2nd Respondent was described as a beneficial owner to the motor vehicle having purchased it from Azan Motors on or about August 2019 and insured it on third party basis which cover lapsed while the motor vehicle was being used by the 1st Respondent who sought comprehensive cover from the Appellant.

12. The Appellant's case was therefore that the 2nd Respondent's agent driving the subject motor vehicle refused to disclose the presence of unauthorized passengers by misrepresenting material facts at the time of the accident and as such was in breach of the requirement for utmost good faith.

13. The Appellant maintained that the subject motor vehicle Registration Number KCR xxxV was beneficially owned by the 2nd Respondent and as such the 1st Respondent had no insurable interest and did not benefit at all from the usage of the vehicle. They stated that the 2nd Respondent was not in the vehicle but was inserted to give legitimacy to a claim herein.

14. The Respondents filed their joint statement of defense dated 19/7/2023 denying the averments in the Plaint. In particular, the Respondents' defence was as follows in summary:

    a. The 1st Respondent disclosed that she was not the registered owner of motor vehicle Registration No. KCR xxxV which the Appellant considered and found applicable and proceeded to issue the subject policy.

    b. The policy was comprehensive and so covered including third party claims.

c. The 2nd Respondent had not hired out the motor vehicle on the date of the accident.

d. The policy was valid and premiums were regularly paid.

e. That the fact that premiums were accepted proved that the Appellant had insurable interest.

f. They denied that the vehicle was hired out on the date of the accident.

g. They denied violating the terms of the contract of insurance including transporting unauthorized passengers.

h. They stated that whether or not the 2nd defendant was a passenger is not fundamental to the contract of insurance.

i. It was their case that the 1st Respondent answered every question in the proposal truthfully. And as such the Appellant owed the 1st Respondent a duty of care and skill as a lay person to inform her that she had no insurable interest.

j. Consequently they denied breaching any material term of the contract of insurance or that the accident was due to negligence of the driver.

Evidence

15. PW1 was Kenneth Muriithi Wangai. He introduced himself as the Senior Claims Officer of the Appellant. He adopted his witness statement and bundle of documents dated 19/5/2023 which were produced as exhibits.

16. It was his case that the insured concealed material information and breached the policy by using the motor vehicle for public service earning money from it when the insurance was for a private motor vehicle with usage limited to social, domestic and pleasure purposes for business and profession. In cross examination, it was his stated case that there was a contract of insurance between the Appellant and the 1st Respondent and the 1st Respondent paid the premiums.

17. He also stated that the hire purchase agreement for the subject motor vehicle was brought to the attention of the Appellant and showed that the 2nd Respondent was the beneficial owner of the motor vehicle.

18. Further, he stated that the motor vehicle was insured against damage, injuries to passengers and other people under the terms of the policy. However, that this was a private policy not public transport service. That the Appellant's assessors investigated and gave their professional opinion contained in exhibits 3 and 13 of the Appellant's documents. It was his case that the logbook was not in the name of the 1st Respondent but the policy was issued in her name and she paid.

19. In reexamination, it was his stated case that the policy was for motor private policy covering private use. That the policy was valued at the time of the accident but the insurer breached the insured risk by suing the motor vehicle for purposes that were not insured or covered.

20. The Respondents called DW1, Ann Waithera Njoki. She relied on her witness statement and bundle of documents dated 25/7/2023 produced in evidence. On cross examination, it was her stated case that she disclosed to the Appellant that the motor vehicle would be used for private and not public service.

21. The witness also stated that she was not aware of the circumstances leading to the occurrence of the subject accident that involved the motor vehicle and she is not the one who made the accident claim

to the insurance. She also testified that she did not benefit from the 2nd Respondent's use of the motor vehicle.

22. It was her case that she was not aware who was driving the motor vehicle at the time of the accident. Also, that an assessor interviewed her and she was aware of the assessment investigation. In reexamination, it was her case that she was given a comprehensive cover but the Appellant did not give her any policy document.

Submissions

23. The Appellant filed submissions dated 2/8/2024 . It was submitted that there was a contract of insurance which the Respondents breached. The policy was that the motor vehicle would be used for private transport and covered only social, domestic, pleasure, profession services but not third-party injuries. As such, it was submitted that the Respondents misrepresented material facts as to the use of the motor vehicle and therefore the utmost good faith. Reliance was placed on the case of Cooperative Insurance Company Ltd vs David Wachira Wambugu (2010) 1 KLR 254 to canvass the argument that a contract of insurance was one of uberrima fidei.

24. It was the submission of the Appellant that the contract of insurance herein was clear and the lower court in interpreting it otherwise ended up rewriting the contract between the parties. Reliance was placed on National Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K) Ltd (2002) 2 E.A. 503, (2011) eKLR where the Court of Appeal at page 507 stated as follows: -

> A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.

25. It was further contended that the lower court failed in not finding that the motor vehicle was being used outside the purpose for which it was insured. The Appellant cited *Heritage Insurance Co. Ltd v Alex Migore HCCC No. 173 of 2002* to support this point.

26. The Appellant submitted that it was entitled to avoid the policy under Section 10 of the Insurance (Motor Third Party Risks) Act, Cap 405. Reliance was also placed on Gateway Insurance Company Limited v Sudan Mathews [2003] eKLR. The Appellant thus submitted that it had discharged its burden of proof and was entitled to the reliefs in the lower court which the court erred in not granting.

27. On the part of the Respondent, it was submitted that the learned magistrate correctly interpreted the law and arrived at a decision that the Appellant had not satisfied the burden of proof. They submitted that there was a valid comprehensive insurance policy at the time of the accident which did not provide for any exclusions or limitation. It was their submissions that the Appellant had not placed any material before the court to demonstrate the grounds upon which it would repudiate the contract. Reliance was placed on Kenya Alliance Insurance Co. vs Parklands Shade Hotel Limited & Another (2015) eKLR.

28. It was also submitted that the policy document provided that the policy was comprehensive and there was no evidence of non-disclosure on the part of the Respondents as alleged in the appeal.

29. On the assessor's reports, the Respondents submitted that the Appellant failed to establish the credential and reliability of the authors of the reports under exhibit 3 and 13 hence the reports had no probative value according the Respondents. Reliance was placed on the case of Patrick Gukura Muraya vs Cooperative Insurance Co. Ltd (2019) eKLR that failure to call the maker of a document would corrode the probative value thereof.

30. On the meaning of a material fact for the purpose of nondisclosure the Respondents submitted that not all cases of nondisclosure would repudiate a contract of insurance. They placed reliance on the case

of Sita Steel Rolling Co. Limited (2007) eKLR. It was their submission that a non-disclosure must relate to the material fact to influence the judgment of a prudent insurer in deciding whether or not to take up the risk.

31. Further, it was submitted that by taking up the policy and paying the premiums, the contract of insurance was sealed and the Appellant was not correct in its postulation that there was no insurable interest. The Respondents cited Kenya National Assurance Co. Ltd vs Kimani & Another (1987) eKLR.

Analysis

32. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a subordinate court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

33. This Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong. In the case of Mbogo and Another vs. Shah [1968] EA 93 the court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

34. The duty of the first appellate court was set out in the case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the court in their usual gusto, held as follows;-

> ".. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-subordinate and the Court of Appeal is not bound to follow the subordinate Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

35. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the subordinate court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

36. In the case of Peters vs Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:-

> "It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

37. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 is as follows:-

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the

evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

38. The case thus was what is the effect of separating the beneficial owner and the insured? The appeal in that respect raises issues which can be summarized into three broad categories, which are intertwined, as follows: -

a. Insurable interest in insurance contracts

b. Utmost good faith in insurance contracts

c. Breach of contract of insurance.

39. In the Appellant's letter dated 2/7/2021 declining to take up the matter, the Appellant stated that the 1st Respondent had no insurable interest in the motor vehicle because per the sale agreement, the motor vehicle was purchased by 2nd Respondent who was a brother to the 1st Respondent. The Appellant consequently, declined to take up the claim. The foregoing is the gist of the entire gamut of the evidence tendered by the parties since the 1st Respondent maintained that the fact that she was a beneficial and not registered owner of motor vehicle was disclosed at the time of taking up the policy and the Appellant endorsed the insurance contract fully aware of the fact.

40. The hire purchase agreement is dated 8/8/2019 between the 2nd Respondent and Azan Motors Limited. The subject motor vehicle's log book indicated the motor vehicle was registered in the name of Moiz Motors Limited. Parties did not state whether Azan and Moiz were the same and nothing turns on this particular aspect.

41. The 1st Respondent's case was that she picked the motor vehicle from the 2nd Respondent in September 2019 for her own use and in fact did assist the 2nd Respondent in paying the instalments to Azam Motors. The insurance policy that the 2nd Respondent had purchased expired and the 1st Respondent had to take up the subject insurance from the Appellant. This is a tacit admission that the vehicle belongs to the 2nd Respondent, who is not the insured. Any assistance given to the 2nd Respondent was clearly for his benefit and not the 1st Respondent.

42. It was the common position of the parties that the 1st Respondent was not the registered owner of the motor vehicle at the time of the accident. The point of divergence leading to controversy is the Appellant's position that the 1st Respondent failed to disclose the true purpose for which the motor vehicle would be used and which amounted to a fundamental breach. The Appellant maintains the view that the 1st Respondent concealed a material fact to the effect that the motor vehicle was for public use and not private use.

43. On insurable interest, the Appellant's position was that the 1st Respondent had no relationship with the subject motor vehicle and as such would not bear any loss or liability of pecuniary nature in respect of the matters insured.

44. The Black's Law Dictionary 11th Edition defines insurable interest as doth:

> " A legal interest in another person's life or health, or in the protection of property from injury, loss, destruction or pecuniary damage".

45. Insurable interest is essentially the pecuniary or proprietary interest which is at stake or in danger should the insured opt to take out an insurance policy on the subject matter. It is the interest that the insured stands to lose if the risk attaches. This classical definition of insurable interest was given by Lawrence J in Lucena vs. Crawford 1806 2 BOS PNR 269 at 302.

46. Insurable interest is an elementary requirement of any contract of insurance which requires the insured or policy holder to have a particular relationship with the subject matter in respect of the liability to which the insured might be exposed. Every insurance contract requires an insurable interest to support it, otherwise it is invalid. This was the holding in the case of Anctol Vs. Manufacture Life Insurance Company (1899) AC 604.

47. It is thus beyond peradventure that for insurable interest to be founded in law, there should be a direct relationship between the insured and the subject matter which must have arisen out of a legal or equitable right or interest in the subject matter and the interest should be such that it bears any loss or liability arising in the event the loss or risk it attaches. The insured's right or interest in the subject matter must also be capable of pecuniary estimation or quantification. In the case of Lion of Kenya Insurance Company Limited v Edwin Kibuba Kihonge [2018] eKLR the court stated as follows as regards insurance interest:

> In view of that piece of evidence, can the Respondent be said to have been the owner of the vehicle and did he have insurable interest in it? In my considered view, he did not. Having admitted that the vehicle was bought by his father and that, it was in his father's possession and that he was not driving the same, one would then wonder what loss he suffered after the vehicle was stolen. In as much as he was the insured, he did not have any insurable interest in the subject vehicle. To the contrary, it was his father who had insurable interest because in the event of loss, as it happened, it is him who lost the money that he used to purchase the vehicle and also the possession thereof.

48. I find and hold that the 1st Respondent did not have any insurable interest in the subject motor vehicle. She had no right to insure the same as she had nothing to lose if it was stolen. For example, if she had a debt, the auctioneers could not by any extension attach the said vehicle. If it caught fire or was stolen, she suffered nothing. She can only sympathize with the 2nd Respondent. There was no form of assignment or causal link to the vehicle. The vehicle was allegedly with the 2nd Respondent and driven by his agent, who was unknown to the insured. It cannot be even said that it was for the insured's business and profession or social, domestic and pleasure purposes for the insured.

49. I agree with the Respondent that the presence of the 2nd Respondent may be irrelevant. However, concealing or inserting such a person is in breach of the doctrine of insurance requiring parties to act in utmost good faith. If indeed the vehicle was with the 2nd Respondent, why was the 1st Respondent insuring the same? The vehicle was in business for the owner, that is the 2nd Respondent. He must learn to insure his interest.

50. Another aspect that needed covering and proper decision is on the question of passengers. The Respondents were of the mistaken view that the Appellant had a duty to prove that the passengers were in the vehicle due to hire and reward. The investigations were carried out and found they were in the vehicle pursuant to hire and reward. Had the passengers been for domestic purposes, the insured will easily know them and call them as witnesses, or at least one of them. The Respondents had special knowledge on who were in the vehicle. Section 112 of the *Evidence Act* posits as follows:

    In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

51. Where a party, as the Respondents in this case, has custody or control of evidence, especially within its knowledge and that party fails or refuses to tender the said evidence, the court is entitled to make the adverse inference that were it produced, it would be adverse to such a party. In the case of Nesco Services Limited v CM Construction [EA] Limited [2021] eKLR, Justice G V Odunga as he was then stated as doth:

    41. Since the said author was for reasons unknown to the Court not called to testify and dispute its authenticity, adverse inference could be made thereon. In Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR the court stated as follows:

        "Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:

            'In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.'

            Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make the adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho – vs- KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."

52. The evidence on who the passengers were and their relationship was not disclosed. The court is entitled to make a negative inference that those were passengers for hire and reward and were not known to the Respondents, otherwise they would have been called.

53. The fact that a person's insurance was accepted does not change the question of insurable interest. An agent for purpose of insurance, is an agent for the insured. Any representation by an agent is not a representation by the insurance. In Insurance Company of East Africa Limited v Ndambuki Kisau[2004] eKLR, Wendoh J posited as follows:

    So whose agent was Jovimu brokers? In support of the contention that Jovimu brokers were agents of the insured (respondents) the appellant relied on the case of ANGLO AFRICAN MERCHANTS LTD VERSUS BAILEM 1969 ALL ER 421 where at page 428 the judge restated what the law is in regard to whose agent the broker is. At paragraph D he stated as follows "in all matters relating to the placing of insurance, the insurance broker is the agent of the insured and the assured only. I do not think that that proposition of law has ever been in doubt amongst lawyers."

Extracts from Halbury's law of England v25 at paragraph 397, the law relating to brokers is also stated which is that if one wishes to obtain insurance of a non marine character he employs an insurance broker as distinct from going to the insurers directly or their agents. It further states that the broker is the insured's agent and the ordinary law of agency governs their relationship. From the extract and authority cited there is no doubt whose agent the broker is. The agent on the other hand transacts business for the insurance company. Paragraph 710 of Halburys laws of England Vol. I confirms this. Whatever the witness from the appellants company told the court about the arrangement the brokers had with the appellants, the brokers remained the agents of the insured. It is the brokers who failed to remit the insurance premiums to the appellants even after the appellants seemed to have waived their notice of cancellation of policy and the appellants could not be blamed for failing to honour the terms of contract. The respondents could not sue the insurance company alone. They should have sought indemnity from their agent – the brokers and should have therefore enjoined them to the suit.

54. In the case of Granata Ernesto suing as Attorney of Denise Granata v Invesco Assurance Co Ltd [2015] eKLR the court held that the agent was acting as agent of the insured and not the insurer. The decision was subsequently affirmed by the Court of Appeal in Invesco Assurance Co. Ltd v Granata Ernesto (suing as Attorney of Denise Granata) [2018] eKLR. In the later decision the Court of Appeal stated as follows: -

> (16) We have considered the authorities cited by the appellant, whereas the Sita Steel Rolling Mills decision (supra) is a High Court decision and thus not binding on this Court, we find the Steel Rolling Mills (supra) most illuminating in this regard. As earlier mentioned, both authorities were heavily relied on by the appellant, although both authorities incidentally seem to favour the respondent's case. According to the Steel Rolling Mills case, for an insurer to avoid liability on account of misrepresentation andor non-disclosure by the insured, two conditions must be satisfied. The insurer must not only prove the misrepresentation andor non-disclosure was material, but that the same induced him to contract on the terms agreed. The burden of proving both aspects lies with the insurer. In the Steel Rolling Mills case, the appellant (Pan Atlantic Insurance Company) relied on the argument that mere material misrepresentation or non-disclosure is sufficient ground to rescind an insurance contract. In dismissing that contention, Lord Mustill had this to say:-
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> > "...Furthermore, the argument for Pan Atlantic demands an assumption that the prudent underwriter would have written the risk at the premium actually agreed on the basis of the disclosure which was actually made. Yet this assumption is impossible if the actual underwriter through laziness, incompetence or simple error of judgment has made a bargain which no prudent underwiter (sic) would have made, full disclosure or no full disclosure."
> >
> > So strict is this burden therefore, that even a fraudulent misrepresentation cannot by itself be ground for rescission of the contract. The same must be proven to have influenced the insurer to contract to his detriment. In the instant appeal, no evidence was tendered to show that the appellant had been induced by the misrepresentation to enter into contract to its

detriment. Consequently, the argument that the appellant was entitled to avoid the contract, is without merit.

55. In *Kenya Alliance Insurance Co Ltd v Kioko (Civil Appeal E143 of 2021*) [2023] KEHC 1819 (KLR) (2 March 2023) (Judgment) Justice M.W. Muigai posted as follows, relying on the foregoing High Court decision:

> This court gleaned through the said authority, of importance found the following apt and relevant to the present circumstances and the High Court sitting in Malindi observed;
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> 25. I have looked at the fields and questions in the proposal form. These clearly require the input of the insured as most of the information sought could only be within his knowledge, as for example question 11, seeking the antecedents of the proposer and the section on articles in the building. Finally, at the end of the proposal form is a declaration which terminates with a space provided for the signature of the proposer.
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> It is crystal clear, from my observation, that the completion of proposal form was the responsibility of the Insured. To suggest that the Insurer takes on the responsibility for the task merely because the form is on its letter head amounts to a non sequitur. But from the facts before me I have no difficulty in finding that in completing the proposal, PW2 was acting on behalf of the Insured whose responsibility it is to complete the form. That is consistent with the decision in Biggar v Rock Life Assce Co [1902] 1 KB 516, quoted by the Insurer.

56. Whichever way one looks at it an agent cannot bind the insurance. Section 2(1) of the *Insurance Act* defines agent as;

> "Agent" means a person, not being a salaried employee of an insurer who, in consideration of a commission, solicits or procures insurance business for an insurer or broker.

57. The position that 1st Respondent was a beneficial owner of the accident motor vehicle was untenable. The 1st Respondent's interest in the motor vehicle was too remote. This fact was brought to the court below. However, the court ignored that information and relied on irrelevant matters.

58. The only person who could have insured the vehicle was the 2nd Respondent as the beneficial owner. The insured had no claim to the vehicle and could not rightly insure the same. The Appellant was rightly entitled to repudiate the policy for lack of an insurable interest. As posited by the Appellant, indeed for having no insurable interest, the 1st Respondent did not prove any loss or liability she would have incurred if the Appellant repudiated the policy. Therefore, in so far as the policy was between the Appellant and the 1st Respondent, the same was a nullity and cannot be said to have existed in law.

59. You cannot put something on nothing and expect it to stay there as was re-stated by the Supreme Court in Petition No. 5 of 2015 - Republic vs Karisa Chengo & 2 Others [2017]

eKLR, where the court quoted Lord Denning M.R in Benjamin Leonard Mcfoy vs United African Company Limited (UK) [1962] AC 152 in the Privy Council as opining:

> " If an act is void, then it is in law a nullity. It is not only bad ...and every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.

60. The Respondents also did not dispute that actual possession of the motor vehicle was with the 2nd Respondent after delivery of possession from the seller. However, it is the case of the Respondents that the 1st Respondent continued to pay the premiums even after the 2nd Respondent took up possession and use. I do not think this was good faith. The insured was bound to inform the insurer of the changes to ensure the policy was issued to the correct person. In Securicor Kenya Limited v. Kyumba Holdings Limited [2005] 1KLR 748, the Court of Appeal found as follows:

> " It was apparent, therefore, that though the appellant remained the registered owner of the motor vehicle its actual possession had passed to a third party. In view of this finding, the subordinate judge cannot be right under section 8 of the *Traffic Act* when she states that the true owner of the motor vehicle was the appellant."

61. Whereas motor vehicle ownership may change without actual transfer being registered, upon such change of ownership, the seller cannot expect to be the owner of the same motor vehicle as to benefit from the insurance policy. This would be an absurd eventuality and negate the very doctrine of indemnity and insurable interest. I say so because it is not candid for one to allege that they are a policy holder for a motor vehicle which they have already sold or which they have no proven registered or beneficial ownership or interest which can only be traced to a third party who is not an insured because of lack of privity of contract. I am fortified by the dictum of the court in the case of Leli Chaka Ndoro v Maree Ahmed & S.M. Lardhib [2017] eKLR where the court stated as follows in respect of a similar fact situation:

> The Respondent's position is that it can pay the hospital bills but the money should be claimed by Resolution Health Insurance Company. That is not logical. I do agree that the Respondent's liability is not dependent on the Appellant's wise decision to take up an accident or medical cover. The respondents are simply liable due to the negligence on their part. The respondents cannot take the place of Resolution Health Insurance Company as they are not parties to the existing arrangement between the appellant and his insurer. It is up to Resolution Health to decide on its arrangement with the appellant.

62. The law cannot countenance an eventuality where the insurance company would retain the records of the insured seller who had in fact lost possession of the motor vehicle vide delivery following sale and as such had no obligation to remit premiums. The moment the motor vehicle was sold and possession changed hands to an uninsured person under the policy, the insurance company ought to have been immediately informed. This is so because there was no contract between the insurer and the new owner the 2nd Respondent, even though the name may not have changed on the paperwork of transfer documents.

63. The new owner was supposed to seek and benefit from a temporary cover to be issued by the insurer for a period of not exceeding 3 months after sale. Section 76A of *Insurance Act* Cap 407 Laws of Kenya provides;

"1. Upon change of ownership of a motor vehicle, an insurer should;

a) Only issue a temporary cover for a period not exceeding three months pending the registration of the motor vehicle in the name of the new owner.

b) Not renew the temporary cover or issue any annual policy in respect of the motor vehicle unless the new owner provides proof of the registration of the motor vehicle. In his name by the Registrar of motor vehicles."

64. Parliament had the intention of remedying such eventualities as in this case by enacting Section 76A of the *Insurance Act*. Lord Denning in Escoigne Properties Ltd – Vs - I.R. Commissioners (15) [1958] A.C at 565 stated that:

> " A statute is not named in a vacuum, but in a framework of circumstances, so as to give a remedy for a known state of affairs. To arrive at its true meaning, you should know the circumstances with reference to which the words were used, and what was the object, appearing from those circumstances, which parliament had in view."

65. In the circumstances of this case, I do not agree that the policy between the Appellant and the 1st Respondent in respect of the subject motor vehicle was lawful because there was no insurance contract between the 2nd Respondent who had already taken possession and the Appellant. The 1st Respondent acted in breach of good faith which binds insurance contracts by not timely reporting the fact of the change of possession as pertains the 2nd Respondent. The learned magistrate got this wrong and was of the impression that so long as there was no dispute, and the 1st Respondent disclosed that she was only a beneficial owner and not registered owner, then she had insurable interest despite the uninsured third party the 2nd Respondent being the actual and beneficial owner thereof. In the case of Opiss vs. Lion of Kenya Insurance Company Civil Appeal No. 185 of 1991:

> > " The right to subrogate does not create a privity of contract between the insurance company and the third party; it only gives the insurance company the right to take over the rights and privileges of the insured and therefore must be brought in the name of the insured."

66. The requirement for full disclosure is key and nondisclosure of a material fact or a false representation of fact in some material particular renders the contract of insurance voidable. As was the view of Sir Udo Udoma, CJ in Jubilee Insurance Co. Ltd vs. John Sematengo [1965] EA 233.

> " It is well established that a contract of insurance is uberrimae fidei and therefore requires that utmost good faith from both parties during the making of it. Nondisclosure of a material fact or a representation of fact false in some material particular renders the contract voidable. Non disclosure of a material fact as such may not by itself be a ground for damages; the only remedy available would appear to be the avoidance of the contract. The contract being uberrimae fidei the insurer is entitled to be put in possession of all material information possessed by the insured. The contract of life insurance is one uberrimae fidei and the insurer is entitled to be put in possession of all material information possessed by the insured. In policies of insurance, whether marine insurance or life insurance, there is an understanding that the contract is uberrimae fidei, that, if you know any circumstance at all that may influence the underwriter's opinion as to the risk he is incurring, and consequently as to

whether he will take it, you will state what you know. There is an obligation therefore to disclose what you know, and the concealment of a material circumstance known to you, whether you thought it material or not, avoids the policy. There is, therefore, something more than an obligation to treat the insurer honestly and frankly, and freely to tell him what the applicant thinks it is material he should know."

67. There is therefore, 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. The principle was also emphasized by the Court of Appeal in the Co-operative Insurance Company Ltd v David Wachira Wambugu NYR CA Civil Appeal No. 66 of 2008 [2010] eKLR where the court quoted Bullen and Leake, Precedents of Pleading, 14th Edition, Vol. 2, which states as follows;

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 vs 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 risqué 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 risqué run is really different from the risqué understood and intended to be run at the time of the agreement...

68. Full disclosure should be made to the insurer of all material facts and circumstances known to the proposer or insured before an insurance cover is issued. In the case of UAP Insurance Company Limited –vs- Lemmy Mutua Kavii [2018] eKLR Justice Majanja held as follows:-

> " It is a conventional principle that full disclosure should be made to the Insurer of all material facts and circumstances known to the proposer or insured before an insurance cover is issued. An insurer cover relies on the good faith of the insured to disclose all information that is likely to affect its decision on whether to incur the risk. The principle was emphasized by the Court of Appeal in the Co-operative Insurance Company limited –vs- Daniel Wachira Wambugu Nyeri C.A. No. 66 of 2008 [2010] eKLR where the court quoted Bullen and Leake precedents of pleadings 14th Edition Vol.2 which state as follows

69. I am also persuaded that, for material disclosure, the special facts upon which the contingent chance is to be computed lies most commonly in the knowledge of the insured only. The insurer trusts the representation by the insured and proceeds upon confidence that the insured does not keep back any circumstances in their knowledge to mislead the insurer into a belief that the circumstances does not exist and to induce the insurer to estimate the risk as if it did

not exist. The below postulation by Lord Mansfield in Carter –vs- Boehn [1766] Burr 1905 has 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 circumstances in his knowledge to mislead the underwriter into a belief that the circumstances does not exist and to induce him to estimate the risk as if it did not exist. The keeping back such circumstances is a fraud and therefore the policy is void. Although the suppression should happened 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."

70. The 1st Respondent thus erroneously made the Appellant to believe that the 1st Respondent had the full control of the motor vehicle when in fact it was the 2nd Respondent. This was in contrast to Section 120 of the *Evidence Act* which provides as follows:-

> " When one person has, by his declaration act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any proceedings between himself and such person or his representative to deny the truth of that thing"

71. Before I pen off, I understand the parties to have also hotly contested the finding of the lower court that the Appellant did not call the makers of exhibits 3 and 13. These were the Assessors who were also argued to not have been licensed under the *Insurance Act*. The said assessors were meant to prove the fact that the motor vehicle was not being used for the purpose it was insured.

72. The issue was not whether the assessor's reports were produced as exhibits because indeed the witness of the Appellant produced them as such. What matters is whether the documents proved the purpose they were tendered in evidence. Production as exhibits did not confer proof upon the matters alleged to be proved. The Court of Appeal in Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR stated as follows:

> The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed andor marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would

look not at the document alone but it would take into consideration all facts and evidence on record.

73. However, having found that the policy was a nullity, I do not think it would serve any purpose to delve into the issue of the contents of the subject policy. I have said enough to show that this appeal succeeds. Based on the foregoing, I find reason to interfere with the finding of the lower court and allow the appeal. The next issue is costs.

74. The issue of costs is governed by Section 27 of the *Civil procedure Act*, which provides as follows:

> (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
>
> (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

75. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh *Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012*; [2014] eKLR, as follows: -

> (18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

76. Having found that the appeal is merited in all its aspects, costs must follow the event. In the circumstances the Respondents ought to bear costs of Kshs. 55,000=.

Determination

77. In the circumstances, I make the following orders:-

a. The appeal is allowed. Judgment and Decree of subordinate Court by Hon. N.W. Wanja (Resident Magistrate) delivered on 26/1/2024 in Othaya PMCCC No. E014 of 2023 is set aside in its entirety and substituted with the following orders:-

i. A declaration that the 1st Respondent herein lacked insurable interest in the subject matter.

ii. A declaration that the 1st Respondent had breached the contract contained in the policy bearing number NYLMPRV*POLxxxx*xxx.

iii. A declaration that the Appellant was entitled to avoid liability for any judgment against the contract of insurance contained in the policy number NYLMPRV*POLxxxx*xxx.

b. The Appellant shall have costs assessed at Kshs. 55,000=.

c. The Appellant shall have costs in the lower court.

d. 30 days stay of execution.

e. 14 days right of appeal.

f. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 14TH DAY OF NOVEMBER, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

Mrs. Anne Muya for the Appellant

Mr. Wakaba for the Respondent

Court Assistant – Jedidah