REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CIVIL SUIT NO. 27 OF 2015

THE MONARCH INSURANCE COMPANY LIMITED.....PLAINTIFF

VERSUS

JOSEPH NJENGA MAINA.....DEFENDANT

JUDGEMENT

1. Vide a Plaint dated 28th May, 2015 the Plaintiff sought for the following reliefs namely: -

a. A declaration that the Plaintiff is not liable or bound to make payments or indemnify the Defendant under the said insurance policy of cover in respect of any claim in respect to death or bodily injury to any person or passenger being carried arising out of the road traffic accident which occurred on 5th March, 2014 along Nairobi-Kangundo involving the Defendant's motor vehicle registration number KAM 997Z.

b. Costs of the Suit.

c. Interest on (b) above.

2. The cause of action is captured at Paragraph 6 of the said Plaint wherein the Plaintiff states that the Defendant was at all material times to this suit the registered owner of a motor vehicle registration number KAM 997Z, Station Wagon (hereinafter also known as the suit motor vehicle) which was at all material times insured by the Plaintiff under a comprehensive Third Party Motor Vehicle Insurance Policy.

3. On or about 5th March, 2014, the Defendant's Motor Vehicle registration number KAM 997Z while in the course of engaging in ferrying passengers was involved in a road traffic accident along Nairobi-Kangundo road wherein three passengers were injured while one died.

4. The Plaintiff averred that it called for investigations into the accident aforesaid and that the report filed by the investigators indicated that the Defendant's said motor vehicle had been hired from the Defendant by the said neighbor namely, Caleb Mutuku, on behalf of the Group (Active Sounds) who were scheduled to perform a show at Matungulu Boys Secondary School. The use of the vehicle was wrong and contrary to the contract of insurance. The plaintiff maintains that the insured's driver was squarely to blame for the accident as he was driving at an excessive high speed.

5. Particulars of breach of contract on the part of the defendant's agent or servant were particularized as follows: -

a. Failing to comply with the Third Party, Only Motor Vehicle Insurance Policy terms while using or hiring the Motor Vehicle Registration Number KAM 997Z.

b. Using Motor Vehicle Registration Number KAM 997Z to carry passengers other than for private purposes only as stipulated and represented in the subject Insurance Policy Covering document and proposal.

c. Misrepresenting or giving false and untrue information while proposing and applying for the subject Insurance Policy Cover with the Plaintiff.

d. Engaging in non-disclosure of true and material facts while proposing for policy cover with the Plaintiff.

e. Using or permitting use of Motor Vehicle Registration Number KAM 997Z contrary to the terms and conditions of Policy Cover Form.

f. Failure by the insured and/or insured driver to co-operate on information leading to the occurrence of the accident contrary to the Insurance Policy Cover Form.

g. Otherwise using the said Motor Vehicle Registration Number KAM 997Z contrary to and in breach of the Insurance Policy Cover terms and conditions.

6. The Defendant filed a statement of defence dated 26th August, 2015 in which he vehemently denied all the singular allegations pleaded by the Plaintiff and further added that the usage of the said motor vehicle was not contrary to and in total breach of the Insurance Policy cover terms and conditions, He put the Plaintiff to strict proof of its averments.

7. In response to the statement of defence, the Plaintiff filed a reply to the Defendant's statement of defence reiterating the contents of their Plaint in their entirety and maintain that the Defendant breached the terms and conditions of the Policy Cover No. THK/0700/000210/2014 issued by the Plaintiff.

8. The Plaintiff called two witnesses while the Defendant called one witness.

9. The **Plaintiff's 1st witness (PW1) Obed Kariuki Ireri**, who is the Plaintiff's Assistant Claims Manager confirmed that the Plaintiff was the insurer of the suit motor vehicle for the period between 3rd March, 2014 to 2nd March, 2015. He also confirmed that an accident occurred on or about 5th March, 2014 but his evidence was focused on the insurance proposal form and the policy document in which the Defendant had declared that he would use the motor vehicle registration number KAM 997Z for private use only yet the investigations that followed the accident established that the Defendant had hired out the said motor vehicle which was clearly in contravention to the agreed terms of their contract.

10. The contract of Insurance Policy Cover between the Plaintiff and the Defendant produced as part of exhibits between No.1-4 contained general exceptions that the insurance company would not be liable to pay or indemnify the Defendant against liability in respect of death of or bodily injury to persons being carried in or upon entering or getting onto or alighting from the subject motor vehicle at the time of occurrence of the event out of which the claims arise. PW1 thus prayed for declaratory order entitling the Plaintiff to repudiate liability for any claims arising out of the accident that took place on 5th March, 2014 involving the suit motor vehicle. He also prayed for the costs for this suit and interest.

11. On being cross-examined by the Defendant's counsel, PW1 explained that a third party means any person other than the insured or his authorized driver. He stated that the investigators who gave the Plaintiff a report dated 14th December, 2014 indicated that the car had been hired at the time of the accident.

12. On re-examination, PW1 further noted that the action by the Defendant was in breach of the Insurance Policy Cover and therefore the Plaintiff should be absolved.

13. PW2 Solomon Wachira, was a private insurance investigator. He noted that he was the author of the investigation report forming exhibit No.5 of the Plaintiff documents. He further noted that his findings were that the use of the motor vehicle was against the Policy issued by the Plaintiff, confirming that the Policy was breached because the driver at the time of the accident was one Kevin Njoroge who used the motor vehicle to ferry a group of actors to Matungulu Boys School to perform.

14. The witness further stated that the occupants of the motor vehicle were involved in an accident around Kangundo. He established from the driver that he had driven the said vehicle once about a week ago and had hired the said vehicle for their business and that there were 4 passengers on board one of whom died in the accident and not related in anyway with the Defendant. He added that he did not manage to get the other survivors to interview them.

15. He further testified that he learnt that the driver of the vehicle at the time of the accident had been hired. He added that he met insured who informed him that he had given the motor vehicle to one Caleb Mutuku who was his neighbour and who needed the vehicle to travel to Matungulu which was against the Insurance Policy requirements. He attached the statement given by the driver to his report.

16. On being cross-examined by the Defendant's counsel, PW2 explained that he is not trained on Insurance investigating as it was just a hands on kind of work. He further reiterated that Caleb Mutuku had hired the vehicle and that the driver of the said vehicle at the time of the accident did not explicitly state that he had hired the motor vehicle. He interviewed the Defendant who claimed he had given the vehicle to Caleb Mutuku and that the Defendant did not tell him that he had hired out the said vehicle. He also noted that he did not see any agreement between the Defendant with any other person and that the driver at the time of the accident noted that they were heading to see Caleb's brother at Matungulu Boys Secondary School.

17. On re-examination, PW2 further noted that the there is evidence that the vehicle had been hired as the driver mentioned that he had driven the vehicle in the past and was not related to the insured. He stated that expected to see relatives to the insured and not strangers. He also maintained that other occupants cannot come to court as they are not willing to and he suspects that they are hiding some information. He also confirmed that he was never given the name of the student being visited.

18. The Defendant's evidence was led by DW1, **Joseph Njenga Maina,** the Defendant in this case. He testified that at the time of the accident, he was not the owner of the motor vehicle registration No. 997Z but he was the one who paid for the Insurance Cover. When the vehicle was involved in an accident it was being driven by one Kelvin Njoroge who was known to him through a neighbor one Caleb

Mutuku. He stated that It was Caleb who had borrowed the vehicle but did not know how to drive and secured another driver as he needed to visit his brother at Matungulu Boys High School. He testified that he had not hired the vehicle and did not receive any payment for the said vehicle. He maintained that the policy was valid at the date of the accident and he urged the Court to reject the claim by the Plaintiff as the vehicle was being used for the purpose for which it had been insured at the time of the accident.

19. On cross-examination by the Plaintiff's Counsel, he claimed that his father had custody of the vehicle but which belongs to him but he was the one who paid for the Insurance Policy as he had an interest in the vehicle. He further reiterated that Caleb is his neighbour and friend, and at the time of the accident he was heading to Matungulu Boys High School to visit his brother. He stated that the driver at the time of the accident was Caleb's friend and that the vehicle was in good condition.

20. On re-examination, DW1 reiterated that he reported the accident to the insurer but was not granted the claim forms to fill immediately.

21. In its written submission filed on 2nd March, 2020, the Plaintiff, through it counsel submitted that, the Policy did not cover the carriages of passengers for hire or reward. It was a contract between the Plaintiff and the Defendant that under the Policy the motor vehicle was not to be used for hire or reward. The Counsel for the Plaintiff relied on the case of **Alisa Craig Fishing Company Ltd vs Malvern Fishing Co. Ltd (1983) AER191** where the learned Judge stated that *the requirements is that an exemption clause must be clear and unambiguous. If it is clear and unambiguous, the Court will as a general rule enforce it.* This is also echoed in the **Civil Appeal Case of Securicor Courier Kenya Ltd vs Onyango & Anor Civil Appeal No. 323 of 2002** as follows:

> **"The limitation clause is clear and unambiguous hence this Honourable Court should absolve the Plaintiff from liabilities arising from the accident.''**

22. Counsel for the defendant submitted that in this suit the burden of proof squarely lays on the Plaintiff who had the duty to prove the Defendant breached the terms of the Contract of Insurance. The Plaintiff also had the duty to prove the Defendant's motor vehicle was being used for hire and reward. He relied on section 107 and 108 of the Evidence Act.

Counsel for the Defendant submitted that the investigation report and the allegations on the interview of Caleb Mutuku did not tally with the statement of PW2 during cross examination where he alleged to have not interviewed Caleb Mutuku, the alleged hirer of the motor vehicle as per with the investigation report. The investigations officer confirmed not to have evidence to depict that the Defendant's motor vehicle was being used to ferry fare paying passengers and not hire contract or agreement as none was presented before court.

Counsel for the Defendant submitted that the Defendant's motor vehicle was being driven with the express authority of the insured and not for hire or reward. He relied on the case of **High Court Eldoret HCCA No. 91 of 2015 Kenya Orient Insurance Ltd vs Godfrey Libuku** where the Court held that

> "**further as pointed out by both the trial magistrate and the Respondent's Counsel, <u>although the investigation claimed to have interviewed one of the persons who had allegedly hired the motor vehicle; that person neither recorder a statement nor was he called to testify and confirm that he had hired the motor vehicle. there was no hire agreement document or receipt and I agree with the Respondent's Counsel that there wasn't a scintilla of evidence to prove that the motor vehicle had been given out for hire</u>" (emphasis added)**

Having not substantiated the allegations against the Defendant, Counsel for the Defendant finally submitted that this Honorable court do find that the Plaintiff is bound by law to indemnify the Defendant for any loss or damages that may be claimed by persons injured. He relied on the case of **Court of Appeal in Nairobi CACA 124 of 2009; Kimwa Holdings Limited vs. Occidental Insurance Company Limited** where the Court stated that

> "**As a consequence, since the reason for repudiation of the policy was for the alleged utilization of KAL 922M for hire and reward, and having fond as we have that the motor vehicle was not utilized at the time of Its theft, we find that the Respondent was not entitled to repudiate the policy on this basis" (Emphasis added).**

23. After considering the pleadings filed in this case, the evidence tendered during the hearing, the submissions by the counsels and the authorities cited, I note that according **to Order 15 rule 1(1) and (4) of the Civil Procedure Rules**:

> **(1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.**
>
> **(2) ……**
>
> **(3) …….**
>
> **(4) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.**

24. The following are the issues to be determined by this court:

> **a. What was the nature of the policy between the Plaintiff and the Defendant?**
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> **b. Whether at the time of the accident, motor vehicle Reg. No. KWQ 534 was being used for the purposes outside the terms of the policy.**

c. Whether the plaintiff is liable to honour any claims related to the aforesaid accident or to indemnify the insured under the policy.

d. Who should bear the costs of the suit?

25. Before delving into the said issues, one needs to understand the nature of contracts of insurance. According **to Newsholme Bros. vs. Road Transport and General Insurance Co. Ltd [1929] All ER 442 at 444:**

> **"…the contract of insurance requires the utmost good faith; the insurer knows nothing; the assured knows everything about the risk he wants to insured and he must disclose to the insurer every fact material to the risk."**

26. That brings me to the nature of the policy in question. According to the Policy form dealing with "limitation as to use (private motor)" it was stated that:

> "Use only for social, domestic, and pleasure purposes. This policy does not cover use for racing competitions or trials (or use for hire or reward, commercial travelling, the carriage of goods in connection with any trade or business for any purpose in connection with the motor trade."

27. It therefore follows that if the suit vehicle was used for hire or reward, the Plaintiff would be entitled to avoid the policy.

28. In this particular case, the only ground upon which the Plaintiff repudiated the Defendant's claim was because the Defendant was at the time of the accident using the vehicle for hire and reward. According to the Defendant at the time of the accident, he gave his neighbour and friend Caleb Mutuku his motor vehicle to go visit his brother in school and since Mr. Mutuku didn't know how to drive he would therefore have to be driven by a friend, one Kelvin Njoroge. The driver, Kevin Njoroge in his report to the investigations officer stated that Mr. Mutuku and himself belong to a gospel group known as Active Sounds and that they were heading to Matungulu Boys Secondary School to visit Caleb's brother as well as perform. He further noted that he had used the same motor vehicle one week earlier and owing to the nature of the group's business activities they normally hire vehicles.

29. According to the Defendant, he did not hire out the vehicle but rather gave it to his neighbor and friend Caleb, who didn't know how to driven and who asked his friend Kevin to do so as he knew how to driver and had a valid driving license.

30. While there was no evidence that the said vehicle was regularly being used for hire and reward, **Musoke, J in Ziwa vs. Pioneer Gen. Assce. Soc. Ltd [1974] EA 141** held while citing **Albert vs. Motor Insurer's Bureau [1971] 2 All ER 1345 and Motor Insurer's Bureau vs. Meaned [1971] 2 ALL ER 1372** that:

> "**There is no evidence before the Court to show that the insured, before the accident, was in the habit of carrying passengers in his motor vehicle so as to make it "a vehicle in which passengers are carried for hire or reward, within the meaning of section 99(b) (ii) of the Act. However, the use of a motor vehicle even on an isolated occasion to carry persons for hire or reward makes that vehicle one in which passengers are carried for hire and reward."**

31. Therefore, the employment of the vehicle for a use other than the one for which it is insured, if the accident occurs at that particular time, may justifiably lead to repudiation of the claim.

32. Did the driver, Kelvin Njoroge, who was the Defendant's friend and neighbour, Caleb Mutuku, hire the Defendant's motor vehicle in order to be ferried to where they were going? In this case, there was evidence from one of the passenger, Kelvin Njoroge, who was the driver at the time of the accident that he had driven the said motor vehicle one week earlier and that owing to the nature of the business of their group, Active Sounds, to which Mr. Caleb Mutuku was a member, they normally hire vehicles.

As regards the statement of Kelvin Njoroge that he had driven the motor vehicle a week earlier, he was not called to testify in the matter hence his statement was not tested in cross-examination. That the contents of statements recorded with the police cannot, without more, be evidence in civil cases was appreciated by the **Court of Appeal** in **Jimnah Munene Macharia Vs. John Kamau Erera Civil Appeal No. 218 of 1998** where it held that:

> "**Admitting in evidence by consent a record of previous proceedings does not mean that all the contents of those proceedings automatically become evidence in the subsequent proceedings. It is always open to advocates in a civil suit to agree upon facts as to which no evidence is called, or to agree to accept a statement by a witness in other proceedings as being a true statement of facts deposed to therein, although the witness is not called as a witness in the civil suit, provided this agreement is absolutely clear and unambiguous. It is not for the Judge to read proceedings in traffic case as if the evidence recorded there was the final position in the case…Equally the contents of a police file in respect of police investigations in the accident cannot become evidence in a civil suit even if such file is put in evidence by consent and tendering the police file as an exhibit is a short cut which advocates should avoid and call the police officer who drew the sketch map for cross-examination."**

33. That it is not advisable to simply produce a report was emphasized by the **Court of Appeal in Nizar Virani T/A Kisumu Beach Resort vs. Phoenix of East Africa Assurance Company Limited Civil Appeal No. 88 of 2002** where it held inter alia that the failure to call the loss assessors to produce their report, which was admitted in evidence, rendered such report of minimal probative value.

34. However, in this case, there was evidence the investigation officer who was able to carry out his investigation and speak to the driver of the vehicle at the time of the accident. In cases of this nature the standard of proof is said to be on a balance of probabilities hence what is

required is that it must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: "we think it more probable than not," the burden is discharged, but if the probabilities are equal, it is not".

35. How then is this standard achieved? **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."**

36. In this case there was evidence from the author of the Investigation Report and the Assistant Claims Manager. The Defendant on the other hand did not call any other passenger to controvert this evidence apart from the insured party. It has not been shown that the said passengers stood to gain by stating in court that they aimed to gain by stating they hired the motor vehicle. The fact that apart from the driver of the motor vehicle at the time of the accident, the other passengers categorically refused to be interviewed by Plaintiff's investigator and which lends credence to the fact that they were not inclined to lean towards the Defendant's case. I therefore believe that the testimony of the Investigating Officer was true that the statement of the driver at the time of the accident as contained in the report does confirm that the motor vehicle had been hired before and at the time of the accident it was on hire or reward which was against the terms of the policy of insurance. Accordingly, based on their evidence, the said vehicle was being used for hire and/or reward at the time of the accident. That was contrary to the terms and conditions of the policy.

37. If the Defendant at the time of taking out the policy knew that the vehicle was going to be used for the said purpose of hire and/or reward but did not disclose this, the failure to do so clearly amounted to the failure on the part of the insured to disclose to the insurer a fact material to the risk. On the other hand, if the Defendant put to use the vehicle for a purpose for which it was not insured, that would amount to a breach of the terms and conditions of the policy. Either way the insurance company would not be liable. The reason for this, as was held in **The Motor Union Insurance Co. Ltd. vs. A K Ddamba [1963] EA 271** is that this is because had the proposer disclosed all the relevant and material information in the proposal form, the plaintiff insurance company might very well have taken a different attitude to the risk.

38. It is therefore my finding that the Defendant violated the terms and conditions for which the suit vehicle was insured. What then, in those circumstances are the options available to the Plaintiff insurer? **Bosire, Ag. JA** (sitting as a Judge of the High Court) in **Elius Gachii Karanja vs. Concord Insurance Company Limited [1997] eKLR** expressed himself as hereunder:

> **"The next issue for consideration is whether the fact that the vehicle was being used for hire entitles the defendant to repudiate the contract of insurance. Authorities are not unanimous as to when a breach of a term of the contract of insurance will entitle the insurer to repudiate the contract. However, in the English case of Pan Atlantic Ins. Co. ltd & Another v Pine Top Insurance Co. Ltd [1994] 3 ALL ER. 581, the House of Lords implied that not every breach entitles the insurer to repudiate the contract of insurance. Lord Templeman in his speech to the House stated, in pertinent part, as follows: -**
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> **"On behalf of the underwriters, Mr. Hamilton QC submitted that a circumstance was material if a prudent insurer would have `wanted to know' or would have `taken into account that circumstance even though it would have made no difference to his acceptance of the risk or the amount of premium. If this is the result of the judgment of the Court of Appeal in CTI Case then I must disapprove of that case. If accepted this submission would give Carte blanche to the avoidance of insurance contracts on vague grounds of non-disclosure supported by vague evidence even though disclosure would not have made any difference. If an expert says `if I had known I would not have accepted the risk or I would have demanded a higher premium, his evidence can be evaluated against other insurance accepted by him and against other insurance accepted by other insurers. But if the expert says, "I would have wanted to know but the knowledge, would not have made any difference then there are no objective or rational grounds upon which this statement of belief can be tested. The law is already sufficiently tender to insurers who seek to avoid contracts for innocent non-disclosure and it is not unfair to require insurers to show that they have suffered as a result of non-disclosure. Of Course they suffer if the risk matures but that is the risk accepted by every insurer. (Emphasis mine).**
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> **The above exposition of the law applies to non-disclosure of material facts, but I suppose the statement will apply with equal force to misrepresented facts. My understanding of the passage above, and I must state at the outset that I agree with it entirely, is that it is not every alleged or proved breach which will entitle an insurer to avoid a policy of insurance. Each Case has to be considered on its peculiar facts and circumstances, and the insurers be permitted to avoid the policy if they can be able to show that they have suffered as a result of the non-disclosure or misrepresentation of material facts."**

39. That was a case where the subject motor vehicle was insured to carry goods. Although there was a restriction or limitation as to whose goods would be carried, the fact that as at the time the vehicle was stolen it was carrying goods against that restriction could not, in the view of the Judge, of itself without more entitle the defendant to avoid the policy since the theft was completely unrelated to the purpose the vehicle was being used. In other words, it would not have made any difference as at the time of the theft whether the vehicle was carrying the plaintiffs or any other persons' goods, or whether the vehicle was loaded or empty. While the Learned Judge agreed that, in an appropriate case, the purpose the motor vehicle was being used would be a material and proper ground for the insurer avoiding the policy, on the facts and circumstances of that Case, he was not persuaded that that was such a case. While not at all unmindful of the fact that in insurance matters, utmost good faith is both important and essential, it was his view that it would be preposterous to treat every breach, irrespective of the facts and circumstances of the particular case under consideration, as entitling the insurer to avoid the policy as that is likely to open the door for fraud against the insured or policies of insurance being avoided on flimsy excuses which would be available to the insurers and doing so would defeat the whole purpose of insurance cover.

40. That case is however distinguishable from the present case where it was an express/implied term of the policy that the vehicle was not to be used for hire or reward but the same was, at the time of the accident being so used. In this case the term that the vehicle was not to be used

for hire or reward was a contractual condition as opposed to a warranty. As the Defendant's vehicle was clearly employed for the use for which it was not insured for by the Plaintiff, it is my finding that the Plaintiff is not under any legal obligation to honour and/or satisfy the claims arising from and/or to indemnify the Defendant for the bodily injuries sustained by or the loss of life on one of the passengers who at the time of the accident were in the Defendant's motor vehicle Reg. No. KAM 977Z should have been covered as a third party by the policy.

41. In the result, it is my finding that the plaintiff has proved its case on balance of probabilities. A declaration be and is hereby issued that the plaintiff is not liable or bound to make payments or indemnify the Defendant under the said insurance policy cover in respect of any claim in respect to death or bodily injury to any person or passenger being carried arising out of the road traffic accident which occurred on 5th March 2014 along Nairobi- Kangundo road involving the Defendant's Motor Vehicle Registration Number KAM 997Z. The plaintiff is awarded costs of the suit plus interest.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 12TH DAY OF MARCH, 2021

D. K. KEMEI

JUDGE