REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 326 OF 2013

THE MONARCH INSURANCE COMPANY LIMITED..APPELLANT

AND

JOHN K. MUTURI.....RESPONDENT

(Being an appeal from the judgment of Kipkorir, RM delivered on 13th May 2013 in Nairobi CMCC No. 4638 of 2011)

JUDGMENT

1. Monarch Insurance Co. Ltd ,the plaintiff in the lower court now the Appellant, had by a plaint dated 5th October, 2011 sued **John K. Muturi** their insured defendant, now the Respondent, seeking a declaration that it is entitled to avoid policy number **2010.082.001733** and be absolved from any liability arising out of the claim in **Machakos CMCC No. 487 of 2010**; and all claims made by injured persons and/or their representatives in respect of an accident that occurred on 1st October, 2010 involving the Respondent's motor vehicle registration number **KBM 080J**. The suit proceeded as an undefended cause as the Respondent neither entered appearance nor filed defence. An interlocutory judgment was entered against him on 13th June 2012. The Appellant adduced evidence in support of the claim during formal proof.

2. By its pleadings and evidence in the lower court, the Appellant presented the following case. That pursuant to a proposal form dated 6th September, 2010 completed by the Respondent, the parties herein entered into an insurance contract for the insurance company to provide a comprehensive insurance cover vide policy No. 2010.082.001733 in respect of the Respondent's motor vehicle registration number KBM 080J which was allegedly used as a taxi; that in breach of the contract, the Respondent's vehicle was used as a public service vehicle commonly known as a *matatu*, and driven by an unlicensed driver without a public service vehicle license; that the said vehicle was involved in a road traffic accident along Kajiado-Namanga Road as a result of which certain persons claiming to have been passengers in the Respondent's vehicle were allegedly injured.

3. The Appellant asserted that under the terms of the insurance contract stipulated that the motor vehicle was to be used as a public hired taxi and the authorized driver of the motor vehicle to be a person permitted in accordance with the licensing or other laws or regulations to the drive the said vehicle. The Appellant stated that, as a consequence of the breach of the insurance contract by the Respondent the Appellant was entitled to repudiate contract.

4. In her judgment delivered on 13th May, 2013, the learned trial magistrate concluded after reviewing the Appellants evidence, that the Appellant had not proved its case on a balance of probabilities thus proceeded to dismiss the suit.

5. The Appellant being dissatisfied with the lower court's decision preferred this appeal against the judgment, seeking, that the judgment and decree be set aside. The memorandum of appeal contains seven grounds of appeal as hereunder:

> "1. **The learned magistrate erred in law and in fact in failing to evaluate the evidence in its totality and to consider the submissions by the Appellant and thereby arrived at the wrong conclusion that the Appellant had not proved its case on a balance of probabilities.**
>
> **2. The learned magistrate erred in law and in fact in failing to evaluate the evidence in its totality and to consider the submissions by the Appellant and thereby arrived at the wrong conclusion that the use of motor vehicle registration number KBM 080J (hereinafter "the insured vehicle") at the time of accident was proper and consistent with the terms of the policy.**

3.The learned magistrate erred in law and in fact in failing to find that driving the insured vehicle by the Respondent's driver without a public service vehicle license was in breach of the policy entitling the Appellant to repudiate the same.

4.The learned magistrate erred in law and in fact and misdirected herself by holding that the Appellant had not proved its case on a balance of probabilities on grounds that the orders sought by the Appellant were drastic to the Respondent and third parties.

5. The learned magistrate erred in law and in fact in finding that the Appellant had not proved its case on a balance of probabilities when the Respondent neither filed a defence nor tendered any evidence to controvert the Appellant's case.

6. The learned magistrate erred in law and in fact and misdirected herself by drawing conclusions that were not supported by the evidence on record.

7. The learned magistrate erred in law and in fact and misdirected herself by failing to consider the Appellant's submissions and authorities."

6. The appeal was canvassed by way of written submissions. The Appellant's Counsel submitted that in civil cases, parties present their issues in pleadings and the court should only direct itself to resolving issues thereby raised. The Appellant relied for this proposition on two cases, namely, **Malawi Railways Ltd v Nyasulu [1998] MWSC 3** and **Dakianga Distributors (K) Limited v Kenya Seed Company Limited [2015] eKLR**. Further citing **Trust Bank Limited v Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001** and **Karuru Munyororo v Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988** inter alia**,** counsel asserted that the Appellant's evidence was uncontroverted and that the trial court's finding that the Appellant had failed to prove its case on balance of probabilities was erroneous. Moreover, it was argued that the trial court misdirected itself by ignoring the Appellant's submissions on the application of Section 98 of the Traffic Act and proceeded to make an erroneous finding concerning the usage of the subject motor vehicle in favour of Respondent. Citing once more the case of **Dakianga Distributors (K) Limited** (supra), counsel submitted the trial court erred by dismissing the Appellant's case on the ground that the orders sought were too drastic.

7. This being a first appeal it is the duty of this court to re-evaluate the evidence adduced at the trial and draw its own conclusions, but always bearing in mind that it did not have the opportunity to see and hear the witnesses testify. See **Peters v Sunday Post Ltd [1958] EA 424**, **Selle –Vs- Associated Motor Boat Co. [1968] EA 123, Williams Diamonds Limited v Brown (1970) EA 11**

8. The Court of Appeal stated in **Ephantus Mwangi & Another vs Duncan Mwangi Wambugu [1982 – 1988] 1 KAR 287** that: -

"A court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the judge is shown to have demonstrably acted on wrong principle in reaching the finding he did."

9. The court has considered the pleadings, evidence adduced at trial, and submissions in the lower court and on appeal in support of the grounds of appeal. The sole issue for determination is whether the Appellant proved its case on a balance of probabilities.

10. The applicable law as to the burden of proof is found in Section 107 (1) of the Evidence Act which states that:

"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."

11. Section 108 further provides that:

"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

12. Further, it has since been settled the standard of proof in civil proceeding is on a balance of probabilities. The court of Appeal in **Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR**, the Judges of Appeal held that:

"Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-

> **"That degree is well settled. 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 a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.**

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties…are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

13. In the case of **Wareham t/a A.F. Wareham & 2 Others Kenya Post Office Savings Bank [2004] 2 KLR 91**, the Court of Appeal stated in this regard that: -

"We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail."

14. At paragraph 3, 4 and 6 of the Appellant's plaint it was averred that:

"3. Pursuant to a proposal form made in Nairobi dated 6th September, 2010 and duly filled by the defendant, the plaintiff and defendant entered into an insurance contract for the provision of comprehensive insurance cover by the plaintiff to the defendant via policy number 2010.082.001733 over motor vehicle registration number KBM 080J (hereinafter "the insured vehicle") owned by the defendant for the period from 6th September, 2010 to 5th September, 2011 (both dates inclusive).

4. The plaintiff in reliance on the defendant's statement contained in the said proposal form issued a certificate of insurance for comprehensive insurance of the insured vehicle.

6. On or about 1st October, 2010 while the insured vehicle was being used as a public service vehicle commonly known as a *matatu*, and while being driven by an unlicensed driver without a public service vehicle license, the insured vehicle was involved in a road traffic accident along Kajiado-Namanga Road (hereinafter the accident) as a result of which certain person claiming to have been passengers in the insured vehicle were allegedly injured. The defendant was thereby in breach of the insurance contract entitling the plaintiff to repudiate the same.

Particulars of Breach by the Defendant

a. Operating the insured vehicle as a public service vehicle commonly known as a *matatu.*

b. Permitting an unlicensed driver to drive the insured vehicle.

c. Employing an incompetent and/or inexperienced driver.

d. Using and/or operating the insured vehicle contrary to the terms of the policy.

e. Making false declaration in the proposal form.

f. Making false statements on the circumstances and/or occurrence of the accident." (sic)

15. The duty of proving the above averments contained in the plaint lay squarely on the Appellant. In **Karugi & Another V. Kabiya & 3 Others [1987] KLR 347** the Court of Appeal stated that:

"[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant…--. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim." (Emphasis added)

16. As I understood it, the Appellant's case was that in completing the proposal form, the Respondent misrepresented certain facts concerning, a) the business in respect of which the vehicle would be used, and b) the competence of its driver. And that having obtained the insurance cover, he put the vehicle to use as a *matatu* rather than as a hired taxi as stated in his proposal and the driver thereof did not hold a public service vehicle (PSV) driver licence as required by section 98 of the Traffic Act.

17. Through its sole witness **Philomena Nyambura Theuri (PW1)** the Appellant asserted that it entered into the insurance contract in reliance on the Respondent's statements contained in the proposal form. The witness testified further that the salient terms of the contract stipulated that the insured motor vehicle was to be used as a Public Hire Taxi only and that the authorized driver thereof be permitted in accordance with the licensing or other laws or regulations to drive the said motor vehicle. That in view of this the Appellant was entitled to repudiate the contract.

18. Several exhibits were tendered, including the proposal form completed by the Respondent on 6th September, 2010 **(PExh 1)**. The relevant questions and the Respondent's respective answers are replicated below, with answers shown in italics:

"6. (a)……

(b)Indicate the purpose for which each vehicle is used: Omnibus, *Public Hire taxi*, Matatu, Private Hire.

7. (a) Are any of the Vehicle licensed as Public Service Vehicle? If so, state which *PRIVATE*.

8. State total number of employees licensed to drive: *ONE*.

9. To the best of your knowledge and belief, have you or or any person who to your knowledge will drive ….

a)…

b)…

c) only passed during test during the last two years? *NO*

d) Has less than three years driving experience? *NO*

……

16….

I/we declare to the best of my knowledge and belief that:

a. the above answers are true

b. all material particulars affecting the assessment of the risk have been disclosed

c. the vehicles …are in a sound and roadworthy condition and….

I/we agree that this proposal and declaration shall be the basis of the contract between me/us and the insures and shall be deemed to be incorporated in the contract.

I/we undertake that the vehicle(s) to be insured shall not not be driven by any person who ….to to my/our knowledge has been refused any motor vehicle insurance…

Dated *6/9/2010*

Proposer's signature

Name of Signatory…. *JOHN K. MUTURI.*

19. First of all, the answers in item 6(a) and item 7 appear contradictory as to whether the vehicle was for public or private hire. However, whether the vehicle was to be used as a taxicab (as suggested in item 6), for public or private hire (latter as suggested in item 7a), makes no difference. So long as the vehicle was to be used to carry passengers for hire or reward, it qualified as a PSV under the definition of a public service vehicle contained in the Traffic Act. The Policy Document named **Schedule Attaching To and Forming Part of Public Service Vehicle (TAXI) Policy No. 2010.082.001733** leaves no doubt that the Respondent's vehicle was a PSV and further states inter alia that :

"Authorized driver: Any of the following

a. The Insured

b. Any person driving on the insured's permission.

Provided <u>that the person driving is permitted in accordance with the licensing or other laws of regulations to drive the motor vehicle or has been so permitted and is not disqualified by order of a court or law or by reason of nay enactment or regulation in that behalf from driving the motor vehicle."</u>

20. Clause 1(b) of the general exception clauses of the policy of insurance it states that:

"The company shall not be liable in respect of:

1. Any accidental loss damage or liability caused sustained or incurred

(a)…

(b) Whilst the Motor Vehicle is

(i)being used otherwise than in accordance with the Limitations as to Use (in this case the insured's taxi business).

(ii) being driven by or is for the purpose of being driven by him in the charge of any person other that an Authorized driver.

iii)…."

21. By his accident report to the Appellant dated 12th October 2010 and the undated letter addressed to the Appellant (received on 8th November 2010), both which are encased in the Investigation Report by **Investic Assessors & Insurance investigations (K) Ltd (P Exh4)** the Respondent asserted that the accident vehicle was *"carrying people as usual"* at the time of the accident. In his letter that seemingly was a response to the Appellant's disclaimer of liability the Respondent was at pains to demonstrate that the insured vehicle was operated as a taxi with the authority of the Kajiado local authority but not as a matatu as asserted by the Appellant. However, he did not attach evidence of the latter alleged authorization or registration of his vehicle by the local authority which under section 96(3) (e) of the Traffic Act is a prerequisite to the issuance of a PSV licence for a taxicab. Section 118A of the Traffic Act empowers local authorities to make by-laws for the regulation of taxi cabs. Section 97 of the Traffic Act requires that any motor vehicle operating as a PSV be so licensed, and failure to comply therewith is an offence under Section 104. The statements of the Respondent and his driver **Gabriel Lemayian** made to the investigators on the 15th and 14th October 20210 (contained in Investigators report) respectively suggest strongly that the vehicle was plying the Kajiado-Namanga route as a matatu. Significantly, none of the persons stated that the vehicle operated from any taxi bay in Kajiado town as the Respondent was later to assert in his letter.

22. Reviewing the Appellant's evidence in its entirety, it appears on a balance of probability that indeed the Respondent's vehicle was operating as a matatu plying the Kajiado-Namanga route. This is contrary to information at item 6(a) of the proposal form completed by the Respondent and pursuant to the general exception clause 1(b) (i) the Appellant was entitled to avoid the contract. This use was clearly a departure from his proposal form to the Appellant that stated that the vehicle was used as taxi. The trial court appears to have erroneously shifted the onus of proving the Respondent's probable defence upon the Appellant by stating:

"It follows that the plaintiff had to prove that the insured motor vehicle was registered as a taxicab under the by-laws of Kajiado Municipality. If it was then the driver was required as per section 95 of the Traffic Act to have a PSV license. The defendant in his letter produced as plaintiff exhibit 5 has indicated that his motor vehicle operates as a taxi at Kajiado bus stage and has been authorized by the municipal council. The inference I get from this is that Section 96(3)(e) was complied with by the defendant, but this was not proved by the plaintiff. I have read the investigation report and it had no information as to registration of the motor vehicle as a taxi under the by-laws of Kajiado Municipality. I do state so because the orders being sought by the plaintiff are very drastic to the defendant and the third parties involved and as a court, I need to be certain that the reasons for repudiating the contract are warranted." (sic)

23. With respect, it was not the duty of the Appellant to prove that the Respondent's vehicle was registered pursuant to section 96(3) (e) of the Traffic Act as a taxicab by the local authority in Kajiado or at all; that was what the Respondent had asserted in his proposal form and subsequent letter referred to earlier. However, he did not furnish proof thereof to the investigators or defend the case against him. The fact that the prayers in the plaint appeared "drastic" did not call for a higher standard of proof as seemingly applied in the case; after all, the remedies sought are provided for in the law. The second misdirection by the trial court is that it overlooked the definition of a PSV in the Traffic Act. Whether a taxicab, private hire vehicle or matatu, a vehicle which carries passengers, or plies for hire or reward is a public service vehicle. The trial court started out on a wrong premise and consequently erred on the proper application of sections 95, 96,97 and 98 of the Traffic Act and the doctrine of *uberrimae fidei* to the matter at hand, and ultimately concluding that the nature of use of the subject insured vehicle in the material time was consistent with the proposal and Policy Document.

24. Given the definition of a PSV in the Traffic Act, the Respondent's assertion in the letter that his taxi which was admittedly for hire or reward was essentially a private vehicle "not licensed by the traffic law" (read not requiring driver's or other PSV licence) has no legal basis. Section 98 of the Traffic Act states:

"(1) A person shall not drive or act as the conductor of a public service vehicle on a road unless he is licensed for the purpose under this Part, and a person shall not employ or permit any person who is not so licensed so to do:

Provided that this subsection shall not apply to any person who has hired a public service vehicle for the purpose of driving the vehicle himself and whose passengers, if any, are not carried for hire or reward, nor to any driver or conductor of a public service vehicle which is not carrying passengers."

25. The Respondent had stated in his letter to the Appellant that his driver held a class "**E"** driving license that was sufficient for the purpose. That is incorrect. The investigation report produced as **Pexh 4** concluded that though the driver of the motor vehicle held a class **'E**' driving licence, a copy of which is in the investigation report, he was not licensed to drive a PSV. Whether the police charged the driver with a related offence or not cannot override the requirements of section 98 of the Traffic Act. Evidently, and in violation of the law, neither the insured vehicle, nor its driver possessed a PSV licence, contrary to information at item 7(a)of the proposal form and the Policy Document.

26. The doctrine of *uberrimae fidei* (utmost good faith) is inbuilt in contracts of insurance**.** The Appellant relied on the Court of Appeal decision in **Co-Operative Insurance Company Ltd v David Wachira Wambugu [2010] eKLR** where the Court stated that:

"The learned authors of Bullen & Leake, Precedent of Pleadings, 14th Edition, Vol. 2 states at page 908:

"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".

27. Quoting from the English case of **Carter –Vs- Boehm (1776) 3 Burr 1905**, to the effect inter alia that an insurance contract is one based upon speculation, the Court stated as follows:

> **"The special facts, upon which the contingent chance is to be imputed, lie most commonly in the knowledge of the insured only: the underwriter trusts his representation, and proceeds upon the 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."**

28. **Maraga J** (as he then was) stated in the **Sita Steel Rolling Mills Limited** v **Jubilee Insurance Company Limited (2007) e KLR** that:

> **"The principle of (*uberrimae fidei*) imposes on the proposer or insured the duty to disclose to the insurer, prior to the conclusion of the contract, but only upto that point, all material facts within his knowledge that the latter does not or is not deemed to know. A failure to disclose however innocent, entitles the insurer to avoid the contract ab initio and upon avoidance it is deemed never to have existed – Mackender –Vs- Feldia Act (1967) 2."**

29. Of course, not every undisclosed fact or misrepresentation gives rise to this consequence, and as **Maraga J** proceeded to explain, the insurer has the onus to demonstrate that:

i) the fact not disclosed was material.

ii) it was within the knowledge of the insured.

iii) the fact was not communicated to the insurance.

And a fact is material if it is one which is likely influence the ***"mind of a prudent intelligent insurer, in determining whether he will underwrite the policy at all, or at what premium he will underwrite it……."*** see **Pan Atlantic Insurance Co. –Vs- Pine Top Insurance Co. Ltd [1994] 3 ALLER 581.**

30. The Respondent in this case misrepresented or concealed two material facts, namely, the actual business in respect of which the insured vehicle herein was used and whether its driver had the necessary PSV licence. Undoubtedly, these were material facts, and were within the knowledge of the Respondent at the time he completed the proposal which formed the basis of the insurance contract he executed. As stated in **Sita Steel Rolling Mills** case**,** such failure on the part of the insurer to disclose however innocent, entitles the insurer to avoid the contract *ab initio* and upon avoidance it is deemed never to have existed. The trial court erred in finding that the Appellant had not established its case on a balance of probabilities. This appeal is allowed. The Court hereby sets aside the lower court judgment and substitutes therefor an order that the Appellant's claim in the lower court is allowed with costs, and judgment entered in the Appellant's favour. The costs of the appeal are awarded to the Appellant.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 14TH DAY OF OCTOBER, 2021

C.MEOLI

JUDGE

In the presence of:

Ms Njuguna for the Appellant

Respondent: N/A

C/A: Carol