REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CIVIL CASE NO.34 OF 2017

(FORMERLY NAKURU HCC NO. 109 OF 2013)

KENYA ORIENT INSURANCE LTD.....PLAINTIFF

- V E R S U S –

ROBERT GAKEI MURINGI.....DEFENDANT

AND

FLORENCE NYAMBURA & ANGELICA KAMAU.....1ST INTERESTED PARTY

PERIS NYAMBURA KAMAU.....2ND INTERESTED PARTY

DANIEL MACHARIA MAINA.....3RD INTERESTED PARTY

LUCY NJERI NG'ANG'A.....4TH INTERESTED PARTY

GRACE WANJIKU MWANGI.....5TH INTERESTED PARTY

J U D G M E N T

By a plaint dated 27/11/2013, the plaintiff,***Kenya Orient Insurance Ltd*** filed this suit against ***Robert Gakei Muringi***the Defendant, the five interested parties ***Florence Nyambura & Angelica Kamau, Peris Nyambura Kamau, Daniel Macharia Maina, Lucy Njeri Ng'ang'a and Grace Wanjiku Mwangi,*** in which the following orders were sought;

> **a. A declaration that the plaintiff is not bound to pay and/or indemnify the defendant against any claim in respect of death, bodily injury to any person, damage to property or any claim whatsoever arising out of the accident which occurred on the 25/08/2013 along Ol-Kalou – Njabini Road involving the defendant's motor vehicle Reg. No. KAY 476D.**
>
> **b. Costs of the suit.**
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> **c. Interest on (b) above at court rates.**
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> **d. Any other or further relief that this Honourable Court may deem just, expedient and fit to grant.**

A background of this case is that the defendant's motor vehicle KAY 476D was insured comprehensively by the plaintiff in accordance with the provisions of the ***Insurance Act, Cap 403 Laws of Kenya.*** On 25/08/2013, the said vehicle was involved in a road accident along Ol-Kalou – Nyahururu Road involving a motor cyclist, the 1st interested party's husband and son who were fatally injured: The 4th and 5thinterested parties, Lucy Njeri Ng'ang'a and Grace Wanjiku Mwangi filed a suit for compensation against the defendant, ***Nyahururu CMC 43/2015*** which was heard and judgment rendered in favour of the 1st and 2nd interested party against the defendant on 12/11/2017. An award of Kshs.2,400,000/-, general damages and special damages was made. The plaintiff instructed counsel to act for the defendant in the suit till it was concluded.

However, the plaintiff after carefully scrutinizing the claims and carrying out investigations of the said accident, found that the defendant breached the principle of utmost good faith because he failed to give the true/correct facts about the occurrence of the said accident (report

PExhibit4). The particulars of breach are set out in paragraph 4 of the plaint;

1. That the defendant claimed that on 25/08/2013, motor vehicle KAY 476D was being driven by a friend while he knew that the driver was his cousin and business partner;

2. The defendant claimed that on 25/08/2013, motor vehicle KAY 476D was used to take the driver's mother to her rural home from Nairobi where she had been undergoing treatment while he knew that the occupants of the motor vehicle were passengers and they were going to view a parcel of land that the defendant intended to lease with the driver;

3. The defendant claimed that the driver of motor vehicle Reg. No. KAY 476D had a driving experience of 2 years while he knew the driving experience to be one year 4 months;

4. Concealing the exact purpose for which the motor vehicle Reg. No. KAY 476D was being used for at the time of the accident.

To prove their case, the plaintiff called two witnesses. ***PW1 Nicholas Mokomba,*** Regional Manager for Rift Valley, Western and Nyanza, knew the defendant as a customer who applied for an insurance policy for motor vehicle KAY 476D between 25/12/2013 and 24/12/2013. The policy was issued and the defendant reported an accident on 25/08/2013 and was advised to fill the claim form which was to inform the company how the accident happened and what passengers were in the vehicle (PExhibit 1); An investigator Peter Kitela (PW2) of Web Insurance Assessors was appointed investigator and their findings were that the defendant had breached one of the principles of insurance i.e. utmost good faith which requires that accurate information be given but the defendant gave contradictory evidence from that of the driver. As a result, the plaintiff issued the defendant with a repudiation notice (PExhibit 3) informing the defendant that the plaintiff would not be liable for any claim arising from the accident. PW1 admitted that the insurance cover was comprehensive which covers both material damage to the vehicle and 3rd party claims.

PW2 Peter Kitela admitted to having been instructed by the plaintiff on 03/09/2013, to carry out investigations in regard to the accident involving motor vehicle KAY 476D that occurred on 25/08/2013. His findings were that the driver was a cousin of the defendant, contrary to what the defendant had indicated in the claim form that the driver was a friend who was carrying the mother and sister in law. Further findings were that the vehicle was ferrying neighbours contrary to defendant's information that the driver was taking the mother to the rural home. It is PW2 who recorded the statements of both the defendant and the driver. PW2 admitted that the driver had a valid driving license at the time and that the policy was issued to cover injuries to 3rd parties.

The defendant did not call any witness to testify in support of the defence.

The plaintiff framed two issues for determination;

a. Whether the defendant was in breach of the principle of utmost good faith;

b. Whether the plaintiff is bound to pay and/or indemnify the defendant against any claim arising from the accident that occurred on 25/08/2013 along Ol-Kalou – Njabini Road involving motor vehicle KAY 476D.

The plaintiff's Counsel, M/s Sheth Wathigo filed submissions in which it was submitted that contracts of insurance are contracts of utmost good faith and the insured is obligated prior to making of the contract, to disclose to the insurer all material facts and circumstances known to the insured which affect the risk being covered. For this proposition, counsel cited ***Bullen & Leake, Precedent of pleadings*** which was cited in ***Co-operative Insurance Co. Ltd vs David Wachira and Margaret Nduta Kamithi & George Njenga Kamithi vs Kenindia Assurance Company Ltd Nairobi HCC.37/2000.*** He submitted that there was material non disclosure of facts regarding how the accident occurred Counsel argued that at the time the vehicle was involved in an accident, it was not being used for the insured's own purposes or business or profession but was being used for the needs of David Maina, the insured's cousin and business partner. It was also submitted that the defendant was represented and filed a statement of defence but at the hearing, did not participate in the proceedings and hence the defence remains a mere statement. Counsel cited the following cases in support thereof;

1. Trust Bank Ltd vs Paramount Universal Bank Ltd HCC.1243/2001 Nairobi, and

2. CMC Aviation Ltd vs Kenya Airways Ltd (CRUISE AIR LTD) CA.App.12/1978.

As to whether the plaintiff should indemnify the defendant, it was submitted that since the defendant had breached the principle of utmost good faith, the plaintiff should not pay. Reliance was made in the case of ***Margaret Nduta Kamithi (Supra)*** where the plaintiff became aware of the material facts of non-disclosure which caused the plaintiff to repudiate the policy after completion of investigations; that in the instant case, the defendant failed to take steps to repudiate the policy but continued to receive premiums from the plaintiff but in this case, the plaintiff acted quickly and repudiated the policy.

Counsel relied on the ***House of Lords*** decision in ***Pan Atlantic Insurance Co. Ltd & Another vs Prime Top Insurance Co. Ltd (1994) 3ALL ER 581,*** where the court set the test for avoiding a policy;

"The test of materiality of disclosure for the purposes of both Marine Insurance under Section 18 (2) of the 1906 Act and Non-Marine Insurance was, on the natural and ordinary meaning of Section 18 (2), whether the relevant circumstance would have had an effect on the mind of a prudent insurer in weighing up the risk, not whether had it been fully and accurately disclosed, it would have a decisive effect on the prudent under writer's decision whether to accept the risk and if so, at what premium. That test accorded with the duty of the assured to disclose all matters which would be taken into account by the

underwriter when assessing the risk (i.e. the speculation) which he was consenting to assume."

Counsel urged the court to grant the plaintiff's prayers because of the discrepancies in the defendants information and non – disclosure of material facts.

Mr. Njuguna Kamanga filed submissions on behalf of the 1st interested party. As respects the allegation that the insured stated that the driver was his friend yet it was his cousin and business partner, Counsel submitted that there was nothing in the policy that barred the insured from having his car driven either by a friend or a relative; that what is material is that the driver was a duly qualified driver and that he was driving with the consent of the plaintiff.

On the claim that the driver was ferrying the defendant's mother and sister in law, infact, it was the driver's neighbour in the vehicle. It was submitted that the policy did not bar the insured from carrying passengers whether relatives or neighbours; that the proposal form filled by the defendant set out the category of persons that could be carried at seat B thereof;

"a. Solely for social and domestic purposes;

b. For purposes of your own or your employer's business or profession;

c. By employees in connection with your own or your employer's business."

It was further submitted that the policy allowed use of the vehicle for social and domestic purposes and allowing a driver to use the vehicle to take his mother to wherever she wished was a social function. If the driver was taking another person to view land, the defendant and driver being business partners, the policy allowed the vehicle to be used for employees business or profession.

Counsel also submitted that the persons who died as a result of the accident were not passengers in the vehicle but were riding a motor cycle and ***Section 10 of the Insurance Act*** covers third parties which the plaintiff cannot avoid as the insurer is obligated to settle such 3rd party claims. Reliance was made on the ***Nairobi HCC.500/2009 Cooperative Insurance Co. Ltd vs Stephen Kamau Wamutwe*** where the court dealt with a similar issue and it held that an insurer is obligated to pay the 3rd party.

Whether a repudiation notice was ever issued and served on the defendant in terms of the provisions of the Act, it was submitted that the purported letter of repudiation was addressed to Clockwise Insurance Agency Ltd instead of the defendants and the notice did not give particulars of the alleged non-disclosure or breach which is irregular. In support of that submission, Counsel cited ***Nairobi CA.124/2009 Kimwa Holdings Ltd vs Occidental Insurance Co. Ltd.*** In that case, the court found that no repudiation notice was served and the court held that failure to serve the repudiation notice was a violation of the insured's rights.

I have considered the evidence and documents produced by the plaintiff. I have also considered the submission filed by both counsel in support of their cases. In my view, I have three issues that require determination;

1. Whether the defendant was in breach of the principle of utmost good faith;

2. Whether the plaintiff is bound to pay and/or indemnify the defendant against any claim arising from the subject insurance policy;

3. Whether a repudiation notice was served on the defendant.

There is no dispute that the defendant took out an insurance policy with the plaintiff for motor vehicle KAY 476D for the period 25/12/2012 to 24/12/2013. An accident involving the said motor vehicle and two people on a motor cycle occurred on 25/08/2018. The accident was reported to the plaintiff and the plaintiff instructed counsel to represent the defendant in court upto the conclusion of the case after which judgment was entered against the defendant.

It is after the defendant filed the claim form (PExh.4) that investigations were carried out by PW2 who determined that the defendant gave a contradictory statement from his driver regarding who was the driver of the vehicle, who were the persons carried on the vehicle and to what use the vehicle was put. In ***Co-operative Insurance Co. Ltd (supra)*** the Court of Appeal said as follows of contracts of insurance;

"Contracts of insurance are contracts of 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 Cater vs Boehim (1766) Burr 1905 hence 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 police is void; because the risqué run is really different from the risqué understood and intended to be run at the time of the agreement.. The policy would be equally void against the underwriter if he concealed... The governing principle is applicable to all contracts and dealings. Good faith forbids either party, by concealing what he privately knows to draw the other into a bargain from his ignorance of the fact and his believing the contrary...."

In ***Margaret Nduta Kamithi (Supra)*** the court cited the ***Law of Insurance 5th Edition para. 5 on page 92 by Colinvaux*** where the author said;

> **"In the case of certain contracts, however, the law demands a higher standard of good faith between the parties, and "there is no class of documents as to which the strictest good faith is more rigidly required in courts of law than policies of assurance." "As the underwriter knows nothing and the man who comes to him to ask him to insure knows everything, it is the duty of the assured, the man who desires to have a policy, to make a full disclosure to the underwriters without being asked of all the material circumstances, because the underwriters know nothing and the assured knows everything. This is expressed by saying that it is a contract of the utmost good faith – uberrima fides**".

Guided by the above decisions and bearing in mind the duty of the insured to disclose all material facts, the question is what is the yardstick of the misrepresentation that would entitle an insurer to avoid the policy. In ***Pan Atlantic Insurance Co. Ltd (supra)***the court held that the test of materiality of disclosure was whether the relevant circumstance would have had the effect on the trial of a prudent insurer in weigh up the risk.

I must now consider the particular allegations leading to the plaintiff seeking toavoid indemnifying the defendant.

Before the issuance of the policy, the defendant signed the proposal form Exhibit No. 1 which contains the terms of the policy. Section B deals with use of the motor vehicle. The vehicle was to be used for;

> **1. Solely for social and domestic purposes;**
>
> **2. For purposes of your own or your employer's business or profession;**
>
> **3. By employees in connection with your own or your employer's business.**

As respects the allegation that the defendant described the driver as a friend while the driver said he was a cousin and business partner, I agree with the interested party's submission that nothing in the proposal form barred the insured from his car being driven by a friend or a relative. The defendant was not required to declare to the insurer who could drive his motor vehicle to the insurer. I am of the view that what was important was that the vehicle was driven with the consent of the insured and that the driver was a qualified driver in possession of a valid driving license. In this case, the vehicle was driven with the consent of the insured and the driver was qualified.

As regards the allegation that the defendant and the driver gave conflicting information on who the passengers were, whether a mother or neighbour, even if the people who were passengers were not exactly what each said they were, the policy did not bar the insured from carrying passengers whether relatives or neighbours. That is part of the social or domestic use of the vehicle. If the passengers were going to view a piece of land, the use would still be covered under Section B whereby the vehicle could be used for the employer's business or profession. Had the vehicle been used for hire or reward, that would be different because it would be against the terms of the policy.

The other reason for purporting to repudiate the contract was that the driver had been qualified as a driver for only one year four months and was thus categorized as inexperienced. Again, the terms of the policy did not indicate the period of time the driver had to have experience. In my view, once one is tested and issued with a driving license, he is a qualified driver unless it is proved to the contrary.

Having considered the reasons for repudiating the policy, I find that the said allegations relied upon by the plaintiff do not amount to breach of the principle of utmost good faith. The use of the vehicle and the driver fell within the terms of the policy.

It is trite law that he who alleges, must prove – ***Section 107 of the Evidence Act***. The legal burden does not shift. It was the duty of the plaintiff to adduce evidence to prove that the defendant misrepresented the material facts to the plaintiff to warrant the plaintiff to avoid the policy. The plaintiff's contention that the defendant did not call any evidence in support of his pleadings and so the court should find in the plaintiff's favour is untenable. It is the plaintiff who filed this suit and bears the duty to prove its case on a balance of probabilities. The defendant does not bear such burden. The defendant can only be found liable if the plaintiff has discharged their duty. I find that the plaintiff has not discharged its duty. In that regard, I agree with the finding of ***Gikonyo in Kenchic Ltd vs John Wamahiu Kimumge CA.3/2015*** where at para 15, the Judge expressed himself thus;

> **"Before I close however, I wish to address one salient point. The legal burden of proof rests with the person alleging. In this case, it was the respondent. And that legal burden does not shift. The only burden which shifts is evidential burden which arises after such preponderant amount of evidence has been adduced against a party that the said party would fail without further evidence. Such party will need to rebut the evidence adduced to avoid judgment being entered against him. But, judgment is entered on the basis that the weight of evidence satisfied the standard of proof; on balance of probabilities; and not on the basis that a party did not call evidence. In simple language, the successful party is one who proves his case on the required standard of proof. I have ample reasons for this proposition. Even where no evidence is called by the defendant, a plaintiff who does not adduce evidence to the required standard will fail. Again, rebuttal may come from cross – examination of a witness, or law, for instance, where statutory requirements underpinning the transaction have not been met. Therefore, entering judgment against a defendant merely because he did not call evidence is an error in principle. Accordingly, the trial court fell into error. The trial magistrate ought to have properly applied his mind to establishing whether the respondent has proved, on balance of probabilities, that the appellant was negligent or did not take proper care of the motorcycle such that the brakes were faulty, and caused the accident. The accident was self involving, and the possibility that the respondent was speeding or did not manage the said motorcycle in a manner that does not culminate into an accident is high. Only speeding motor cycle would throw a person off in a violent way upon application of emergency brakes. Had the respondent been riding in a moderate speed, he would probably have been in a position to brake and manage the said motorcycle in a manner that would have avoided the accident. It bears repeating that nothing shows that**

the breaks were faulty. With tremendous respect to the trial court, I see no basis on which the appellant was found to be negligent or responsible for this accident. In light thereof, this appeal should succeed."

I echo the Judge's observation that even where the defendant has not called evidence, a plaintiff who does not adduce evidence to the required standard will fail. That is the fate of the plaintiff's case. It must fail.

The defendant's vehicle was involved in a fatal accident where the passengers on the motor cycle lost their lives. The 1st and 2nd interested parties filed suits against the defendant representing their estates. The deceased were not passengers in the defendant's vehicle but were third parties. ***Section 10 of the Insurance (Motor Vehicle Third Party Risk) Act Cap 405***imposes an obligation on the insured to settle all 3rd party claims. Third party insurance is mandatory for all motor vehicle. Section 10 and (4) of the Insurance Act Cap 405 provide as follows;

"(10) 1. If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of *section 5* (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable there under in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

Provided that the sum payable under a judgment for a liability pursuant to this section shall not exceed the maximum percentage of the sum specified in *section 5(b) prescribed in respect thereof in the Schedule.*

1. (a) The Minister may, in consultation with the Director of Medical Services and the Insurance Regulatory Authority, prescribe compensation for other categories of disablement not provided for in the Schedule.

(10) 1. (b) The percentage of the sum specified in *section 5(b) and prescribed in the Schedule under this Act shall include but not limited to the medical expenses on the judgment or claim.*

(10) 4. No sum shall be payable by an insurer under the foregoing provisions of this section if in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto.

4. (a) Notwithstanding any other provision under this Act or any other written law, any person who willfully presents false or inaccurate information to the insurer or any court of competent jurisdiction with the intention of benefitting under this Act through;

a. falsification and alteration of treatment documents and records;

b. exaggeration of injuries or degree of incapacitation;

c. falsification and alteration of police documents and records;

d. falsification and alteration of identification documents and records, commits an offence and upon conviction, in addition to the applicable penalty, the claim or judgment the subject matter of the false or inaccurate information shall not be payable by the insurer."

My understanding of the above provision is that the insurer is permitted to avoid satisfaction of an insurance claim provided the conditions under ***Section 10 (4)*** are met, that is, that a notice of repudiation was served on the defendant in terms of ***Section 10 (4)*** of the Act.

In this case, the plaintiff produced a letter dated 11/10/2013 addressed to Clockwise Insurance Agency Ltd in respect to the defendant's motor vehicle. There is no evidence that the said letter (notice)was served on the defendant. In the said letter, there are no specific allegations of breach of utmost good faith to which the defendant could have responded to, even if he had received the letter. In ***Nairobi 124/2009 Kimwa Holdings Ltd vs Occidental Insurance Co. Ltd,***the Court of Appeal said;

"The letter is clear that the reason for repudiation was the use specifically of KAL 922M for hire or reward. Despite this, the respondent advanced other reasons for its refusal to settle the claim such as failure to report the theft immediately after the occurrence, the failure to pay the insurance premium and the usage of motor vehicle KAE 299D which was also covered under the same policy for hire and reward. The assertions notwithstanding, there was no evidence showing that the policy was repudiated or cancelled for the aforestated reasons. Hence the repudiation was not done in accordance with the terms of

the policy. Again no input was sought from the appellant before the cover was repudiated and/or cancelled. The law as we understand it is that a party is entitled to be given an opportunity to answer or rebut allegations against him before a decision against him is arrived at. That was not done, which in our view was violation of rules of natural justice. In the premises we are not satisfied with the reasons advanced for the repudiation of the substance cover. We also consider the process to have been violation of the rights of the appellant."

In the above cited case, the Court of Appeal stated that the law requires a party who has been issued with a repudiation notice to be given an opportunity to answer and rebut the allegations against him before a decision is made by the insurer. I have found above that there is no evidence that the repudiation notice was served on the defendant and even if it had, he needed to be heard but no such opportunity was accorded him.

It follows that without a proper repudiation notice, even if the defendant was guilty of breach of the principle of utmost good faith, the plaintiff would not have been entitled to avoid the policy without notice.

For all the foregoing reasons in this judgment, this court is satisfied that the plaintiff has not proved on a balance of probabilities that it is entitled to the orders sought. The suit is hereby dismissed. The result is that the plaintiff is duty bound to indemnify the defendant against any claim by the defendant arising from the accident that occurred on 25/08/2013 that resulted in the judgment in CMC 43/2015. The defendant and interested parties will also have costs of this suit.

Signed and **Dated** at **NYAHURURU** this ***19th*** day of ***May, 2020***.

.....

R.P.V. Wendoh

JUDGE

PRESENT

Mr. Kamanga for 1st Interested Party

Mr. Muriithi for the plaintiff

Eric – Court assistant