REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL SUIT NO 3 OF 2016

MADISON INSURANCE COMPANY OF KENYA LIMITED LIMITED.....PLAINTIFF

VERSUS

VERONICA BANCHIRI METIOKIO.....DEFENDANT

JUDGEMENT

1. In this suit which was commenced by way of a plaint dated 29th January, 2016, the Plaintiff sued the Defendant, its insured, substantially seeking a declaration that it is entitled to avoid the private Motor Vehicle Policy No. HQS/701/56908/2013 (the said policy) for Motor Vehicle Registration No. KBW 962G (the said vehicle) issued to the Defendant regarding the liabilities arising from the road traffic accident which occurred on 15th November, 2014 or hereabouts. Consequently, the plaintiff sought an order entitling it to repudiate any liability to indemnify the Defendant in respect of claims made against the Defendant and/or her driver, **Onesmus Mutua Kyeva**, arising from the said accident.

2. The Plaintiff's claim was based on the fact that on or about 13th November, 2014 the Defendant took out the said policy with the Plaintiff whose insurance cover was in respect of loss or damage to the said vehicle and/or death, bodily injury, loss or damage to property of third parties arising out of the use of the said vehicle in accordance/compliance with the statutory requirements of section 5(b) of the ***Insurance (Motor Vehicle Third Party Risks) Act***, Cap 405 Laws of Kenya (The Act). It was pleaded that the said cover was sourced through the Plaintiff's contracted agents, M/s Equity Insurance Agency Limited. However, it was an express and/or implied term of the said policy that the said vehicle would at all times be limited in its user to the Defendant's private, social, domestic, pleasure and disclosed business use.

3. However, on or about 15th November, 2014 while the said vehicle was on hire and carrying fare paying passengers, the said vehicle was involved in a self-involving accident along Machakos-Kitui Road in consequence whereof some of the passengers sustained bodily injuries and the vehicle was extensively damaged. In the main the Plaintiff pleaded that the Defendant breached the terms of the said policy by putting to use the said vehicle activities which were not covered by the said policy and materially tampering with, overhauling, changing and/or replacing the car Engine from B162537 to C783959 without informing the Plaintiff. That was the basis upon which the Plaintiff sought to repudiate liability in respect of the claims arising from the said accident.

4. Accompanying the plaint was a witness statement by **Moses Mwariri Humbo**, the Plaintiff's Legal Supervisor who testified as PW1 substantially adopting the contents of the said statement. According to him the Defendant was at all material times the registered and/or insured owner of the said vehicle KBW 962G Toyota Probox over which he had an insurable interest. The Defendant on or about 13th November, 2014 took out the said policy and he was issued with a Certificate of Insurance No. NBD142757046 for the period 15/11/14-14/11/15 covering loss or damage to the said vehicle and/or death, bodily injury, loss or damage to property of third parties arising out of the use of the said vehicle in accordance/compliance with the statutory requirements of section 5(b) of the said Act. the policy was sourced through the Plaintiff's contracted agents, M/s Equity Insurance Agency Limited. The rest of the statement was a regurgitation of the contents of the plaint.

Determination

5. In this case the Defendant neither appeared nor filed a defence. Accordingly, the only evidence on record is the evidence of the Plaintiff based on the witness statement and the documentary evidence which I have considered. According to the policy document clause MOT003-Limitation as to Use – Private & Professional Use, the vehicle was insured for:

> ***"Use for social domestic and pleasure purposes and for the Insured's business. The policy does not cover use for racing competitions rallies or trials (or use for practice for any of them) or the carriage of passengers for hire or reward."***

6. The evidence on record, as can be gleaned from the copies of the plaints, is that the passengers in the said motor vehicle were travelling in

the said vehicle as fare paying passengers. Accordingly, it would seem that the Defendant used the said vehicle for ***the carriage of passengers for hire or reward*** which was expressly excluded under the terms of the said policy. 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". See **Miller vs. Minister of Pensions [1947] 2 All ER 372.**

7. 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."**

8. What are the consequences of a party failing to adduce evidence? In the case of **Karuru Munyororo vs. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988, Makhandia, J** (as he then was) held that:

> **"The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon."**

9. In **Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J.** citing the decision in **Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997** held that:

> **"In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations…Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence."**

10. Similarly, in the case of **Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000, Mbaluto, J.** held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted.

11. If one is still in doubt as to the legal position reference could be made to the case of **Drappery Empire vs. The Attorney General Nairobi HCCC No. 2666 of 1996** where **Rawal, J** (as she then was) held that where the circumstances leading to the deliveries of goods are not challenged and stand uncontroverted due to the failure by the defendant to adduce evidence, the standard of proof in civil cases (on the balance of probabilities) has been attained by the plaintiff.

12. 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. 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 her part 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, the Plaintiff herein, 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. The facts of this case were similar to those of **Corporate Insurance Company Ltd vs. Elias Okinyi Ofire [1999] eKLR**; **[1999] 2 EA 61** wherein the Court of appeal found that:

> **"The respondent (plaintiff there) said: 'The vehicle was carrying passengers on the material day. I paid fare as I was charged. The vehicle had other passengers as well as some luggage on top." There can be no doubt that the vehicle was being used as a "matatu". But was it insured as a "matatu"" The policy of insurance produced as an exhibit by the appellant's witness one Mr. Zacharia who is a senior executive assistant employed by the appellant, shows that the same is a Commercial Vehicle Policy. It is described in the schedule to the policy as a Toyota pick-up with carrying capacity of one ton and carries the following limitation:**
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> > **"Use in connection with insured's business. Use for the carriage of passengers in connection with the insured's business. (1)The policy does not cover use for hire or reward or for racing, pacemaking, reliability, trial or speed testing. (2)Use while drawing a trailer except the towing (other than for reward) of any one disabled mechanically propelled vehicle."**
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> **The vehicle was therefore insured as a commercial vehicle for use in connection with the insured's business which business is described as "Farmer/Business." It is not the insured's business to run "matatus". If that was his business he would have had to obtain a different insurance cover namely that of carrying passengers for hire and reward. If an insured after obtaining an insurance cover for a commercial vehicle for use in connection with his business changes the nature of the vehicle to that of a "matatu" the nature of the policy remains that of a commercial vehicle policy and such change does not and cannot make the insurer liable to the passengers who are thereafter carried in the vehicle for reward (fare). If this were the case most insurers would decline to issue a commercial vehicle policy."**

13. **Ringera, J** (as he then was) in **Gateway Insurance Company Limited vs. Sudan Mathews Nairobi HCCC NO. 1078 of 2000** held that:

"Under Section 5 of the Insurance (Motor Vehicle Third Party Risks) Act, Cap. 405 the Statutory third party cover is not required to extend to the risks of death or bodily injury to employees of the insured arising out of or in the course of their employment; or to the death or injury to passengers except in the case of motor vehicles in which such persons are carried for reward or hire or in pursuance of a contract of employment; or to any contractual liability. Where the motor vehicle in question is insured for the purposes of being used for social, domestic and pleasure purposes and not for hire and reward or the carriage of employees the risk of injury or death to a passenger therein is not compulsorily required to be covered under Cap 405 and if such risk is not actually covered the insurance company is not obliged to indemnify the insured against any claim by the passengers."

14. 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:-

> **"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).**

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."

15. 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 person's 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.

16. That case is however distinguishable from the present case where it was an express 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 by the Defendant, it is my holding that the Plaintiff is not under a legal obligation to honour and/or satisfy the claims arising from and/or to indemnify the Plaintiff for the bodily injuries sustained by the passengers who at the time of the accident were in the Defendant's said motor vehicle should have been covered as a third party by the policy.

17. In the premises I find merit in this suit and I hereby issue the following orders:

a) A declaration that the Plaintiff is entitled and/or was entitled to avoid the Private Motor Vehicle Policy No. HQS/701/56908/2013 for the motor vehicle Reg. No. KBW 962G issued to the Defendant, to the extent of and regarding the occurrence, consequences, damage, liability, losses and claims arising from and connected with the suit road accident on 15/11/2014 or thereabouts.

b) An order that in the event of any existing and/or future claim by and/or against the Defendant and/or her driver Onesmus Mutua Kyeva arising from the suit accident on 15/11/2014 involving motor vehicle KBW 962G, the Plaintiff is entitled to repudiate, and is hereby freed from any liability to indemnify the Defendant in respect thereof.

c) There will be no order as to costs.

18. Judgement accordingly.

19. This Judgement has been delivered online with concurrence of counsel for the Plaintiff, there being no appearance for the Defendant, due to the prevailing restrictions occasioned by COVID 19 pandemic.

Read, signed and delivered online at Machakos this 20th day of May, 2020.

G V ODUNGA

JUDGE

Delivered in the presence of:

CA Geoffrey