



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**CIVIL SUIT NO. 291 OF 2015**

**STARGENT ENTERPRISES LIMITED.....PLAINTIFF**

**AND**

**CANNON ASSURANCE LIMITED.....DEFENDANT**

**JUDGMENT**

1. By a plaint dated 16<sup>th</sup> June 2015, the plaintiff **Stargent Enterprises Limited** seek judgment against the defendant **Cannon Assurance Limited** for Ksh 17,700,000.

2. The plaintiff's claim is that it insured its motor vehicle registration number KBX 687C with the defendant, under comprehensive insurance. After that subject vehicle was involved in accident, which accident was reported to the defendant, the defendant refused, failed or declined to make payment to the plaintiff Ksh 17,700,000 being the assessed value on total loss basis of the subject vehicle.

3. The defendant's defence is that it issued policy number 04/07/00607/11 in respect to the subject vehicle but that it repudiated that policy on account of mis-representation by the plaintiff, in that, the plaintiff knowingly represented to the defendant that the subject vehicle was manufactured in the year 2012; the plaintiff misled the defendant to believe that the value of the vehicle at the time of the insurance cover was Ksh 19.6 million; the plaintiff knowingly presented documents in respect of the subject vehicle that are erroneous and misleading; and that the plaintiff know or ought to have known that the subject vehicle was a 2006 model whose value was Ksh 4.2 million. The defendant pleaded those particulars set out above as a breach of the principle of utmost good faith in an insurance contract and the plaintiff is estopped from benefitting from such policy of insurance.

**ANALYSIS**

4. It is clear from the evidence presented by the parties that it is not denied that the plaintiff took out a policy of insurance, with the defendant, over the subject vehicle. The only issue needing determination is:

***“Did the plaintiff make mis-representation in taking the insurance policy and if so was the defendant entitled to repudiate that policy.”***

5. The plaintiff approached the defendant's agent, AON MINET Insurance Brokers Ltd for purpose of insuring the subject vehicle. The plaintiff, through its director Franck Onchagwa Nyabwari informed the agent that value of the subject vehicle was Ksh 19,650,000 as per an AA of Kenya valuation dated 30<sup>th</sup> May 2014. Plaintiff after paying the premium obtain comprehensive insurance cover with the defendant for the period 31<sup>st</sup> July 2014 to 30<sup>th</sup> July 2015. The plaintiff, again through its director, reported to the defendant that the subject motor vehicle had been involved in an accident which occurred on 22<sup>nd</sup> December 2014. The report was made to the defendant on 24<sup>th</sup> December 2014.

6. The plaintiff stated that the defendant presented to it a discharge of charge, for Ksh 17,700,000; there was no proof presented before court of that discharge of charge but this was not denied by the defendant. Indeed the defendant's witness, Evans Ratemo, stated that the defendant sent the discharge voucher to AON Minet Insurance Brokers Ltd (hereinafter AON) but the plaintiff rejected it wishing to have the claim settled for a higher amount it is probably that rejection that set in motion the inquiries initiated by the defendant that eventually led the defendant to repudiate the insurance policy.

7. Before going into what these inquiries, by the defendant, uncovered I wish to respond to what is raised by the plaintiff's learned advocate by his written submissions. The plaintiff through its written submissions has sought that the court will reject the computer print outs, produced in evidence by the defendant which are emails, letters attached to an email and website searches. The plaintiff places its submissions for rejection of that evidence on the provisions of section 78A and 160 of the Evidence Act Cap 80. The plaintiff submitted that

the defendant failed to lay a proper foundation prior to production of that evidence of website search and other computer print out. That the defendant did not first authenticate those documents.

8. Those two sections, that is sections 78A and 160 of Cap 80, provide that electronic and digital evidence is admissible. The sections however require that the party producing those documents to provide a certificate showing the authenticity and validity of the information thereof.

9. What happened at the trial is that the defendant called the assessor Miricho Nderitu and the investigator John Mukigi who narrated their investigation over this matter and what that investigation entailed and proceeded to produce in evidence, without any objection by the plaintiff, emails and website searches. Is the plaintiff at this late stage permitted, after those documents were admitted in evidence and after all the parties closed their cases, to object to the court relying on those documents. I would respond in the negative. The plaintiff should have raised an objection, at the trial, and before those documents were admitted in evidence. Those documents are part of the evidence and the court cannot disregard them. In my above finding I find support in the case **Kenneth Nyaga Mwise v Austin Kiguta & 2 others [2015] eKLR**. In that case the court of appeal was considering whether a document marked for identification was evidence before court. The court of appeal found that a document marked for identification was not evidence and went on to express itself on admissibility of documents during trial as follows:

***“First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record.”***

10. It follows that the emails and website searches are evidence in this case and this court will proceed to consider those documents in conjunction with the other facts and evidence in this case.

11. The defendant relied on the evidence of Miricha Nderitu, the proprietor of Intergrated Motor Assessors. This assessor was able to confirm that indeed the subject vehicle was damaged during the accident and also, after observations noted that the lorry which was involved in the accident with the subject vehicle was also showing signs of damage as result of the accident.

12. Miricho Nderitu, when testifying said that he was a lecturer at the Polytechnic at Nairobi. After he undertook a course in automotive engineering he was sent to Britain, by the Government, to do a course in motor vehicle design. while he was in Britain he also did a course in motor vehicle assessment. On his return to Kenya in 1989 he registered himself with the automotive engineering of Britain. After lecturing for 3 years he registered his business Intergrated Motor Assessors. He has been the chairman of the Motor Assessors Association of Kenya. He has had an experience of 26 years as a motor assessor and does lecturing part time, at the college of insurance.

13. This witness on going to the place where the subject motor vehicle was stored to see how damaged it was, he said that something else caught his attention. This is what he said about the subject motor vehicle:

***“I noted it looked (sic) old rather than what was in the logbook***

***....***

***To me the Range Rover looked different to models of 2012.”***

14. That curiosity caused him to examine other Range Rover vehicles that were there and he noted that the subject vehicle resembled those of 2006 model. To satisfy his curiosity he took a photograph of those similar vehicles and the chasis number of the subject vehicle. He first spoke to the manager of RMA Motors, where the subject vehicle was stored. The manager gave him a computer printout which showed the subject vehicle was a 2006 model. He also did his own search on his own computer and also inquired from CMC Motors which confirmed that the subject motor vehicle was 2006 model. He produced a print out of ‘Direct Dealer Warranty – vehicle Details’ which revealed as seen below:

***“Basic Details***

<b>VIN:</b>	<b>LSAA336A</b>	<b>Reg Number</b>	<b>Y300SIS</b>
		<b>978452</b>	
			<b>Distance at last</b>
			<b>15515 Miles</b>
			<b>claim:</b>
<b>Description:</b>	<b>RANGEROVER SPORT V8 PET</b>		

2006 MY

**Despatched** 24 Aug 2006 **CSO Number:** 978452

**Date**

**Sold date** 21 Sep 2006 **Sold by:** 115464 –*Lookers I and Rover*

**Paint:** *Java Black* **Trim Colour** *Ebony Embossed Sport*

*leather seats.”*

15. He further stated that he searched the internet, using the subject vehicle Identity Number (VIN), which he said can be done by any one, and found as follows:

“VIN decoder

**SALLSAA336A978452**

VIN SALLSAA3 3 6 A 9 7 8 4 5 2

**Manufacturer** *Land Rover Ltd*

**Manufacturer address:** *Gaydon Test Centre*

*Banbury Road*

*Lighthorne*

**Product type:** *Land Rover*

**Make:** *Land Rover*

**Check digit** 3

**Model year** 2006

*United Kingdom*

**Sequential number** 978452.”

16. He stated that the years 2007-2008 model of Range Rovers were sold at Ksh 5 million. He valued the subject vehicle at Ksh 4.25 million.

17. His evidence was unshaken in cross examination. He confidently stated that he had carried out that investigation and had confirmed that indeed the subject vehicle was a 2006 model.

18. The defence also relied on the evidence of John Machuru Mukigi, the investigator. He is a private investigator with Rapid Investigation Services, which he registered in the year 2006. He has been a private investigator since 1984. He is a holder of Bachelor degree in Insurance and he is certified by the Insurance Institute of East Africa as an Insurance Investigator.

19. He prepared two reports which he produced in court as evidence in this case. His investigation revealed various inconsistencies to narrative given by the plaintiff’s director. His investigations led him, to believe that the plaintiff’s director knew that the subject vehicle was a 2006 model even when he obtained insurance cover, for that subject vehicle, from the defendant.

20. He carried investigation at Kenya Revenue Authority (KRA) the then custodian of all logbooks in the country. He was unable to see the physical file, relating to the subject vehicle, but his search did reveal that the subject vehicle was registered in the plaintiff’s name on 7<sup>th</sup> January 2015. Noteworthy is that the accident occurred on 22<sup>nd</sup> December 2014. He blamed, what he called, the notorious corruption of KRA, with logbooks, as the reason he could not trace the physical file. It is the physical file that contained the importation records which were issued to produce the logbook.

21. He, just as the assessor, used the VIN number of the subject vehicle on a website he was instructed to use by Jaguar – land Rover Africa Regional Office in South Africa, and that search revealed that the subject vehicle was manufactured on 24<sup>th</sup> August, 2006.

22. In his report he stated that the year of manufacture is the main determinant of the market value of any used car.

23. The plaintiff's director, on being interviewed by this investigator stated that he purchased the subject vehicle in December 2013 from a company called Exotic Cars Limited at Ksh 19.2 Million. The said director stated that the said transaction was informal without any purchase receipt and without a sales agreement. The said director said that on purchase of the subject vehicle he dealt with Mr Mohammed Mirza. A search over Exotic Cars Limited carried out by the investigator revealed the directors of Exotic Cars Ltd were Mohamed Ashraf Noor and Abid Hussein Baig. The investigator deduced that the alleged Mohammed Mirza the plaintiff's director transacted the sale of the subject vehicle was not a director of Exotic Cars Ltd and was perhaps an employee. That notwithstanding the plaintiff's director explained the process of buying the subject vehicle thus: that Mohammed Mirza owed him Ksh 10 million and this was used to partly offset the purchase price of the subject vehicle and the balance he paid by four instalments, in cash and in dollars. The plaintiff's director was unable to show bank withdrawal of such funds used to pay for that subject car. The investigator was unable to trace such a person by the name of Mohammed Mirza, the plaintiff said that he was out of the country.

24. The investigator interviewed the driver of the lorry into which the subject vehicle rammmed into on 22<sup>nd</sup> December 2014. That interview although confirming that an accident occurred when the subject vehicle rammmed into the back of the lorry the driver was driving, unlike the information given by the plaintiff's director that he was driving alone on the night the accident occurred, the lorry driver, Mutisya stated that there was the driver and three passengers in the subject vehicle.

25. The plaintiff's director has also informed the investigator that he was rescued from the scene by a good Samaritan whom he named as Simon Mwangi. Simon Mwangi allegedly with his car drove the plaintiff's director to the police road block, along Mlolongo area, for him to get assistance.

26. On Simon Mwangi being interviewed by the investigator it was found that the national identity card number he gave was in the name of James Wacira Murage, his alleged telephone number was registered in the name of James Wacira Murage and the address he gave was also in Karatina and belonged to James Wacira Murage. when these facts were revealed the alleged good Samaritan refused to answer the investigator's further calls.

27. The issue under determination is whether the plaintiff mis-represented facts to the defendant at the time of obtaining insurance cover for the subject vehicle. A contract of insurance is in the class of contracts conducted in utmost good faith. This was so stated in the case **Sita Steel Mills Ltd vs Jubilee Insurance Co. Ltd (2007) eKLR** thus:

*"...I would like to state that the contract of insurance is perhaps the best illustration of a class of contracts described as uberrimae fidei, that is, of the utmost good faith. That being so the potential parties to such contract are bound to volunteer to each other, before the contract is concluded, information that is material. This principle imposes on the proposer or insured the duty to disclose to the insurer, prior to the conclusion of the contract, but only up to 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 AG [1967] 2 QB 590. The rationale for this rule was stated by Lord Mansfield in the old English case of Carter Vs- Boehm (1766) 3 Burr. 1905 thus: -*

**"Insurance is a contract upon speculation. The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the underwriter trusts to 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. In that case **Sita Steel** (*supra*) the court considered what material facts that can influence an insurer and this is what the court stated:

*"Quoting from Marshall on Insurance (3rd Ed) Vol I, P. 465, this is how Lord Mustill defined what a material fact is in the famous case of Pan Atlantic Insurance Co. –Vs- Pine Top insurance Co. Ltd. [1994] 3 ALL ER 581 at P.606:-*

**"Every fact and circumstance, which can possibly 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, is material."**

The plaintiff relied on that case **Sita Steel** (*supra*), in submitting that the plaintiff could only disclose what it knew and quoted the following:

*"It must, however, be emphasized that it is only actual knowledge of those facts that imposes the duty to disclose. As was stated by Moulton L.J in Joel v Law union and Crown Insurance Co [1908] 2 K.B. 863 at pg 884:-*

**"The duty is a duty to disclose, and you cannot disclose what you don't know. The obligation to disclose, therefore, necessarily depends on the knowledge you possess."**

29. I must begin by stating there is sufficient evidence before court, eloquently presented by the assessor and the investigator, which proves that the subject vehicle was of 2006 mode and its value was therefore not for the amount insured by the plaintiff but for much lower and perhaps as low as Ksh 4 million.

30. Is there evidence pointing to the plaintiff knowing that the subject vehicle was of 2006 model, when it was insured with the defendant. In my assessment of the evidence adduced I have formed the opinion that the plaintiff did know of that fact and was the center player of misrepresentation of the facts that led the defendant to insure the subject vehicle for Ksh 19,650,000.

31. The evidence surrounding the accident scene as narrated by the plaintiff's director is not credible nor corroborated. As stated before the lorry driver at the scene saw a driver and three passengers in the subject vehicle. The plaintiff's director insisted he was alone. His evidence might have been considered credible if only the good samaritan's identity was credible. That good Samaritan gave his name as Simon Kimani Mwangi but his identity card number, telephone number and his post office box number were all registered in the name of James Wacira Murage.

32. But I think the most telling is what shrouded in mystery, if not deceit that the plaintiff's director did not explain how he could undertake the purchase of a car for Ksh 19.2 million without obtaining a receipt or entering into a sale agreement. when he was asked about this by the investigator he trivialized it and did not offer credible explanation. He further stated that he was owed Ksh 10 million by Mohammed Mirza, which was used to offset part of the purchase price. There was absolutely no proof of this.

33. On obtaining the insurance policy, whereby the defendant relied on the value set by the plaintiff the plaintiff was required to produce an AA valuation. He did not until after reporting the accident and on being requested to produce that AA valuation surprisingly the report was carried out in Nyeri, yet the plaintiff's director stated in evidence he resided in Karen area, Nairobi. Secondly, that report dated 12<sup>th</sup> June 2014 was made in respect to the insurance company AIG Kenya Insurance Company Ltd, not the defendant and the policy number quoted thereon was not the policy of the defendant.

34. In whichever way one turns in this case, One is faced with documents that speak of deceit being weaved with one intention in mind, that is to over insure the subject motor and stage manage an accident with a view to claiming the insurance money which amount of money far exceeded the valued of the subject vehicle.

35. My finding is that the plaintiff did know the actual model of the subject car and mis-represented that fact to the defendant. The defendant was entitled as it did to repudiate the policy. It is for the above reason that the plaintiff's case fails. Having failed the defendant shall be awarded costs.

### **CONCLUSION**

36. This case is hereby dismissed with costs to the defendant for the reasons stated herein above.

**DATED, SIGNED and DELIVERED at NAIROBI this 4<sup>th</sup> day of MAY, 2020.**

**MARY KASANGO**

**JUDGE**

### **ORDER**

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17<sup>th</sup> April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **4<sup>th</sup>** day of **May, 2020**.

**MARY KASANGO**

**JUDGE**