REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D.S. MAJANJA J.

CIVIL SUIT NO. 3 OF 2016

BETWEEN

DIRECTLINE ASSURANCE COMPANY LIMITED.....PLAINTIFF

AND

BETHUEL OMAIKO TWEYA.....DEFENDANT

JUDGMENT

1. The plaintiff is a licenced insurer within the meaning of **section 5** of the ***Insurance (Motor Vehicle Third Party Risks) Act (Chapter 405 of the Laws of Kenya)*** ("the ***Act***"). Following a request by the defendant for comprehensive insurance for his motor vehicle, Toyota Hiace Van registration number KCB 118 X ("the motor vehicle"), it issued to him a Comprehensive Motor Vehicle Policy of Insurance No. 09501296 ("the Policy") and Certificate No. A 6843943. It agreed to indemnify him against any claims in respect of death or bodily injury to any third party as is required to be covered by a policy of insurance under **section 5(b)** of the ***Act*** for a period of 12 months from 18th June 2015 to 17th June 2016.

2. On 12th January 2016, the defendant's authorised driver was involved in an accident along the Kisii- Keroka road with another motor vehicle registration number KCD 191Q as a result of which four passengers were fatally injured and other sustained injuries of varying degrees. Following the accident, the plaintiff commenced investigations and discovered that the defendant's authorised driver was driving at a high speed when the brakes failed causing it to ram into the other motor vehicle. After the accident, the vehicle was taken to the Kisii Motor Vehicle Inspection Centre where it was examined and found unroadworthy prior to the accident.

3. The plaintiff now seeks to avoid the Policy issued to the defendant under **section 10(4)** of the ***Act*** on the grounds that the said policy was obtained from it by the defendant by non-disclosure and/or misrepresentation of material facts It seeks the following reliefs in its plaint:

> *a) A declaration that the Plaintiff has at all material times been entitled to avoid the aforesaid policy of insurance No. 09501296 and any provision contained therein on the ground that the Defendant obtained the said policy by:-*
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> *i) The non-disclosure of a material fact or facts; or*
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> *ii) Representation of facts which were false in material particulars; or*
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> *iii) Both (i) and (ii) above.*
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> *b) A declaration that the Plaintiff is not liable to make any payment under the aforesaid policy of insurance No. 09501296 in respect of any claim against the Defendant herein arising out of the fatal and other injuries sustained in the accused of 12th January 2016 involving motor vehicle registration number KCB 118X and Motor vehicle registration number KCD 191Q;*
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> *c) A declaration that Motor Vehicle registration number KCB 118X was being used in an unroadworthy condition on 12th January 2016 and therefore the Plaintiff is not liable to pay any claim arising out of the accident on 12th January 2016 as the Plaintiff is entitled to avoid the policy of insurance No. 09501296 on the ground that the Defendant breached the terms of the policy.*
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> *d) Costs of the suit together with interest thereon.*

4. In his statement of defence, the defendant admitted that it was duly insured as alleged by the plaintiff but denied that he had breached the policy. He stated that he had provided and/or disclosed all the information in respect of the motor vehicle before the policy was issued to him and also disclosed that the motor vehicle had not been used prior to the issue of the Policy and that he only intended to use the motor vehicle after the policy was issued to him. He asserted that the motor vehicle was roadworthy before the accident occurred and that he had complied with all the current laws and regulations imposed by the ***Traffic Act (Chapter 403 of the Laws of Kenya)*** and by the National Transport and Safety Authority. He maintained that the plaintiff was not entitled to the declarations sought in the plaint.

5. After the close of pleadings and the pre-trial conference, I set the matter down for hearing. Kelvin Ngure (PW 1), the Deputy Claims Manager of the plaintiff and Mukabane Wanda Evans (PW 2), a gazetted Government Motor Vehicle Inspector, testified on the behalf of the plaintiff while the defendant testified on his own behalf. The parties also filed written submissions to support their respective positions.

6. The fact that defendant was insured and that the accident took place during the currency of the policy was not in dispute. So too was the fact that several people died and were injured and lodged claims against the defendant. What is in dispute is whether the defendant failed to disclose to plaintiff the motor vehicle was defective and/or unroadworthy.

7. PW 1 testified that the motor vehicle was not roadworthy according to the report of the motor vehicle inspector. He further testified that the plaintiff decided to repudiate liability under the Policy, despite having paid some claims before the current suit was instituted. PW 2 produced a Certificate of Examination and Test of Vehicle ("Inspection Report") dated 13th January 2016 in which the inspector remarked that the motor vehicle was unroadworthy at the time of the accident.

8. The defendant (DW 1) admitted that after the motor vehicle was damaged in the accident, it was written off and he was paid Kshs 1,800,000/ by the plaintiff as compensation. He further testified that he had been sued in 14 cases by various claimants for damages arising out of the accident. He stated that he passed the summons to the plaintiff and it had settled two claims; one for Kshs 257,151/- and another for Kshs 307,300/-. He further testified that at the time of the accident the motor vehicle was still new and had been on the road for 6 months and that he had installed a speed governor.

9. The plaintiff's case is premised under **section 10(4)** of the ***Act*** which provides that:

> *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.*

10. It is now established and it is not disputed that contracts of insurance are contracts of the utmost good faith. This principle was summarized by the Court of Appeal in ***Co-operative Insurance Company Ltd v David Wachira Wambugu*** **NYR CA Civil Appeal No. 66 of 2008 [2010] eKLR** where the court quoted with approval ***Bullen and Leake, Precedents of Pleading, 14th Edition, Vol. 2*** at P. 908, which states as follows;

> *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. Lord Mansfield's words in Carter vs Boehm (1766) Burr. 1905 have stood the test of time:*
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> *"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 policy is void; because the risqué run is really different from the risqué understood and intended to be run at the time of the agreement …"*

11. The plaintiff claims that the defendant was obliged maintain the motor vehicle at all times and keep it in a roadworthy condition. It relied primarily on the Inspection Report produced by PW 2 to show that the motor vehicle was not roadworthy prior to the accident. Counsel for the plaintiff also submitted that the contents of that report were not disputed or challenged save denying that the motor vehicle was not roadworthy without bringing forward any proof.

12. Counsel for the defendant submitted that the plaintiff has failed to discharge its burden of proof to show that the defendant had violated the terms of the policy. He pointed out that the plaintiff is the one who furnished all the documents to the plaintiff yet it proceeded not only to settle the material damage claim but also some third party personal injury claims and that it could not turn around and repudiate the policy.

13. As regards the Inspection Report, the defendant submitted that PW 2 did not have first-hand knowledge of the report as he was not the author of the report and that the report was not conclusive evidence of material non-disclosure or of misrepresentation. Counsel for the defendant also submitted that the plaintiff did not produce a pre-accident report which would have indicated whether the motor vehicle was unroadworthy. He added that motor vehicle had been licenced to operate as a public service vehicle hence it which was proof that it was in fact roadworthy.

14. The success or otherwise of the plaintiff's suit turns on the Inspection Report produced by PW 2 in which the inspector remarked, *"unroadworthy motor vehicle prior to the accident."* When cross-examined on this report, PW 2 stated that motor vehicle had a speed governor which was defective hence the vehicle was unroadworthy. He pointed out the speed governor could not have been damaged during the accident. He also noted that the speedometer was damaged as a result of the accident.

15. While I accept that the Inspection Report was produced without objection of the defendant, I am unable to accept that it is conclusive proof that the motor vehicle was unroadworthy. The conclusion that the motor vehicle was unroadworthy was that of an expert. The evidence of an expert is opinion evidence which the court may accept or reject as it not evidence of fact. As the Court of Appeal observed in ***Kimatu Mbuvi t/a Kimatu Mbuvi & Bros v Augustine Munyao Kioko*** **Civil Appeal No. 203 of 2001 [2007] 1 EA 139**;

> *Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions and such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so.*

16. I have scrutinized the Inspection report and the only defect that is not accident related that is shown in the report is that the EKAS speed governor/limiter fitted was found to be defective. At the time of inspection, it was found to be intact. The term, ***"unroadworthy"*** is a conclusion based on a set of facts which the expert witness was required to elucidate and which the court and indeed the defendant would be entitled to test in order to understand and reach a conclusion as to the mechanical state of the vehicle. As I understand, a speed governor is a device that controls the speed of a vehicle so that it does not exceed the prescribed speed. In as much as the Inspection Report alluded to a defective speed governor, it was not clear from the report or indeed the testimony of PW 2 what the nature and effect defect was and whether such defect affected the mechanical state of the motor vehicle so as to render it unroadworthy. Neither of the plaintiff's witnesses were of much assistance on this issue. On the other hand, the defendant's evidence was that it was duly licenced to operate the motor vehicle on the road as a public service vehicle.

17. I cannot say that the motor vehicle was unroadworthy merely because the speed governor or limiter was defective without identifying the nature and extent of the defect and which defect the defendant was required or duty bound to disclose under the policy. I therefore find and hold that the plaintiff has failed to discharge its burden of showing that the motor vehicle was unroadworthy for purposes of avoiding the policy. Consequently, I must dismiss the suit.

18. The plaintiff shall bear the costs of the suit.

DATED and DELIVERED at KISII this 2nd day of JULY 2019.

D.S. MAJANJA

JUDGE

Mr Mbugua instructed by KRK Advocates LLP for the plaintiff.

Mr Mainga instructed by Mainga and Company Advocates for the defendant.