



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL SUIT NO. 32 OF 2018

UAP INSURANCE COMPANY LIMITED.....PLAINTIFF

VERSUS

CANADIAN BAPTIST INTERNATIONAL.....DEFENDANT

JUDGEMENT

1. Vide a Plaint dated 6/12/2018 and amended on 6/03/3019 the plaintiff sought for the following reliefs namely:-

(a) A declaration that the Defendant did not have an insurable interest in motor vehicle registration number KBA 812 K.

(b) A declaration that the plaintiff is and has at all material times been entitled to avoid the aforesaid policy of insurance 010/070/1/006634/1993 on the ground that the said policy of insurance was obtained by non-disclosure of all material facts and representation of facts which were false in material particulars.

(c) A declaration that the Plaintiff is not liable to make any payment under the aforesaid policy of Insurance No. 010/070/1/006634/1993 in respect of any claim against the Defendant arising out of injuries or loss sustained by any or all of the passengers travelling in motor vehicle registration number KCN 912T on 26/05/2018 when the same was involved in an accident including but not limited to 3rd – 9th interested parties and/or any other person on board motor vehicle registration number KBA 812 K whatsoever.

(d) A declaration order that the Defendant and all interested parties have no claim against the plaintiff.

(e) A declaration that motor vehicle registration number KBA 812 K was being used for uninsured purposes on 26/05/2018 and therefore the Plaintiff is not liable to pay any claims arising out of the accident of even date.

(f) Costs of the suit.

(g) Any other relief that this Honourable court deems fair and just.

2. The Defendant filed a statement of defence dated 20/03/2019 in which it vehemently denied all the singular allegations pleaded by the Plaintiff and further added that the Plaintiff had previously indemnified the Defendant where the subject motor vehicle registration No. KBA 812 K had been involved in an accident and which left no doubt that the plaintiff was aware of the existence of Registered Trustees of the African Brotherhood Church.

3. The Plaintiff called one witness while the Defendant also called one witness.

4. The Plaintiff called its Senior Legal Officer Joseph Mwai who sought to adopt the contents of his statement dated 6/3/2019 and filed on 8/3/2019. He started off by maintaining that the plaintiff is not aware of an entity called African Brotherhood Church as the Plaintiff had no dealings with it. He averred that the Plaintiff had insured the Defendant's motor vehicle KBA 812K vide a comprehensive policy number **010/070/1/006634/1993** which was to run from 10/06/2017 to 9/06/2018. He stated that the said vehicle was involved in an accident on the 20/05/2018 and thereafter investigations were conducted which revealed two new developments namely that the vehicle had been registered in the names of Trustees of African Brotherhood Church and not the Defendant and secondly that the authorized driver Leonard Munyao Kamba Kiiti had a driving license that had expired on 9/4/2009 and which was not valid at the time of the accident. He went on to state that several suits have been lodged against the said Trustees of African brotherhood church by claimants who sustained injuries during the said accident as revealed by the statutory notices served upon the Plaintiff. He further stated that the policy document required that any person driving the insured vehicle must have a valid driving license. He also maintained that the contract of insurance was between the Plaintiff and Defendant and not any other person and that as far as he was concerned the Defendant could not transfer the insurable interest to another entity. He added that a declaration be made in the Plaintiff's favour as they cannot honour the purported claims since the Plaintiff did not insure the said third parties. He sought reliance on the documents (1 – 12) filed by the plaintiff.

On cross – examination, he stated that the insurer relies on the documents supplied by the insured and on the principle of utmost good faith. He further stated that the Defendant did not present the logbook of the motor vehicle. He also confirmed that the Defendant had been their insured for over twenty years and had even indemnified it in the past over the subject motor vehicle. He confirmed that the copy of records shows that motor vehicle KBA 812 K is registered in names of African Brotherhood Church and which is dated 19/08/2018. He finally confirmed that the Plaintiff can only indemnify the Defendant but not third parties.

5. The Defendant called its Executive Director **Erica Nicole Kenny** who sought to adopt her statement dated 20/03/2019. She started off by stating that her organization formed a partnership with African Brotherhood Church in 1974 whereby a covenant was entered into on issues of funding. She stated that some of the funds were used to purchase vehicles which are in the names of the partners such as the African Brotherhood Church. She added that her organization was the one paying up the insurance premiums and that the Plaintiff had always been aware of the arrangement as evidenced by the Plaintiff who indemnified the Defendant over an accident involving the subject vehicle registration number KBA 812 K in 2013. She urged the court to dismiss the suit and order the plaintiff to meet the claims arising out of the accident.

On cross – examination, she stated that she had duly disclosed to the plaintiff the existence of a partnership with the African Brotherhood Church through verbal communication and e-mail. She stated that the driver of the ill-fated car was husband to the Defendants Security Officer Ruth Munyao and that she could not vouch for the validity of the driver’s license. She finally stated that the Plaintiff should not run away from its responsibility but to proceed and settle the claims arising out of the accident.

6. Parties filed written submissions. The Plaintiff’s submissions are dated 7/7/2019 while those of the Defendant are dated 12/07/2019.

7. Learned counsel for the Plaintiff submitted that the Plaintiff is entitled to repudiate the contract of insurance because the Defendant did not disclose that it was not the registered owner of the subject motor vehicle at the time of taking out the insurance policy and further that the driver of the insured vehicle did not have a valid driving license at the time of the accident which actions went against the terms and conditions of the insurance policy. It was submitted that the Defendant did not have an insurable interest in the vehicle as it was not the registered owner. Learned counsel added that the Defendant was under obligation to disclose all material facts to the insurance since insurance contracts are based on the principle of utmost good faith. Learned counsel suggested three issues for determination namely; whether the lack of disclosure of material facts entitles the Plaintiff to avoid the policy of insurance; whether the Defendant breached the insurance policy by allowing a driver to drive the vehicle without a valid driving license; whether the Plaintiff is estopped from avoiding the policy of insurance and lastly who should bear the costs?

On the issue of non-disclosure of material facts, counsel sought reliance in the cases of **UAP Insurance Co. Ltd –Vs- Lemmy Mutua Kavii [2018] eKLR** and **Margaret Nduta Kamiti & George Njenga Njuguna Kamithi –vs- Kenindia Assurance Co. Ltd [2001] eKLR** where it was held that an insured must disclose to the insurer every material circumstances which is known to the insured and if he fails to make such disclosure, the insurer may avoid the contract. It was contended that the Plaintiff is entitled to avoid the policy of insurance and further on the ground that the driver had no valid driving license at the time of the accident.

Finally, it was submitted that the Defendant’s claim of estoppel has not been established since the same was not pleaded. Reliance was placed in the case of **Agricultural Finance Corporation & Another –vs- Kenya Alliance Insurance Co. Ltd & Another [200] eKLR** where the court held that a party who seeks to rely on estoppel must plead it.

8. Learned counsel for the Defendant raised four (4) issues for determination; whether the Defendant has an insurable interest in the subject motor vehicle; whether there was a breach of the insurance policy by the Defendant; whether the Plaintiff is estopped from avoiding the policy of insurance; who should bear costs of the suit?

On the issue of insurable interest, counsel submitted that the Defendant had a partnership agreement between itself and African Brotherhood Church which is the registered owner of the subject vehicle and thus the Defendant is also an owner under the principle of partnership. Reliance was placed in Section 18 of the Partnership Act No.6 of 2012 and it was contended that there arose an equitable interest by the Defendant in the African Brotherhood Church and thus by extension has an insurable interest in the properties of the African Brotherhood Church and further it was submitted that the subject vehicle was used jointly by the Defendant and African Brotherhood Church for its missions and that the Plaintiff had paid out compensation in the past arising out of accidents involving the said subject vehicle.

On the issue of whether there was breach of the insurance policy, it was submitted that there was no such breach because of the fact that the defendant was in partnership with the registered owner who held the vehicle in trust for the Defendant.

As regards the issue of the lack of a valid driving license by the driver of the subject vehicle, it was submitted that the Plaintiff is not entitled to avoid liability in respect of third parties so long as there is a valid insurance policy between the insurer and the insured. Reliance was placed in the case of **New Great Insurance Company of India Ltd –vs- Lilian Evelyn Cross & Another [1966] EA 90** where the Court of Appeal pointed out that it is proper to enforce the purpose and important of the insurance (Motor Vehicle Third Party Risks) Act by providing protection to third parties who receive injuries.

On the issue of whether or not the Plaintiff is estopped from avoiding the policy of insurance, it was submitted that the provisions of Section 120 of the Evidence Act should be invoked to find that the principle of estoppel arises herein and that the said principle had been pleaded vide paragraphs 4 and 10 of the Statement of defence. It was submitted that it would be unfair for the Plaintiff who had been receiving premiums from the Defendant without fail to avoid liability to the third parties who were injured.

9. I have considered the evidence of both the Plaintiff and the Defendant as well as the submissions of learned counsels. It is not in dispute that the Plaintiff provided a motor vehicle insurance policy to the Defendant vide Policy No.**010/070/1/006634/1993** in respect of motor vehicle registration number KBA 812 K. It is also not in dispute that the said vehicle was involved in a road traffic accident on the 26/05/2018 during the pendency of the insurance policy cover. It is also not in dispute that the Defendant did not turn out to be the registered owner of the subject motor vehicle as a new entity known as African Brotherhood Church is the current registered owner thereof. It is also

not in dispute that at the time of the accident the driver did not have a valid driving license. I find the issues necessary for determination are as follows:-

- (a) Whether the Defendant has an insurable interest in the subject motor vehicle registration number KBA 812 K;**
- (b) Whether there was a breach of the insurance policy by the Defendant;**
- (c) Whether the Plaintiff is estopped from avoiding the policy of insurance;**
- (d) Who should bear the costs of the suit?**

10. As regards the first issue, it is noted that the defendant took out an insurance policy from the Plaintiff in respect of motor vehicle registration number KBA 312 K and was thus issued with policy number **010/070/1/006634/1993**. The Defendant has maintained that it had an insurable interest in the said vehicle by virtue of being in partnership with the African Brotherhood Church. An insurable interest has been described in Black's Law Dictionary 10th Edition as:

"A legal interest in another person's life or health, or in the protection of property from injury, loss, destruction or pecuniary damage".

It is thus clear that a person purchasing an insurance policy must have an insurable interest in the property so covered under the policy. Section 94 of the Insurance Act (Chapter 487 Laws of Kenya) provides that no policy of insurance shall be issued on the life or lives of any person or persons or on any other event or events whatsoever wherein the person or persons for whose use benefit or on whose account such policy or policies shall be made shall have no insurable interest. That being the position then it follows that the Defendant ought to have an insurable interest in the subject vehicle. It has however transpired that the subject motor vehicle is registered in name of African Brotherhood Church as per the motor vehicle copy of records as at 10/08/2018. The insurance policy documents availed by the Plaintiff confirms that the insured was the Defendant and not any other entity. Even though the Defendant has sought to rely on a partnership agreement with African Brotherhood Church as giving rise to a partnership and thereby allude to an equitable interest in the properties of the latter, and further that the vehicle had been used jointly for their church missions is not that convincing to me. I have perused the covenant dated 8/4/2007 and find that the same entailed some form of a memorandum of understanding between the defendant and the African Brotherhood church. The same is just an agreement to join hands in the spread of the Gospel of Jesus Christ. There is nothing in the covenant that created rights and obligations as well as ownership of properties. To my mind each entity was to own its properties separately but could be mutually shared upon request as the covenant stated clearly that the parties were required to respect each other's local contexts. The Defendant's witness Erica Nicole Kenny (DW.1) stated in her evidence that her organization provided the funds which were used in the purchase of vehicle which were later registered in the name of African Brotherhood Church. The said witness confirmed on cross-examination that the Defendant does not own any property. She also claimed that the Plaintiff had been aware of the identity of African Brotherhood Church and which were disclosed via verbal and e-mail communications. However none was availed by the Defendant to back the claim. The defence witness sought to rely on a claim form in respect of an accident which took place in 2013 and which contained joint names of the Defendant and African Brotherhood Church. However, I find that was only a claim form and not the insurance policy document and further the insured still remained as Canadian Baptist International (Defendant). As the Defendant is now not the registered owner of the subject vehicle, I find it did not have an insurable interest in the said property. The purported covenant did not give the Defendant rights of ownership. Even if the Defendant provided the funds for the purchase of the vehicle, the moment the same was registered in the names of African Brotherhood Church, the Defendant's claim to ownership even if remotely became extinguished and it therefore cannot claim to have an insurable interest in the subject vehicle.

11. As regards the second issue, it is noted that the Plaintiff has sought to avoid the policy on the ground that the Defendant is guilty of non-disclosure of material facts as well as the fact that the subject vehicle had been driven by a driver who had no valid driving license at the time of the accident. The Defendant on the other hand maintains that it was in partnership with the registered owner who held the property in trust for it. The policy of insurance availed by the Plaintiff shows that the Defendant was the insured and not any other entity. It has now transpired that the registered owner is African Brotherhood Church and not the defendant. There is also no evidence that the said vehicle is jointly registered in the names of the Defendant and African Brotherhood Church. At the time of the insurance transaction, it seems the Defendant did not disclose the fact that it was not the registered owner of the subject car. Even if the Defendant provided funding to African Brotherhood Church pursuant to their covenant, I find it was incumbent upon the Defendant to disclose this crucial fact. It is noted that the receipt of premiums bears the name of the Defendant as the insured and hence had the Plaintiff been made aware of then it could have issued the insurance policy in the name of Africa Brotherhood Church. Further if the Defendant sought to change the ownership then it was expected to inform the Plaintiff to act as appropriate but this was not done. It is not in doubt that contracts of insurance involve the principle of *uberimae fide* (utmost good faith). The Defendant owed a duty to the Plaintiff to disclose this fact so as to enable the Plaintiff to decide whether or not to take up the risk and issue the policy. A perusal of the documents submitted by the parties left no doubt that the Plaintiff knew the Defendant to be the registered owner of the vehicle. Even though the Plaintiff did not do due diligence to establish the ownership of the vehicle, the Defendant was duty bound to disclose all the relevant facts to the Plaintiff so as to enable it decide whether or not to assume the risk. There is no evidence that the logbook or a copy thereof was given to the Plaintiff for perusal. The Plaintiff therefore must have believed and trusted the information given by the Defendant. I find this to have been a material fact relevant in the circumstances. The Plaintiff upon being served with statutory notices from the third party claimants learnt that the registered owner of the vehicle was not the Defendant and hence the present proceedings. In the case of **UAP Insurance Company Limited –vs- Lemmy Mutua Kavii [2018] eKLR** Justice Majanja held as follows:-

"It is a conventional principle that full disclosure should be made to the Insurer of all material facts and circumstances known to the proposer or insured before an insurance cover is issued. An insurer cover relies on the good faith of the insured to disclose all information that is likely to affect its decision on whether to incur the risk. The principle was emphasized by the Court of Appeal in the Co-operative Insurance Company limited –vs- Daniel Wachira Wambugu Nyeri C.A. No. 66 of 2008 [2010] eKLR where the court quoted Bullen and Leake precedents of pleadings 14th Edition Vol.2 which state 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 in Carter –vs- Boehn [1766] Burr 1905** have 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 circumstances in his knowledge to mislead the underwriter into a belief that the circumstances does not exist and to induce him to estimate the risk as if it did not exist. The keeping back such circumstances is a fraud and therefore the policy is void. Although the suppression should have happened through mistake, without any fraudulent intention yet still the underwriter is deceived and the policy is void; because the risk run is really different from the risk understood and intended to be run at the time of the agreement.”

A perusal of the proposal form confirms that the Defendant indicated itself as the registered owner of the vehicle in question. Indeed the Defence witness confirmed in her testimony that the proposal form filled did not indicate Africa Brotherhood Church as the registered owner of the subject vehicle and further confirmed that the Defendant is not the registered owner of the subject vehicle. I find that the Defendant had this information within its knowledge but choose not to disclose to the Plaintiff about it until after the accident had taken place. This was a material non-disclosure as the Plaintiff is now being forced to engage with a stranger over the policy of insurance. It is not sufficient for the Defendant to claim that the Plaintiff had been aware of the relationship between the Defendant and African Brotherhood Church when no such evidence had been given to the Plaintiff prior to the contract of insurance. Under those circumstances the contract of insurance cannot be used to benefit a third party. Suffice to add that the Defendant did not find it necessary to even inform the Plaintiff on the change of ownership of the vehicle so as to enable it to act in its best interest. The Plaintiff who is now besieged with myriad claims from third parties ought to be given an opportunity to exercise its rights under the policy by avoiding the contract of insurance.

It has also transpired from the evidence and documents presented that the driver who was in control of the subject vehicle at the time of the accident on the 26/05/2018 did not have a valid driving license in that the driving license had expired on the 9/04/2009. It is a standard rule that all drivers whether or not authorized ought to have valid driving licenses once they take control of vehicles and hit the roads or thoroughfares. This was no exception to the Defendant’s driver who was expected at all times to ensure that his or her driving license remained valid whenever in control of the subject vehicle. As the driving license was not valid at the time of the accident, I find this was a breach of the insurance policy. Page five of the policy of insurance provided for an authorized driver who could either be the insured or any person driving on the insured’s order or with his permission provided that the person driving holds a license to drive the motor vehicle and is not disqualified from holding or obtaining such license. The terms ‘*license*’ means a license or other permit by the licensing authority or other laws or regulations. It would thus appear that there was a breach of the express terms of the contract of insurance entered between the Plaintiff and the Defendant which then entitles to Plaintiff to avoid the policy.

12. As regards the third issue, the Defendant has maintained that the Plaintiff had been aware of its relationship with African Brotherhood Church when the contract of insurance was entered and as such the Plaintiff should be estopped from avoiding the policy of insurance. It was the submissions of counsel for the Defendant that the issue of estoppel had been pleaded vide paragraph 4 and 10 of the statement of defence on the ground that the Plaintiff knew of the existence of African Brotherhood Church in that it had earlier compensated the Defendant over the same subject vehicle. Learned counsel sought reliance on Section 120 of the Evidence Act which provides as follows:-

“When one person has, by his declaration act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any proceedings between himself and such person or his representative to deny the truth of that thing”.

The Plaintiff on its part maintains that it is not estopped from avoiding the policy on the ground that the Defendant had failed to disclose the true state of affairs regarding the subject motor vehicle. Looking at the rival claims by the parties, I am persuaded by the Plaintiff’s claim that the Defendant had not been candid with it at the time of the contract of insurance as it failed to disclose that it was not the registered owner of the vehicle. The Defendant’s assertion that the past practice had revealed the presence of African Brotherhood Church in its dealings with the Plaintiff is far from the truth since all the premiums had been paid by the Defendant and receipts as well as the policy of insurance indicated in its name. The claims now being made of the existence of a partnership does not help matters since the vehicle is registered in the name of a different entity other than the Defendant. Even though the Defendant appeared to be in control of the funds due to African Brotherhood Church, it was necessary for the Defendant to ensure that the contract of insurance reflected the correct position of who the insured was. It would appear that the conduct of the Defendant has somewhat overshadowed African Brotherhood Church to its detriment. No wonder the Plaintiff only came to learn of the existence of the said entity after the suits were filed. No evidence has been tendered by the Defendant to show that the Plaintiff had by its conduct or otherwise led it to believe that it was aware of the existence of African Brotherhood Church. If anything the Plaintiff appears to be the one who has been misled by the Defendant and therefore the Plaintiff is not estopped from avoiding the policy of insurance as it has no privity of contract between it and African Brotherhood Church. The defence of estoppel is therefore not available to the Defendant to rely upon in the circumstances. The Defendant had the opportunity to present the correct position to the Plaintiff but it did not do so and now must have itself to blame for the turn of events.

13. One of the claims sought by the plaintiff is for a declaration that the insured vehicle had been used for uninsured purposes at the time of the accident. However the plaintiff did not manage to prove the claim on a balance of probabilities.

14. As regards the last issue and in view of the foregoing observations, it is my finding that the Plaintiff has proved its case on the balance of probabilities. The reliefs sought are allowed in terms of prayers a), b), c), d), and f).

It is so ordered.

Dated and delivered at Machakos this 17th day of December, 2019.

D. K. Kemei

Judge