REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

HIGH COURT CIVIL CASE NO. 287 OF 2012

REAL INSUNRANCE COMPANY LIMITED.....PLAINTIFF

VERSUS

BOARD OF GOVERNORS VICTONELL ACADEMY.....DEFENDANT

JUDGMENT

1. **Background and Pleadings**

The plaintiff is an Insurance Company and at all material times was the Insurer of the defendants vehicle Registration Number KAK 096R vide Third Party Insurance cover **No. NKR/MCOM/POL/2022762** commencing on the 28th May 2009 and renewable yearly.

On the 29th July 2011 when the said cover was in force, the vehicle was involved in an accident with another Registration Number KBA 773, a Toyota Matatu and several passengers herein sustained injuries. They sued the defendant as owner of the other vehicle for compensation for the injuries sustained.

2. Upon notification of the accident and claims, the plaintiff denied that under the policy, it was not obligated to settle the 3rd party claims on grounds that the policy did not cover claims when the vehicle was being used for hire as it contravened the policy terms. As a result, the insurance company filed this suit and sought a declaration that it is not bound to pay and/or indemnity the insured, (defendant) against any claim in respect of death, body injury or death of any person arising out of the accident that occurred on the 29th July 2011 along Kericho-Kisumu road involving the defendant vehicle KAK 096 R, and at KBA 778B. That is the claim as stated in the amended plaint dated 21st September 2012.

3. The defendant denied the claim and in is defence dated 4/9/2012 and filed on the 5th September 2012, it was its averments that the policy covered all 3rd party claims from the use of their vehicle for its intended purposes of ferrying school children as its core business. It therefore denied it contravened the requirements of the policy and asserted that the plaintiff is liable to indemnity all claims arising out of the 29th November 2011 accident under the terms the policy.

4. Proceedings in numerous court cases were stayed by an order issued on the 9th October 2013 of the court to await the determination of this suit as to which of the two parties, the plaintiff or the defendant is liable to compensate the claimants for injuries they sustained in the subject accident.

5. **Plaintiff's Case**

The Plaintiffs Evidence was adduced by **PW1 Stephen Mugunyu Mumira** the Manager of the Plaintiff

Insurance Company. He adopted his statement recorded on the 6th August 2012 as his evidence. He produced the Insurance Policy document in respect of motor vehicle KAK 096R (PEx.1) the application for renewal of the policy dated 21st September 2011 (P Ext. 2) and the endorsement on the policy dated 21st December 2011 (PExt. 3) and an Investigation Report by Parilylaw Assessor dated 20/10/2011 as (Pext. 3)

It was his testimony that the vehicle was under cover and on the 21st December 2011 after the subject accident, an endorsement on the Policy was made to extend cover for hire to organized groups (P.ext 1).

Referring to the investigation report the witness testified that the plaintiff was satisfied that the vehicle was hired to another school, St. Verovian school for reward contrary to the terms of the policy.

6. On cross examination, PW1 stated that the 3rd Party Cover given to the Defendants Vehicle was for the use of the vehicle by the defendant school students and not for hire to other schools and cited Section 4 of the police document.

He stated that the vehicle had a right cover but was wrongly used, as the cover had limitations on usage, not to be used by other students or hired out to other schools.

PW1 Evidence was that the vehicle at the time of accident was carrying students of another school in breach of the policy terms and therefore the insurance company is not obliged to pay the 3rd Party claims arising from the wrong use of the vehicle.

7. **The Defendant called one John Waweru Wanyoike as is witness DW1**.

He is the manager of Defendant School. He adopted his statement recorded on 22/4/14 as his evidence. His testimony was that the school board authorized the vehicle to carry St.Verovian students on an academic tour to Kisumu, that it was a special arrangement and the vehicle was being driven by is driver and no money was paid to the school as it was not hired.

He explained that special arrangement was covered under the Insurance Policy as they they were sharing areas of special interest, and that they were operating within the limits of the cover in force.

He further testified that when claims were filed the school forwarded them to the plaintiff who instructed their lawyers to defend them on its behalf, and therefore the decision to avoid the policy was but an afterthought. On cross examination, DW 2 reiterated that the vehicle was not hired and no money reward was received or exchanged.

It was his testimony that the school declared use of the vehicle in the proposal form as ferrying students and staff. He confirmed that the school applied for extension of use of the vehicle after the accident to cover hire by organized groups and other schools, and confirmed the original cover did not include other schools and organized parties.

8. The Headmistress of St. Victonnel Academy **Esther Samoei testified as DW 3.** Her evidence was that they did not hire out the school bus, but had assisted St. Victonell Academy with the bus to take its students to Kisumu, that her school fueled the vehicle and paid allowance to the driver and conductor. The driver of the accident vehicle testified but other than admitting in that he was employed by the defendant, he could not testify on the pertinent issues.

9. Both the plaintiff and the defendant filed written submissions in support of their rival positions. I have read thorough their together with consideration of the recorded evidence. There is no dispute that an accident occurred on the date stated involving the defendants vehicle who was under a 3rd Party cover issued by the Plaintiff company. It is also not in dispute that several people were injured and 3rd party claims filed against the defendant and further that the plaintiff by its lawyers defended them in the various courts. There is also no dispute that the vehicle though a commercial vehicle (Isuzu Bus) was insured for

"own use" not for '**hire for reward**".

10. 'The issues that arise for determination from the evidence from the evidence are:

> ***(a) Whether under the policy No. NKR/M/COM/POL/2022762 the plaintiff company is not obligated to settle the 3rd party claim arising from the subject accident.***
>
> ***(b) Whether the defendants' vehicle was hired for hire for reward to a 3rd party school on the date of the accident.***
>
> ***(c) Whether there was non-material disclosure of the use of defendants vehicle to the plaintiff that would entitle it to avoid and repudiate the insurance policy.***

11. The defendant's vehicle KAK 096R was an Isuzu Bus, a commercial vehicle, but for own use by the defendant Victonell Academy for ferrying is students, and was insured as such under the policy with the plaintiff.

At date of accident, it was ferrying students of another school St. Verovian Academy for an academic tour to Kisumu. The defendants evidence is that it had not hired out the bus to his school, but by a corroborative arrangement, had given out the vehicle to the school and did not receive any reward. The Headmistress of St. Verovian Academy even under intense cross examination denied that her school had hired the vehicle. I have seen the proposal form by Victonell Academy signed on the 28th May 2009 to Real Insurance Company Limited.

On its **Clause 4** – Use of vehicle is shown as carrying pupils, Students and School Staff with a no carriage of passengers. For hire or reward.

In the Motor Accident Report Form, it is stated that at the time of accident the vehicle was being used for carrying students to Kisumu.

12. In the letter of repudiation of claim dated 26th June 2012 by the plaintiff's legal officer to the defendant's Insurance Brokers Fortress Insurance Brokers Ltd, the reason for such repudiation is stated as:-

> ***"Hiring out motor vehicle was contrary to the representations the insured made at the proposal as to use of the motor vehicle –---- the subsequent hiring of the motor vehicle was contrary to the policy we subsequently issued which limited the use to the insured's own use that the motor vehicle had the accident while in the use and direction of a third party hirer renders the policy voidable at our instance."***

13. So was the the vehicle hired out for reward to St. Verovian academy? The plaintiff submits that by fueling and paying the driver's allowance by the defendant amounts to hiring out the vehicle. It is further submitted that non disclosure by the defendant to the insurance company about the corroboration arrangement amounted to material non disclosure. Though admitted by the defendant that the disclosure was not shown in the proposal form, would that be a ground to repudiate the policy? The defendant is of the view that the limitation as to use clause in the policy document did not limit the use of the vehicle to carry the defendant's students only, and cited other **Clause(1)**.

> ***"Use for social domestic and pleasure purposes and the defendant's business or profession and clause (2) use of carriage of passengers in connection with our business."***

14. It is submitted that the said vehicle was being used in terms of the two clauses above(I) and (2) as it was being used for social and educational purposes to carry students for such purpose and not for any other, that the students were not fare paying passengers nor was the vehicle on hire but on the defendants profession, educational purposes, and that the defendant was not limited to carrying students of its school

alone, and therefore there was no breach of the policy terms.

15. It Is Not In Dispute That The Plaintiff Did Not Call Any Evidence To Prove The Allegation That The Vehicle Was Hired Out To St. Verovian Academy For Reward. This Being One Of The Two Main Issues In Contention, I Was Upon The Plaintiff To Present Credible Evidence Of Hirer Of The Vehicle In The Face Of Strong Denial By The Defendant's Witnesses That The Vehicle Had Not Been Hied Out. See Section 107-109 Of The Evidence Act. The Burden Of Prove Lies On The One Who Alleges And Mere Denials Or Allegations without prove remain as such. The limitations on use of the vehicle by the policy cannot, in my view, be interpreted so narrowly as to exclude, as the plaintiff submits, the other "**uses**" stated thereunder, as

> "***use for social, domestic and pleasure, and the Defendants business or profession or use for carriage of passengers in connection with your business."***

16. The policy document in that regard continued that " this policy does not cover use for racing, competition, rallies or trials (or use for any, practice of them). It is evident therefore, for **"Own Use**" purposes, the only limitation by the policy is he above, and not inclusive of the first two above. That is a practical interpretation of the insurance contract as to the user clause.

An exemption clause must be clear and unambiguous for a court to enforce it. **See Securicor Carrier(K) Ltd -vs- Onyango & Another C.A No. 323 of 2012** where it was rendered that a contract of insurance is one of good faith and both parties are bound to declare material facts to each other before the contract is concluded.

17. The proposer is under a duty to disclose the real use of a vehicle and not to make assumptions that the insurer is deemed to know **See Sita Steel Rolling Mills Ltd -vs- Jubilee Insurance Co.(2007) e KLR** where the judge quoting **Mackener -vs- Feldia AG (19670 2 QB 590** stated:

> ***"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..... Disclosure of material facts is therefore of utmost importance when making an insurance proposal as non disclosure will lead to the insurer to avoid and repudiate the policy***."

18. That was the case in the case **Corporate Insurance Company limited -vs Ibrahim Gichuhi Mugo (2015) e KLR** in the case, the insured asked for a cover for a private vehicle when being used for social, domestic and pleasure purposes. The insurance avoided the police because the insured used the vehicle for hire for reward, a use other than that it was insured. The court had that the plaintiff (insurer was no liable to indemnity the defendant for claims arising from an accident by the passengers. The above is not the position in the present case. I have made a finding that the defendant vehicle was not hired out nor was it being used for purposes not declared or disclosed by the insured the defendant.

19. Going back to the proposal form signed by the defendant and upon which the insurance policy was given, on clause 4 the policy did not exclude use of the vehicle for social domestic or for purposes of business or profession. The defendant is a school which is in the business and profession of a school. It did not exclude carrying of passengers in connection with business of the school.

I find that the defendant made total disclosure of the use of the vehicle as required and indeed stated so in the proposal form. I agree with the learned Judges decisions and holdings in **Heritage Insurance Co. Ltd -vs- Alex Migore cited with approval in Day break Ltd -vs- Monarch Insurance Co. Ltd (2013) e KLR t**hat an insurer is not in law obligated to indemnity an insured for an accident loss or damage or liability caused or sustained whilst the insured motor vehicle is issued for purposes outside the purposes for which it was insured.

20. In my considered view the plaintiff has failed to prove to the required standards, a reasonable decree of probability with the evidence it tendered that the subject vehicle when the accident occurred had been hired out for reward, and that the defendant had failed to disclose material facts to the insurer on the use

of the said vehicle so as to entitle it to avoid and repudiate the policy.

As stated in the case **Miller -vs- Minister of Pensions (1947)** and cited with approval in th case **D.T. Dobie & Company Limited – vs- Wanyonyi Hebukati (2014) e KLR**

> ***"If the evidence is such that the tribunal can say, "We think it is more probable than not" The burden is discharged, but if the probabilities are equal, it is not. Thus proof on a balance or preponderance of probabilities means a win however narrow."***

21. It is therefore evident from the above analysis that the issues I set out to determine in paragraph 16 above are answered that the vehicle was not on hired for reward to St. Verovian academy when the accident occurred but was being used on a disclosed use of the vehicle as stated in the policy of insurance. It is a further finding that the plaintiff has failed to make out a strong case against the defendant to entitle it to the relief it seeks by way of a declaration that it is not bound to indemnity the insured, (the defendant) against any claims arising from the 29th July 2011 accident in respect of death, bodily injuries or any claim arising therefrom between the defendants Motor vehicle Registration No. KAK 096R and Motor vehicle Registration No. KBA 773B.

22. For the above reasons, the plaintiff 's case is dismissed with costs.

Dated, Signed and Delivered this 11th Day of May 2017.

J. N. MULWA

JUDGE