



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**CIVIL APPEAL NO. 64 OF 2015**

*(Being an appeal from the Judgment in SRMCC 29 of 2014 M. K. Mutegi - SRM)*

**C.I.C. GENERAL INSURANCE COMPANY LTD.....APPELLANT**

**-VERSUS-**

**JOSEPH WARUI MWANGI.....RESPONDENT**

**J U D G M E N T**

**Introduction**

1. The Respondent, Joseph Warui Mwangi had sued C.I.C. General Insurance Company Limited (Appellant) in the lower court. The claim was in respect of an insurance cover taken out by the Respondent with the Appellant for, vehicle registration number **KBH 926K**, which subsequently sustained damage, allegedly in an accident on 8/3/2013.

2. The Appellant declined compensation to the Respondent alleging that the insurance policy was taken out at a time when the vehicle had already been damaged and was infact a salvage. The Respondent by his suit sought compensation in the sum of Shs 3,000,000/= in respect of the vehicle, and damages for loss of user, calculated at Shs. 5,000/= daily since 1<sup>st</sup> June 2013.

3. The Appellant disputed the claim asserting in their Statement of Defence and counterclaim that liability was repudiated on the basis of material non disclosure of facts, interalia:-

**“a) the Plaintiff had no insurable interest in the vehicle.**

**b) the vehicle was the property of APA Insurance Co. Limited.**

**c) the vehicle was at time of insurance cover lying in accident state at Amazon Motors.”**

4. The Appellants averred that the subject vehicle was sold as “salvage” by APA Insurance Company Limited to Robian Agencies on 18<sup>th</sup> December 2012 for Shs. 250,000/=. The Appellant pleaded entitlement to avoid liability on grounds that “*the said policy was obtained by the Plaintiff through non-disclosure and/or misrepresentation of one or more material facts.....*” Accordingly the Appellant sought declarations that it was entitled to avoid the policy and that it was not liable to make any payment to the Respondent under the said policy.

5. During the hearing, the parties adduced evidence in support of their respective claims. Judgment was entered in favour of the Respondent at the conclusion of the trial. The Appellant’s counter claim was

dismissed.

6. Aggrieved by the decision, the Appellant appealed to this court. The Memorandum of Appeal contains seven grounds of the appeal as follows: -

**“1) The Learned Magistrate erred in law and in fact in failing to appreciate that the Respondent’s suit lacked merit and ought to have been dismissed.**

**2) The Learned Magistrate erred in law and in fact by failing to appreciate and consider the evidence produced by the DW1, DW2 and DW3 and thereby arrived at the wrong decision.**

**3) The Learned Magistrate erred in law and in fact in admitting the evidence of PW1, PW2 and PW3 which contradicted their witness statement filed in Court on 11<sup>th</sup> April, 2013.**

**4) The Learned Magistrate erred in law and fact by speculating as to the condition of motor vehicle registration number KBH 956H at the time the Respondent applied for insurance cover from the Appellant.**

**5) The Learned Magistrate erred in law and fact in failing to attach due weight to Appellant’s evidence and submissions on the main suit and the counter claim.**

**6) The Learned Magistrate erred in law and fact by delivering a judgment that was lopsided and biased in favour of the Respondent and failed to take into serious consideration the evidence adduced by the Appellant.**

**7) The Learned Magistrate erred in law and fact by dismissing the Appellant’s counterclaim.”**

7. The parties agreed to dispose of the appeal by way of written submissions. I note from the Appellant’s submissions that rather than submit under each ground of appeal in the memorandum, the Appellant, in demonstrating that the trial court misapprehended the evidence and acted on wrong principles, proceeded to compress its submissions under four issue heads as follows:-

1) Who was the lawful owner of subject vehicle at the time the Respondent took out an insurance policy.

2) Whether the Respondent at the time had an insurable interest in the subject vehicle.

3) Whether the Respondent misrepresented and/or failed to disclose any material facts on taking out the policy; and consequently whether the Appellant was entitled to avoid the policy.

4) Whether an accident did occur on 8<sup>th</sup> March, 2013.

### **The Submissions**

8. On the first issue, the Appellant submits that, as at 7<sup>th</sup> December 2012 when the Respondent claims to have purchased the vehicle from its previous owner, Jeremiah Mwangi Kagwi, the same was lying at Amazon Motors as a salvage held by APA Insurance Company. That APA Insurance upon indemnifying the previous owner sold the salvage to Robian Agencies at Shs. 250,000/= and releasing it on 17<sup>th</sup> December 2012. Further, that there was no evidence that the said original owner had been allowed to retain the salvage by APA Insurance. The Appellant faults the trial magistrate for placing reliance on a copy of records showing that Jeremiah Mwangi Kagwi was the registered owner of the vehicle in December, 2012.

9. They cited the decision of the High Court (**Muchemi J**) in **Dorcas Wangithi Nderi –Vs- Samuel**

**Kiburu Mwaura & Anor [2015] eKLR** to the effect that a copy of records is only *prima facie* evidence of ownership. The Appellant's main submission on the second issue is captured in the following statements:

**“... ..(It is the Appellant's contention that as at 7<sup>th</sup> December, 2012 when the insurance policy was taken out with them the Respondent did not have any insurable interest in the said motor vehicle ... .. Jeremiah did not have capacity to sell the said vehicle to the Respondent on 4<sup>th</sup> December, 2012 motor vehicle was the property of APA Insurance ... .. If Jeremiah had capacity to sell the said motor vehicle on 4<sup>th</sup> December, 2012, then APA Insurance would not have been able to sell it as salvage to a third party on 17<sup>th</sup> December, 2012.” (sic)**

The Appellant quoted a portion of **Kasango J's** judgment on the concept of insurable interest in **Insurance Company of East Africa –Vs- Wellington Omodho [2005] eKLR**.

10. The Appellant further submitted under the third issue that the trial court erred, having found that the time the Respondent took out cover the vehicle belonged to APA Insurance, by dismissing the counterclaim. Further, that evidence tendered by the Appellant showed the vehicle was a salvage lying at Amazon Motors with a value of Shs 250,000/=, but that the Respondent suppressed these facts in the proposal for insurance cover.

11. Relying on the doctrine of *uberrimae fidei* in insurance contracts as restated in **Margaret Nduta Kamithi and George Njenga Kamithi –Vs- Kenindia Assurance Company Limited [2001] eKLR**, the Appellant submits that the Respondent was in breach of the principle of good faith, by misrepresenting relevant facts and therefore the Appellants were justified to avoid the insurance contract.

12. Finally, on the fourth issue, the Appellant submitted that the accident of 8<sup>th</sup> March 2013 was stage-managed, with the assistance of an Administration Police Officer, IP Wakori, who purported to handle the matter. That the accident was the culmination of misrepresentations by the Respondent in his bid to defraud the Appellant.

13. The Respondent defends the decision of the lower court and attacks the submissions of the Appellant to the effect that the trial court misapprehended the evidence and acted on wrong principles. Responding to the four issues canvassed in the Appellant's submissions, the Respondent argues on the first issue that the defence, through DW2 and DW3 admitted that the material motor vehicle belonged to Jeremiah Mwangi Kagwi, and that, he had capacity to and did sell it to the Respondent at Shs. 2.4 million. Based on the foregoing, the Respondent submits that the Respondent had an insurable interest in the subject motor vehicle. In support he also cited the **Insurance Company of East Africa v Wellington Omodho** (supra).

14. On the question of non-disclosure and/or misrepresentation, the Respondent emphasizes evidence by the Respondent on the state of the vehicle at purchase and his lack of knowledge that the same was a salvage. Thus, his proposal to insure it at Shs. 3 million. The Respondent faults the Appellant for failing to conduct a pre-insurance valuation of the motor vehicle. The Respondent further supports the lower court's conclusion that there was adequate proof that the subject motor vehicle was involved in an accident on 8/3/2013. The Respondent faults the Appellant for failing to argue grounds listed in the memorandum of appeal.

15. Taking the last issue first, it is my view that an Appellant ought to argue as closely as possible the grounds of appeal presented in the memorandum of appeal. In this case however, a part from ground 3, all remaining grounds are general enough to be encompassed within the issues under which the Appellant prosecuted the appeal.

16. I have given due to consideration to the submissions by counsel for the parties. In **Selle –Vs- Associated Boat Co Ltd. [1968] EA 123** the court outlined the duty of the first appellate court as follows:-

**“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally.**

**An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally. (Abdul Hameed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).”**

17. The Respondent’s case through pleadings and testimony in the lower court was as follows. On or about 4/12/2012 the Respondent purchased the subject motor vehicle from one Jeremiah Kaguri Mwangi for Shs 2.4 million. On 7/12/2012 he obtained a comprehensive insurance cover in respect of the vehicle for the sum of Shs. 3 million from the Appellant. He collected the vehicle on 17/12/2012 from Amazon Motors. The collection letter indicated the motor vehicle was a ‘**salvage sold by APA Insurance.**’ He signed the letter as the motor vehicle was mobile and had no indication of involvement in an accident. Thereafter, he continued to use the motor vehicle, but was involved in a road traffic accident on 8/3/2013 at Ol Kalou. Administration Police IP Moses Wakori of Wanjohi attended to the accident and later issued a police abstract. The vehicle sustained serious damage. However, when the Respondent made a claim for compensation to the Appellant, they declined, citing misrepresentation of facts regarding ownership and the state of the insured vehicle at the time of the insurance contract.

18. The Appellant’s evidence was that it was entitled to avoid the insurance contract, on several grounds. They asserted that as at 7/12/2012 when the Respondent completed the insurance proposal form, the vehicle did not belong to the Respondent, but rather, to APA Insurance Company, which company had written off the said vehicle following an accident, and paid off their insured, Jeremiah Mwangi Kagwi.

19. That the APA Insurance Company did not allow Kagwi to keep the salvage. Instead, the vehicle was retained at Amazon Motors and subsequently to Robian Agencies at Shs. 250,000/= on 17<sup>th</sup> December 2012. Thus as at the time of the insurance contract with the Appellant, the motor vehicle was a salvage and incapable of moving. Finally, that the Respondent stage-managed the accident of 8<sup>th</sup> March 2013 for the sole purpose of fraudulently inducing the Appellant to pay the insured sum of Shs. 2.6 million.

### **Common Ground**

20. Some basic facts were not disputed. These include the fact that the subject vehicle was property of Jeremiah Mwangi Kagwi and insured through APA Insurance until late 2012. That on 7<sup>th</sup> December 2012, the Respondent approached the Appellant seeking to insure the subject vehicle which he claimed to own, at a sum of Shs 2.4 million. The proposal was accepted and an insurance cover issued. In March 2013, the Respondent filed a claim for compensation citing an accident that occurred on 8/3/2013. The Appellant instructed an investigator to inquire into the matter.

21. The Investigator’s report indicated that the subject vehicle was a salvage accident vehicle owned by APA Insurance at the time Respondent took out a cover with the Appellant. That subsequently, the vehicle was sold by APA Insurance to Robian Agencies at a sum of Shs. 250,000/=. Basing its right to repudiation on these findings, the Appellant sought to avoid the insurance contract.

### **Analysis and Determination**

22. I have considered the trial evidence and the arguments raised on this appeal. The Respondent’s claim was primarily predicated on his alleged ownership (beneficial or legal) of the subject vehicle at the

material time. The issue whether he had insurable interest can be collapsed therein. As a corollary, the twin aspects of the state of the vehicle at the time of insurance and the subsequent accident in March 2013 come into play.

23. Ultimately, the question to be answered is whether or not the Respondent's claim against the Appellant was payable or, whether as prayed by the Appellant in the counterclaim, liability was avoided arising from the Respondent's alleged breach of the principle utmost good faith through non disclosure of material facts.

#### **Whether the Respondent owned the vehicle and had insurable interest as at 7/12/2012**

24. Regarding the question whether the Respondent held any insurable interest (through beneficial or legal ownership) of the subject vehicle, both parties relied on **Kasango J's** decision in **Insurance Company of East Africa –Vs- Wellington Omodho** where she quoted a passage from **E.R. Hardy Iramy's General Principles of Insurance Law** as follows:

**“In the case of goods, or other property, insurable interest may be based on ownership and this ownership may be either sole or joint; absolute or limited; legal or equitable. Ownership is not, however, necessary; insurable interest may be founded on contract...The fact that the interest of the assured is precarious, and that other persons are entitled at any moment to call on him to hand over the object insured to them, does not, therefore prevent his interest from being sufficient to support a contract of insurance.”**

25. In **Nancy Ayemba Ngaira –Vs- Abdi Ali (2010) eKLR** the court identified various forms of vehicle ownership including actual ownership, beneficial ownership and possessory ownership which may in some instances override the details of ownership in a certificate of registration. In this case, the Respondent based his claim on legal ownership of the subject vehicle at the time of taking out a contract with the Appellant.

26. At paragraph 3 of the plaint the Respondent averred inter alia that:

**“On or about the 7<sup>th</sup> December, 2012 the Plaintiff through the duly appointed agent of the Defendant proposed for an insurance to cover motor vehicle registration number KBH 956K Volvo which he had purchased from one Jeremiah Mwangi .....” (sic)**

27. This averment is disputed in paragraph 3, 6 a & b 11 – 16 of the Defence and Counterclaim, inter alia. The burden lay with the Respondent to prove his averments in this regard. There is a plethora of authorities for the proposition that ownership of vehicles is best proved through a copy of records, pursuant to the provision of Section 8 of the Traffic Act stating that:

**“The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.”**

28. Admittedly, it was not until November 2013 that the Respondent's name entered the registration record in respect of the subject motor vehicle. In **Charles Nyabuto Mageto -Vs- Peter Njuguna Njathi [2013] eKLR** the court stated inter alia that:

**“The courts recognize that there are various forms of ownership..... actual possessory and beneficial, all of which may be proved in other ways, including by oral or documentary evidence.....”**

29. The Respondent herein relied on oral and documentary evidence, the latter consisting mainly of the alleged sale agreement between him and the registered owner of the subject motor vehicle and the acknowledgment of receipt of payment of the purchase price by the said owner. Surprisingly, despite the joinder on this issue by the Appellant, the Respondent did not call the said owner Jeremiah Mwangi Kagwi to give evidence. Being the registered owner of the subject vehicle in early December, 2012 he

was the right person to explain the circumstances in which he sold the vehicle to the Respondent.

30. More so because, there is credible evidence by Consolata Kiura (DW2) that the subject vehicle was written off and remained in the custody of APA Insurance at Amazon vehicles and was sold by APA to Robian Agencies. The insurance documents (D. Exhibit 3), letter of release of salvage (D. Exhibit 4) and official receipt to Robian Agencies (D. Exhibit 5) support the evidence of DW2.

31. In his testimony, the Respondent confirmed that he saw a release letter indicating that the subject vehicle was a salvage, at the time of collection on 17<sup>th</sup> December, 2012. His sale agreement is dated 4/12/2012 (Exhibit 3), the vendor being Jeremiah Mwangi Kagwi and not Robian Agencies. So, how did the vehicle end up with Jeremiah Mwangi Kagwi? At any rate, the motor vehicle was in the custody of APA Insurance at Amazon Motors and had not been sold per DW2. The fact that DW2 conceded that Kagwi had expressed a desire to retain the salvage cannot displace the contents of D. Exhibit 3–5, or explain the circumstances in which Kagwi sold the motor vehicle.

32. Against the documentation by the Appellant, the Respondent relied on documents Exhibit 3 and 4 and oral evidence, by himself and his friend John Irungu Mwangi (PW2) and the broker Samuel Ngure Mwai (PW3). Notably these witnesses assert that the purchase price, all of Shs. 2.4 million was paid in cash. For starters, that is remarkable in my view.

33. Secondly, there is no indication whatsoever that the Respondent had viewed or had the vehicle tested before paying this alleged large sum of money. The Respondent in his evidence stated that:

**“I viewed the car at Amazon Motors on 15/12/2012 and collected it on 17<sup>th</sup> December, 2012. When I came to collect it, Jeremiah sent one of his men with a letter (indicating) the car was a salvage having bought it from APA Insurance. Since what I viewed was a moving vehicle I signed the letter at the exit of Amazon Motors for its release. The vehicle had no indication of any accident/salvage state.”**

34. In cross-examination the Respondent was to claim that the vehicle had been valued at purchase at Shs. 3 million but he did not tender the valuation, and confirmed again to viewing the vehicle at Amazon Motors. There is no evidence that prior to 4/12/2012 the Respondent visited Amazon motors to view the vehicle. Even on 17<sup>th</sup> December the Respondent did not drive the motor vehicle himself, leaving PW2, allegedly, to drive it home. PW2 was not a mechanic and only stated in cross-examination that he would know if a vehicle had a problem. He only saw the motor vehicle on 17/12/2012.

35. Equally PW3’s account does not mention any viewing of the vehicle on or before 4/12/2012 or 17/12/2012. He, like Respondent, asserted that the vehicle was released to them on the basis of a letter from APA saying the vehicle was a salvage. He stated:

**“I was surprised because the vehicle was in moving condition. The seller had told me that it was at Amazon Motors for service. He told me not to be bothered with the APA letter because the vehicle was in moving condition.”**

36. During cross-examination PW3 said he saw the APA letter on collection and that the vehicle had some defects, repaired before the sale and that he was not an expert in the field of motor vehicle mechanics. He claimed in re-examination to have viewed the motor vehicle in November 2012.

37. While PW3’s attitude may be excused his role being that of a broker, with an eye on his commission, the Respondent’s reaction to the APA letter describing his vehicle as a salvage is baffling. He stated that despite the contents of the said letter, he did not question the vendor on his relationship with APA Insurance. His explanation was supposedly the fact that the vehicle was ‘**moving**’ and showed no evidence of damage from accident.

38. In cross-examination he stated:

**“The gear box had a problem prior to my purchasing the vehicle. It was at Amazon Motors for service. The car belonged to Jeremiah not APA Insurance. I believed a salvage is not a moving car.”**

39. I find it unbelievable that a reasonable person indeed an alleged businessman such as PW1 would pay such a large sum of money without seeing the object of purchase. And that even when doubts are raised as to the state of the purchased item he takes no action to reassure himself. The Respondent does not pass as an innocent purchaser for value. There are only two possibilities in light of the foregoing and the evidence by DW2: that there was no sale on 4/12/2012 as purported by the Respondent and who was himself party to a nefarious scheme to lay a false claim, or that Robian Agencies was a proxy for Kagwi and that the true purchaser of the motor vehicle on 17/12/2012 from APA was Kagwi.

40. Either way, no title could have passed from Kagwi to the Respondent on 4/12/2012 or any date before 17<sup>th</sup> December 2012. Little wonder that the Respondent is unable to produce evidence of the source of Shs 2.4 million in cash he allegedly used to pay Kagwi and he also did not call him as a witness or complain against him for selling him a vehicle that has caused him trouble with the insurance company. The trial magistrate relied merely on the logbook on this aspect despite contrary evidence by DW2.

41. The mere fact that the log book was in Kagwi’s name as at December 2012 did not confer any ownership or title on him having surrendered the vehicle to APA Insurance as a salvage. Hence the letter of 17/12/2012 admitted by the Respondent as describing the vehicle to be a salvage of APA Insurance. As DW2 stated, the vehicle belonged to APA Insurance thereafter. Hence the connections between APA and the vehicle, the reference to the motor vehicle as a salvage, which facts the Respondent claims he did not bother investigating. As alluded to earlier, the conduct of the Respondent in relation to the alleged purchase of the motor vehicle and subsequently, as we shall see, is anything but puzzling.

42. In his judgment, the trial magistrate restated the evidence and submissions by the Respondent and the Appellant. I find it instructive to quote the portion of the said judgment on the question of ownership in full. The trial magistrate stated as follows:

**“The plaintiff in his submissions stated that the insured had viewed the Motor Vehicle at Amazon Motors. That it was in good working condition. He did a search and confirmed that the Motor vehicle belonged to one Jeremiah Kagwi Mwangi. That a copy of the log book was produced by DW1 and DW3. That DW2 could not confirm when the insured retained the vehicle. The plaintiff submitted that in the absence of contrary evidence, the vehicle belonged to Jeremiah Mwangi as at 03/12/2012 who duly sold it and signed a sale agreement dated 04/12/2012. The defendant on the other hand, submitted that the sale of the Motor Vehicle Reg. No. KBH 956K was a sham. That the salvage belonged to APA Insurance as stated by DW2. That therefore one Jeremiah Mwangi did not have capacity to sell the same to anyone. That he could not pass ownership to the plaintiff. The defendant further urged the court to take cognizance of inconsistencies in the plaintiff’s evidence and that of his witnesses with regards to the sale and purchase of the said motor vehicle. That in the plaintiff’s statement dated 02/04/2014, he states that he bought the said motor vehicle on 05/11/2012. But according to the statement of PW3, Samuel Ngure Mwai, the plaintiff came to buy the said motor vehicle on 04/12/12 after viewing it the day before. He is the one who brokered the deal. That in the investigation report the statement given by the plaintiff indicates that he bought the motor vehicle in June, 2012 at a car bazaar. That the plaintiff did not furnish the court with evidence of actual payment save for an acknowledgement allegedly signed by Jeremiah Mwangi. That it would have been easier for the plaintiff to furnish the court with a bank statement showing where the money came from and if it was wired to Jeremiah Mwangi and also if the money was paid by cheque. That the plaintiff should have called Jeremiah Mwangi as a witness to testify as to when he sold the motor vehicle, in what condition it was in and how much he was paid for it.**

**That the sale was a sham meant to dupe the defendant into giving the plaintiff the insurance policy.**

**In his testimony, the plaintiff stated that he bought the vehicle from Jeremiah Kagwi on 04/12/2012 for ksh.2.4 M. he produced a copy of sale agreement dated 04/12/2012 and also an acknowledgment receipt. Produced as Exhibit 3 & 4 respectively. PW3, Samuel Ngunge Mwai stated in his testimony that, towards the end of November 2012, he took the plaintiff to the seller. That on 04/12/2012, the plaintiff bought the car and paid Ksh.2.4 M in cash. DW2 in her testimony stated that as at 07/12/2012, the vehicle belonged to APA Insurance. The salvage was sold to Robian Agencies on 18/12/2012. That no one would have been able to access the vehicle. During cross-examination, DW2 admitted that this vehicle was not in the yard where APA Insurance stores salvages. She could not explain why the salvage was not in the yard. That the insured expressed desire to retain the vehicle. It was not shown whether, Amazon Motors is an alternative storage for APA Insurance Co. Ltd for salvages.**

**The fact that this vehicle had not been stored in the yard of APA Insurance, and the fact that, their insured had been allowed to retain the vehicle, the argument that no one would have access to the said vehicle at Amazon Motors does not come up since their insured was allowed to retain the vehicle. It is not probable that he was able to have access to it in terms of showing it to the plaintiff herein with the sole purpose of selling it off. The log book produced in court by the DW2 shows that the vehicle belonged to one Jeremiah Kagwi Mwangi.**

**Therefore, I find that it is not in dispute that the plaintiff purchased the Motor Vehicle on 04/12/2012. This is supported by Exhibit 3 & 4.” (sic)**

43. There was clearly a dispute on the above question and the log book alone could not resolve it as the trial court appeared to hold. The trial magistrate failed to analyse the evidence and submissions in any depth. Had he done so, he would have noted that the Respondent’s submissions were inaccurate in several respects. There was no evidence in the Respondent’s recorded statement on the file or his oral evidence in court that he viewed the motor vehicle before purchase and confirmed it was in good condition or that he conducted a search. There was therefore no confirmation at all on the part of Respondent of evidence by PW3 that the former had viewed the motor vehicle on 3/12/2012. This was a crucial matter requiring more careful attention than it received in the judgment.

44. Secondly, he ignored inconsistencies highlighted in the evidence of the Respondents by the Appellants, in relation to the date of the sale agreement, whether 5/12/2012 (per written statement), 4/12/2012 (per evidence) or June 2012 (per statement to the investigator, DW3). He did not deal with question raised by the Appellant concerning the Respondent’s failure to call Jeremiah Mwangi Kagwi as a witness, to tender evidence of source of money or actual payment.

45. There was further a misdirection that resulted in a conclusion regarding DW2’s evidence that Kagwi was allowed by APA to retain the salvage. The record shows that all DW2 said was that Kagwi had requested to keep it. That does not take away evidence of sale and release to Robian Agencies tendered by DW2.

46. Equally, and tied to the question of APA’s ownership of motor vehicle as a salvage, the trial magistrate dismissed evidence by DW2 that the vehicle was inaccessible to Kagwi without APA’s authority yet found that the vehicle was with APA Insurance “pursuant to a claim”. The Respondent never testified that Kagwi showed him the motor vehicle at Amazon Motors for the “sole purpose of selling it off”. Secondly, the motor vehicle was not sold to Kagwi but to Robian Agencies to whom it was released by APA, not Kagwi on 17/12/2012.

47. Tellingly, the Respondent while referring to the release letter did not produce a copy of such letter indicating release to Kagwi or himself or demonstrate that he actually signed to receive the vehicle. The fact, unfortunately glossed over by the trial court, that the Respondent gave different dates of the purchase of the vehicle to DW3, in his statement and evidence, was a relevant matter for consideration of the question of the sale. It also went to the veracity of his evidence.

48. Indeed the sale agreement exhibited in court as P. Exhibit 3 and acknowledgment P. Exhibit 4

seemingly, existed by the date of filing of the suit in April 2014 and were filed with other documents alongside the plaint. The discrepancies in the date of purchase should have been but were not explained. Thus in my own evaluation, there was no credible evidence before the court to support the trial court's finding that it was "**not in dispute that the Plaintiff purchased the vehicle on 4/12/2012.**"

49. The Respondent's claim to insurable interest having was based on his alleged ownership of the vehicle. The Respondent having failed to tender credible evidence of his acquisition of the motor vehicle could not set up any claim to insurable interest, but it must be said that the alleged act of taking out an insurance cover for a vehicle the Respondent had not seen is anything but incredulous.

#### **The state of the vehicle as at 7/12/2012; Material Non-disclosure and Accident on 8/3/2013**

50. The value placed on the vehicle was Shs. 3 million, attracting fairly high premiums which were tendered to the Appellant. No reasonable person would take up such commitment over a chattel not seen and whose state had not been verified and was indeed described in the sale agreement as sold subject to "*its current condition.*"

51. The photographs Exhibit 5 produced by the Respondent cannot replace a proper inspection report or technical evaluation of the vehicle. Nor is it enough for Respondent to claim he was satisfied merely because it was "moving." I will return to this question next, but suffice to say that no basis was laid for the Respondent's insurable interest in the motor vehicle. His payment of premiums was one of several questionable steps taken alone or in cahoots with Kagwi to ultimately induce payment of claim money by Appellant.

52. Regarding the state of the vehicle as at 7<sup>th</sup> December, 2012, it is an established fact that Kagwi, had been indemnified by APA after the subject vehicle was written off. Seemingly, the Respondent was aware the vehicle had some 'gear' defects well before 17<sup>th</sup> December 2012. If the Respondent's case was that he could not tell the state of the motor vehicle before taking out insurance on 7/12/2012, it is accurate. However, such conduct would be inconsistent with the claim that he had paid Shs. 2.4 million for the vehicle and further blindly paid more by way of insurance premiums even before setting his eyes on the vehicle. Such is hardly the conduct of a reasonable person.

53. Evidence by the Appellant and not controverted by the Respondent shows that the vehicle was a salvage owned by APA and remained as such until 17/12/2012 when it was released to Robian Agencies. There is no evidence that it was ever repaired before then. Thus when the Respondent claims it was in good order and he was therefore satisfied one would require an explanation for its being written off in the first place by APA. The first misrepresentation in my considered view was that the Respondent had purchased the subject vehicle.

54. In the circumstances of this case, the second misrepresentation is necessarily that the vehicle was worth Shs. 3,000,000/= and impliedly a road worthy vehicle. But without a valuation or seeing the vehicle, or even owning it, how could the Respondent vouch that it was a roadworthy vehicle and not a piece of junk?

55. It was submitted by the Respondent's counsel that there was no particular requirement in the claim form for the Respondent to indicate whether or not the vehicle was a salvage on its state for that matter. In this case, the vehicle was pleaded by the Appellant to have been a salvage until 17/12/2012 while the Respondent asserted that it was in a good condition and worth 3 million. It behooved the Respondent to prove his averments through evidence and counter the Appellant's position. I agree with the Appellant that in the instances of this case, the subsequent accident on 8/3/2012 was part of a well choreographed plot to defraud the Appellant.

56. Nothing demonstrates the above more than the fact regular traffic police who are well versed in assessing damage and investigating motor vehicle accidents were not involved. The Respondent did not report to traffic police at Kinangop Police Station, nor obtain an abstract from them. Administration Police Inspector Wakori (PW4) clearly trespassed into an area where he had no competence by purporting

to handle the accident of 8/3/2013.

57. Unsurprisingly, he did not record any statement of the several alleged witnesses and could not give a technical appreciation of the accident impacts on the vehicle. Again, the conduct of the Respondent in managing an accident out which he would to claim compensation is questionable. Why did he not report to traffic police officers at Kinangop? His claim that PW4 got the go-ahead to investigate the accident is not believable.

58. In the absence of credible technical evidence by the Respondent that the vehicle he received on 17/12/2012 was in good condition and the specific damage sustained in the subsequent accident, one cannot overrule the possibility that the defects on the vehicle as at 8/3/2013 had little to do with the accident of 8/3/2013. The vehicle was so badly damaged that it had to be written off. Yet it did not overturn in the “serious” accident of 8/3/2013 described by the Respondent. He did not call any witness to the accident itself.

59. Despite the admission that the Respondent was warned at 17/12/2012 that the vehicle was a salvage, he seemingly did nothing to assure himself of its condition and had allegedly continued to drive the vehicle for two months until the accident date. Even after the accident, he seems to ascribe no blame to Kagwi for selling him a salvage motor vehicle at Shs. 2.4 million and misleading him.

60. Taking the entire conduct of the Respondent into consideration, and the established fact that as at 7/12/2012 he did not own the vehicle he purported to insure, or at all, it becomes evident that the Respondent, possibly in cahoots with Kagwi hatched a scheme through which they would defraud the Appellant. It appears that the Respondent’s role was a major one. He was the one appointed to make representations to the Appellant to induce the issuance of an insurance cover and to actuate the accident that triggered the compensation claim. As indicated earlier, it must be that Robian Agencies were a proxy for Kagwi.

61. On material non-disclosure, the trial magistrate reviewed in a fairly accurately manner several authorities on the question whether the Respondent misrepresented and/or failed to disclose any material facts. Having already concluded that the Respondent had purchased the motor vehicle from Kagwi, he further found that there was no evidence that the Respondent was aware of the condition of the subject vehicle i.e. salvage – at the time of insurance.

62. The conclusions were in part informed by the fact that the trial magistrate failed, with respect, to subject the Respondent’s evidence to close scrutiny. Had he done so, he would have found it unbelievable that the Respondent had actually purchased the vehicle from Kagwi or at all or 4/12/2012 or that the said vehicle was roadworthy. The Respondent’s evidence on these aspects do not stand up to scrutiny. He pleaded certain facts and had the onus to prove them. The trial magistrate in my considered view ignored tell-tale signs in the disclosed conduct of the Respondent that invited a more thorough examination of the evidence in support of his claim.

63. The Appellant’s submissions in this regard emphasise two misrepresentation, firstly, the Respondent’s alleged ownership of the subject vehicle and secondly its state at the time of insurance cover, both being the basis of the Appellant’s disclaimer of liability. They assert, citing **Margaret Nduta Kamithi (Supra)** that due to the non-disclosure and/or misrepresentation on the part of the Respondent, the Appellant was entitled to repudiate liability. The Respondent submit that “*the Respondent offered evidence on record that he viewed the vehicle at Amazon Motors. It was in good moving condition*”, citing the undated photograph P. Exhibit 5.

64. As I have observed earlier, there is no evidence to support the foregoing assertion. The Respondent did not say that he viewed or examined the vehicle which was in good condition prior to collecting it. Nor did he even test drive the vehicle. The stated description of a ‘moving vehicle’ cannot certify the mechanical state of a motor vehicle and no reasonable person would part with Kshs. 2.4 million for a vehicle he has neither seen, tested or had inspected by a person knowledgeable in motor vehicles.

65. Section 10 (4) of Insurance (Motor Vehicle Third Party Risks) Act states:-

**“(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:**

**Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto.”**

66. It is true as argued by the counsel for the Insurer that the doctrine of *uberrimae fidei* (utmost good faith) is inbuilt in contracts for insurance. In the case of **Sita Steel Rolling Mills Limited –Vs- Jubilee Insurance Company Limited [2007] eKLR**, the Plaintiffs took out an insurance cover against loss and damage, in respect of machinery. Subsequently the goods were damaged in floods. The Defendants repudiated liability, for reasons *inter alia*, that at inception, the claimants failed to disclose to the Insurers the existence of a water channel running next to the Insured’s premises, which channel overflowed, leading to flooding, and further, that the claimants misrepresented to the owners that the machinery was stored in an enclosed godown.

67. The Insurer in the above case relied on the holding in the English case of **Carter –Vs- Boehm (1776) 3 Burr 1905** to the effect that Insurance is a Contract based upon speculation and further that:

**“The special facts, upon which the contingent chance is to be imputed, lie most commonly in the knowledge of the Insured only: the underwriter trusts t 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.”** (emphasis added)

68. Maraga J (as he then was) stated in the **Sita** case that:

**“The principle of (*uberrimae fidae*) imposes on the proposer or Insured the duty to disclose to the Insurer, prior to the conclusion of the contract, but only upto 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 Act (1967) 2.”**

69. This is consistent with Section 117 of the Evidence Act which states: -

**“Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence..”**

70. Of course not every undisclosed fact or misrepresentation gives rise to this consequence, and as **Maraga J** went on to state the Insurer has the onus to prove that:

- i) the fact not disclosed was material.
- ii) It was within the knowledge of the Insured.

iii) the fact was not communicated to the insurer.

And, a fact is material if it is one which is likely 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.....*” see **Pan Atlantic Insurance Co. –Vs- Pine Top Insurance Co. Ltd [1994] 3 ALLER 581.**

71. Whether or not the proposal form contained a field requiring the insured to indicate the state of the vehicle does not oust the duty of the insured to disclose the true value based on the known state of the vehicle. It is a matter of common sense that the true value of the vehicle has a direct bearing on its state. By his own evidence the Respondent had not bothered to satisfy himself of the value or condition of the vehicle as at 7/12/2012. He had not seen the vehicle. Thus, if he was not acting fraudently, he was negligent. The state of the vehicle, its ownership are material facts likely to influence the mind of the prudent insurer as to whether he would underwrite the risk or what premium to charge.

72. Another way to restate this materiality for purposes of this case is that the Appellant would not have accepted to assume the risk in respect of the subject vehicle if it became aware the vehicle was indeed a salvage worth a mere Shs. 250,000/=, and on all accounts unrepaired as at 7/12/2012, and secondly that the same was at the time not the property of Kagwi whose log book the Respondent proffered in proof of ownership.

73. Maraga J in the **Sita** case quoted **Lord Lloyd** in the **Pan Atlantic Insurance Co. Ltd** case as follows:-

**“Whenever an Insurer seeks to avoid a contract of insurance or reinsurance on the ground of misrepresentation or non disclosure, there will be two separate closely related questions**

**1. Did the misrepresentation or non-disclosure induce the actual Insurer to enter into contract on those terms?**

**2. Would the prudent Insurer have entered into the contract on the same terms if he had known of the misrepresentation or non-disclosure immediately before the contract was concluded?**

**If both questions are answered in favour of the Insurer, he will be entitled to avoid the contract but not otherwise.”** (emphasis supplied).”

74. Evidently the Respondent did not disclose the facts relating to the state of the vehicle to the insurance company. Infact he could not. Neither could he state openly that the subject vehicle was a salvage owned by APA as at 7/12/2012. I agree with the submission by the Appellants that in the proven circumstances of this case, the Respondent must be deemed to have been aware but suppressed these matters at the time of obtaining insurance on 7/12/2012. Even subsequently, on 17/12/2012 when he claims to have learned that the vehicle was a salvage with a value of only Shs. 250,000/= and owned by APA, he purportedly did nothing. Had he been the innocent he purports to be he would have notified the Appellant of his discoveries forthwith.

75. The trial magistrate appears to have taken the Respondent’s evidence at face value ignoring evidence by the defence and particularly DW2 and DW3 as well as various pointers of incredibility. As I have observed before, a careful review of the evidence exposes the Respondent as a key player in a plot, most likely, with the connivance of Kagwi to defraud the Appellant.

76. Section 119 of the Evidence Act provides that:-

**“The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”**

77. Reviewing the evidence on my part, it is simply not believable that a vehicle written off by APA insurance in November 2012, sold as a salvage on 17/12/2012 was the same one earlier sold to the Respondent in good order at Shs. 2.4 million on 4/12/2012, or at least before 7/12/2012 by the party indemnified by APA. Little wonder that the Respondent could not produce the release letter from APA to enable his receipt of the vehicle and furnish evidence of actual source of Shs 2.4 million allegedly paid to Kagwi or call Kagwi to explain the sale. And he eschewed direct mention of whether or not he viewed the vehicle prior to purchase, leaving that to the broker PW3 to assert casually. The subject vehicle was not sold to the Respondent by Kagwi before 7/12/2012 (or at all). The sale agreement and acknowledgment of receipt (Exhibit 3, 4) are mere 'paper work'.

78. Equally, that the Respondent allegedly left the driving of the subject vehicle from the Amazon Motors to his friend PW2, so that all he would say is that the vehicle was moving and therefore in good order as at 17/12/2012 is incredible. The admitted fact, that the APA letter which facilitated release described the motor vehicle as a salvage, but the Respondent did not subject it to an inspection thereafter but allegedly used it for two months before it crashed in Olkalou is also unbelievable. The only witness to the said accident is a police officer whose duties do not include traffic duties and is therefore incompetent in accident investigations. The "**facts**" relied on by the Respondent do not add up at all and point to an insidious scheme involving the Respondent, Kagwi and/or Robian Agencies to lay a false claim against the Appellant.

79. In dismissing the Appellant's counterclaim the trial court held that the "**defendant wholly relied on the Investigator's Report to refuse to indemnify the Plaintiff herein**". That is not an accurate assessment of the Appellant's evidence at the trial. The defence called the Group Legal officer of the Appellant (DW1), a legal officer at APA insurance (DW2) who confirmed key factual matters raised in the Investigator's Report.

80. The Respondent did not tender cogent evidence in support of his claim, and in particular, proof of ownership of the vehicle as at 7/12/2012, upon which he staked insurable interest in the accident vehicle whose value was Shs. 3 million. For its part, the Appellant brought evidence that totally displaced the Respondent's claims to ownership of the vehicle at 7/12/2012. They proved that the Respondent was guilty of misrepresentation in asserting ownership of the subject motor vehicle as at 7/12/2012; that he suppressed information in his possession that he did not have any insurable interest in the motor vehicle therefore, that as at 7/12/2012 the motor vehicle was a salvage lying at Amazon Motors and owned by APA Insurance Company.

81. Thus, the trial court erred in allowing the Respondent's claim and dismissing the counter claim that was put up the Appellant. Through analyzing the evidence before him properly, the trial magistrate ought to have seen through the web of deceit built up by the Respondent. For all the foregoing reasons, I do allow the appeal by setting aside the judgment appealed from. The Respondent's suit in the lower court is dismissed with costs and the Appellant's counter claim allowed with costs to the Appellant. The Appellant also gets the costs of this appeal. It is so ordered.

82. As a final note, the prayer in the Plaint had sought "**a declaration to compel payment**" against the Appellant yet effectively what the Respondent was seeking was payment of the sum of Shs 3,000,000/=. The term "**declaration to compel**" conflates the idea of a declaration regarding liability and an order for payment. This form of drafting of the prayer introduces ambiguity but is also frequently used, often deliberately to avoid payment of appropriate court fees.

83. The record of the lower court file does not contain a receipt indicating full payment for a claim in the sum awarded, although a decree and warrants of execution issued, after judgment. Such a state of affairs is not acceptable, denying the Exchequer as it does, of much needed revenue by way of statutory court fees.

Delivered and signed at Naivasha this 5<sup>th</sup> day of **October, 2016**.

In the presence of:-

For Appellant : Mr. Chege

For Respondent : Mr. Moseti

Court Assistant : Barasa

**C. MEOLI**

**JUDGE**