REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL SUIT NO. 22 OF 2011

BETWEEN

CHARLES MOMANYI MAGETO ..... PLAINTIFF

AND

THE CO-OPERATIVE INSURANCE

COMPANY OF KENYA LIMITED ……...…DEFENDANT

JUDGMENT

1. The plaintiff, as owner of motor vehicle registration number KAZ 413G Toyota RAV 4 Station wagon ("the Vehicle") filled a proposal form dated 10th September 2008 and was issued with an insurance policy no. 003/070/1/0461113/2007/09 covering the period 10th September 2007 to 9th September 2008 by the defendant.

2. The terms of the policy were that the defendant would indemnify the plaintiff against any loss and damage to the Vehicle and liability to third parties in the event of an accident caused by or through or in connection with the use of the Vehicle in Kenya against all sums which the defendant would legally become liable to pay in respect of the death or bodily injury or any person or damage to property being such liability as is required to be covered by a policy of insurance under the provisions of ***Insurance (Motor Vehicle Third Party Risks) Act (Chapter 405 of the Laws of Kenya)***. The policy contained a limitation that the Vehicle was for, *"Use only for social, domestic and pleasure purposes and by the insured in person in connection with his business and profession …."*

3. On 27th February 2008, during the currency of the policy, the Vehicle was involved in a road traffic accident along the Siaya-Kisumu Road. The Vehicle was extensively damaged and several people were injured and died.

4. After the accident, the plaintiff lodged a claim to be indemnified for the loss of the Vehicle. The defendant agreed to pay him Kshs. 975,000/-, being the assessed loss, on receipt of a duly executed discharge voucher. The third parties involved in the accident sued the plaintiff for damages thus exposing him to execution if the defendant did not indemnify him. Before the defendant could pay the plaintiff for the loss of the Vehicle, it discovered that the plaintiff had breached the terms of the policy. It declined to pay the said sum and repudiated liability under the policy.

5. In the plaint dated 25th February 2011, the plaintiff prayed for the following reliefs;

(a) A declaration that the Defendant is liable to indemnify the plaintiff against the total loss of the

insured motor vehicle registration No. KAZ 413G Toyota RAV 4 Station Wagon.

(b) A declaration that the Defendant is liable to indemnify the Plaintiff against liability to all third parties involved in the road traffic accident on 27th February 2008 involving the insured motor vehicle registration No. KAZ 413G Toyota RAV 4 Station Wagon, and that the Defendant is liable to satisfy all decrees and to pay all the costs of Kisumu HCCC No. 114 of 2008, Siaya PMCC No. 39 of 2008, Kisumu HCCA No. 95 of 2009, Siaya PMCC No. 40 of 2008, Kisumu HCCA No. 96 of 2009 and Siaya PMCC No. 69 of 2009 as well as any other costs and expenses which the Plaintiff should become legally liable to pay.

6. While the defendant, in its defence and counterclaim dated 16th March 2011, admitted that it was obliged to indemnify the plaintiff against third party claims, it stated that it could only do so on condition that plaintiff used the Vehicle in accordance with the terms of the cover and upon full disclosure of all material facts.

7. The defendant admitted that the accident had taken place but averred that it was entitled to avoid liability under the policy on the following grounds;

(a) The Vehicle was being used to carry passengers for hire and reward in breach of the terms of the policy.

(b) That in the claim for dated 18th March 2008, the plaintiff made a false claim that the Vehicle was on its way to Siaya to, *"deliver the parcels and medicine to the motor vehicle's owner's employee"* a fact which the plaintiff knew was false and was intended to deceive the defendant.

(c) That the defendant failed to disclose the fact that the Vehicle was carrying passengers for hire.

8. The defendant therefore contended that it was entitled to rescind and repudiate liability and that it was neither bound to honour the discharge voucher nor indemnify the plaintiff against any suit that had been filed against him. The defendant sought the following reliefs in its counterclaim;

(a) A declaration that the Defendant is and has at all material time been entitled to avoid the policy of insurance number 003/070/1/046113/2007/09 on the basis of breach of the provision therein contained and the grounds that the Plaintiff breached fundamental condition of the policy and failed to observe and fulfil the terms of the policy which were conditions precedent to any liability of the Defendant.

(b) A declaration that the Defendant is not liable to indemnify the plaintiff from any loss and damage to the vehicle and from any liability found against the plaintiff in respect of third party injury claims on the grounds that the Plaintiff breached fundamental conditions of the policy and failed to observe and fulfil the terms of the policy which were conditions precedent to any liability of the plaintiff.

(c) A declaration that the defendant is and has at all material times been entitled to avoid the policy of insurance number 003/070/1/046113/2007/09 apart from any provisions therein contained on the grounds that the plaintiff obtained the policy by representation of facts that were false in material particulars namely that he intended to use the vehicle only for his social domestic and pleasure purposes and failed to disclose a material fact namely that he intended to use it for hire and reward.

9. The plaintiff gave evidence on his own behalf while Lydia Mwangi (DW 1), the defendant's Legal Manager, testified on behalf of the respondent. The issue for determination in this case is whether the defendant is entitled to avoid or repudiate the policy hence determination of the where the burden of proof lies is critical.

10. Under the provisions of **sections 107**, **108** and **109** of the ***Evidence Act (Chapter 80 of the Laws of***

Kenya), the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. Since the policy and the accident was not disputed, it fell upon the defendant to prove the reasons for avoiding or repudiating the policy.

11. DW 1 testified that after the accident, the plaintiff submitted a claim form dated 18th March 2008 in which he stated that, *"I had sent my driver, Charles Bulemi to deliver medicine to my other driver in Siaya, when I was informed at around 9.00am of the accident which occurred …."* The claim form did not indicate that there were any passengers injured because of the accident. After the claim was lodged, the defendant instructed Bright Loss Assessors to investigate the accident and in a report dated 19th June 2008, they confirmed that the vehicle was carrying 5 passengers who had by the time instituted several suits in Kisumu and Siaya Law Courts. While it had undertaken to pay for the loss of the Vehicle and had indeed issued a discharge voucher, DW 1 explained that new information came to its attention when it received the proceedings and judgment in ***Kisumu HCCC No. 114 of 2008 (Stephen Otieno Gwer suing as the personal representative and administrator of the estate of Elga Akoth Onyango (deceased) v Charles Momanyi Mageto and Charles Bukhala Bulemi)***.

12. During the proceedings in that case, which had been instituted by the estate of one of the passengers who had died in the accident, the issue of ownership of the Vehicle was in dispute. It emerged that the Vehicle had been hired by Kemri through a firm associated with the plaintiff known as GEFEMA for the period between 25th January 2008 upto 6th March 2008. The plaintiff, who was the first defendant in that case, denied that he had hired the Vehicle and after hearing the case the trial Judge found as fact the plaintiff had hired the Vehicle to Kemri. In the judgment dated 10th December 2010, Karanja J., dealt with the issue as follows;

> *PW 5 strongly implied that the vehicle had indeed been hired by Kemri/CDC to provide transport services for its staff when it was involved in the accident.*
>
> *Although no written hire agreement was provided by PW 5, the requisition forms proved on the balance of probabilities that there existed an arrangement or agreement between the first defendant and Kemri/CDC for the provision of transport services.*
>
> *Such an arrangement and/or agreement does not necessarily have to be in writing. The requisition forms shows that the arrangement was between Kemri/CDC and Gefema Travels Ltd which is associated with the first defendant. The outfit may as well be a mere business name as there was no production of a certificate of incorporation to prove that the firm is a limited liability company. This court found it difficult to believe the first defendant when he made an attempt to conceal the truth by alleging that the material vehicle was for personal use only and was not used to transport Kemri/CDC staff to their work station in Siaya when the accident occurred.*
>
> *It was unbelievable for the first defendant to allege that the vehicle was involved in the accident when transporting some documents to Siaya. The callous intention of the first defendant to disown his contractual relationship with Kemri/CDC and lay blame for the accident solely on his driver was clearly displayed by his demenour in court.*

13. DW 1 testified that in view of the judgment, she took the position that the plaintiff had violated the terms of the policy by using the vehicle for commercial purposes and that he did not disclose in the claim form that he was carrying passengers for reward. In the circumstance, DW 1 stated that the defendant was entitled to repudiate liability and avoid the policy due to breach of a fundamental term. DW 1 wrote to the plaintiff a letter dated 7th January 2011 informing him that it could not honour the judgment in ***HCCC No. 114 of 2008*** due to breach of policy conditions.

14. When the plaintiff gave evidence, he denied the fact that Kemri/CDC had hired the Vehicle and blamed his driver. He told the court that the documents by Kemri did not show that there was an agreement between himself and Kemri for the hire of the Vehicle. He testified that his position was supported by conclusions reached by Bright Loss Assessors which concluded that the vehicle was used

for private business.

15. I hold that the plaintiff is now debarred from contesting the findings against him in ***HCCC No. 114 of 2008*** by the doctrine of estoppel on record. The doctrine is explained in ***Halsbury's Laws of England (Vol. 16, 4th edition)*** at **paragraph 1503** as follows:

> ***Estoppel of record or quasi of record, also known as estoppel per rem judicatam, arises (1) where an issue of fact has been judicially determined in a final manner between parties by a tribunal having jurisdiction, concurrent or exclusive, in the matter, and the same issue comes directly in question in subsequent proceedings between the parties (this is sometimes known as cause of action estoppel); (2) where the first determination was by a court having exclusive jurisdiction, and the same issue comes incidentally in question in subsequent proceedings between the parties (this is sometimes known as issue estoppel); (3) in some cases where an issue of fact affecting the status of a person or thing has been necessarily determined in a final manner as a substantive part of a judgment in rem of a tribunal having jurisdiction to determine that status, and the same issue comes directly in question in subsequent civil or criminal proceedings between any parties whatever".***

16. In this instance, the issue of whether the plaintiff has hired the Vehicle to Kemri was heard and determined in the judgment in ***HCCC No. 114 of 2008***. It cannot be reopened and determined afresh. Based on those findings, the defendant was entitled to conclude that the Vehicle was used for hire or reward contrary to the conditions of the policy, that the plaintiff failed to disclose in its proposal form that the Vehicle would be used to carry passengers and that at the time of the accident the Vehicle was carrying passengers for hire and was thus being used for uninsured purposes.

17. The plaintiff suggested that the defendant ought to have known of the omission in the claim form and that the initial investigation by the defendant's own investigators absolved him from any breach of the policy. I reject this suggestion. The facts relating to breach of the conditions, non-disclosure of material facts and concealment of material facts by the plaintiff only came to light in the judgment. The duty disclose material facts is a fundamental duty in an insurance contract. Once these facts, including the fact that the plaintiff had used the Vehicle for hire and reward contrary to the terms of the policy, came to the attention of the defendant, it was entitled to repudiate the contract (see ***Day Break Ltd v The Monarch Insurance Co., Ltd*** **Milimani HCCC No. 225 of 2007 [2013]eKLR** and ***Heritage Insurance Co., Ltd v Alex Migore*** **ELD HCCC No. 173 of 2002(UR)**).

18. In short, the plaintiff's evidence cannot surmount the clear findings of a court of law that lead to the inextricable conclusion that he breached the policy. He has not demonstrated that he is entitled to judgment. His suit must fail and is dismissed. Conversely, the counterclaim by the defendant succeeds. I grant the declarations sought in the counterclaim as prayed.

19. The plaintiff shall pay the defendant's costs of the claim and counterclaim.

DATED and DELIVERED at KISUMU on this 5th day of December 2016

D. S. MAJANJA

JUDGE

Mr Moses Orengo, Advocate for the plaintiff.

Mr Peter Karanja, Advocate for the defendant.