



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 96 OF 2004

HALIMA ABDINOOR HASSAN

JELLE SHEIKH AHMED and

ABDIKHEIR SHEIKH AHMED

(suing as the Administrators of the Estate of

ABDULLAHI SHEIKH AHMED (Deceased).....PLAINTIFFS

Versus

CORPORATE INSURANCE COMPANY LIMITED..... DEFENDANT

JUDGMENT

Liability under Insurance contract

[1] This suit was initiated by the Plaintiffs by a plaint dated 13th February, 2014. The Plaintiffs are the administrators of the estate of Abdullahi Sheikh Ahmed, deceased. The Plaintiffs' claim against **CORPORATE INSURANCE COMPANY LIMITED**, the insurer, is for:-

- (a) The sum of USD 1,000,000 (Kshs. 90 million) together with interest at commercial rates from due date until payment in full;
- (b) General damages for breach of contract together with interest
- (c) Costs of the suit and interest at court rates; and
- (d) Any other relief that the court deems fit and just.

[2] The Plaintiffs' claim is founded on alleged breach of contract of insurance arising out of an aircraft insurance policy No. AVN/901/0073/96 taken out upon aircraft known as BEECH KINGAIR 200, Registration Number 5Y-BIW, Serial No.BB-782 and manufactured by Beech Aircraft. The Plaintiffs' contention is that, the deceased, Abdullahi Sheikh Ahmed who died on 17th September, 1997 was the registered owner of the insured Aircraft and paid all the premiums on the policy. See the certificate of registration issued on 4.4.1997. Under the policy, the insurer was to pay for any loss or damage to the insured aircraft arising from fire, explosion or impact of the aircraft with an external object arising from

such cause.

[3] According to the Plaintiffs' witness, the aircraft was insured by the Defendant for the first time on 8th November, 1996 vide policy No AVN/901/00073/96. The policy was for the period of one year. The policy was then renewed for the period starting from 7th November, 1997 to 7.11.1999. They argued that the Insurance premiums were paid yearly in the sum of Kshs. 3,242,507/=. The insured sum insured indicated in the policy document was US\$ 1,200,000 but expressed in the policy document as Kshs. 60,000,000. See page 8 of the Plaintiffs list of documents. The Plaintiffs stated that the evidence to show that the premiums were paid in full is the receipt for Kshs. 640,000/= paid on 24th August, 1999 to the Defendant's agent, Utmost Insurance consultants. The payment was described in the receipt as "being payment of Insurance". The receipt is also in the name of the insured.

[4] But the Plaintiffs find to be quite curiously that, although the policy was taken out in 1996, the proposal form for the cover was indicated to have been made on 7th January, 1997 and the proposal is Tristar Aviation Limited. See page 4 of the Defendant's List of Documents.

[5] On 20th September, 1999 while the policy was in force, the aircraft mysteriously got burned and was completely destroyed by an explosion. As a consequence, the Plaintiffs are convinced that they became entitled to full indemnity from the Defendant under the policy. The Defendant received the Plaintiff's claim, but declined to honour it. The disclaimer of liability was mainly on two grounds;

1. Lack of contractual capacity by the insured and
2. Malicious act by the insured and /or his agents.

[6] The Plaintiff took issue with the Defendant's claims that; first, the proposal form for this policy is dated 7th January, 1997 after the policy had come into effect. Secondly, from the Defendant's own documents, the proposal form was not completed by the insured but by a third party by the name Tristar Aviation Limited. The Defendant was not able to tell this Honourable court the relation between the proper and the registered owner of the aircraft. The Defendant's contention is that the insured Buraq Sheikh Ahmed was a minor. According to the Plaintiff, the Defendants bore the onus of proving that the insured was a minor. They did not call or avail any evidence to proof the age of the insured. He, who alleges a fact, must prove it. But even assuming that Buraq was a minor, she was not the registered owner of the aircraft. The Plaintiff quipped; why didn't the Defendant at the stage of entering into this contract with the Plaintiff inquire as to why the aircraft was being insured in a different name other than the registered owner?

[7] The Plaintiff was adamant that, by its own conduct, the insured received premiums for the aircraft from a person other than the registered owner, and should not be allowed to suddenly wake up after a claim has risen to purport to disclaim liability. The Defendant by its own conduct connived at and acquiesced to the issuance of the policy in the name of the purported minor. The Plaintiff asserted that the Defendant should, therefore, be estopped from disclaiming liability on the ground of lack of capacity of the insured.

[8] It is the Plaintiff's contention that the damage to the aircraft was covered by the policy. Page 5 of the Defendant's own documents states at paragraph 2 as follows;

Loss of Damage to Aircraft while on the ground –

“the insurers shall not be liable to pay for, replace or make good, wear and tear, gradual deterioration, structural defect, electric, hydraulic or mechanical breakage or breakdown or loss of damage arising therefrom OTHER THAN loss or damage caused by fire explosion or impact of the aircraft with an external object arising from such cause”

The Plaintiff's says that it is too late for the Defendant to avoid paying for a risk that was covered under the insurance policy. The Plaintiffs urged the court to carefully examine the General Exclusions,

especially paragraph 8 of the Insurance Policy (page 6 of the Defendants List of Documents) to see that it does not support disclaimer of liability as argued by the Defendants. According to the Plaintiffs, the clause shows, otherwise. Paragraph 8 states as follows –

“This policy does not cover claim ... from loss or damage attributable to the willful and malicious act of the insured or of any agent or servant of the insured or other person under the control of the insured acting within the scope of his employment and authority.

[9] Therefore, the Plaintiff submitted that the Defendant failed to prove any malicious action on the part of the insured or that any person was responsible for the alleged burning of the aircraft. It is not enough to speculate that it must have been the Plaintiff who was responsible for the fire at Wilson airport where the aircraft was parked. The Plaintiffs averred that Wilson Airport is a very secure area. Security at the airport is tight as there are many aircrafts and idlers cannot be allowed to roam to the airport at will. Also, nobody was arrested in connection with the burning of the aircraft from 1996 to date. The Plaintiffs stated that not a single member of the insured’s family was shown to have been connected to this incident. The Plaintiff said that they adduced enough evidence in support of their claim and concluded that the Defendant breached the policy by refusing to pay. The Plaintiffs also noted that they denied any involvement in the destruction of the aircraft.

[10] The Plaintiffs took issue with the fact that the Defendant called three witnesses who were mostly loss adjusters, hired and paid by the Defendant. They stated that DW1 – Adrew Ngoya Wasike although an employee of the Defendant as an Assistant General Manager joined the Company long after the cause of action herein arose. He produced documents done by third parties most of whom did not come to give evidence in this case. They submitted that DW2, carried out investigations in this matter and concluded that there were too many owners of the aircraft without producing any evidence of the purported other many owners of the aircraft apart from the only registered owner of the aircraft- the late Sheikh Ahmed.

[11] They did not stop there. They said that DW3 was an investigator but he told the court that there was no independent evidence to show the plane was blown up and by whom. According to the Plaintiffs, DW3 only stated without evidence that in the course of his investigations he learnt from Wilson Airport Police station that somebody of Somali origin had been driven to the airport. This should be seen within the fact that Wilson Airport is a very secure place. And on the basis of this conjecture which has no factual basis or support from independent evidence, DW1 nonetheless concluded that the explosion was a malicious act. The Plaintiffs were convinced that all the investigation reports submitted to this Honourable court by the Defendant have not shown that the destruction of their aircraft was malicious act by the insured or his agents or servants. They asked; if there were many people claiming ownership of the aircraft, why did the investigations conclude that it was only the insured who was responsible for its destruction? Any of the other purported claimants to the aircraft could have wanted it destroyed.

[12] The Plaintiffs cited case law as well as eminent literary works to support their case. For instance, ***Halsbury’s Law of England Fourth Edition Vol.16*** para 1609 writes–

“...thus the acceptance of premiums with the knowledge of circumstances entitling the insurer to avoid the policy stops him from averring that for that reason it is not a valid policy”.

The insurer accepted premiums from a person who was not the registered owner of the aircraft. It is estopped by conduct to insist that the policy was not valid.

Again, they cited the case of ***Spiro vs. Lintern & others (1973) 3 Au E.R. 319*** on promissory estopped where the court held, inter alia,

“In the circumstances the Plaintiff had been induced by the first Defendant’s representation to act to this detriment in that he had been put to expense in employment of his solicitor in the conveyancing work in connection with the purchase. It followed that the first defendant was estopped from asserting that the contract had been entered into without his authority and the Plaintiff was entitled to specific performance”

On that basis, the Plaintiffs urged the court to have the Defendant estopped from repudiating liability after it continued receiving premiums from a person other than the registered owner of the aircraft. They also urged the court to find and hold that the Plaintiffs have proved their case on the balance of probabilities and enter judgment in their favour.

The Defence case and

[13] The Defendant denied the Plaintiffs' claim and filed defence dated 10th June 2004 which was amended on 14th June 2004. The Defendant submitted that, the parties filed a Statement of Agreed Issues on 7th August 2006. The court is only obliged to consider the issues that arise from the pleadings and make a determination thereof. Anything else not pleaded and which does not form part of the issues before the court is not a matter in issue and is not to be determined by the court.

[14] The Defendant stated that the Plaintiffs called only one witness, **Jelle Sheikh Ahmed** to testify. His testimony was basically in consonance with the witness statement filed in court on 19th April 2012. The Defendant noted that the witness admitted in his testimony that the insured, **Buraq Sheikh Ahmed**, was the deceased's daughter, aged 5 years at the time the contract was entered into. It is therefore erroneous for the plaintiffs to submit that the age of the insured was a fact in issue and ought to have been proved by the defendant. This fact was admitted and cannot be in issue. See Section 107 of the Evidence Act. The witness also admitted that the premiums regarding the aircraft insured used to be paid by the deceased and he was not certain whether the policy was in force or had lapsed by the date of the incident being the 20th September 1999.

[15] But the defendant called three witnesses to testify namely, Messrs. **Andrew Wasike, Chris Gitimu and Jonathan Mwalili**. And looking at the evidence by both parties, the Defendant was of the view that the Plaintiffs have not made out a prima facie case with any probability of success due to the following:-

(a) Privity of Contract: -

The Insurance Contract, Policy Number AVN/901/00073/96 that is the subject of the suit was entered into between BURAQ SHEIKH AHMED (the Insured) and the Defendant. The Defendant was never in contractual relationship with the Plaintiffs. The Plaintiffs are merely strangers to the Insurance Contract and therefore cannot lay any claim on the basis of that contract. The claim fails on that basis.

a. Insurable Interest and Subject Matter of Insurance: -

The policy of Insurance was effected on 8th November 1996. The proposer for the insurance on BEECH KINGAIR 200 Aircraft Number 5Y-B1W, serial number BB-782 was BURAQ SHEIKH AHMED. The insurable interest in this case was thus expressed to be for **BURAQ SHEIKH AHMED** and not anyone else.

(c) Utmost Good Faith (Uberrimae Fides):-

(i). The Proposal Form – In Insurance Law, the duty of utmost good faith and disclosure is placed on the Insured. This is based on the fact that the Insured is the one in possession of all information about the risk proposed for insurance. Such information cannot be imputed upon the Insurer because the Insurer relies on the Proposal Form. See the case of **Newsholme Bros. v Road Transport and General Insurance Co. Ltd (1929) All E.R. Rep. 442**. The Insured takes the statements and answers in the proposal form to be truthful and accurate; the Proposal Form is the basis of, and form part of the Contract between the parties and is deemed to be incorporated into the Policy; and the Insured accepts a Policy subject to the terms, conditions and exclusions prescribed therein.

(ii. Non-disclosure, concealment and misrepresentation of material facts to the Insurer gives the Insurer the right to avoid the Contract at the instance of the Insurer regardless of when such non-

disclosure, concealment or misrepresentation is discovered. After such discovery, the time taken by the Insurer to decide whether to avoid or affirm the policy does not amount to a waiver of right to avoid the Contract. See **Newsholme Bros. vs. Road Transport and General Insurance Co. Ltd (Supra)** and also **Kamithi and another versus Kenindia Assurance Company Ltd, [2001] eKLR.**

Had the Plaintiff disclosed that: the Proposer was a minor; the aircraft was not registered in the Proposer's name; the Ownership of the Aircraft was in dispute; and the Aircraft was grounded due to Court Order; the Defendant would have declined to give insurance for the Aircraft.

(d) Capacity to Contract: -

The parties to a contract of insurance must have the legal capacity to enter into a binding contract. The Plaintiff deliberately misled the defendant to enter into contract with a minor who did not have capacity to contract whilst knowing the aircraft was not registered in the Insured's name.

(e) The Doctrine of Estoppel: -

The Defendant did not know prior to the loss of the aircraft that: 1) the Insured was a minor; 2) Insured (**Buraq Sheikh Ahmed**) and the plaintiffs were not the registered owners of the aircraft at the time of taking out the insurance and therefore did not have insurable interest. The deceased never disclosed he was communicating with the defendant on behalf of the minor which in itself was deceitful; that the aircraft ownership was involved in dispute and three cases were on-going in Court (HCCC No.491 of 1997, HCCC No.351 of 1997, and HCCC No.1248 of 1999); the first two had been filed before the date of loss (21.09.1999) and the third one was filed on 23.09.1999 after the loss.

[16] According to the Defendant, the above vital information was not within the knowledge of the defendant, and so it would be unreasonable to assert that the defendant had consented to the circumstances and should be stopped from repudiating the claim. See the case of **Moorgate Mercantile CO. Limited vs. Twitchings [1977] A.C 890.** The plaintiffs are stopped from holding such a position. The question whether the information that "Insurance Agent knows could be imputed upon the Insurers was settled in the case of **The Motor Union Co Ltd v AK Damba.** The Court declined to follow the argument by the Insured and relied on the case of **Newsholme Bros. v Road Transport and General Insurance Co. Ltd (Supra)** that the Insurer only had information that was in the proposal form and this was the basis upon which the insurance contract was made. Greer, L.J further observed that, the acceptance of the premium cannot be regarded as an agreement to vary the contract by inserting in it a promise to indemnify the assured if the statements contained in the proposal form are untrue, nor can the Company be said to be estopped by the receipt of the premium from relying on the contract under which the premium was paid."

[17] The Defendant also relied on the case of **Kamithi and another v Kenindia Assurance Company Ltd, (Supra)** that the Insurance Company could avoid the Life Insurance Policy where the deceased insured had not disclosed to the Insurance Company that he had a private doctor for his heart condition and that had been treated for pneumonia prior to applying for insurance. The court observed that non-disclosure or concealment or misrepresentation of material facts did not have the effect of automatically voiding a contract of insurance, but its effect was to make the contract voidable at the instance of the Insurer. If and when the Insurer became possessed of all material facts entitling him to avoid or repudiate the Policy for reason of non-disclosure, concealment, or misrepresentation of material facts, he would be entitled to elect to avoid or affirm the contract at once, or to have a reasonable time to weigh his options. If he opted to delay his election, the delay per se would not have the effect of vitiating his right to avoid or repudiate the contract.

(e) Proximate Cause: -

A Contract of Insurance promises to pay indemnity to the Insured for loss of the subject matter of

insurance on the happening of a stated event: The event must be the real single cause, or real nearest cause if several causes operate concurrently and must not be an excluded event. In this instance, the policy covered “.....accidental loss of or damage to the aircraft as described in the Schedule.....whilst the aircraft is: In flight; on the ground; Taxying; Moored.

Provided that loss or damage “caused by fire, explosion or impact of aircraft with an external object...” See Section 1 of the policy – Loss or damage to aircraft at page 5 of the defendant’s bundle of documents.

In this instance, the aircraft was parked in the apron area due to a grounding order of the Court. The aircraft did not come into contact with any external object. Consequently, the cause of loss fell outside the scope of perils covered by the Policy. The defendant, therefore, beseeched the Court to find and hold that the claim is not payable due to the operation of an excluded peril.

[18] Based on the above submissions, the Defendant responded to each and every issue framed by the parties. Their submissions will be discussed in the determination. But the overall impression they make out of the entire submission is that the contract of insurance herein was null and void for it was contracted by a minor and was dogged with non-disclosure of material information on the age of the age of the insured and particulars of ownership of the aircraft, including the various disputes on ownership of the aircraft. They also submitted that the loss was willful and malicious act which was not covered by the policy. Finally, the submitted that the claim herein was already expired by effluxion of time and in any event premiums had not been paid as required and the policy had been cancelled thereto. On those grounds they are not liable to compensate the plaintiffs for the loss of the aircraft. They cited the cases of **Coast Bus Services Ltd and Sisco E Murunga Ndanyi & 2 others C.A.C.A. 192 of 1992** and **Peter Mwangi Mbutia v Samow Edin Osman [2014] eKLR**. The plaintiffs are not entitled to damages for breach of contract and they cited **Dharamshi v Karsan [1974] ea 41** and **KCB Ltd v Stephen Mukiri Ndegwa & Another [2014] eKLR**.

THE DETERMINATION

Issues

[19] A total of 12 issues were framed by the parties for determination as follows:-

- i) **Whether the plaintiffs’ are the administrators of the Estate of the late Abdullahi Sheikh Ahmed?**
- ii) **Whether the deceased was the registered owner of the aircraft Beech King Air 200 Registration Number SY-BIW Serial Number BB0782?**
- iii) **Whether the policy of insurance was taken out and or signed between the deceased and the defendant or between the defendant and one Buraq Sheikh Ahmed?**
- iv) **Whether the said Buraq Sheikh Ahmed was a minor and incapable of entering into contract and whether the insurance contract is void *ab initio*?**
- v) **Whether the renewed policy lapsed on 8th August 1999?**
- vi) **Whether the plaintiff or the deceased paid any premiums to the defendant?**
- vii) **Whether the policy of insurance was in force on 20th September 1999?**
- viii) **Whether the fire explosion was excluded from the policy cover of the aircraft?**
- ix) **Whether the plaintiffs have any cause of action against the defendant?**
- x) **Whether the defendant is liable under the policy to compensate the plaintiffs a claimed**

or at all?

xi) **Whether the plaintiffs' claims are barred by effluxion of time under General Condition 9 of the policy?**

xii) **Damages**

[20] Issues 1 and 2 are not in dispute. The Plaintiffs are the administrators and personal representatives of the deceased, ADBULLAHI SHEIKH AHMED. And the deceased was the registered owner of the insured aircraft in question. Certificate of Registration was produced as exhibit. All the other issues are contested and I will determine based on the evidence and the law. I have analyzed and considered all the evidence-documentary as well as oral, and make the judgment here below. But in reaching the ultimate question on whether the plaintiffs can sue on the insurance contract herein, as a matter of good order, I should start with matters around the inception of the policy herein, that is, the proposal form.

Parties to the insurance contract

[21] I note the names Baraq and Buraq have been used in the documents presented in court. Nonetheless, the two names refer to one and the same person **Buraq Sheikh Ahmed**. In these proceedings, I will use the name in the policy which is **Buraq Sheikh Ahmed**. As a general rule, only parties to a contract can enforce it. Third parties are kept at bay unless they fall within the accepted exceptions provided in common law and statutory law. In this case, arguments on Privity of Contract make a lot of sense. The Defendant argued that the documentary evidence produced in court and the oral testimony of the witnesses show that the insured was **Buraq Sheikh Ahmed**. And, therefore, to them the Plaintiffs cannot sue on the said contract of insurance. The Plaintiffs on the other hand claim that the insurer received premiums and should be estopped from disclaiming liability.

[22] On my part, the policy document shows that the insured was **Buraq Sheikh Ahmed**. But, policy No AVN/901/0073/96 was taken out upon aircraft known as BEECH KINGAIR 200, Registration Number 5Y-BIW, Serial No.BB-782 and manufactured by Beech Aircraft. The registered owner of this aircraft is the deceased, on whose estate these proceedings are brought. And from the evidence produced, all future dealings as well as payments of premiums were done in the name of the insured, Buraq Sheikh Ahmed. But, astounding events; some communications although in the name of **Buraq Sheikh Ahmed** were signed by the deceased. For instance, the letter dated 14th March 1997. Other letters, for example the one dated 31st July 1997 was purportedly written and signed by **Baraq Sheikh**. It has now emerged from the evidence that the said **Buraq Sheikh Ahmed** was a minor aged 5 years at the time of taking out the insurance policy herein which compounds the problem. What do parties say about this fact?

[23] The Defendant submitted that since the insured was a minor aged five years, she was incapable of entering into a contract and on that basis; the contract was void *ab initio*. They also argued that there was no disclosure made by the deceased that the contract was entered into for the benefit of the minor. The Plaintiffs, on the other hand, argued that the Defendant received premiums from a person who was not the registered owner of the aircraft to cover the insured aircraft and so they are estopped from denying liability. Here there are issues on acceptance of premiums, disclosures in the proposal form, and the capacity of the minor to enter into an agreement arise. A proposal form is the basis for the insurance policy as it provides vital information on the insured and the property insured. It carries questions which ordinarily require candid answers and any non-disclosure or concealment of material information or facts would entitle the insurer to disclaim liability. The proposal produced before court was filled in by Tristar Aviation Ltd on 7th January 1997. The Plaintiffs said they were shocked to see that the proposal was dated 7th January 1997 instead of 7th January 1996. That notwithstanding, the proposal named **Buraq Sheikh Ahmed** as the insured. The policy of insurance herein as evidenced by the policy document produced by the plaintiffs, also shows that the insured is **Buraq Sheikh Ahmed**. The policy produced runs from 08.11.96 to 07.11.99. PW1 insisted that the proposal was filled through Utmost Insurance Consultancy and a Mr. Gikandi was the link person. Indeed the policy document in the schedule indicates the agent to be Stanley Gikandi. PW1 told the court that on expiry of the cover on 7th November, 1997,

the deceased renewed it for another period from 8th November 1998 to 7th November 1999. But PW1 took out a temporary cover on the aircraft when he realized that the name of the insured was different from that of the registered owner, and he withheld payment of premium for some time as he waited for the error to be rectified. Meanwhile, he was later advised to pay the premium to avoid a lapse as the error was being rectified. He paid and was on cover for the period of 8th November 1998 to 7th November 1999.

[24] The Defendant is relying on the doctrine of *uberimae fidei* and non-disclosure to disclaim liability. The insurance law has also developed like any other limb of law, and an insurer bears some obligations also to follow through on a path which is diligent. I have carefully examined the proposal form and it contains parts where details on the insured are required. Prominently also, the proposal requires details of the aircraft to be insured including ownership. Naturally, when the proposal form was submitted, the Defendant as a diligent insurer ought to have realized that the details on the age of the insured were missing. Again, the details on ownership of the aircraft are conspicuously missing. Good faith cut both ways and it would be contrary to the law for an insurance to issue a policy on such scanty information without any documents of ownership and identification of the insured. Any insurer would be interested in these details if it attaches any weight to the requirements of the principle of insurable interest. Therefore, while the Defendant argues its case, it ought to have occurred to them that they are not beyond reproach. These facts are important in adjudication of cases.

[25] I have examined the evidence and documents produced and the veracity of witnesses. The Endorsements by the Defendant at page 12 and 38 of their documents show that the policy was renewed for a period of one year starting from 8th November, 1998 to 7th November 1999. The agency is referred to as Stanley Gikandi. There was back and forth on the repayment of premiums in this matter but it appears that after discussions between the parties the premiums were paid. See documents appearing at pages 23 to 41 of the Defendant's documents. It is only the letter dated 21st October 1999 at page 41 of the Defendant's documents which alluded to:-

“...On perusing our records we appear not to have received the fourth premium instalment which was due on 8th August, 1999. Consequently under the terms of the policy, cover lapsed on that date.”

The record shows premiums were paid in full and there was cover on the aircraft in force at the time of the accident.

[26] But the question on the insured still lingers. The policy was in the name of **Buraq Sheikh Ahmed** and not the deceased who was the registered owner of the aircraft. In law, a minor may not have capacity to enter into a contract. But, he can do so through legal guardians or trustees. From the evidence, the Deceased was the father of the minor herein and the possibility of a trust is not remote. I have noted that some letters were written in the name of **Buraq Sheikh Ahmed** but were signed by the deceased. Unfortunately, only the deceased can tell us whether he created a trust for his daughter. That is not useful now for he has departed. More importantly, the evidence coming through is not that the deceased held the aircraft as a trustee for the minor, but that he insured the aircraft for himself and for his benefit as the registered owner. PW1 has explained that the insurer renewed the policy under the name of **Buraq Sheikh Ahmed** but the deceased paid the premiums. PW1 also stated that at one time he realized that the insured was **Buraq Sheikh Ahmed** and not the deceased and he raised the issue with the insurer. He even withheld premiums for some time but he was advised to pay to avoid any lapse. He stated that he paid in full although it seems they did not rectify the error. The deceased has insurable interest in the preservation of the aircraft for he was the registered owner. The insured aircraft was owned by the deceased. But the insured is indicated as **Buraq Sheikh Ahmed**, a minor.

[27] The Defendant argued that, there was non-disclosure that the insured is a minor. They have also relied on the fact that the deceased continued to disguise himself as the insured and was signing letters on behalf of the minor. Although the insurer is also to blame for not following up on the necessary details, the conduct of the deceased as well as the Plaintiffs in handling the entire insurance matter is obscure. I

have stated this, and I will repeat; there is nothing wrong in declaring a trust for the minor and taking out insurance policy on the trust property for the minor as the beneficial owner of the trust property. This is perfect as in law legal ownership in a trust resides in the trustee. Nothing prevented the deceased from doing so. The Plaintiffs have not explained why the insurance was taken out in the name of a minor rather than in the name of the registered owner of the aircraft. There is no any legal limitation which prevented the insurance from being taken out in the name of the registered owner of the aircraft. There is more. Going by the evidence of PW1, the minor should be of age by now but she is not a party to the suit. We are not even told of her whereabouts. That is one aspect of the cheese.

[28] The other side is the fact that, although PW1 insisted that he had asked the insurance to change the name of the insured to that of the registered owner, in law that would still be impossible because at around 1999 when he discovered the anomaly, the registered owner was already deceased. The policy would still not have been maintained in the name of the deceased but of the administrator. All these lapses weigh heavily against the Plaintiffs. The Plaintiffs did not provide full information and details about this policy to the insurer even when they became aware of the fatal anomaly in the insurance policy. Therefore, even if they paid full premiums to the Defendant, their claim would be limited to return of premiums with interest. Certainly, despite the lack of diligence on the part of the Defendant in the way it handled the policy, it cannot be said that they had knowledge of the circumstances which would entitle them to avoid the policy but went ahead to collect premiums from the Plaintiffs. In the circumstances of the case, estoppel may not arise in favour of the Plaintiffs. Accordingly, this view is supported by the passage in *Halsbury's Law of England Fourth Edition Vol.16* para 1609 that—

“...thus the acceptance of premiums with the knowledge of circumstances entitling the insurer to avoid the policy stops him from averring that for that reason it is not a valid policy”.

And the argument by the Plaintiffs that the insurer accepted premiums from a person who was not the registered owner of the aircraft and should be estopped by conduct to insist that the policy was not valid, is only available to the minor if she was a party in this suit. But it should be known that subject to limitation of actions, this judgment does not foreclose the possibility of a future suit by the insured. As I have stated, there is nothing wrong in establishing a trust for a minor on a property which is registered in another person's name who happens to be the guardian or trustee of the minor. But for completeness of record, let me determine the other claims by the Defendant on malicious damage to the aircraft.

Malicious damage

[29] From the policy, malicious damage to the aircraft by an act or acts of the insured or his agents or servants is excluded. The Defendant called three witnesses all of whom were loss adjustors and investigators. They also produced reports where they made conclusions that the policy should be avoided for two reasons. One; the policy was in the name of a minor. And two; they believed that the Plaintiffs were involved in the explosion of the aircraft. The witnesses did not offer any concrete evidence to support their conclusions. They admitted that the report from the police was also not conclusive as to who caused the explosion of the aircraft. The evidence shows that there were various claims on the aircraft and it had even been grounded by a court order. But all these circumstantial evidence does not support their conclusions. The conclusions are therefore, mere suspicion and cannot found any reasonable inference that the explosion was malicious and was caused by the insured or the Plaintiffs or their agents or servants. I dismiss that defence by the Defendant.

[30] I have not decided this case on the basis that the contract of insurance was a nullity for having been or purportedly entered into by a minor, but on the basis of the conduct of parties and the circumstances of the case. Ordinarily, in such cases the court will not be involved in resolving one side's claim over the other; and may just leave the parties where it finds them. Nonetheless, I will answer the contentious issues herein as follows:

On non-disclosure

[31] There was non-disclosure of material information on the part of the Plaintiffs as administrators of

the estate of the deceased especially on the fact that the insured was a minor and the registered owner of the aircraft was the deceased. The Defendant as the insurer also failed the test of a diligent insurer under the Insurance Act by underwriting a risk without details of the age of the insured, and ownership of the aircraft despite these details having been conspicuously missing in the proposal form. These details are important in order to determine the insurable interest of the insured. Both parties are with blemish and so the Defendant cannot claim they were beyond reproach or take the advantage of the principle of *uberime fidei*.

Premiums and policy of insurance

[32] The defendant accepted premiums in respect of the insured aircraft. However, the insured was named as **Buraq Sheikh Ahmed**, a minor at the time. It is not in the name of the deceased for whose estate the Plaintiffs are claiming. It is not clear on what basis the insured is **Buraq Sheikh Ahmed** although the deceased who took out the policy was the father to the minor. The minor who is of age now is not a party in this suit. This judgment does not, however, foreclose her right to sue subject to limitation of actions. In real sense, however, the registered owner of the aircraft had insurable interest on the insured aircraft.

Capacity for a minor to contract

[33] As a general rule, a minor may not have the legal capacity to enter into a contract unless through guardians and trustees. The minor or her representative are not parties to the suit and I hesitate to declare that the insurance contract herein is invalid *ab initio*. I have said, this judgment does not foreclose her right to sue on it subject to limitation. These arguments would be profitable in such suit.

Whether the fire explosion was excluded from the policy

[34] I have found and held that the fire explosion which destroyed the aircraft on 20th September 1999 was not a willful and malicious act of the Plaintiffs or their agents. The evidence produced by the defendant's witnesses was pure conjecture lacking any concrete evidence. The risk was, therefore, not excluded from the cover. See the General Exclusions in the policy.

Whether the plaintiffs have any cause of action against the defendant?

[35] The plaintiffs have a cause of action against the defendant, except it fails for reasons I have given above. The plaintiffs have locus to sue in respect of a contract of insurance over the aircraft. Again, they are unsuccessful because of the quagmire that the insurance policy was in the name of on **Buraq Sheikh Ahmed**, and not the deceased. The Plaintiff did not explain sufficiently why this was the case. And the said **Buraq Sheikh Ahmed** is not a party in this suit.

Whether the defendant is liable

[36] I have found that the Plaintiffs' case fails and ample reasons have been given above.

Damages

[37] No damages are awarded after the findings of the court above.

Final orders

[38] For reasons foregoing, the Plaintiffs' case fails. It is dismissed but I make no order as to costs given the unfavorable conduct of both parties in the entire transaction. It is so ordered.

Dated, signed and delivered in court at Nairobi this 10th day of March 2015

F. GIKONYO

JUDGE