REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 1426 OF 1993

ELIUS GACHII KARANJA ..... PLAINTIFF

VERSUS

CONCORD INSURANCE COMPANY LIMITED ..... DEFENDANT

J U D G M E N T

By a Commercial Vehicle Proposal form dated 23rd August, 1991, Elias Karanja Gachui, the plaintiff requested the defendant, Concord Insurance Company Limited, (Under the defendant) an Insurance Company incorporated in Kenya, to insure his motor vehicle registration number KAB 354L, comprehensively. Clause 7 of the proposal form required the plaintiff to state fully the purpose for which the motor vehicle would be used to which he stated that he would use it "To carry own Goods". A Policy of insurance was later issued which did not cover the use of the motor vehicle for hire or reward or for racing, pacemaking, reliability trial or speed testing or while drawing a trailer.

On 14th March, 1992, while the said policy was still in force the motor vehicle was stolen by armed robbers while being driven from Nakuru to Nairobi carrying some irish potatoes. In the course of police investigations contradictory statements were given to the police by witnesses regarding the purpose for which the motor vehicle was being used at the time. The plaintiff gave a statement to the effect that the vehicle was carrying his own goods, while the driver of the vehicle and one of the lady passengers stated that it was on hire. After conducting its own investigations and coupled with the witness statements to the police which I earlier alluded to the defendant came to the conclusion that the plaintiff had breached an express term of the insurance policy and accordingly notified the plaintiff that it had avoided the policy. That provoked this suit.

The plaintiff's case as pleaded and presented was that the motor vehicle was carrying his own goods at the time of the theft. On the other hand the defendants case was that the goods it was carrying belonged to known people who had hired the motor vehicle to transport the same from Nakuru District to NaAitr otbhie. trial of the suit a part from the issue of quantum of damages and costs three other issues were settled; firstly, whether the subject motor vehicle was being used for hire and reward at the date of the theft; If so, secondly, whether that entitles the defendant to repudiate the insurance contract; thirdly, what was the value of the subject motor vehicle as at the date of the theft.

It was common ground that among the risks covered by the policy was theft. It was also common ground that the subject motor vehicle was stolen on 14th March, 1992 while en route to Nairobi from Nakuru. It was, also, not in dispute that it was carrying some potatoes at the time. The plaintiff admitted under cross-examination that prior to the theft he knew he was only supposed to use the subject motor vehicle for carrying his own goods. He however, denied the potatoes which were stolen with the vehicle belonged to other people.

On the other hand Charles Njonjo Mwaura (DW3) who the defendant Company instructed to investigate the loss of the motor vehicle, testified and produced a statement from the driver of the motor vehicle as at the time of the theft in which he stated that the motor vehicle was then carrying potatoes on hire. The driver, John Nderitu Mbogua (DW4) was called to testify on behalf of the defendant but in his testimony he denied knowledge of the terms under which the potatoes were carried. He however, admitted the potatoes belonged to a certain lady he lifted from Nakuru.

I have considered the evidence before me. I have no doubt in my mind that the motor vehicle was carrying the potatoes in question for hire and reward. The evidence is clear on this and although both the

plaintiff and his driver as at the time the motor vehicle was stolen attempted to convince this Court that that was not so, I am of the firm view and so hold, that their attempt was but in vain. The next issue for consideration is whether the fact that the vehicle was being used for hire entitles the defendant to repudiate the contract of insurance. Authorities are not unanimous as to when a breach of a term of the contract of insurance will entitle the insurer to repudiate the contract. However, in the English case of Pan Atlantic Ins. Co. ltd & Another v Pine Top Insurance Co. Ltd [1994] 3 ALL ER. 581, the House of Lords implied that not every breach entitles the insurer to repudiate the contract of insurance. Lord Templeman in his speech to the House stated, in pertinent part, as follows:-

> "On behalf of the underwriters, Mr. Hamilton QC submitted that a circumstance was material if a prudent insurer would have `wanted to know' or would have `taken into account that circumstance even though it would have made no difference to his acceptance of the risk or the amount of premium. If this is the result of the judgment of the Court of Appeal in CTI Case then I must disapprove of that case. If accepted this submission would give Carte blanche to the avoidance of insurance contracts on vague grounds of non-disclosure supported by vague evidence even though disclosure would not have made any difference. If an expert says `if I had known I would not have accepted the risk or I would have demanded a higher premium, his evidence can be evaluated against other insurance accepted by him and against other insurance accepted by other insurers. But if the expert says, "I would have wanted to know but the knowledge, would not have made any difference then there are no objective or rational grounds upon which this statement of belief can be tested. The law is already sufficiently tender to insurers who seek to avoid contracts for innocent non-disclosure and it is not unfair to require insurers to show that they have suffered as a result of non-disclosure. Of Course they suffer if the risk matures but that is the risk accepted by every insurer. (Emphasis mine).

The above exposition of the law applies to non-disclosure of material facts, but I suppose the statement will apply with equal force to misrepresented facts. My understanding of the passage above, and I must state at the outset that I agree with it entirely, is that it is not every alleged or proved breach which will entitle an insurer to avoid a policy of insurance. Each Case has to be considered on its peculiar facts and circumstances, and the insurers be permitted to avoid the policy if they can be able to show that they have suffered as a result of the non-disclosure or misrepresentation of material facts.

In the case before me the subject motor vehicle was insured to carry goods. Although there was a restriction or limitation as to whose goods would be carried, the fact that as at the time the vehicle was stolen it was carrying goods against that restriction could not, in my view, of itself without more entitle the defendant to avoid the policy. The theft was completely unrelated to the purpose the vehicle was being used. In other words it would not have made any difference as at the time of the theft whether the vehicle was carrying the plaintiffs or any other persons goods, or whether the vehicle was loaded or empty. While I agree that, in an appropriate case, the purpose the motor vehicle was being used would be a material and proper ground for the insurer avoiding the policy, on the facts and circumstances of this Case, I am not persuaded that this is such a case. I am not at all unmindful of the fact that in insurance matters, utmost good faith is both important and essential. However it would be preposterous in my view to treat every breach, irrespective of the facts and circumstances of the particular case under consideration, as entitling the insurer to avoid the policy as that is likely to open the door for fraud against the insured or policies of insurance being avoided on flimsy excuses which would be available to the insurers. Doing so will in my view defeat the whole purpose of insurance cover.

What are the material facts of this case? The plaintiff obtained the subject vehicle from Consumer Hire Purchase Ltd, on hire purchase terms. The price of the motor vehicle was Kshs.679,400/-, of which the plaintiff paid Kshs.288,939/- as deposit. As a condition for the hired the plaintiff was required and insured the motor vehicle comprehensively with the defendant. A sum of ksh.42,929/- was paid for the cover which was obtained after the plaintiff executed a proposal form as earlier on stated. At the time of the theft of the vehicle that policy was still in force. The motor vehicle has to date not been recovered. So apart from the loss of the motor vehicle by the plaintiff there is also the loss by the hire purchase

company of its security. The latter could not sue the defendant because it was not named as the insured-the plaintiff was. It apparently, initially, paid the premium for the insurance policy. This fact was known to the defendant, or so I think, considering that the amount of the premium is shown on the schedule to the hire-purchase agreement. In fact clause 2(h) of that agreement provides, in pertinent part, that the vehicle would be comprehensively covered against "all risks without restrictions or excuses..... ." So that the hire purchase company in making payment to the defendant for cover, it must have done so on the basis that all the risks would be included. So if the vehicle was insured to cover all risks, then the restriction imposed by the policy although it may have been brought to the attention of the plaintiff prior to the theft appears to me to be a ploy for avoiding liability under the policy. In the circumstance I find that the alleged breach, of itself without more does not entitle the defendant to avoid the insurance contract.

The other issue is with regend to the value of the suit motor vehicle. The plaintiff claimed Kshs.679,400/- which was the stated price at the time of the hire purchase contract, namely on or about 29th September, 1991. The vehicle was stolen on 14th March, 1992, about five or six months after hire. I do not think the issue as to its value as at the time of the theft is available here for consideration, as the insurance contract expressly states the amount recoverable subject to payment of the agreed amount of the excess. In those circumstances I refrain from dealing with the issue. In the above circumstances I find for the plaintiff as prayed in prayer (1) of the plaint. That now leaves me with the question of general damages and costs. The plaintiff testified that after the vehicle was stolen he was unable to pay the hire purchase charges to the hire-purchase company which eventually successfully sued him for the balance of the hire purchase amount and accrued interest in High Court Civil Case No.5413 of 1993. As at the date of trial of this suit Kshs.588,000/= was outstanding from him. That was Kshs.192,460/= higher than the amount which was outstanding as at the date of the suit. So the plaintiff prays for judgment for that sum as general damages. To my mind, the claim is reasonable and having not been challenged in cross-examination I allow the figure, with the result that I give judgment to the plaintiff against the defendant in the sum of Kshs.872,360/= with costs and interest. A special rate of interest having not been prayed for it shall be chargeable at court rates from the date of the suit until payment in full.

Dated at Nairobi and delivered this 9th day of April, 1997.

S. E. O. BOSIRE

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AG. JUDGE OF APPEAL

SITTING AS JUDGE OF THE HIGH COURT