

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL SUIT NO. 8 OF 2020

OCCIDENTAL INSURANCE COMPANY LIMITED.....PLAINTIFF
VERSUS
RUTH NYANGANYI OGOTI.....DEFENDANT
AND
PETER SUNGUTI MUSUNGU.....1ST INTERESTED PARTY
DANIEL CHIVUYO SHALO.....2ND INTERESTED PARTY

JUDGEMENT

1. By way of a Further Amended Plaint dated 7th October 2020, the Plaintiff seeks the following orders;
 - a) **A Declaration that it is not bound to pay/or satisfy judgment in any suit arising from the said accident and/ or indemnify the Defendant against any claim in respect of bodily injury to any person, damage to property or satisfy any claim whatsoever arising out of the accident which allegedly occurred on 8th December, 2018 along the Webuye-Eldoret Road; involving the Defendant’s Motor Vehicle Registration Number KCS 667E.**
 - b) **A Declaration that it is not bound to pay or satisfy judgment in Eldoret CMCC No. 300 of 2019 and Eldoret CMCC No, 303 of 2019 and/ or indemnify the Defendant against any claim in respect of bodily injury to any person, damage to property or satisfy any claim whatsoever arising out of Eldoret CMCC No. 300 of 2019 and Eldoret CMCC No. 303 of 2019.**

c) Costs of this suit.

d) Interest on (b) above at Court rates.

e) Any other or further relief that this Honourable Court may deem just, expedient and fit to grant

The Plaintiff's Case

2. The Petitioner's case was as stated by their witness **PW1** one **Samuel Thuo Gitau** who is a Legal Officer at Occidental Insurance Company Limited. He adopted his witness statement filed on 29th October 2024. He stated that the Defendant, vide her proposal, requested to be issued with an insurance policy cover for her motor vehicle registration number KCS 667E which was intended for the Defendant's private use, without reward or hire. That on 20th November 2018, pursuant to the said proposal, the Plaintiff issued to the Defendant policy number COMP/07/215180/11 upon payment of the requisite premium. The said policy was to expire on 19th December, 2018. It was a term of the policy cover that the Plaintiff would indemnify the Defendant in the event of an accident caused or arising from the use of the motor vehicle registration number KCS 667 E as a private vehicle without reward or hire. That the said policy did not cover Third Party risks involving passengers aboard the subject motor vehicle.
3. The witness testified that on or about 8th December 2018, the Defendant's subject motor vehicle was involved in a road traffic accident along the Webuye - Eldoret Road at Jua Kali Area near Eldoret as a consequence of which the passengers who were in the Defendant's motor vehicle sustained bodily injuries. That these passengers were not covered by the insurance policy for the insured's motor vehicle, because any claims for bodily injuries

sustained in the course of the subject accident by them would not fall within the scope of the private use of the motor vehicle as covered by the relevant insurance policy. That this was the case for reasons that the Defendant's insurance policy did not cover usage of the motor vehicle registration number KCS 667 E for hire for reward and for carriage of passengers for hire and reward. That for this reason, the Defendant's use of the motor vehicle at the time of the accident which occurred on 8th December 2018 for the carriage of passengers for hire and reward was a material breach of the insurance policy.

4. The witness further testified that the Plaintiff conducted investigations through a Private Investigator M/s Uptown Loss Assessors (K) Ltd whose Report he produced as PExh-8. He stated that the Report established that at the time of the accident the insured's motor vehicle was used contrary to the policy terms and conditions in that it was carrying fare paying passengers. That the defendant therefore breached the express terms of the insurance policy and/or the contractual agreement between her and the Plaintiff and that the Defendant should bear any liability for any claims by any person arising from the non-contractual use of the subject motor vehicle.
5. During his testimony in open court, he testified that annexed to his witness statement is a List of Documents dated 4th February 2022 all of which he intended to rely on entirely. The documents in the list were marked chronologically as PExh1-9 and he produced them as exhibits in support of the plaintiff's case. He summarised his case by stating the plaintiff is seeking to avoid liability in **Eldoret CMCC No. 300/2019** and **Eldoret CMCC No. 03/2019** because the insured breached the terms and conditions of the policy because the same was specific that it did not cover fare paying passengers. That the private investigator upon conclusion of their investigations made a

finding that the motor vehicle was being used for hire for reward by the insured at the time of the accident.

6. In cross examination, he stated that from the policy, the insured was indicated to be a business person but the type of business was not indicated. That the Report indicated that it is the husband of the insured who it was noted was the one who was driving the motor vehicle at the time of the accident who communicated that the claimants were fare paying passengers and that the fare was paid to him. He referred the Court to the relevant par of the Report as paragraph 5 line 3.

The Defendant's Defence

7. The defendant filed a Defence and Counterclaim dated 27th May 2021. She admitted that she was insured by the plaintiff as herein stated and also that the cover was to expire on the date stated. She also confirmed that the said insurance policy was in respect of the private use of the insured motor vehicle. The defendant stated that the plaintiff is liable to compensate third parties travelling in the said motor vehicle in so far as the said third parties were not fare paying passengers and stated that the claimants herein were not fare paying passenger and so the plaintiff is liable to compensate them. Additionally, for the plaintiff to claim that they are not liable for even non-fare paying passengers would limit the said motor vehicle to use by the registered owner only and the same is unjust and would amount to the plaintiff seeking to illegally evade liability.
8. The defendant denied that she failed to report the accident to the plaintiff as is required by the terms of the policy. She stated that the report was made and in good time. She further denied that she concealed material facts and/or misrepresented information and therefore wilfully breached the terms of the

contract and reiterated that the injured passengers were no fare paying but had simply been given a lift and so cannot be classified as such. She prayed that the plaintiff's suit be dismissed with costs.

9. In her counterclaim, she pleaded that she had taken a policy with the Plaintiff, now Defendant to have the motor vehicle insured against accident and the said policy was in respect of private use. Further, that the said motor vehicle had been used for private purposes as provided for in the insurance policy. That on the 8th December 2018, the said motor vehicle registration number KCS 667E was involved in a self-involving accident along the Webuye Eldoret Road at Jua kali area. That at the time of the accident, there were passengers on board the motor vehicle who had been given a lift, and they were injured in the process.

10. The defendant averred that the ferrying of the passengers was in accordance with the policy and as such the plaintiff should be held contractually liable to compensate her and the interested party. The defendant seeks the following orders;
 - a) **That the Plaintiff's case against the Defendant, now Plaintiff be dismissed with costs and the counter-claim herein allowed.**

 - b) **A declaration that the Plaintiff, now Defendant is contractually liable to compensate the Defendant, now Plaintiff and the interested parties herein.**

 - c) **Costs of the suit**

 - d) **Interest on (3) above at Court rates**

11. The defendant's did not avail any witnesses at the hearing and the court therefore closed their case and proceeded with the interested party's case.

Interested party's defence

12. The interested party filed a defence dated 3rd September 2021. In their defence, they denied that the motor vehicle KCS 667E was ferrying them as passengers for hire and/or reward or such related user or that they were aboard the subject motor vehicle as such. They denied that they did not report the accident to the plaintiff as is required of them, and specifically, that the Defendant concealed material facts and or misrepresented information and wilfully breached the terms of the subject insurance policy cover materially on the status of the injured persons. They specifically denied that the Defendant's Motor Vehicle had aboard it fare paying passengers which action was materially against the subject insurance policy cover which was for private use. They denied the contents of the plaint and prayed that the suit be struck out.

13. The 2nd interested party **Daniel Chivui Shalo** is the only witness who testified in support of the interested party's case as **DW1**. He stated that even though he was sick in hospital and it is his father who wrote his statement dated 3rd September 2021 on his behalf and brought it to him to sign which he did, he confirmed that the contents were correct.

14. In the statement, he stated that the defendant was the legally registered beneficial owner of the motor vehicle registration no. KCS 667E and that on 8th December 2019 he was lawfully travelling as a passenger in the said Motor vehicle along the Webuye Eldoret Road when at a place known as Jua Kali, the vehicle was involved in an accident and he sustained major injuries. He denied having paid any fare and stated that he was only travelling as a

passenger. He stated that he was travelling to Nairobi when the driver of the motor vehicle found them on the road and offered them a lift to Eldoret and they accepted.

15. In cross examination, he stated gave the name of the owner of the motor vehicle as Aaron Okemo. He stated that he did not know him before that day. He also stated that he was not Aaron's employee. That Aaron did not charge them. He stated that the motor vehicle was a personal car. That apart from him, there were two other passengers who too had been given a lift and of the two he only knew his cousin Peter Sunguti. Upon being questioned by the court he stated that the driver found them at a bus stop at Kaburengo.

16. The parties were then directed to file submissions.

Plaintiff's Submissions

17. Counsel reproduced the evidence of the parties and the evidence tendered, then proceeded to submit on the issues for determination. Counsel urged that the main issue for determination in this case is whether a declaration should be made in favour of the plaintiff against the defendant to the effect that the plaintiff is not bound to pay/satisfy any claims/judgment that may arise out of the accident that occurred on 8th December 2018 involving the defendant's motor vehicle.

18. Counsel submitted that the defendant, who was the insured did not come to challenge this case and as such the plaintiff's evidence against the insured is unchallenged. Be that as it may the plaintiff still went ahead to adduce and call for cogent evidence to prove its case. The evidence by the plaintiff's witness which included the investigation report clearly pointed out to the required standard of proof that the interested parties were on board the

vehicle for hire. Such class of passengers had been excluded from the cover as proved by the police schedule that was produced in evidence.

- 19.**Counsel urged that the defendant averred in her statement of defence and counter claim that the passengers were friends, a fact that was refuted on oath by the interested party who confirmed that he did not know the insured and that he had only been offered A lift by the driver of the vehicle. He pointed that it is indeed telling that the lift was given from a passenger service vehicle terminus and further, that the uncontroverted evidence forms the investigation report shows that the vehicle had driven from Naivasha to Bungoma where it spent the night at the stage and left for the journey in the morning. That the interested party unknowingly corroborates this by confirming that they boarded the vehicle from the stage. This piece of evidence counters the defendant's version as per her pleadings and statement that the passengers were picked on the way.
- 20.**Counsel submitted that the evidence on record can only lead to the conclusion that the subject motor vehicle was being used for hire at the time of the accident. This was Contrary to the policy cover taken by the defendant that limited the use to private and personal use and specifically excluded use for hire or use for reward. In fact, the only reason why fare may not have been paid at the time of the accident was that the accident occurred soon after the vehicle had left the stage and the passengers had not reached their destination. In any event, actual exchange of money is not the only evidence of hire, that could be evidence of reward but in this case, the interested party confirmed in his testimony that they had sought for lift, which is hire, as they were travelling to Nairobi. They were thus not passengers in the vehicle for any social, pleasure, private and or personal business of the insured.

21. Counsel cited **Section 10 (4) of the Insurance Motor Vehicle Third Party Risk Act CAP 405** and urged that this suit was instituted on 6th June 2019. The interested parties' suits were instituted on 12th April 2019 and therefore this declaratory suit was thus instituted within the requisite time frames as provided by **Section 10(4)**. Counsel submitted that the plaintiff has equally been able to prove that there was material non-disclosure of a material fact in that the defendant did not disclose that the vehicle will be used for hire.

22. Counsel further submitted that the defendant discloses in the claim form that the vehicle was being used for private purposes, yet the evidence has shown that the vehicle was being use for hire by carrying fare paying passengers. The defendant also gave false representation that the passengers were her workers yet the evidence showed the persons were actually unknown to her. That the insured gave false representation to the plaintiff that the passengers were picked along the way yet the evidence showed that the passengers were picked from a PSV terminus.

23. Counsel cited the case of **Britam General Insurance Company (Kenya) Limited v Musila; Mali & Others (Interested Party) (Civil Suit 19 of 2017) (2022) KEHC 12036 (KLR) (27 July 2022) (Judgment)** where the High Court was faced with similar set of facts and urged further that even without all the arguments raised above, the plaintiff would still not be obliged to satisfy the judgement arising out of bodily injuries or death by passengers because even assuming the interested parties were able to prove that they were not passengers on hire, then the provisions of **Section 5(b)(ii) of Insurance (Motor Vehicle Third Party Risk) Act CAP 405** would still come into play and protect the plaintiff from liability to satisfy the judgement.

24. Counsel urged that this section removes passengers from the ambit of compulsory third party compensation unless such passengers were employees or passengers in a PSV and the motor vehicle in question having not been a PSV then the defendant ought to have taken a specific passenger extension policy for the passengers to have been covered. The passenger extension would have informed the insurer the amount of premiums to be levied to the insured. But in this case the insured (defendant) wanted to steal a match by carrying passengers yet her vehicle was not a PSV and neither had she paid for passenger extension. Counsel relied on the case of **Gateway Insurance Company Limited v Sudan Mathews [2003] eKLR** in this regard.

25. Counsel submitted that the plaintiff's case is one for succeeding and the defendant did not adduce any evidence in support of her counterclaim. Considering the submissions and the evidence adduced by the plaintiff and even the third party, they prayed that the counterclaim be dismissed with costs to the plaintiff.

Interested parties' submissions

26. The interested party **Section 107 of the Evidence Act** submitted that it is trite law that he who alleges must prove. Counsel submitted that the evidential burden lies squarely on the plaintiff and additionally, that the defendant's failure to participate in the hearing is not an admission of liability. Urging that at no time should the burden of proof shift to the Defendant, he cited **Section 107-109 of the Evidence Act**, and the case of **Tabitha Atsinaa Musambi v Standard Ltd and (2019) eKLR; Blue Shield Insurance Co. Ltd v Samuel Nyaga Naurukiri [2008] eKLR; Palace Investment Ltd Vs Geoffrey Kariuki Mwendo & Another [2015] eKLR** and **Karugi & Another v Kabiya & 3 Others [1987] KLR 347**.

27. On whether the Plaintiff has established that the defendant breached the insurance policy herein, thus, entitling the plaintiff to repudiate liability herein under **Section 10(4) of Cap 405** as submitted Counsel urged that the requirement under this provision is that the plaintiff must prove that: -

i) The insured used the subject motor vehicle for carrying passenger for reward and that the interested parties were fare-paying passengers in the subject vehicle at the time of the accident

28. He urged that there is no admission that the vehicle was being used for hire and reward at the time the subject accident occurred. Further, that PW1, the investigating officer did not adduce evidence of how much fare was paid if any. PW1 testified that at the time of the accident, the subject motor vehicle had been converted to one for private use. The allegations that the car was used for hire and reward was rebutted by DW1 on oath, who was categorical that no fare was paid to the driver of the subject vehicle.

29. He urged that the police abstract simply indicates that the matter was pending under investigation and it does not categorize the interested parties as fare-paying passengers. Counsel submitted that being a passenger in a car is not the same thing as paying fare for the ride. Further, that, no extract of the OB or any statement was produced to show that the passengers aboard the vehicle paid fare. PW1 did not establish whether the owner and driver recorded any statements with the police to prove this allegation. That the police officers who were at the scene of the accident and who were the authors of the police abstracts provided herein were not called to testify. Additionally, that the Investigator did not interview any of the alleged fare paying passengers.

30. Counsel urged that there is no evidence to prove that this vehicle was being used as a taxi or a matatu at the time of the accident nor is there any evidence that the passengers in the said vehicle were fare paying. He urged the court to find that the Plaintiff has failed to prove on a balance of probability that the vehicle was being used outside the scope of the Insurance Policy.

Analysis & Determination

31. Having addressed my mind to the pleadings, the evidence as well as the submissions, it is my considered opinion that the issue that arises for determination is as hereunder;

Whether the interested parties were fare paying passengers in the Defendant's motor vehicle Registration Number KCS 667E on 8th December, 2018 along the Webuye-Eldoret road when the accident occurred and as such the plaintiff is bound to satisfy judgment and/or indemnify the Defendant against any claim in any suit arising therefrom

32. It is common ground that an accident did occur involving the defendant's motor vehicle. It is also common ground that the interested parties were passengers in the subject motor vehicle at the time of the said accident. It is admitted by the defendant that the insurance policy issued to her by the plaintiffs to cover the subject motor vehicle was for private use only and fare paying passengers were not covered. The above being the case, as has been rightly submitted by the Counsel for the interested party, the Burden of proof in this case lies with the plaintiff in demonstrating that the interested parties were fare paying passengers

33. In the case of **William Kabogo Gitau v George Thuo & 2 Others [2010] 1 KLR 526** the court established the standard of proof required to for a party who asserts the existence of any fact that he seeks the court to rely in order that it finds in their favour as follows;

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

34. The interested party who are the claimants in the case before the Magistrates court testified that they were simply given a lift. The circumstances of their being given the lift is that they did not ask for it and they were not picked by the roadside. They were at a known bus stop where the driver of the motor vehicle is the one who approached them and offered them the lift. The testimony of DWI is that they did not know the driver.

35. As already noted herein, the defendant did not call any witnesses. I agree with the submissions by Counsel for the interested party that this omission by the defendant does not by itself mean that liability is not denied because in any event, a defence and counter claim was filed by the defendant which the court is bound to consider. The defendant states in her defence that the passengers in the vehicle were not fare paying but had been given a lift. The private investigator's report that forms part of the plaintiff's evidence and whose contents were neither denied, rebutted and or contradicted states as follows as regards the presence of the interested parties in the vehicle as

reported to the investigator by both the defendant and her husband who is the person that was driving the motor vehicle at the time of the accident;

36.The driver stated that he was driving back to Naivasha from their farm in Kipkaren and the three passengers were his casual workers. That he travelled with them from Naivasha the day before on 7th December 2018 and went with them to Kipkaren where they ploughed his one-acre farm and spent the night in his small house at the farm. That the next day they set off at 8:00am when the accident occurred at Jua Kali area at 8:30am.

37.In contrast, the court notes that the investigator's report on the other hand states that contrary to the driver's explanation as given to them by the said driver, the motor vehicle's tracking device, excerpts of which also form part of the plaintiff's documents, showed that the motor vehicle left Naivasha on 7th December 2018 at 6:53pm but not to Kipkaren, but headed straight to Bungoma where it arrived at 4:59am on 8th December 2018. That while at Bungoma, it was parked at the main bus terminus for a short while and then at 5:21am it started its journey back. This aspect of the report corroborates the 2nd interested party's testimony that they were picked at a bus stage. The court also notes that the investigator has made an observation in the report that Bungoma is approximately 90kms from Kipkaren and also that the vehicle was driven overnight.

38.This observation that the vehicle was driven overnight is a direct contradiction to the representation by the driver to the investigators that they went to Kipkaren where his workers ploughed their one-acre piece of land on 7th December 2018 and even spent the night there. Along this same line of evidence, the court also notes the testimony of the 2nd interested party that they did not know the driver of the accident motor vehicle at all because he simply gave them a lift from the bus stage at Kaburengo.

39. Further, the fact that the report states that the driver was not able to avail the three persons whom he had allegedly given a lift to the investigators for interview only goes to lend credence to the interested party's testimony that the three of them who were passengers in the accident motor vehicle were not known to the driver and therefore contradicting the driver's assertion that they were his casual workers whom he had travelled with from Naivasha to his farm in Kipkaren.

40. Moreover, the court notes that in the plaintiff's bundle of documents, there are two versions of the driver's statements thereto annexed which are contradictory of each other. In the first statement dated 20th February 2019, the narration of how the accident occurred is as captured in the investigator's report. In another undated version the driver stated that he was driving from Bungoma to Naivasha and not from Kipkaren.

41. On her part, in her statement to the Insurers dated 15th April 2019, the defendant stated as follows;

“According to the driver, on 7th December 2018 was heading to Bungoma from Naivasha while driving the vehicle KCS 667E Toyota Probox, on 8th of December 2018 while from Bungoma back to the farm at Kipkaren. The driver stopped to pick workers who were occupants of the vehicle back to Eldoret. Before reaching Eldoret the driver got an accident at JuaKali area....”

42. From the analysis of the evidence of the defendant and her witness on who the passengers in the accident motor vehicle were, it is clearly apparent that their inability to place them in one clear category of passengers by the manner in which the evidence adduced by them in this regard is contradictory

clearly points to the fact that they were not merely given a lift as alleged and they were also not the defendant's workers.

43. By dint of the fact that the plaintiff's uncontroverted evidence has sufficiently demonstrated that the defendant's motor vehicle upon reaching Bungoma was parked at a Bus Terminus and the 2nd interested party also stated that they were picked at a Bus Stage, the court is satisfied that on a balance of probabilities the plaintiff has proved its case that the three passenger's that were in the defendant's motor vehicle on the date material to the accident the subject matter of this case were fare paying passengers and it is therefore my finding that the defendant's motor vehicle was being used for the carriage of passenger for reward on 8th December 2018 when the accident occurred contrary to the insurance policy agreement

44. The above being the case it follows then that the exception in Section 5(b)(ii) of the Insurance (Motor Vehicle Third Party Risks) Act Cap. 405 is relevant in support of the plaintiff's assertion that they are no bound to satisfy any judgment and/or indemnify the Defendant against any claim in any suit arising from the accident that occurred on 8th December 2018 involving the defendant's motor vehicle registration number KCS 667E. The said provision is as follows;

In order to comply with the requirements of section 4, the policy of insurance must be a policy which—

(a) is issued by a company which is required under the Insurance Act (Cap. 487) to carry on motor vehicle insurance business; and

(b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury

to, any person caused by or arising out of the use of the vehicle on a road:

Provided that a policy in terms of this section shall not be required to cover—

- (i) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or
- (ii) except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arose; or
- (iii) any contractual liability;
- (iv) liability of any sum in excess of three million shillings, arising out of a claim by one person.

45. In this regard, I associate myself fully with the finding of Fred A. Ochieng, J (as he then was) in **Nairobi HCCC No. 9 of 2004 - Gateway Insurance Co. Ltd -vs- Albert J. N. Njagi** where he held thus;

“In so far as the vehicle had been put to use other than that for which it was insured, I hold that the defendant did obtain the policy of insurance through non-disclosure of a material fact. And, to the extent that the vehicle was used to carry passengers whilst it was only supposed to carry the defendant’s own goods, the defendant is deemed to have made representations of fact which were false in

material particulars. Accordingly, the plaintiff cannot be under an obligation to honour its part of a contract of insurance which had been founded on material non-disclosure. I therefore grant the declaration that the plaintiff is not liable to make payment under the policy of insurance, in respect to any claim by any passenger in the motor KSW 814, arising from an accident on 29th October 2001”

46. Having found that the Defendant was in breach of the insurance policy entered into between herself and the plaintiff, it is my further finding that the plaintiff is not at all bound to indemnify the Defendant for any claims arising from the said accident and in this regard, I find no merit in the defendant's counterclaim as well as the interested party's Defence and both are accordingly dismissed. I therefore find merit in the plaintiff's case and enter judgement for the plaintiff and against the defendant as follows;

a) A Declaration is now hereby issued that the plaintiff is not bound to pay/or satisfy judgment in any suit arising from and/ or indemnify the Defendant against any claim in respect of bodily injury to any person, damage to property or satisfy any claim whatsoever arising out of the accident which allegedly occurred on 8th December, 2018 along the Webuye-Eldoret Road involving the Defendant's Motor Vehicle Registration Number KCS 667E.

b) A Declaration is now hereby issued that the plaintiff is not bound to pay and/or satisfy judgment in Eldoret CMCC No. 300 of 2019 and Eldoret CMCC No, 303 of 2019 and/ or indemnify the Defendant against any claim in respect of bodily injury to any

person, damage to property or satisfy any claim whatsoever as long as the judgement and/or the claim therein relates to an accident which allegedly occurred on 8th December, 2018 along the Webuye-Eldoret Road involving the Defendant's Motor Vehicle Registration Number KCS 667E.

c) The Defendant is to bear the costs of this suit.

Read date and Signed at ELDORET on 9th October 2025

E. OMINDE
JUDGE