APA Insurance Limited v Gatugi (Civil Case 32 of 2020)
[2024] KEMC 18 (KLR) (27 September 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE MACHAKOS LAW COURTS

CIVIL CASE 32 OF 2020

CN ONDIEKI, PM

SEPTEMBER 27, 2024

BETWEEN

APA INSURANCE LIMITED ..... PLAINTIFF

AND

MARY WANJIRA GATUGI ..... DEFENDANT

JUDGMENT

PART I: Introduction

1. On 11th May 2023, this Court delivered an ex parte Judgment in favour of the Plaintiff. On the successful motion of the Defendant, the said Judgment was set aside on 21st August 2023.

2. A contract of insurance is the unsurpassed embodiment of the doctrine of uberrima fides. A full and frank disclosure of material facts is not for ornamental reasons. The rationale underlying this position is the fact the contract involves undertaking the risk which would have otherwise befallen the insured and all material facts within the personal knowledge of the insured, which would reasonably and materially impact the decision to undertake the risk ought to be disclosed.

PART II: The Plaintiff's Case

3. In its Plaint dated 13th December 2019 and filed on 23rd January 2020, the Plaintiff brought this action against the Defendant seeking Judgment for: (a) A declaration that the Plaintiff is and has at all material times been entitled to avoid the policy of insurance herein, apart from any provision contained therein on the grounds that the said policy of insurance was obtained by non-disclosure of material facts and/or misrepresentation of facts which were false in some material particular. (b) A declaration that the Plaintiff has effectively avoided the policy number 43/700/2018/044-COMP and it is not liable under the said policy to satisfy any third party claims under the *Insurance (Motor Vehicles Third Party Risks) Act*, Chapter 405 of the Laws of Kenya. (c) Costs of this suit.

4. The Plaintiff avers that the Defendant entered into contract of insurance to cover third party risks over motor vehicle registration number KCG 863N and relying on the representations the Defendant made in the form provided, the Plaintiff issued a policy of insurance number 43/700/2018/044-COMP to cover the period 15th May 2018 to 14th May 2019 and that an insurance certificate number C17009230 was accordingly issued. It is claimed that contrary to the express terms of the policy, the Defendant leased it to a third for use in taxi and/or hire for reward services and that the third party had no valid driving licence in breach of the express terms of the policy. It is claimed that on 21st July 2018, while the policy was still in force, the vehicle was involved in a fatal road traffic accident where four persons were fatally injured, while offering taxi services and being driven by the said third party who had no driving licence. It is claimed that the Defendant had made false representations on the nature of use of the subject motor vehicle when she applied for the policy of insurance where in the proposed use of the vehicle, the Defendant indicated that it will be exclusively be driven by her for private use only but did not at all indicate that it will be used for taxi/hire for reward purposes.

5. At the hearing of the Plaintiffs' case, PW1, a Legal Officer employed by the Plaintiff, adopted her witness statement dated 7th January 2021 and filed on 26th January 2022 as her evidence-in-chief. In the said witness statement, the Plaintiff rehashed the material facts set out in the Plaint and the Defence to the Counterclaim. This Court finds it unnecessary to regurgitate.

6. In buttressing its case, PW1 exhibited the following documents: (i) a copy of the Police Abstract dated 13th August 2018 as the Plaintiff's Exhibit 1; (ii) a copy of the Motor vehicle accident report form as the Plaintiff's Exhibit 2; (iii) a copy of the private motor vehicle proposal form in respect to policy number 43/700/2018/044-COMP issued to the Defendant for motor vehicle registration number KCG 863N as the Plaintiff's Exhibit 3; (iv) a copy of the insurance endorsement policy schedule number 43/700/2018/044-COMP dated 25th August 2018 as the Plaintiff's Exhibit 4; and (v) a copy of the Investigation Report by Starden Insurance Investigators on the subject accident was marked as MFI 5.

7. In cross-examination of PW1, she stated that the Plaintiff passed a resolution to have PW1 represent the Plaintiff but conceded that it was not part of the record exhibited by the Plaintiff. She stated that she had no documents regarding the two suits alluded to in paragraph 11 of the Plaint. She conceded that she is not the maker of the investigation report. She stated that the Plaintiff issued instructions to the investigator to investigate the accident. She stated that there is a letter of instructions but it was not part of the records which were exhibited by the Plaintiff. She stated that the insurer did provide the circumstances of the accident. She stated that the insurance was for a private vehicle which was in force between 15th May 2018 and 14th May 2019. She stated that disputes between the insurer and the insured can be resolved by arbitration but none was pursued. She stated that the Plaintiff did not pursue arbitration because they were seeking a declaration which cannot be secured in arbitration. She stated that the cause of the accident was the front right tyre burst. She stated that the vehicle was carrying out taxi operations as opposed to private use in breach of the contract of insurance.

8. In re-examination of PW1, she was referred to MFI 5 and she stated that it is directed to APA Insurance Limited. She stated that the Defendant said that the vehicle was carrying business associates who had not hired the car.

9. PW2, Mr. James Maina Kanyingi, informed this Court that he is an insurance investigator certified by AKI. He recalled that he was instructed by the Plaintiff on 20th September 2018 to investigate this accident and upon completion, he prepared a report dated 5th November 2020. He produced it as Exhibit 5. He testified that the driver carried three business people to go and buy produce at Matuu

market and on the way there, the front right tyre burst and the vehicle rolled. He stated that the owner of the vehicle, an eye witness, the driver's wife and traders in Kagio were interviewed.

10. In cross-examination of PW2, he stated that he received instructions on 20th September 2018 but conceded that the letter of instruction was not exhibited. He conceded that the traders he interviewed were not witnesses in this case. He stated that the accident occurred on 21st July 2018. He stated that all the occupants in the motor vehicle died. He stated that the driver was the Defendant's son. He stated that the driver had no driving licence. He stated that when she was interviewed, the Defendant confirmed that the vehicle was being used for taxi. He stated that he took a photo of the motor vehicle on 2nd October 2018 during investigations. He stated that he was not aware of the cereal business of the Defendant.

11. In his written Submissions dated 29th July 2024 and filed on 31st July 2024, learned Counsel Mr. Ochieng' instructed by the Firm of Messieurs Ochieng' K. & Associates Advocates, representing the Plaintiff, submits that contracts of insurance are based on utmost good faith and this fastens an obligation upon the insured to disclose all material facts placing reliance in UAP Insurance Company Limited vs. Lemmy Mutua Kavii [2018] eKLR; and Co-operative Insurance Company Limited vs. David Wachira Wambugu [2010] eKLR.

12. It is submitted that having failed in her obligation to disclose material facts, the Defendant breached this obligation by indicating that the vehicle will "solely for social, domestic and pleasure purposes" and the Plaintiff is thus entitled to the prayers sought. It is urged that the vehicle was used for purposes other than the one it was insured for, placing reliance upon Monarch Insurance Company Limited vs. Joseph Njenga Maina [2021] eKLR.

13. Further, it is submitted that it has been proved that the vehicle was being driven by an unqualified driver, citing the holding in Catherine Mbithe Ngina vs. Silker Agencies Limited [2021] eKLR.

14. It is submitted that an investigation report – if unchallenged - is sufficient to prove this fact, placing reliance in Kenya Orient Insurance Company Limited vs. Martha Angila Cynthia [2018] eKLR.

15. It is submitted that although the Defendant filed a Defence and Counter-Claim, she did not call evidence to controvert the Plaintiff's said evidence and hence, the facts are proven, staking reliance in Netah Njoki Kamau & another vs. Eliud Mburu Mwaniki [2021] eKLR.

16. It is finally submitted that in the circumstances, the Counterclaim is unmerited.

17. Finally, the Plaintiff prays for costs of this suit and interest.

PART III: The Defendant's Case

18. In her Statement of Defence and Counterclaim dated 9th January 2021 and filed on 12th January 2021, except that there was a contract of insurance between the two and that the accident occurred, the Defendant denied every material averment in the Plaint and put the Plaintiff to strict proof thereof.

19. In her Counterclaim, the Defendant seeks Judgment against the Plaintiff for: (a) a declaration that the Plaintiff is liable to compensate the Defendant for the loss of the motor vehicle registration number KCG 863N. (b) a declaration that the Plaintiff is bound to satisfy all the claims emanating from the said accident. (c) Costs of the counterclaim.

20. At the hearing of the Defendant's case, DW1, the Defendant, adopted her witness statement dated 9th January 2021 as her evidence-in-chief. In the said witness statement, the Plaintiff states on the material date, the vehicle was being driven by her son, the late Denis Muthie Wanjira, on a trip to source more cereals (green peas) from the market for their business which she jointly ran with her said son. She states

that her son was with his three business associates who also died in the accident, and denied that the vehicle was not being used for hire and reward.

21. In buttressing her case, DW1 exhibited the following documents: (i) a demand letter dated 5th September 2019 as the Defendant's Exhibit 1; (ii) an abstract of police for loss of a driving licence as the Defendant's Exhibit 2; (iii) an abstract of the accident dated 13th August 2018; and (iv) a policy document number 43/700/2018/044-COMP as the Defendant's Exhibit 4.

22. In cross-examination of DW1, she stated that she did not witness the accident. She stated that three passengers did not pay fare. She stated that the insurance cover was for a private vehicle. She stated that she did not use it for business. She stated that there was evidence that the driving licence of his late son was lost. She stated that they were all going to source green grams. She stated that she did not meet the investigator. When she was referred to page 33 of the report, she conceded that the signature appearing therein was hers. She stated that the investigator did not demand to be shown the shop. She stated that she met the investigator in town and he did not get home. She stated that the three men were her business associates. She stated that they were her labourers, who were porters of goods. She stated that she used to pay them in that capacity. She denied that they were business associates.

23. In re-examination of DW1, she stated that she met the investigator in Kagio market. She stated that the investigator told her that he came to her home but he did not find her. She stated that the three passengers were porters and not business associates.

24. In his written Submissions dated 4th July 2024 and filed on 12th July 2024, Mr. Asimwe the Firm of Messieurs Magee Law LLP, Advocates representing the Defendant, submits that the Plaintiffs failed to discharge its burden of proof, on a balance of probabilities, that the vehicle was being used for hire and reward at the material time, placing reliance upon Alice Wanjiru Ruhiu vs. Messiac Assembly of Yahweh [2021] eKLR; Bwire vs. Wayo & Sailok (Civil Appeal 032 of 21) (2022) KEHC 7 (KLR) (24 January 2022) (Judgment); and Re Estate of M'Mugambi M'Mbiro [Deceased] [2022] eKLR.

25. Regarding the Counterclaim, it is urged that the Defendant has on a balance of probabilities proved that there was an insurance contract in force at the material time, placing reliance upon *AIG Insurance Company Limited vs. Bernard Kiprotich Kirui Civil Appeal No. 17 of 2019*, which described the features of an insurance contract; *Imara Steel Mills Limited vs. Heritage Insurance Co. Kenya Limited & Sila Nzioka & 37 others Civil Suit No. 8 of 2015* where it was held that a contract of insurance can only be repudiated on account of a contractual or legal basis only and there was none in that matter; and Canon Assurance Kenya Limited vs. Mohansons Food Distributors Limited Civil suit No. 373 of 2003.

26. It is submitted that there is breach of the contract which has been proved by the Plaintiff, relying on the purport of breach illuminated in Gatobu M'Ibuut Karaatho vs. Christopher Muriithi Kubai [2014] eKLR; Edward Mugambi vs. Jason Mathu [2007] eKLR; National Bank of Kenya Limited vs. Pipe plastic Samkolit Kenya Limited [2017] eKLR; Corporate Insurance Company Limited vs. Stephen Wamutwe Civil Case No. 500 of 2009; and Madison Insurance Company Limited vs. Solomon Kinara t/a Kisii Physiotherapy Clinic [2004] eKLR.

PART IV: Questions For Determination

27. It is now common cause that there was a contract of insurance between the Plaintiff and the Defendant, which was reduced into policy document number 43/700/2018/044-COMP dated 25th August 2018. This, thus, narrows down the questions for determination. Commending themselves for determination - gleaning from the Plaint; the Statement of Defence and Counter-Claim; and the rival written Submissions - are two questions namely:

i. Whether, on a balance of probabilities, the Plaintiff has proved that the Defendant breached the doctrine of uberrima fides (utmost good faith) by misrepresenting and/or concealing material facts and whether the Plaintiff is entitled to avoidance OR that on a balance of probabilities and in accordance with the Counterclaim, the Defendant has proved that the requisite conditions for a declaration that the Plaintiff is liable to compensate the Defendant for the loss of the motor vehicle registration number KCG 863N and a further declaration that the Plaintiff is bound to satisfy all the claims emanating from the said accident, are present in this case.

ii. Which party should bear the costs of this Suit and Counterclaim?

PART V: Analysis Of The Law; Examination Of Facts; Evaluation Of Evidence And Determination

28. This Court now embarks on analysis, interrogation, assessment, and evaluation of each of the two questions, in turn.

(i) Whether, on a balance of probabilities, the Plaintiff has proved that the Defendant breached the doctrine of uberrima fides (utmost good faith) by misrepresenting and/or concealing material facts and whether the Plaintiff is entitled to avoidance OR that on a balance of probabilities and in accordance with the Counterclaim, the Defendant has proved that the requisite conditions for a declaration that the Plaintiff is liable to compensate the Defendant for the loss of the motor vehicle registration number KCG 863N and a further declaration that the Plaintiff is bound to satisfy all the claims emanating from the said accident, are present in this case

29. In this regard, the Plaintiff adduced both oral and documentary evidence that the Defendant misrepresented and/or concealed material facts by stating that the vehicle was "solely for social, domestic and pleasure purposes." In fortifying this assertion, the Plaintiff exhibited a copy of the Police Abstract dated 13th August 2018 (the Plaintiff's Exhibit 1); a copy of the Motor vehicle accident report form (the Plaintiff's Exhibit 2); a copy of the private motor vehicle proposal form in respect to policy number 43/700/2018/044-COMP issued to the Defendant for motor vehicle registration number KCG 863N (the Plaintiff's Exhibit 3); and a copy of the Investigation Report by Starden Insurance Investigators on the subject accident (the Plaintiff's Exhibit 5).

30. On the other hand, the Defendant rebuffed the Plaintiff's claim, asserting that on the material date, the vehicle was being driven by her son, the late Denis Muthie Wanjira, on a trip to source more cereals (green peas) from the market for their business which she jointly ran with her said son. The Defendant testified that her son was with his three business associates who also died in the accident, and denied that the vehicle was not being used for hire and reward. The Defendant exhibited a demand letter dated 5th September 2019 (the Defendant's Exhibit 1); an abstract of police for loss of a driving licence (the Defendant's Exhibit 2); an abstract of the accident dated 13th August 2018; and a policy document number 43/700/2018/044-COMP (the Defendant's Exhibit 4).

31. The law prohibits any person from using or causing or permitting to be used a motor vehicle on a road unless it there is a policy of insurance or security is in force to cover third party risks. The only motor vehicles exempted are those owned by the Government or tractors or other motor vehicles used solely for agricultural purposes. With the exceptions set out, my reading of section 4 of the *Insurance (Motor Vehicles Third Party Risks) Act* is that taking out a policy of insurance against third party risks is compulsory, if the owner of a motor vehicle intends to use it on a road. See section 4 of the *Insurance (Motor Vehicles Third Party Risks) Act*, Cap 405 of the Laws of Kenya.

32. In order to comply with the requirements of section 4 aforesaid, the policy of insurance must first, be a policy issued by a company which has been licenced as such; and second, insures third parties as may be specified in the policy in respect death or bodily injuries. See section 5 of the *Insurance (Motor Vehicles Third Party Risks) Act* which provides that "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*,1984 (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."

33. Once such a policy of insurance is in force, a judgment in respect of any such liability covered thereunder obtained against the insured shall be settled by the insurer, except in circumstances where the insurer has already avoided liability. Put differently, if the risk is covered under the subject policy and Judgment has been obtained against the insured, then the insurer bears a statutory duty to pay to the third party (the person entitled to benefit from the Judgment) notwithstanding that the insurer may be entitled to avoid or cancel the policy in future. See section 10(1) of the *Insurance (Motor Vehicles Third Party Risks) Act* which provides that "If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments."

34. If the owner of a private vehicle with an insurance cover for a private vehicle uses it for ferrying fare-paying passengers, he does so at his own risk since such a venture is without the appropriate insurance cover. See Corporate Insurance Company Limited vs. Elias Okinyi Ofire [1999] eKLR, where the Policy of Insurance in that matter had a clause closely similar to the clause in the policy of insurance which was exhibited by the Plaintiff in this matter and it read as follows: "Use in connection with insured's business. Use for the carriage of passengers in connection with the insured's business. (1) The policy does not cover use for hire or reward or for racing, pacemaking, reliability, trial or speed testing. (2) Use while drawing a trailer except the towing (other than for reward) of any one disabled mechanically propelled vehicle." In interpreting this clause in the context of the Act, the Court of Appeal held as follows: "The vehicle was therefore insured as a commercial vehicle for use in connection with the insured's business which business is described as "Farmer/Business." It is not the insured's business to run "matatus". If that was his business he would have had to obtain a different insurance cover namely that of carrying passengers for hire and reward. If an insured after obtaining an insurance cover for a commercial vehicle for use in connection with his business changes the nature of the vehicle to that of a "matatu" the nature of the policy remains that of a commercial vehicle policy and such change does not and cannot make the insurer liable to the passengers who are thereafter carried in

the vehicle for reward (fare). If this were the case most insurers would decline to issue a commercial vehicle policy...The learned Magistrate as well as the learned Judge (Nambuye, J.) misconstrued and misunderstood the nature of the requirement of compulsory insurance cover required to comply with the statutory requirements laid out in The Insurance (Motor Vehicles) Third Party Risks) Act Cap. 405 Laws of Kenya (the Act)." In construing sections 5 and 10 of the said Act, the Court of Appeal rendered itself as follows: "It would suffice to say for the purposes of this case that section 5 of the Act lays down the requirements and expressly provides exceptions as follows: "5. In order to comply with the requirements of section 4, the policy of insurance must be a policy which - (a)... (b) Provided that a policy in terms of this section shall not be required to cover (i)- (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 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)..." The compulsory insurance cover for use of a vehicle on a road especially in regard to fare-paying passengers is required in respect of vehicles like buses and matatus; whose owners use it for hire or reward. But an owner of a vehicle who is not supposed to use his vehicle for carrying fare paying passengers is not bound to insure the passengers and if he carries such passengers he does so at his own risk and in fact he commits an offence if he uses the vehicle for such purpose without relevant cover as provided for in section 4(2) of the Act. The learned Magistrate referred to section 16 of the Act and concluded that "a policy purporting to restrict the insurance of persons incurred (sic) by referring to matters like those raised by the Defendants herein shall as respects such liabilities as are required to be covered by a policy under paragraph (b) of section 5 of the same Act be of no effect." The learned Magistrate misread section 16. This section renders of no effect certain conditions inserted in a policy, and such conditions are specifically referred to in the section... The learned Judge failed to consider the effect of the second proviso to section 5 of the Act."

35. It bears repeating that the statutory duty to pay claims emanating from an accident as contemplated by section 10(1) of the Act, is limited to liabilities covered by the terms of the policy of insurance between the insurer and the insured. In no way does the Act contemplate an open cheque to fill. In the contrary, the Act contemplates a guarded crossed cheque. If it were to be so, there will be no need for policies of insurance which then set out terms as contemplated by section 5(b) of the Act. In fact, if it were to be so, there will be no classification of insurance policies and consequently, there will be no need of varied quantum of premiums. If it were to be so, a person can take up an insurance cover and do as he/she pleases on the strength of the statutory duty to pay. In the fullness of time, if the carte blanche was to be allowed, it will lead close-down of all insurance businesses. Deploying the standard of a reasonable man in the Machakos market hearing this (in the terms enunciated in Stanley Munga Githunguri vs. Republic [1986] eKLR), I dare surmise strongly so, that nobody (including this Court) wishes this to happen since exposure to personal liabilities, without insurance, can easily economically enervate the strongest of the strong. If this was to happen en masse, it will negatively impact on the economy.

36. It's now settled law that a contract of insurance is contract of undertaking risk. Certain material facts affect the risk. In this connection, uberrima fides (utmost good faith) is the lifeblood of such a contract. In this connection, in entering into such a contract, an insured is legally obligated to disclose to the insurer all material facts and circumstances within the personal knowledge of the insured at the time, which is highly likely to materially affect the risk. See Bullen and Leake Precedents of Pleadings, 14th Edition, Vol. 2, where it is stated that: "Contracts of insurance are contracts of utmost good faith. This gives rise to a legal obligation upon the insured, prior to the contract being made, to disclose to the insurer all material facts and circumstances known to the insured which affect the risk being run." This principle was adopted in Co-operative Insurance Company Limited vs. Daniel Wachira Wambugu [2010] eKLR, and UAP Insurance Company Limited vs. Lemmy Mutua Kavii [2018] eKLR.

37. A contract of insurance is thus deemed to be the best illustration of the doctrine of uberrima fides. In Sita Steel Rolling Mills Limited vs. Jubilee Insurance Co. Ltd [2007] eKLR, Maraga, J. (as he then was) rendered himself as follows: "The contract of insurance is perhaps the best illustration of a class of contracts described as uberrimae fidei, that is, of the utmost good faith. That being so the potential parties to such contract are bound to volunteer to each other, before the contract is concluded, information that is material. This principle imposes on the proposer or insured the duty to disclose to the insurer, prior to the conclusion of the contract, but only up to that point, all material facts within his knowledge that the latter does not or is not deemed to know."

38. A full and frank disclosure of material facts is not for ornamental reasons. The rationale for this obligation proceeds on the premise that since the insurer is assuming a risk, it should be supplied with all material facts which can reasonably expected to influence the risk to enable the insurer make an informed choice. The nature of a contract of insurance and the rationale underlying the full and frank disclosure of material facts by the insured was elucidated in three celebrated English decisions namely Carter vs. Boehm (1766) 97 ER 1162, 1164; Newsholme Bros. vs. Road Transport and General Insurance Co. Ltd [1929] All ER 442; and Seaton vs. Heath [1899] 1 QB 782, all of which have been cited by superior Courts in Kenya with approval. The sole reason for the disclosure obligation is the acknowledgement that there's information asymmetry between the insured and the insurer, where all material facts necessary to assess the magnitude of the risk lie within the knowledge of the insured. In the locus classicus case on the doctrine of uberrima fides namely Carter vs. Boehm (1766) 97 ER 1162, 1164, Lord Mansfield elegantly explained the rationale this principle as follows: "Insurance is a contract of speculation... The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the under-writer trusts to his representation, and proceeds upon confidence that he does not keep back any circumstances in his knowledge, to mislead the under-writer into a belief that the circumstance does not exist... Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact, and his believing the contrary." Also, in Seaton vs. Heath [1899] 1 QB 782, the Court stated that "Contracts of insurance are generally matters of speculation, where the person desiring to be insured has the means of knowledge as to the risk, and the insurer has not the means or use the same means." The explanation in Newsholme Bros. v Road Transport and General Insurance Co. Ltd [1929] All ER 442 at 444, was cited with approval in Paul Mutisya v Jubilee Insurance Company of Kenya Limited [2018] eKLR that "...The contract of insurance requires the utmost good faith; the insurer knows nothing; the assured knows everything about the risk he wants to insure and he must disclose to the insurer every fact material to the risk."

39. And so, in British American Insurance Co. Limited & another vs. Isaac Njenga Ngugi [2019] eKLR, Mwongo, J. was of the view that "It is not contested that the insurance contract is premised on "uberrimae fides", the principle of good faith and full disclosure, that the contract of insurance requires that the assured knows everything about the risk he wants to insure and he must disclose to the insurer every fact material to the risk." So did the Court of Appeal observe in Co-operative Insurance Company Ltd vs. David Wachira Wambugu [2010] 1 KLR 254 that "... a contract of insurance is one of uberrimae fidei. The insurer is entitled to be put in possession of all material information possessed by the insured. In policies of insurance, whether marine insurance or life insurance, there is an understanding that the contract is uberrimae fidei, if you know any circumstances at all that may influence the underwriter's opinion as to the risk he is incurring, and consequently as to whether he will take it, you will state what you know. There is an obligation there to disclose what you know, and the concealment of a material circumstance known to you, whether you thought it material or not, avoids the policy...Contracts of insurance are contracts of utmost good faith and this gives rise to a legal

obligation upon the insured, prior to the contract being made, to disclose to the insurer all material facts and circumstances known to the insured which affect the risk being run."

40. See also Maragaret Nduta Kamithi & George Njenga Kamithi vs. Kenindia Assurance Company Limited [2001] eKLR; UAP Insurance Company Limited vs. Canadian Baptist International [2019] eKLR; UAP Insurance Company Limited vs. Lemmy Mutua Kavii [2018] eKLR, et alia.

41. The first exception to this obligation is whenever the material facts were not within the knowledge of the insured at the time of entering into the contract since the insured is only expected to disclose what was within his/her knowledge. It follows that an innocent non-disclosure outside the knowledge of the insured is accepted from this obligation. See Elius Gachii Karanja vs. Concord Insurance Company Limited [1997] eKLR where the Court held that "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."

42. The second exception to this obligation is whenever the insurer fails to ask the question or fails to design the Proposal Form in a manner that captures the question. See BMK vs. AIG Kenya Insurance Ltd [2020] eKLR, where the insurer declined to pay a medical bill for the insured on basis of non-disclosure of a material fact namely a pre-existing fact that she was diabetic for 30 years preceding the proposal. Whereas the Court acknowledged that the insured (the Plaintiff in that case) had an obligation to disclose material facts, the Court found for the Plaintiff only because the Proposal Form was designed in such a way that it did not have such a question. Odero, J. rendered herself as follows: "(36) There is therefore the expectation that the insurer will ask material questions necessary to enable it reach an informed decision on whether or not to offer insurance. It is also expected that the insured will honestly answer said questions. Given that no such questions were asked in the application form, the Plaintiff had no opportunity to reveal her past medical history and thus cannot be said to have deliberately withheld that information." This is contradistinguished from this case where the form was clearly designed with such a question."

43. The net legal effect of failure to so disclose is to render the contract voidable at the election of the insurer and unenforceable. In other words, since the contract is rendered voidable as opposed to void, the insurer is left with two options on the table which is to repudiate the contract or choose to honour it for whatever reason.

44. What is the tenor of being voidable? The Black's Law Dictionary (Black's Law Dictionary, Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern by Henry Campbell Black, M. A., Ninth Edition), at page 1709, defines "voidable" as follows: "...Valid until annulled; esp., (of a contract) capable of being affirmed or rejected at the option of one of the parties. This term describes a valid act that may be voided rather than an invalid act that maybe ratified." The same dictionary, at page 374, defines a "voidable contract" to mean "A contract that can be affirmed or rejected at the option of one of the parties; a contract that is void as to the wrongdoer but not void as to the party wronged, unless that party elects to treat it as void." P.S. Atiyah, An introduction to the Law of Contract 37-38 (3d ed. 1981) defines a "voidable contract" as follows: "A voidable contract is a contract which, in its inception, is valid and capable of producing the results of a valid contract, but which may be 'avoided', i.e. rendered void at the option of one (or even, though rarely, of both) of the parties."

45. The onus of proof is on the person alleging that he/she/it is entitled to refuse or decline. In the event of refusal or repudiation by the insurer on basis of non-disclosure or misstatement of material facts, the burden of proof thus lies on the shoulder of the insurer. See British American Insurance Co. Limited

& another vs. Isaac Njenga Ngugi [2019] eKLR, where the COA stated that "19. On this there are authorities to the effect that where the declination is by the insurer, he is bound to prove the basis of the repudiation..."

46. Whenever there are documents governing a contractual relationship, the parole rule applies. In this context, in Fidelity & Commercial Bank Ltd vs. Kenya Grange Vehicle Industries Ltd (2017) eKLR, the Court of Appeal stated thus: "So that where the intention of parties has in fact been reduced to writing, under the so called parol evidence rule, it is generally not permissible to adduce extrinsic evidence, whether oral or written, either to show the intention, or to contradict, vary or add to the terms of the document, including implied terms. Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it."

47. Relatedly, in Attorney General of Belize Et Al vs. Belize Telecom Ltd & another (2009), 1WLR 1980 at page 1993, the Court cited Lord Person in Trollope Colls Ltd vs. North West Metropolitan Regional Hospital Board (1973) I WLR 601 at 609, where the Court stated that "The Court does not make a contract for the parties. The Court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the Court thinks some other terms could have been more suitable."

48. It is instructive to underscore that this suit turns on the fulcrum of proof of the fact whether the subject motor vehicle was used for hire and reward, contrary to the said policy of insurance and in this context, the proverbial kick that broke the back of the camel lies in the Investigation Report by Starden Insurance Investigators on the subject accident (the Plaintiff's Exhibit 5). The probative value of an investigation report was considered in Kenya Orient Insurance Company Limited vs. Martha Angila Cynthia [2018] eKLR, where it was held that if it is unchallenged, it is sufficient to prove the disputed fact that a private motor vehicle was used for hire services.

49. While under cross-examination, the Defendant failed to give a proper account of the three passengers. In direct contradiction to her witness statement where she stated that the they were business associates of her son, the Defendant stated in both cross-examination and re-examination that the three were her porters.

50. In connection to the foregoing, time without number, it has been held that a party or witness should not create an impression in the mind of the Court that (s)he is not a straight-forward person or raise a suspicion about his/her trustworthiness or say something which indicates that (s)he is a person of doubtful integrity and therefore unreliable witness which makes it unsafe to accept his evidence. See the Court of Appeal decisions in Ndungu Kimanyo vs. R [1979] KLR 282 and Khalif Haret vs. Republic [1979] eKLR. And the evidence of a discredited witness is absolutely worthless. See the Court of Appeal holding in Rashid Thomas vs. Republic [2008] eKLR, per Tunoi, Onyango Otieno & Aganyanya, JJA (as they then were). Besides, a party seeking a remedy from Court should be ready and willing to give a good account of himself/herself failing which a Court would be reluctant to extend its hand to a person with dirty and unclean hands, for to do so, is to soil the hands of justice. In Johnson Kimeli vs. Barclays Bank of Kenya Ltd Kisumu HCCC No. 171 of 2003 (unreported) it was said of such parties as follows: "Where the Plaintiff is seeking a remedy from Court he must show a good account of himself for the Court would be reluctant to extend its hand to a person with dirty and unclean hands for he would soil the hands of justice..."

51. Ultimately, the Plaintiff's evidence in this regard was insufficiently shaken by the Defendant and it made a favourable impression in my mind, a feat the Defendant's evidence terribly failed to achieve.

52. This yields a conclusion that the Plaintiff has adduced evidence to the required standard that the Defendant breached the principle of utmost good faith by misrepresenting and/or concealing material facts.

53. It follows that the Defendant's Counterclaim cannot see the light of the day. It further follows that the Plaintiff is entitled to the remedy of avoidance.

(ii) Which party should bear the costs of this Suit and Counterclaim?

54. Regarding costs, upon considering the cause of action and circumstances unique to this case, this Court has found no good cause to depart from the general proposition of the law that costs follow the event and accordingly, this Court exercises its discretion in favour of the Plaintiff.

PART VI: Disposition

55. Wherefore this Court finds the Plaintiff's claim meritorious but the Defendant's Counterclaim unmeritorious. Accordingly, Judgement is entered in favour of the Plaintiff in the following terms:

    i. A declaration is hereby issued that the Plaintiff is and has at all material times been entitled to avoid and has henceforth avoided liability arising from the policy of insurance number 43/700/2018/044-COMP, having been obtained by non-disclosure of material facts and/or misrepresentation of facts.

    ii. A declaration is hereby issued that the Plaintiff is thus not liable to satisfy the specific claims arising from the accident of 21st July 2018 under the *Insurance (Motor Vehicles Third Party Risks) Act*, Chapter 405 of the Laws of Kenya.

    iii. Finally, it is hereby ordered that the Defendant shall bear the costs of this suit with interest at Court rates, from the date of this Judgment until payment in full.

56. It is so ordered.

VIRTUALLY DELIVERED, SIGNED AND DATED THIS 27TH DAY OF SEPTEMBER 2024

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C.N. ONDIEKI

Principal Magistrate

Advocate for the Plaintiff:

Advocate for the Defendant:

Court Assistant: Mr. Ndonye