

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

HIGH COURT CIVIL CASE NO. 3 OF 2018

UAP INSURANCE COMPANY LIMITED.....
.....PLAINTIFF

VS

BEN OTIENO
ODEYO.....
DEFENDANT

JUDGMENT

1. By a plaint dated 16th May, 2018, the plaintiff sued the defendant seeking for judgment against the defendant for;

a) A declaration that the plaintiff is not bound to pay or satisfy the judgment in Naivasha CMCC No. 208, 209 and 210 of 2015 and 633 of 2016 and/or indemnify the defendant against any claim in respect of bodily injury to any person, damage to property or satisfy any claim or

award whatsoever arising out of the accident which allegedly occurred on 4th July, 2014 along Nakuru - Gilgil road at Karura area involving motor vehicle registration number KAZ 044X and KBD 941J.

b) Costs of this suit.

c) Interest on (b) above at court rates

d) Any other or further relief that this Honourable court may deem just, expedient and fit to grant.

2. It is averred that at all material to this suit, the plaintiff provided an insurance cover to the defendant for motor vehicle registration number KAZ 044X Toyota Vista Saloon under policy number 120/070/1/0118/11/2013 commencing from 2nd November, 2013 and expiring on 1st November, 2014.
3. That before the cover was provided, the plaintiff required the defendant to fill in an insurance

proposal form providing relevant details indicating the particulars and use of the motor vehicle.

4. That defendant filled and submitted an insurance proposal form in which he indicated that the subject motor vehicle would be used only for private purposes and not for carriage of passengers for hire and reward.
5. It is averred that consequently, on the basis of the information provided by the defendant in the insurance proposal form, and relying thereon under the doctrine of *uberrimae fidei*, the plaintiff issued an insurance cover to the defendant in respect of the subject motor vehicle.
6. The plaintiff avers that it was a term of the insurance policy that the plaintiff would indemnify the defendant for injuries to third parties in the event of an accident caused or arising from use of the subject motor vehicle registration as a private vehicle or in connection with his business.

7. That on or about July, 2014, the defendant reported to the plaintiff that on 4th July, 2014, the subject motor vehicle had been involved in an accident along Nakuru - Gilgil road at Karura area involving another motor vehicle registration number KBD 941J.
8. That the plaintiff commissioned an investigation into the alleged accident wherein it was established that the defendant had hired out his motor vehicle at the time of the accident contrary to the terms of the insurance policy.
9. That as a result of the said accident, suits CMCC No.208, 209 and 210 of 2015 and 633 of 2016 were instituted at Naivasha against the defendant for recovery of compensation for personal injuries sustained by the respective plaintiffs.
10. The plaintiff avers that the defendant having breached the terms under which the insurance cover was issued, he is not entitled to compensation

and hereby seeks to repudiate the insurance policy in so far as the said accident is concerned.

11. The plaintiff therefore seeks for a declaration that it is not bound to pay or satisfy any imminent or existing judgment in Naivasha CMCC No. 208, 209 and 210 of 2015 and 633 of 2016 and/or indemnify the defendant against any claim arising therefrom.

12. The on 4th July, 2014, the plaintiff further states that it has written to the defendant notifying him of its decision to repudiate the insurance policy in so far as liabilities arising out of the said accident are concerned but the defendant has stood mute necessitating this suit.

13. The defendant was served with summons to enter appearance and/or file a defence but the same was not done. There are several affidavits of service indicating the defendant was throughout notified of the existence of the suit herein but did not enter appearance or file a defence.

14. Pursuant to the aforesaid, the plaintiff made a request for judgment against the defendant vide a notice dated 26th October, 2023. On 15th January, 2024, the court was notified of entry of interlocutory judgment and directed the matter be heard in formal proof.

15. On 9th April, 2024, the plaintiff's case was heard and supported by the evidence of Frankline Njuki Nyaga who relied on the witness statement filed alongside the plaint. He testified that he is a legal officer at the plaintiff's company. He adopted the witness statement as his evidence in chief. The statement reiterates the averments in the plaint. He also produced documents filed alongside the plaint. The witness maintained that the defendant breached the contract of insurance herein and therefore released the plaintiff from liability.

16. At the close of the plaintiff's case, the plaintiff filed submissions in which it is argued that prior to

instituting this suit, the plaintiff sought for leave vide a miscellaneous application serialized as Naivasha Miscellaneous Civil Application No. 5 of 2018, to file a declaratory suit outside time and the application was allowed vide an order given on 2nd May, 2018.

17. That the plaintiff based this suit on the fact that at the time of the accident, the insured who is defendant herein had hired out his motor vehicle KAZ 044X contrary to the terms of the policy where the motor vehicle was to be used for personal use only as confirmed from the proposal form at paragraph 8 on the use of the vehicle “for what purpose will the vehicle be used: Social, Domestic, Pleasure and own business? Yes”

18. That the defendant in the proposal form expressly stated that he would not use the motor vehicle for carriage of passengers for hire and reward or for

carriage of goods for hire and reward by indicating “NO” for the same.

19. The plaintiff relied on the case of Kenya Orient Insurance Co. Ltd Vs Hassan Khamis Said Civil Appeal 3 of 2006 (2009) eKLR. That Invespot Insurance Investigators report dated 7th September, 2015 confirmed the vehicle was used for hire at time of the accident in breach of the policy and also a breach of the principle of utmost good faith.

20. Further when reporting the accident, the defendant did not disclose that he hired out the vehicle but claimed to have been using the motor vehicle for personal use (transport). Further the investigator was also able to obtain the defendant witness statement dated 3rd April, 2023 recorded with the police where he expressly stated that he had hired out the said motor vehicle.

21. It is also worth noting that the plaintiff’s evidence remains uncontroverted, as held in the case of

Karuru Munyororo vs Joseph Ndumia Murage & Another, Nyeri HCCC No. 95 of 1988 where the court held that: -

“ he plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and/or their counsel to cross-examine her on the evidence, the plaintiff’s evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon”

22. Be that as it were, before judgment was delivered a memo of appearance was filed by the firm of Orego & Odhiambo Advocates on behalf of the defendant but no appearance was made nor any documents filed.

23. Having evaluated the evidence herein, it is clear that the plaintiff's claim is not opposed as no defence has been filed against it.
24. Be that as it were, an evaluation of the evidence adduced reveals that the motor vehicle in question was insured for social, domestic, pleasure and own business as indicated in the proposal form at page 36 of the plaintiff's bundle of documents.
25. However, from the investigation report by Invespot Insurance Investigators, it was established that at the time of the accident, the motor vehicle had been let out for hire. The report and statement recorded from the defendant support that position. The defendant has not controverted the same.
26. It suffices to note that a contract of insurance is a contract of *ubberimae fide* (utmost good faith) and false information or non-disclosure of material facts or breach of the contractual terms entitles the insurer to repudiate the contract.

27. In the given circumstance, it is the finding of this court that the plaintiff has proved the case on the balance of probability and enter judgment in favour of the plaintiff as prayed.

28. It is so ordered.

Dated, delivered and signed on this day of 25th
February 2026.

GRACE L NZIOKA
JUDGE

In the presence of:

Mr. Karanja for the plaintiff

N/A for the defendant

Ms Hannah: court assistant