REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. E182 OF 2023

FIDELITY SHIELD INSURANCE COMPANY LIMITED…….APPELLANT

VERSUS

JOHN OKIDO IMAILUK……RESPONDENT

(Being an appeal from the Judgment and Order of Hon. T. W. Mbugua, Adjudicator, Resident Magistrate Small Claims Court Eldoret in Eldoret Small Claims court claim number E118 of 2023 delivered on 11th September 2023)

JUDGMENT

1. Vide the statement of claim dated 2nd February 2023, the Respondent herein, then the Claimant, sought compensation for repairs to his motor vehicle arising from a road accident on 21st August 2022. The brief facts underlying the claim are that on 21st August 2022 the claimant was that the Claimant was lawfully driving his motor vehicle registration no. KCX 529X along Webuye Road when at Maili Nne he was involved in a head on collision with a motorcycle and his motor vehicle was extensively damaged.

2. He pleaded that the vehicle was assessed by Maka Automotive works who prepared an assessment report at a cost of Kshs. 5,000/- and further, that the vehicle was later repaired by The Namz Auto Care at a cost of Kshs. 374,000/-. The claimant sought to be compensated for the expenses incurred in repairing the vehicle.

3. The Appellant, then the Respondent, opposed the Claim by way of an Amended Response to Statement of Claim dated 27th March 2023 denying all

the contents of the statement of claim. Further, the Respondent stated that it initiated investigations into the accident claim by the Respondent herein and found that the said Respondent had given false information regarding the accident. It pleaded that the Claimant was in breach of the principle of *Uberrimae fidei* and therefore, in accordance with the provisions of the insurance policy declined the claim and maintains that it is not bound to indemnify the Claimant.

Hearing at the Trial Court

4. The Claimant, **John Okido Imailuk** testified as **CW1.** He testified that he was the owner of KCX 529X. That on 21st August 22 he was coming from his rural home at night driving the subject motor vehicle when he encountered a motor cycle coming from the opposite direction overtaking a truck. which was overtaking a truck and since he was riding at a high speed, he was unable to get off the Respondent's path in good time and there occurred a collision between the Respondent's motor vehicle and the motor cyclist who then fell onto his motor vehicle's windscreen as a result and then slid off and fell onto the road.

5. That when he got out of the vehicle, the motorcyclist rose and boarded his motor cycle and disappeared into the darkness. He then went to the police station and left his vehicle at the Police Station after they directed him to report the matter at the police station. He then reported the matter to his insurer.

6. He testified that the vehicle was insured by Fidelity Insurance and produced a copy of the Insurance statement as CExh-2. He stated that he had a sale agreement confirming that the vehicle belonged to him, producing the same as exhibit Cexh-3. That Moka conducted assessment of the motor vehicle and

charged him Kshs 5000. He produced the assessment report plus a receipt for Kshs 5000 as PMFI-4. He also produced a receipt from Nulls Auto Care that assesses the damage occasioned to the motor vehicle as a result of the accident at Kshs. 374,000 as Cexh-5(a), and 5(b).

7. He stated that he made communication with the insurance and they told him to clear his payment for the car for them to be able to deal with his case. He produced the bundle of correspondences 5(a)-(f) (g) and further stated that he issued the insurer with a statutory notice which he produced as Cexh-7 and the demand letter as Cexh-8. In cross examination he stated that he had taken up insurance with Fidelity Shield Insurance Company Limited but was never issued with a policy. He produced the insurance sticker.

8. The claimant called **P C. Sitty Mohammed** as **CW2.** He corroborated the evidence of the claimant on how the accident occurred. He stated that as a result of the impact, the impact, the claimant's motor vehicle was damaged on the front windscreen, front bumper left head lamp, wing and side mirror. In cross examination he stated that the accident occurred on 21st August 2022 and the report was made to the police station on 22nd August 2022. He produced the OB report and stated that nobody visited the scene and that he did not have any sketch plans.

9. **CW3** was **George Methu**, a motor vehicle loss assessor with Moka Automotive Works Assessors. He testified that he assessed motor vehicle registration number KCX 529X Toyota Crown and listed down the damages of the motor vehicle and the respective costs and this came to a total of Kshs 374,000, and the estimated duration of repair was 10 working days. He produced the report as Cexh-4(a) and the fee note for Kshs 3000 as exhibit CExh 4(b).

10. The Respondent called 2 witnesses in support of its case. **RW1** was **Robert Wabwile Munga**, an Insurance Investigator stated that he was instructed by Fidelity Insurance and he carried out an investigation on the occurrence of the accident and prepared a report. He testified that his finding was that the vehicle had some accident damage but the damage was not consistent with the circumstances of the accident. He described the accident and stated that ordinarily, the damage would have started on the front right side going by the circumstances reported by the Claimant.

11. That he therefore recommended that because the damage was not consistent with the manner in which the accident occurred hence the claim was not payable. In cross examination he stated that he visited the scene 6 days after the accident and there was no evidence of any debris. Further, that he requested for the tracking record of the vehicle from the tracking device the dealers who were controlling the same but it was not availed to him. He stated that the Respondent could have interfered with and manipulated the system

12. **RW2** was **Sammy Kamau**, a Claims Manager with the Appellant. He stated that they declined the claim because they concluded that there was a breach of the principle of *Uberrimae fidei* (utmost good faith) by the Respondent after they engaged an investigator to review the claim. That this is because from the investigator's report, they noted that the damages on the motor vehicle were not consistent with the circumstances of the accident. That further, there was some lapse of time before the Claimant took cover with them.

13. Upon considering the pleading, testimonies and evidence tendered before the court, the learned trial adjudicator entered judgment in favour of the Claimant

as against the Respondent in the sum of Kshs. 379,000/- plus costs and interest.

14. Being dissatisfied with the decision of the trial court, the Appellant instituted the present appeal vide a memorandum of Appeal dated 21st September 2023 premised on the following grounds;

a) The learned trial adjudicator erred in law and fact in finding that the Respondent had proved his case on a balance of probabilities contrary to the evidence on record.

b) The learned trial adjudicator erred in law and fact in failing to dismiss the Respondent's claim.

c) The learned trial adjudicator erred in law and fact in failing to find that the Respondent was in breach of the principle of utmost good faith.

d) The learned trial adjudicator erred in law and fact in failing to find that the Appellant was not statutorily bound to indemnify the Respondent for loss and damage to his car.

e) The learned trial adjudicator erred in law and fact in failing to consider in its judgment the matters in issue.

f) The learned trial adjudicator erred in law and fact in failing to consider the Appellant's submissions.

15. The appeal was canvasses by way of written submissions.

Appellants' Submissions

16. Learned Counsel for the Appellant laid down the background of the case and the duty of this court before delving into the issues for determination. Counsel urged that the doctrine of utmost good faith (*Uberrimae fidei*) is fundamental to insurance law and any breach thereof renders an insurance policy voidable at the option of the innocent party. He cited the case of **Co-operative Insurance Company Ltd v David Wachira Wambugu [2010] eKLR** and **James Kamau Kimani v Corporate Insurance Co. Limited [2020] eKLR** in support of the submission.

17. Counsel posited that the evidence established clear breaches of utmost good faith by the Respondent to wit: a) Inconsistent accounts of the accident; The Respondent provided conflicting versions of how the accident occurred, demonstrating lack of truthfulness. b) False information regarding circumstances; RWl's investigation revealed that the damage pattern was inconsistent with the reported accident circumstances. c) Failure to disclose material facts: The Respondent failed to provide complete and accurate information about the accident and d) Misrepresentation of the impact location.

18. He urged that in insurance claims, the burden lies on the claimant to prove their entitlement to compensation on a balance of probabilities. He cited **Section 109 of the Evidence Act** and the holding in **Miller v Minister of Pensions [1947] 2 All ER 372** in this regard. He urged that the respondent failed to prove its case to the required standard.

19. Counsel submitted that the Appellant conducted a thorough investigation through qualified professionals *to wit* RW1 who is a qualified Insurance Investigator with 21 years' experience. That he conducted the investigations

and prepared a comprehensive report. That his expert findings revealed damage inconsistent with the reported circumstances, indicating that false information was provided. That RW1's professional conclusion was that the claim should be repudiated due to the inconsistencies noted. Counsel further submitted that the trial court erred in failing to give proper weight to expert evidence, citing the decision in **Stephen Kinini Wang'ondu v The Ark Limited [2016] eKLR** on expert evidence. That the expert evidence clearly supported the Appellant's position that the Respondent breached utmost good faith.

20. Counsel urged that the insurance policy contained clear terms regarding utmost good faith and the consequences of breach, and, that the Respondent testified that he was aware of the consequences of providing false information. Counsel cited **National Bank of Kenya Ltd v Pipelastic Samkolit (k) Ltd & another [2001] eKLR,** and stated that the Respondent was contractually bound to provide truthful information, and his breach of this fundamental obligation entitled the Appellant to avoid the policy.

21. Counsel urged that **Section 10 (4) of the Insurance (Motor Vehicles Third Party Risks) Act Cap 405** provides the framework for a claim repudiation based on material misrepresentation and cited the case of **Kenya Alliance Insurance Company Limited v Naomi Wambui Ngira & another (Suing as Legal Representatives and Administrators of the Estate of Nelson Macharia Maina (Deceased)) [202l] eKLR** where the court analysed this provision. Counsel submitted that the Appellant properly repudiated the claim in accordance with policy terms and statutory requirements, and the Respondent's action should have been dismissed.

22. Counsel reiterated that the trial court failed to properly consider the Appellant's comprehensive evidence and further, that the trial court committed several fundamental errors that individually and collectively require the setting aside of the judgment. Counsel urged the court to allow the Appeal.

Respondents' Submissions

23. Learned Counsel for the Respondent also set down the duty of the court and proceeded to submit on the issues for determination. Counsel urged that the Assessment Report found at Pages 15 to 25 of the Record of Appeal clearly document the damage that occurred to the Motor Vehicle Reg. No. KCX 529X. Further, that the Appellant through its witness, RW1 claimed that the accident could not possibly have taken place as alleged by the Respondent since when the Insurance Investigator, visited the scene of the accident six (6) days later, he could not find any debris.

24. Counsel's rejoinder to this submission was that this accident happened on a busy highway i.e. the Eldoret-Webuye road at Pipeline area and as the Investigator went to the scene 6 days after the occurrence of the accident, he could not possibly expect to find debris at the scene. He additionally stated that the said investigator did not witness the accident and that the evidence he gave was mere hearsay.

25. Counsel pointed out that the Appellant pleaded fraud in his Defence and/or Response, submitting that it is settled law that fraud must be specifically pleaded and proved. He urged that the Appellant did not bring to court any evidence to prove the existence of any fraud. Further, the assertion that the Respondent interfered with the Tracking System is baseless as the Tracking System in any locomotive is normally installed and controlled by the

financier. He submitted that the Appellant had no control over the Tracking System and could in no way have interfered with the same.

26. Counsel submitted that the assertion, through the Insurance Investigator's Report, that there was another car at the Police Station whose damage was more consistent with the particulars as detailed in the Statement of Claim, was nothing more than mere conjecture and wild speculation on the part of the Appellant. He pointed out that the particular details and photos of the said Motor Vehicle were not brought to court. Counsel submitted that a Police Officer testified at the trial as Claimant's Witness No.1 and as noted in the judgment, the evidence of the Police Officer corroborated that of the Claimant. That the Appellant did not bring a Police Officer to back up its claims, even though its own investigations allegedly revealed information that the police would be best placed to shed light on. He additionally pointed out that Respondent's Witness No.1 walked back the conclusions in his Report when he stated that "there is not a set formula that damages must he on a particular place". Counsel urged that the Appellant has not discharged its burden to cause this Honourable court to interfere with the finding of fact by the trial court.

27. On Whether the Appellant was statutorily bound to indemnify the Respondent for loss and damage to his car, Counsel urged that the Respondent had a valid Comprehensive Insurance policy with the Appellant against Motor Vehicle Reg. No. KCX 529X. That it follows that the Appellant is bound to satisfy any claim arising out a Road Traffic Accident with regard to the insured vehicle. Further, that the Appellant gives a totally false reading of the doctrine of *Uberrimae fidei*. That it requires an insured party to give full and frank disclosure of all necessary facts that may affect the insurer's decision prior to the issuance of the insurance policy.

28. That the doctrine kicks in if after a claim is lodged, the insurer discovers some material fact which the insured kept from it, and which if the insurer knew about prior to the claim materializing, the insurer would have declined to issue the cover. He stated that the Appellant has not shown what such fact exists in this case which would have made it refuse to issue the Respondent with the insurance cover. Counsel further urged that the Appellant points to facts that occurred after the policy had been issued and tries to bring them under the ambit of *Uberrimae fidei* by claiming that there was some falsehood about them.

29. He urged that neither proposition is true. That when Respondent's Witness No. 2 testified at trial, he confirmed that there was no criminal case that had been lodged against the Respondent for fraud. He stated that fraud is a criminal offence and further, that the Appellant's theory for repudiating the claim suggests that the Respondent is guilty of fraud; yet no report of fraud has been made to the Police.

30. Counsel urged that it is trite law that any allegations of fraud must be specifically pleaded and strictly proved. He cited the decision of the Court of Appeal in the case of **Vijay Morjaria v Nansingh Madhusingh Darbar & Another [2000] Eklr** and further submitted that it is not enough for the Appellant to merely allege fraud by invoking the doctrine of *Uberrimae fidei*. For the Appellant to rely on the said doctrine, it would have to make specific allegations of fraud on the part of the Respondent and provide sufficient evidence to prove the same.

31. Counsel cited **Section 10(4) of the Insurance (Motor Vehicle Third Party Risks) Act CAP 405**, urging that an insurer who wants to repudiate a claim must avoid the same within 90 days. The procedure of avoiding the claim is

by an insurer filing a suit repudiating the claim once served with sermons to enter appearance. The insurer is not supposed to instruct an advocate to file a Defence in the suit it wishes to repudiate. The Appellant made no effort to repudiate the claim in the manner prescribed in law. Counsel prayed the Appeal be dismissed with costs and interest.

Determination

32. **Section 38 of the Small Claims Court Act** provides as follows:

> **"38. (1) A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.**
>
> **(2) An appeal from any decision or order referred to in subsection (1) shall be final."**

33. In the case of **Peter Gichuki King'ara Vs Iebc & 2 Others, Nyeri Civil Appeal No. 31 Of 2013, (Court of Appeal) (Visram, Koome & Odek, JJA) Of 13.02.2014**, the court of Appeal stated as follows: -

> **"It was held that it is trite law that the exercise of judicial discretion is a point of law and that the trial court in denying a prayer of scrutiny is exercising judicial discretion. The Court concluded that it would not be feasible for the Court of Appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court. The court further held that the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that is**

supported by law and evidence – with the caveat that the appeal court did not see the witness demeanour – is an issue of law."

34. In **Mwangi v Kihiu (Civil Appeal 16 of 2023) [2023] KEHC 18643 (KLR) (28 April 2023) (Judgment)** when handling an Appeal emanating from the Small Claims Court, the court stated as follows:

"Even on the normal legal lingua, a point of law must clearly arise out of the pleadings. In case of appeal, it should arise out of the memorandum of appeal vis-à-vis the pleadings in the court below ……."

35. In **Mbogo vs Shah 1968 EA 93** the court held thus on the duty of the Appellate Court

"The duty of this court in an appeal against the exercise of that discretion is not to interfere unless the Judge has exercised his or her discretion wrongly in principle or perversely on the facts of the case."

36. This being the first appellate court, the guiding principle is as set out in the case of **Selle v Associated Motor Boat Co. [1968] EA 123 as follows: -**

The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial

Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence.

37. Having considered the grounds of appeal as well as the submissions rendered by Counsel, I find that the following issues arise for determination;

i. **Whether the trial court erred in finding that the respondent had proved his case on a balance of probabilities**
ii. **Whether the trial court erred in failing to find that the Respondent was not in breach of the principle of utmost good faith**
iii. **Whether the trial court erred in failing to find that the Appellant was not statutorily bound to indemnify the Respondent**

38. On whether the trial court erred in finding that the respondent had proved his case on a balance of probabilities, it is trite law that he who alleges must prove as provided for in **Sections 107, 109 and 112 of the Evidence Act.**

39. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in **Mumbi M'Nabea vs David M. Wachira [2016] eKLR** stated as follows:

"In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will

assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.

40. The Court of Appeal in the above case also reiterated their decision in **Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280** over the very same matter where it was held thus;

"Whereas under section 107 of the Evidence Act, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognises that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."

35. On burden of proof, the learned Judges of Appeal in the case of **Palace Investments Limited vs Geoffrey Kariuki Mwenda & Another [2015] eKLR,** posited thus:

"Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say:

"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable

than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties…are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

36. A fundamental principle of fraud is that the same must be specifically pleaded and proved. This was aptly expressed in **Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR**, where Tunoi, JA (as he then was) stated as follows:

"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently"

37. Fraud can therefore not be inferred from facts. In **Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) vs Stephen Njoroge Macharia [2020] eKLR,** the Court of Appeal observed as follows:

"In the instant case, the appellants needed to not only plead and particularize the fraud, but also lay a basis by way of credible

evidence upon which the Court would make a finding that indeed there was fraud…."

38. As regards the burden of proof in matters fraud, the same is higher than that required in civil cases, that of proof on a balance of probabilities; and lower than that required in criminal cases being beyond reasonable doubt. The Court in **Moses Parantai & Peris Wanjiku Mukuru (supra)**, observed as follows:

"…. Fraud is a quasi-criminal charge which must, as already stated, not only be specifically pleaded but also proved on a standard though below beyond reasonable double doubt, but above balance of probabilities…"

39. In considering the law as herein set out, the court notes that in the instant case, the Appellant contended that the claim by the Respondent was fraudulent and that it was on those grounds that they declined to compensate the Respondent for the Insurance claim. I note that the Appellant pleaded the particulars of fraud but the only evidence that produced in support of this allegation was the report by the Insurance Investigator who visited the scene of the accident six days after the accident had occurred.

40. It has been asserted that the narration given by the Respondent on how the accident occurred differed significantly with the damage that was occasioned to the vehicle and hence the conclusion that the claim was a fabrication. However, in my consideration of the evidence in its totality, I am satisfied that the reasonable probability that the accident occurred as narrated by the

Respondent does exist. He stated that the motorcyclist was overtaking an oncoming motor vehicle which then placed him on the path of the Appellant's motor vehicle.

41. He stated that he hooted at the motor cyclist who reasonably then, in realising that there was an oncoming vehicle on its path, in a bid to avoid hitting the oncoming motor vehicle, and with one he was overtaking still on the path behind him, would reasonably attempt to swerve off the road through the nearest exit which direction then would be to the motor cyclist's right and to the Respondent's left. It is therefore not improbable in such a scenario that the Respondent's car would then be damaged more to the left than to the right. The investigator premised his findings primarily on the part where the damage to the Respondent's motor vehicle was discernible.

42. I have considered the testimony of the Respondent on how the accident occurred vis-à-vis the damage occasioned to the motor vehicle and in light of my conclusions herein reached, coupled with the fact that the said Investigator upon whose evidence the Appellants exclusively relied upon did not witness the accident and also inspected the scene much later after the accident had occurred I find that the evidence of the Appellants upon which it seeks that the court solely relies in reaching its determination is not cogent and sufficiently reliable. It falls short of the standard of proof for required in an allegation of fraud. In this regard, I see no reason to fault the Learne Adjudicator's finding based on the said evidence.

43. On the ground of appeal that the trial court erred in failing to find that the Appellant was not statutorily bound to indemnify the Respondent, **t**he courts must give effect to the intentions of the parties as expressed in any agreement reached as between themselves. In **National Bank of Kenya Ltd v**

Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR, the Court of Appeal stated thus;

> **"A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved."**

44. **Section 10(2)** of the **Insurance (Motor Vehicles Third Party Risks) Act** provides instances when an insurer can avoid liability as follows:

a) **If the insurer was not given notice of the claim or lawsuit, they are not bound to pay the third-party claim.**

b) **If the insurance policy was obtained by fraudulent means or misrepresentation, the insurer can apply to the court for a declaration that the policy is void. If the court grants the declaration, the insurer is relieved of its obligations under the policy.**

c) **If the policy was cancelled before the accident occurred, and the insurer notified the Registrar of Motor Vehicles, the insurer is not liable. However, if the cancellation was not properly communicated to the authorities, the insurer may still be held responsible.**

d) **If the policy had an exclusion clause covering certain circumstances and the accident falls within such an exclusion, the insurer can reject liability. However, the exclusion must be valid**

under the law, as some exclusions may be unenforceable if they conflict with statutory obligations.

e) If the vehicle was being used for a purpose not covered by the insurance policy, the insurer may deny liability.

f) If the insured refuses to cooperate with the insurer in defending a claim, the insurer may use this as grounds to avoid paying third-party damages. This could include failure to provide necessary documents, not reporting the accident, or failing to attend court proceedings.

g) If the driver at the time of the accident was unlicensed, underage, or explicitly excluded from coverage under the insurance policy, the insurer may refuse to pay third-party claims.

h) If the vehicle was involved in illegal activities, the insurer may be able to avoid its obligations.

45. Having addressed my mind on the submissions on this issue, it is my finding that it is not in dispute that the Respondent had an insurance policy with the Appellant. Having satisfied myself that the Appellant failed to prove the allegations of fraud against the Respondent to the required standard, the policy could therefore not be vitiated or invalidated in the circumstances for reasons that the indemnification arises from the existing insurance policy between the Appellant and the Respondent.

46. In this regard, none of the conditions set out in the above cited Section 10(2) have been satisfied by the Appellant. The existence of such a policy having not been denied by the Appellants, I am of the finding that the trial court did

not err in its finding that the Appellant was statutorily bound to indemnify the Respondent. The upshot then is that it is my finding that the Appeal herein filed lacks merit and the same is accordingly dismissed in its entirety with costs to the Respondent.

Read Dated and Signed at ELDORET on 19th March 2026

E. OMINDE

JUDGE