



**Corporate Insurance Company Limited v Rainbow Cabs & Car Hire Limited  
(Civil Appeal 352 of 2012) [2023] KECA 1029 (KLR) (4 August 2023) (Judgment)**

Neutral citation: [2023] KECA 1029 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 352 OF 2012  
DK MUSINGA, K M'INOTI & KI LAIBUTA, JJA  
AUGUST 4, 2023**

**BETWEEN**

**CORPORATE INSURANCE COMPANY LIMITED ..... APPELLANT**

**AND**

**RAINBOW CABS & CAR HIRE LIMITED ..... RESPONDENT**

*(Being an appeal from the judgment and decree of the High Court of Kenya at Nairobi (Mugo, J.) delivered on 17th February 2011 in HCCC No. 415 of 2009)*

**JUDGMENT**

1. Before this court is an appeal against the judgment of Mugo J. delivered on February 17, 2011 in HCCC No 415 of 2009.
2. The background to the dispute between the parties herein can be traced to a comprehensive policy of insurance No C01/075/1/900137/2007 issued by the appellant to the respondent on or about April 20, 2007 in respect of the respondent's motor vehicle registration No Kxx xxxN. The policy was issued through the appellant's agent, High Vision Business & Insurance Agency, in accordance with the provisions of section 7 of the [Insurance \(Motor Vehicle Third Party Risks\) Act](#) (cap 405 Laws of Kenya) as read with the [Insurance Act](#) (cap 487).
3. The policy was meant to cover, *inter alia*, eventualities as would lead to death or personal injuries suffered by third parties and authorized passengers when the subject motor vehicle was being used for the insured's private purposes. The policy was renewed from time to time between April 13, 2008 to April 12, 2009 on the same terms and conditions.
4. On September 14, 2008 whilst the policy was in force, the subject motor vehicle was involved in an accident in which a passenger known as James Muriuki died. The appellant caused an investigation into the accident and discovered that the vehicle had been hired by the deceased's employer, Forecast



- Electronics Solutions Limited, to transport the deceased on an official duty, which act was contended by the appellant to be in contravention of the express terms and conditions of the policy.
5. The estate of the deceased passenger issued a notice of intention to sue the appellant for damages arising out of the said accident. The appellant filed a suit against the respondent vide a plaint dated June 9, 2009 arguing that it was entitled to avoid liability under the said policy for reasons that, when it was taking the policy, the respondent failed to disclose material facts and/or represented facts that were false; and that, at all material times, the motor vehicle would not be used for hire and reward. The suit was premised on, inter alia, the provisions of section 10 (4) of the [Insurance \(Motor Vehicle Third Party Risks\) Act](#). It was stated that, at the time of the accident, the subject motor vehicle was being used by third parties for hire and reward. The appellant sought for the following orders against the respondent:
    - a. A declaration that it is and has at all material times been entitled to avoid the private car policy of insurance No C01/075/1/900137/2007 issued on April 20, 2007, apart from any provision contained therein on ground that the said policy of insurance was obtained by the non- disclosure of material facts and/or by the representations of facts which were false on some material particular(s).
    - b. A declaration that the appellant is not liable to indemnify the respondent for claims by the passengers injured or killed as a result of the said accident under the said policy or under the [Insurance \(Motor Vehicle 3<sup>rd</sup> Party Risks\) Act](#) cap 405 Laws of Kenya.
    - c. Costs and interest at court rates.
  6. The respondent neither entered appearance nor filed a defence despite service of summons to enter appearance by way of substituted service. The matter therefore proceeded *ex-parte*. The appellant's claims manager, Anna Mwangi, testified on behalf of the appellant and produced the following documents in support of the appellant's case: A certified true copy of a private car policy No C01/075/1/900137/2007; certified true copy of the policy renewal cover note for the period of April 13, 2008 to April 12, 2009; claim notification dated September 16, 2008; police abstract dated September 26, 2008; A copy of a demand letter dated March 13, 2009 from Forecast Electronic Solutions Ltd to the appellant; and a demand letter dated July 28, 2009 from Arusei & Company Advocates to the appellant.
  7. The trial court delivered judgment in the matter on February 17, 2011. It dismissed the appellant's claim, holding that the appellant had not proved its case on a balance of probabilities. Although the respondent did not make any attempt to challenge the appellant's suit, the learned judge was not satisfied that the allegations made by the appellant against the respondent had been proved in the absence of the proposal form that had been completed by the respondent. The court noted that the proposal form would have been the basis upon which the court would have determined with certainty whether the respondent was guilty of material non- disclosure or misrepresentation. The trial court further held that nothing was produced as proof that the respondent accepted the terms as appearing in the private policy document produced in the court by the appellant.
  8. Aggrieved and dissatisfied with the entire judgment, the appellant preferred this appeal. It is argued that the learned judge erred in law and in fact: by holding that the production of a proposal form in evidence was a pre-requisite for the appellant to succeed in its case; in giving undue weight to documents or evidence not produced before the court; in failing to appreciate that the evidence on record was sufficient to prove the appellant's case on a balance of probabilities; in speculating about the nature of the insurance cover given to the respondent; contradicted herself by making a finding that the subject policy was renewed severally on the same terms and conditions, but at the same time



held that there was no evidence to show that the respondent accepted the same policy terms; and erred in dismissing the appellant's case.

9. At the hearing of this appeal, learned counsel Ms Mshila appeared for the appellant. There was no appearance on behalf of the respondent. Learned counsel indicated that she would be entirely relying on the appellant's written submissions dated January 13, 2023, but nonetheless made brief oral highlights on the issue relating to the proposal form.
10. The appellant submitted that the learned judge erred in law by making a finding that production of the proposal form in evidence was a pre-requisite in proving terms of the policy. It contended that a proposal form does not constitute a binding contract between the parties. According to the appellant, the document that created a binding relationship between the parties was the policy of insurance which contained express terms and conditions relating to the use of the insured motor vehicle.
11. The appellant further submitted that the learned judge erred by giving the proposal form undue probative value whereas none of the parties made reference to it at the hearing; that, by so doing, the trial court was in essence placing the burden of proof on the appellant for facts it did not allege. The decision of this court in *Kenneth Nyaga Muwige v Austin Kiguta & 2 others* [2015] eKLR was cited for the proposition that a document marked for identification only becomes part of the evidence on record when it is formally produced as an exhibit by a witness, and that until a document marked for identification is formally produced, it is of very little, if any, evidential value.
12. On whether the appellant had proved its case to the required standard, it was submitted that the appellant had present documentary and witness evidence sufficient to determine the case in its favour; that the duty of the trial court is to examine evidence and satisfy itself that the claim has been proved. See *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR.
13. This being a first appeal, it is the duty of the court to review the evidence adduced before the trial court and satisfy itself that the decision was well-founded. In *Selle & another v Associated Motor Boat Co Ltd & others* [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this 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...”
14. The main issue that commends itself for determination in this appeal is whether the learned judge gave undue weight to the proposal form. Our finding on this issue will inevitably lead to a determination of the question as to whether the appellant was entitled to avoid liability under the policy.
15. The essentials of an ordinary contract apply to a contract of insurance. There must be an offer from the person intending to take an insurance policy, who at this initial stage is referred to as a ‘proposer’. The offer is ordinarily made through a document known as a ‘proposal form’. There must be in existence a subject matter for which insurance is proposed for. This could be a house, a car, household items, et al. The proposer must have ‘insurable interest’ in the subject matter. A person is said to have an insurable interest if he would suffer loss when the insured object is damaged or lost. The offer by the proposer must be accepted and consideration in the form of premium paid before an insurance policy can be said to exist. Therefore, a contract of insurance, like any other contract, comes into existence when there is an offer made, that offer is accepted, and consideration (payment or a premium) is given. See *General Principles of Insurance Law* by R. Hardy Ivamy, 4<sup>th</sup> Edition.



16. In this matter, it is not disputed that a contract of insurance existed between the appellant and the respondent in respect of motor vehicle registration No Kxx xxxN which was said to belong to the respondent. The contract of insurance, to wit, policy No C01/075/1/900137/2007 which was originally issued on April 20, 2007 was subsequently renewed on April 13, 2008 and on April 12, 2009. This to us is *prima facie* evidence of the appellant's acceptance of the offer by the respondent. It is generally accepted that premium was paid by the respondent in the initial contract and in the subsequent renewals. We are satisfied, therefore, that at all material times, a valid contract of insurance existed between the appellant and the respondent.
17. The gravamen of the appellant's case before the trial court was whether it was entitled to avoid liability owing to the respondent's breach of certain terms and conditions of the insurance policy; that whereas the respondent took out a private car policy with a limitation for use only for social, domestic and pleasure in connection with the respondent's business or profession, the respondent instead used the vehicle for hire and reward, which act constituted a breach of the terms and conditions of the policy. It was argued that the respondent was liable for the non-disclosure and misrepresentation of material facts and that pursuant to the provisions of section 10 (4) of the *Insurance (Motor Vehicle Third Party Risks) Act*, Cap 405, the appellant was entitled to avoid liability under the policy.
18. The trial court held as follows:
- “ Although the defendant did not make any attempt to challenge the suit, I am not satisfied that the allegations made by the plaintiff against the defendant have been proved in the absence of the proposal form presented to the plaintiff when the policy was issued. That would be the basis upon which the court can determine with certainty that the defendant is guilty of material non-disclosure or misrepresentation.” [emphasis added]
19. With respect to the learned judge, we do not think that she applied her mind correctly on this issue. Whereas a proposal form would be important in such an inquiry, we are of the view that it is not mandatory. The proposal form, in our view, contained the offer made by the respondent to the appellant. It could not be construed as binding on the parties. It is the policy that was issued by the appellant which created a contractual relationship between the parties. The learned judge noted that one of the documents produced in evidence by Anna Mwangi, who testified on behalf of the appellant, was a certified true copy of a private car policy No C01/075/900137/2007. We perused the policy document dated April 20, 2007 and noted that it contains various headings such as particulars of risk, insurance provided and limits of liability. The policy document also contains a section headed 'clauses endorsement memoranda to which the insurance is subject to.' endorsement No 003 which reads limitations as to use-private vehicles provides as follows:
1. Use only for social, domestic and pleasure purposes. The policy does not cover use for racing competitions rallies or trials (or use for practice for any of them) or use for hire or reward commercial travelling the carriage of goods in connection with any trade or business or use for any purpose in connection with the motor trade.
  2. Use only for social, domestic and pleasure purposes and by the insured in person in connection with his business or profession. The policy does not cover use for racing competitions rallies or trials (or use for practice for any of them) or use for hire or reward commercial travelling the carriage of goods in connection with any trade or business or use for any purpose in connection with the motor trade.



3. Use for social, domestic and pleasure purposes and for the Insured's business of profession. The policy does not cover use for racing competition, rallies or trials (or use for practice for any of them) or carriage of a passenger for hire or reward."
20. The policy document, in our view, speaks expressly as to the intention of the parties. The scope of the insurance cover was expressly stated as well as the limit of use of the insured's motor vehicle. No evidence was placed before the trial court to show that the cover issued to the respondent or the limits thereof was different from what the respondent had proposed. In fact, the renewal for the two subsequent insurance periods confirms that the respondent was aware of and/or understood the terms and conditions under the policy and agreed to be bound by them. In this regard, we note that a certified true copy of the policy renewal cover note for the period of April 13, 2008 to April 12, 2009 was produced in evidence before the trial court. In the circumstances, it is our view that the learned judge erred by attaching unnecessary import on the proposal form, whereas the terms and conditions of the contract as well as the intention of the parties could be clearly deciphered from the policy documents and the renewal cover note.
21. Turning to the issue of non-disclosure of material facts and misrepresentation on the part of the respondent, it is clear beyond any peradventure that the insured's motor vehicle was to be used only for social, domestic and pleasure purposes and by the insured in person in connection with his business or profession. The policy did not extend to the use of the insured motor vehicle for hire and reward, or the carriage of passengers for hire and reward.
22. The allegation that the vehicle was being used for hire and reward on September 14, 2008 when an accident occurred leading to the demise of James Muriuki, an employee of Forecast Electronic Solutions Limited who had hired the vehicle was not controverted by way of evidence.
23. A contract of insurance is a contract that is based on the doctrine of utmost good faith. The insured has a duty to disclose any material facts within his/her knowledge. A representation is said to be material if it would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk. In *Margaret Nduta Kamithi & George Njenga Kamithi v Kenindia Assurance Company Limited* [2001] eKLR, the court cited the *Law of Insurance* 5<sup>th</sup> Edition para. 5 on page 92 by Colinvaux where the author stated:

“In the case of certain contracts, however, the law demands a higher standard of good faith between the parties, and “there is no class of documents as to which the strictest good faith is more rigidly required in courts of law than policies of assurance.” “As the underwriter knows nothing and the man who comes to him to ask him to insure knows everything, it is the duty of the assured, the man who desires to have a policy, to make a full disclosure to the underwriters without being asked of all the material circumstances, because the underwriters know nothing and the assured knows everything. This is expressed by saying that it is a contract of the utmost good faith – uberrima fides.”
24. Lord Mansfield expounded on the nature of the contract of insurance in *Carter v Boehm* [1766] Burr 1905 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 assured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance



does not exist and to induce him to estimate the risqué as if it did not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void; because the risqué run is really different from the risqué understood and intended to be run at the time of the agreement... The policy would be equally void against the underwriter if he concealed... The governing principle is applicable to all contracts and dealings. Good faith forbids either party, by concealing what he privately knows to draw the other into a bargain from his ignorance of the fact and his believing the contrary...”

25. The holding by Lord Mansfield was endorsed by this court in *Co-operative Insurance Company Ltd v David Wachira Wambugu* [2010] eKLR.
26. The respondent did not disclose to the appellant when it was taking the initial policy or during the subsequent renewals that the insured motor vehicle would be used for hire and reward. The disclosure would have, in our view, influenced the appellant in deciding whether to issue cover, the terms of the cover and the premium to charge. Failure to disclose material facts and misrepresentation on the respondent’s part were prejudicial to the appellant. The policy of insurance in question covered the vehicle when it was being used for social, domestic or pleasure purposes. That is what the respondent had asked for, and that is what the appellant provided. Therefore, when the vehicle was being used for hire or reward, the policy of insurance did not provide cover. It is our view that from the totality of evidence presented before the trial court, the appellant had established its case on a balance of probabilities. The appellant was entitled to avoid the policy because the respondent used the vehicle for a purpose other than that which it had declared it would be put to.
27. The upshot of the foregoing is that we find the appeal meritorious and accordingly allow the same with costs to the appellant.

**DATED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY AUGUST, 2023.**

**D. K. MUSINGA, (P.)**

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**JUDGE OF APPEAL**

**K. M’INOTI**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

*Signed*

**DEPUTY REGISTRAR**

