IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), MAKHANDIA & GATEMBU, JJA)

CIVIL APPEAL NO. 244 OF 2003

BETWEEN

MOHAMMED ALI AHMED...............................APPELLANT

VERSUS

BLUE SHIELD INSURANCE LIMITED.........RESPONDENT

(An appeal arising from the judgment of the High Court of Kenya at Nairobi (Ang'awa, J) dated and delivered on 22nd January, 2002

in

HCCC NO, 250 OF 1997)

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JUDGMENT OF THE COURT

1. By a policy of insurance issued on 30th August 1993 the appellant insured his motor vehicle registration number KAA 081, make Isuzu TFR 12 truck, with the respondent under a commercial vehicle policy (the policy) for the period 6th August 1993 to 5th August 1994.

2. On 7th May 1994, during the currency of the policy, the vehicle was involved in an accident along Ganyurey/Wajir road. The appellant lodged a claim with the respondent for indemnity under the policy. In the motor vehicle accident report form submitted to the respondent, the appellant's driver stated that, "*I was driving towards Hadado from Wajir town when I had front tyre burst, vehicle overturned and caught fire*". The police abstract report relating to the accident captured that a report had been received at the police station involving the vehicle that was "*shot by robbers, overturned and burned beyond repair*."

3. The respondent declined to indemnify the appellant and repudiated liability under the policy. In a letter dated 25th August 1994 addressed to the insurance brokers, the claims supervisor of the respondent stated as follow:

> ***"We refer to the above accident and we confirm having received the investigation report in respect of the above loss.***
>
> ***From the available information and evidence in our possession, the insured's vehicle was travelling along Wajir/Wagalla Road in Ganyure trading centre carrying forty***
>
> ***(40) passengers when it was attacked by 27 armed bandits as a result the vehicle lost control overturned and caught fire. A number of 20 passengers when it was attacked by 20 passengers died (sic) i.e 18 adults and 2 children. The policy issued to insured is a commercial vehicle policy for carrying own goods and hence, the vehicle was being used contrary to "Limitation as to use" at the time of loss. Nevertheless, we received the information from the police that this is not a normal robbery but clanship war situation between the Degodias and the Ajurans of North Eastern Province.***
>
> ***The Company shall not be liable in respect of loss of liability arising out of Civil War, whether declared or not as per Section 3 of General Exceptions.***

***In the premises, we have repudiated liability*."**

4. There appears to have been unsuccessful attempts to refer the dispute to arbitration but the matter ended up in court. In his plaint filed before the High Court at Nairobi on 5th February 1997, the appellant sought a declaration that the respondent was liable under the policy to indemnify him for the loss of the vehicle. He sought judgment for Kshs. 1,052,640.00, as the value of the vehicle as well as general damages "*for breach of contract and loss of use of the said motor vehicle*".

5. In its statement of defence, the respondent admitted having insured the vehicle but contended that the appellant was in breach of his duty of good faith to the respondent in failing to disclose material facts about the usage of the vehicle; that the appellant misrepresented that the vehicle would be used in Nairobi; that he did not disclose that the vehicle would be "used in the bandit prone areas of the North Eastern Province" which facts were material in determining the risks attendant to the usage and the premium payable; that the appellant misrepresented that the vehicle would be used for carriage of "own goods for commercial purpose" whilst at the time of the accident the vehicle was carrying over 40 passengers contrary to the policy.

6. According to the respondent, the vehicle was damaged in circumstances not covered under the policy in that the vehicle was attacked and deliberately set on fire by armed bandits in a high-risk area, and the appellant was carrying passenger's contrary to the policy. Further that the appellant gave false and misleading information in his proposal form as well as in the claim form and misrepresented facts of the alleged accident, persons involved in the alleged accident, and usage of the vehicle at the time of the accident.

7. The appellant and his driver, Mohammed Yusuf testified before the trial court as PW1 and PW2 respectively. The respondent's only witness was its assistant accident manager, Kennedy Moseti.

8. After considering the evidence and the submissions, the learned trial judge dismissed the claim on grounds that: the use of the vehicle under the policy was restricted to the geographical area of Nairobi; that the appellant breached the terms of the policy by carrying passengers; that the vehicle was not damaged in circumstances covered under the policy in that "*the fire was a deliberate damage done by bandits*."; that the appellant did not establish that the business he was undertaking at the time of the attack was in connection with his work but "instead passengers and goods for a school was carried which may not necessarily fit in the plaintiff business."

9. The Judge concluded that the respondent was entitled to repudiate liability under the policy. The Judge stated that had she found in favour of the appellant, she would have computed damages at "Kshs. 1,052,640.00 only"

The appeal and submissions

10. Aggrieved, the appellant lodged this appeal complaining that the Judge erred: in concluding, without evidence, that the vehicle was set ablaze by bandits; in holding that the circumstances in which the accident occurred were not covered under the policy; in failing to appreciate that the accident was a consequence of a tyre burst arising from a robbery attack; in finding that the vehicle was used outside the permitted geographical area covered under the policy; in holding that the appellant was guilty of material non-disclosure of material facts; and in concluding that at the time of the accident, the appellant did not establish that the business he was doing was his own.

11. During the hearing of the appeal, learned counsel Ms.Wamaitha appeared for the appellant. Although notice of hearing was served, there was no appearance for the respondent.

12. Counsel for the appellant submitted that contrary to the finding by the Judge that the vehicle was set "ablaze" by the bandits, the evidence by the appellant's driver was that bandits shot the left tyre of the vehicle as a result of which the vehicle overturned; that under clause 1 of Section 1 of the Policy, the respondent was liable to indemnify the appellant against loss or damage to the vehicle by accidental collision or overturning and loss or damage by fire external expulsion, self-ignition or lightning or burglary; that the police abstract indicated that the vehicle was shot at, overturned and burned beyond repair; that the Judge erred in finding that the vehicle was being used outside the permitted geographical area; that the Judge erred in finding that the vehicle was being used otherwise than in accordance with the limitation as to use; and that the finding that there was material non-disclosure of material facts was not well founded.

Analysis and Determination

13. We have considered the appeal and the submissions by counsel. It is not in dispute that the accident giving rise to the claim occurred on 7th May 1994 when the policy was in force and that the accident resulted in the total write off of the vehicle. The two issues that arise are, first, whether the finding by the Judge that the appellant was guilty of non-disclosure of material facts was well founded. Secondly, whether the risk that attached and on the basis of which the appellant lodged the claim for indemnity was an insured risk covered under the policy.

14. On the first issue, it was the respondent's plea in its defence that the appellant breached his duty of good faith by failing to disclose material facts about the usage of the vehicle. In particular, the respondent asserted that the appellant misrepresented that the vehicle was to be used in Nairobi; that he did not disclose that it would be used in a bandit prone area; and that he also misrepresented that the vehicle was to be used for the carriage of his own goods.

15. As the Court held in ***Co-Operative Insurance Company Ltd v David Wachira Wambugu [2010] eKLR***, a contract of insurance is a contract of utmost good faith. A proposer has a legal obligation, prior to the contract of insurance being made, to disclose to the insurer all material facts and circumstances known to the insured which affect the risk being run. An insurer can avoid a contract of insurance on the grounds of misrepresentation and non-disclosure of material information on the part of the insured. See ***Margaret Nduta Kamithi vs Kenindia Assurance [2001]eKLR*** as well as the House of Lords' decision of ***Pan Atlantic Insurance Co. Ltd v Pine Top Insurance Co. Ltd [1994] 3 ALL ER 581***.

The test of 'material information' being that "*every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.*"

16. Centuries earlier 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…***"

17. According to the respondent, the appellant breached that cardinal duty in misrepresenting in the proposal form the territory where the vehicle would be used. In the proposal for insurance on the basis of which the respondent issued the policy, in answer to the question: "*State fully the purpose for which the Vehicle(s) will be used*", the answer given was, "*carrying own*" goods. In answer to the question: "*state in which East African territories vehicle(s) is are normally garaged and used*", the answer supplied was "*Nairobi/Kenya*".

18. It was contended for the respondent, and the Judge agreed, that the appellant thereby represented that the vehicle would only be used within Nairobi. In our view, the reference to "*Nairobi*" in that answer, was where the vehicle would be "garaged" whilst "*Kenya*" referred to the territory in East Africa where the vehicle would be used. The question required the proposer to identify the particular East African territory the vehicle be used. It is also noteworthy that the appellant gave his address in the proposal form as "*P. O. Box 230 Wajir*." That is not consistent with a proposer intent on concealing that the vehicle would be used in North Eastern Province. We think the Judge erred in concluding that the respondent was entitled to repudiate liability on basis of non-disclosure of material facts regarding the territory where the vehicle would be used.

19. Turning to the question whether the risk that attached was an insured risk and whether liability in respect thereof was exempted. The learned Judge determined that the damage to the vehicle was not covered under the policy because the fire was a deliberate act of the bandits. There was however no evidence to show how the vehicle caught fire. According to the respondent's witness, the respondent's investigators did not investigate the cause of the fire.

20. As already stated, under Section 1 of the policy, the respondent undertook to indemnify the appellant against "*loss of or damage to*" the vehicle by, amongst other things "*accidental collision or overturning*"; "*fire external explosion self-ignition or lightning or burglary housebreaking or theft*". The driver of the vehicle stated in the claim form "*front tyre burst vehicle overturned and caught fire*". He reiterated in his testimony before the trial court that he found bandits along his way, "*they shot the left tire (sic). The vehicle overturned*." It is not clear on what basis the Judge concluded that the bandits "*set the vehicle ablaze*". What we understand the driver to have said is that the tyre of the vehicle was shot at and the vehicle overturned.

Although the driver stated that after running to save himself he "*saw smoke then flames*", there was no evidence at all as to what may have caused the flames. To the extent that the damage or loss was occasioned by overturning, it was a risk covered under the policy.

21. It was also contended by the respondent that under the policy, it would not be liable in respect of loss or damage "*whilst the motor vehicle is (i) being used otherwise than in accordance with the limitation as to use*." The use of the vehicle was limited under the policy to:

> "**Use in connection with the insured's business."**
>
> "**Use for the carriage of passengers in connection with the insured's business. Use for social domestic and pleasure purposes.**
>
> **The policy does not cover:**
>
> > **1) Use for racing competitions rallies or trials (or use for practice for any of them) or use for hire or reward**

2) Use while drawing a trailer except the towing (other than for reward) of any one disabled mechanically propelled vehicle."

22. And what was the insured's business? In the proposal form, under "trade or business", the answer supplied was "businessman". In answer to the question "*state fully the purpose for which the vehicle(s) will be used*" the answer given was "*carrying own goods*". In the claim form, the insured described himself as a "wholesaler". The policy was a "commercial vehicle policy". The evidence of PW1 (the appellant) and PW2 (the appellant's driver Ibrahim Mohamed Yusuf) was that on the material day the vehicle carried goods to be delivered to a school at the request of the school's headmaster. The vehicle also carried some students, teachers and the headmaster. In the words of PW2:

> "***I was carrying school feeding programme together with students. I was to go with the headmaster***. … ***The vehicle I used had no problem prior to this. The vehicle had passengers. They were asking for vehicle to deliver the school program. … I have been [sic] agreed to carry passengers. The headmaster and teacher. …I agree I carried teachers and students.***"

23. Based on that testimony, and in so far as carriage of goods is concerned, it is not clear to us how and in what respect the limitation "*use in connection with the insured's business*" was violated. We do not construe the limitation as to use as limiting the insured, as a wholesale businessman, from transporting goods for its customers.

24. There is however the concession that the vehicle was ferrying passengers. This in our view was not permitted use under the policy. It was not demonstrated that the students and the teachers who were being ferried in the vehicle would fall under the category "*carriage of passengers in connection with the insured's business.*" The Judge was right that this constituted a breach of the terms of the policy for which reason the respondent was entitled to repudiate liability. The words of the policy are that the respondent shall not be liable in respect of loss or damage sustained whilst the vehicle is being used otherwise than in accordance with the limitation as to use. The use of the vehicle, a truck, for the carriage of passengers not connected with the appellant's business violated the terms of the policy.

See generally E. R. Hardy Ivamy, **Fire and Motor Insurance**, 3rd edition, Butterworths, 1978, chapter 30 at page 253. For that reason alone, we uphold the decision of the trial court. In the result, the appeal fails and is dismissed. As the respondent did not appear during the hearing, we make no orders as to costs.

Dated and delivered at Nairobi this 8th day of February, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

...

JUDGE OF APPEAL

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

DEPUTY REGISTRAR