



REPUBLIC OF KENYA



KENYA LAW
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**CIC General Insurance Limited v Muiruri (Civil Suit 110 of 2017)
[2025] KEHC 3161 (KLR) (Civ) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 3161 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL SUIT 110 OF 2017**

TW OUYA, J

FEBRUARY 27, 2025

BETWEEN

CIC GENERAL INSURANCE LIMITED PLAINTIFF

AND

WILSON GATHONDU MUIRURI DEFENDANT

JUDGMENT

Background

1. By way of the plaint dated 4.05.2017 CIC General Insurance Limited (hereafter the Plaintiff) filed the present declaratory suit against Wilson Gathondu Muiruri (hereafter the Defendant) seeking the following reliefs:
 - a. A declaration that the Plaintiff is and has at all material times been entitled to avoid the aforesaid Policy of Insurance No. 012/070/069350/08 and any provision contained therein on the ground that the terms of the policy had been breached by the Defendant.
 - b. A declaration that the Plaintiff is not liable to make any payment under the aforesaid policy of Insurance No. 012/070/069350/08 in respect of any claims against the Defendant herein arising out of the injuries sustained in the accident on the 24th day of July, 2016 involving the Motor vehicle registration number KBW 038R.
 - c. A declaration that the Plaintiff is not liable to make any payment under the aforesaid Policy of Insurance No. 012/070/069350/08 in respect of any orders and/or judgments that would be obtained as a result of the case which will be instituted by DAVID MWANGI KIURI against the Defendant herein.
 - d. Any other or further relief that this Honourable Court may deem fit to grant.



- e. Costs of the suit be paid by the Defendant.
2. The Plaintiff averred in the declaratory suit that pursuant to the Policy of Insurance under Policy Number 012/070/1/069350/2010/08 (hereafter the policy) it had agreed to insure the motor vehicle registration number KBW 038R (the subject motor vehicle) belonging to the Defendant at all material times, for the period between 30.08.2015 and 29.08.2016. That pursuant to the policy, the Plaintiff issued the Defendant with a Certificate of Insurance in respect of the subject motor vehicle.
 3. The Plaintiff averred that during the subsistence of the policy, the Defendant permitted the subject motor vehicle to carry passengers for hire and reward, in contravention of the terms thereof. That while the Defendant's authorized driver was driving the subject motor vehicle along Nairobi-Naivasha Road near Rironi area on 24.07.2016, the same was involved in an accident, thereby resulting in bodily injuries to pedestrians who were standing nearby. That consequently, one of the pedestrians namely David Mwangi Kiuru, issued the Plaintiff with a statutory notice of intention to institute legal proceedings against the Defendant. That the said proceedings were subsequently instituted vide Limuru SPMCC No. 217 of 2017 (hereafter the primary suit) whereby the above-named person sought general and special damages arising out of the material accident.
 4. It is the averment by the Plaintiff that in view of the Defendant's breach of the terms of the policy, the particulars of which are set out under paragraph 11 of the plaint, the Plaintiff is entitled to avoid the policy. That the Plaintiff therefore sent a notice of repudiation of any arising claim to the Defendant, outlining the said particulars of breach of the policy agreement.
 5. It is equally the averment by the Plaintiff that the Defendant is guilty of non-disclosure of all the material facts relating to the primary suit, though the Defendant on his part denied using the subject motor vehicle in a manner contrary to the terms stipulated in the policy.
 6. Upon the Plaintiff's request made on 30.10.2023, an interlocutory judgment was entered against the Defendant on 5.12.2023 for his failure to enter appearance and to file a statement of defence, despite service of summons and the relevant pleadings being effected upon him by way of substituted service. The matter therefore proceeded for formal proof hearing on 28.10.2024.
 7. The sole witness at the trial in the matter was Phylis Mutua, whose brief testimony as PW1 constituted the adoption of her signed witness statement dated 25.10.2024 and the production of the Plaintiff's list and bundle of documents dated 4.05.2017 as P. Exhibits 1-6. The witness, who stated that she is a Legal Officer for the Plaintiff, urged the court to grant the declaratory reliefs sought in the plaint, consequently discharging the Plaintiff from satisfying any and all decrees arising out of judgments delivered in suits relating to the material accident, including the primary suit. The witness likewise sought costs of the suit and interest thereon, on behalf of the Plaintiff; marking the close of the Plaintiff's case.

Written Submissions

8. Directions were therefore given for the Plaintiff to put in written submissions. Its counsel anchored his submissions on the decision in *Karugi & Another v Kabiya & 3 others* (1987) KLR 347 on who has the burden of proof in civil claims, as well as the decision in *Kenya Orient Insurance Company Limited v Martha Angila Cynthia* [2018] KEHC 4238 (KLR) on the admission of an investigation report by assessors, in the absence of any objection.
9. Counsel proceeded to submit that the Plaintiff has tendered sufficient evidence to support its claim for breach against the Defendant, specifically that the latter party ought to have disclosed all relevant particulars of any claims made against him in respect of the subject motor vehicle and which may give



rise to a claim under the policy. Counsel argued that in the present instance, the Plaintiff instructed M/S Uptown Loss Assessors (K) Ltd to undertake investigations on its behalf in respect of the material accident, which investigations concluded that the Defendant had either misrepresented or concealed material facts from the Plaintiff, while reporting the claim relating to the material accident. That the investigations further established that at the time of the material accident, the subject motor vehicle was being used for hire and reward purposes, in total contravention of the terms of the policy. Counsel borrowed from the case of *British American Insurance Co. Ltd v Kanyi* [2022] KEHC 16790 (KLR) where Meoli, J. reasoned thus:

“The Plaintiff insured the motor vehicle on the misrepresentation by the Defendant that its usage would solely be for general cartage. As the investigation report (P. Exh.6), shows, when accident occurred the motor vehicle was ferrying unauthorized number of passengers and was equally overloaded in contravention of the terms of the policy.”

10. For those reasons, counsel urged this court to find that the Plaintiff has proved its claim for misrepresentation and non-disclosure of material facts, against the Defendant, on a balance of probabilities; with counsel adding that the Plaintiff's case remains uncontroverted. That in the circumstances, the Plaintiff is entitled to repudiate the policy.

Analysis

11. The court upon considering the pleadings, evidence tendered and the Plaintiff's submissions on record plus the supporting authorities, identifies the sole issue for determination as being whether the Plaintiff has proved its claim for breach of the policy agreement and misrepresentation against the Defendant to the required standard, in order to warrant the reliefs sought in the plaint.
12. The applicable law as to the burden of proof is set out under Sections 107, 108 and 109 of the [Evidence Act](#). The Court of Appeal in *Mumbi M'Nabea v David M.Wachira* [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:

“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. Section 107(1) of the [Evidence Act](#), Cap 80 Laws of Kenya provides as follows:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” The above provision provides for the legal burden of proof.

However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000* [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the [Evidence Act](#), (which deals with the legal 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 recognizes 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.”

13. The latter statement alludes to the position that the legal burden of proof, unlike the evidentiary burden of proof does not shift. In reiterating the standard of proof, the Court of Appeal in *Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another* [2015] eKLR held that:

“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.”

14. From the foregoing guiding authorities, it is clear that the duty of proving the averments contained in the plaint lay squarely with the Plaintiff. In *Karugi & Another v Kabiya & 3 Others* (1987) KLR 347 the Court of Appeal stated that:

“[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff’s case is not controverted or is proved on a balance of probabilities by reason of the defendants’ failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...-. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.” (Emphasis added)

15. The undisputed facts are that the Plaintiff had insured the subject motor vehicle belonging to the Defendant, at all material times. It is also not in dispute that the subject motor vehicle was involved in a road traffic accident on the date and at the place earlier set out, thereby injuring certain pedestrians including David Mwangi Kiuri, who consequently instituted the primary suit against the Defendant.
16. That said, as earlier mentioned, the Plaintiff’s case rides primarily on the allegations that the Defendant breached the policy agreement by failing to disclose material facts pertaining to the claim associated with the material accident; that the Defendant violated the term of the policy which provides that the subject motor vehicle shall not be utilized for transporting passengers for hire or reward; and that the Defendant misrepresented the facts pertaining to the claim resulting from the material accident.
17. By way of her witness statement dated 25.10.2024, PW1 stated that following the accident, the Plaintiff engaged the services of M/S Uptown Loss Assessors (K) Ltd (the investigators) to undertake investigations as to the circumstances surrounding and leading up to the material accident; the result of which an investigation report dated 2.09.2016 was compiled and tendered as P. Exhibit 2. That the said report revealed that at the time of the accident, the subject motor vehicle was ferrying passengers for



hire, in breach of the policy; and that the Defendant had failed to disclose material facts to the Plaintiff, in respect of the improper use of the said vehicle.

18. The Plaintiff's witness similarly tendered as P. Exhibit 1 a copy of the relevant policy document titled "Private Motor Insurance Policy" which stipulates on page 2 that "the policy does not cover use for racing, competitions, rallies or trials (or use for practice for any of them) or the carriage of passengers for hire or reward." Suffice it to say that, the policy was comprehensive in nature.
19. Upon its study of the investigation report, the court observed that the same alleges that on the material date, the Plaintiff was not on board the subject motor vehicle but that his authorized driver (Joseph Simiyu Shapili) was driving the said vehicle, carrying two (2) pastors; namely Bishop Onditi and Pastor Wanyonyi, enroute from a church anniversary celebration which was held in Kakamega County, when the accident occurred at around 10:30pm, with the subject motor vehicle knocking down two (2) passengers, one of whom became the Plaintiff in the primary suit.
20. Upon its further study of the aforementioned report, the court observed that the investigators incorporated the respective statements of the Defendant and his driver, both of whom stated that they were aboard the subject motor vehicle accompanied by the two (2) pastors mentioned hereinabove, and that they are both congregants of the same church. That both the Defendant and his driver confirmed the occurrence of the accident, with the former stating that he reported the incident to the Plaintiff soon thereafter.
21. As a matter of general principle, the courts have acknowledged the need for exercise of good faith and transparency in insurance contract relationships and in the absence of which an insurer can be permitted to avoid its obligations under the policy. See for instance the case of *Co-Operative Insurance Company Ltd v David Wachira Wambugu* [2010] eKLR where the Court of Appeal held that:

"The learned authors of *Bullen & Leake, Precedent of Pleadings*, 14th Edition, Vol. 2 states at page 908:

"Contracts of insurance are contracts of the 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. Lord Mansfield's words in *Carter vs Boehm* (1766) Burr. 1905 have stood the test of time:

"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 risk 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 risk run is really different from the risk 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..."
22. In the present instance, the court noted that the maker of the investigation report was not called to testify as to the contents of the said report, though it was admitted as an exhibit in the absence of any objection. Nevertheless, upon examination of the totality of the material on record and including



the report, the court is of the view that no credible material was tendered to support the particulars of breach, misrepresentation and non-disclosure of material facts, set out in the report. No credible material was adduced to demonstrate that the persons aboard the subject motor vehicle were in fact unauthorized passengers for hire or reward or that the said motor vehicle was ever utilized for such purpose at any material time, as claimed in the investigation report.

23. Furthermore, going by the contents of the said report, it is apparent that the persons who are said to have been injured in the material accident were pedestrians and not passengers in the subject motor vehicle. Such persons would ordinarily be covered under the policy. On this note, the court wishes to point out that the circumstances in the case of *British American Insurance Co. Ltd v Kanyi* [2022] KEHC 16790 (KLR) cited in the Plaintiff's submissions are distinguishable, since in that case, the injured persons were unauthorized passengers aboard a motor vehicle, in contravention of the insurance policy agreement existing therein.
24. In view of all the foregoing circumstances, the court finds that the Plaintiff has failed to prove the particulars of breach as well as the allegations of misrepresentation and/or non-disclosure of material facts made against the Defendant, to the required standard of proof, in order to entitle it to a repudiation and/or avoidance of the policy.

Determination

25. Consequently, the Plaintiff's suit is hereby dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 27TH DAY OF FEBRUARY, 2025.

ROA

HON. T. W. OUYA

JUDGE

For Plaintiff.....Mr Muguna

For Respondent...No Appearance

Court Assistant:. Martin

