



**Uap Insurance Company Limited v Atenya (Civil Case 23 of 2019)  
[2024] KEHC 8402 (KLR) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8402 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL CASE 23 OF 2019  
DO CHEPKWONY, J  
JUNE 28, 2024**

**BETWEEN**

**THE UAP INSURANCE COMPANY LIMITED ..... PLAINTIFF**

**AND**

**JARED KEFFA ATENYA ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff's claim against the Defendant is as enshrined in the Plaintiff dated 18<sup>th</sup> October, 2019 which seeks the following orders:
  - a. A Declaration that the Plaintiff is not liable or bound to make any payments or indemnify the Defendant under Insurance Policy Cover Number 020/070/1/000001/2000, in respect to any claim in respect to death or bodily injury to any person or passenger being carried out of road traffic accident which occurred on 7<sup>th</sup> December 2012 along Thika Super highway at Juja near Highpoint Guest House involving the Defendant's Motor Vehicle Registration Number KBL 746R.
  - b. Costs of the suit.
  - c. Interest on (b) above.
2. It is the Plaintiff's case that it issued the Defendant with a Comprehensive Insurance Policy Cover No 020/070/1/000001/2000 (hereinafter the policy" for Motor Vehicle Registration Number KBL 746R (hereinafter subject motor vehicle) upon payment of requisite premiums for the period commencing 3<sup>rd</sup> February, 2012 and expiring 31<sup>st</sup> December, 2012.
3. According to the Plaintiff, it was a term of the policy that it would cover third party risks only but not liability or risk in respect to death of or bodily injury to the passenger and or employee in the subject Motor vehicle at the time of occurrence of event. In essence, the Plaintiff was not bound to



indemnify the Defendant in the event of an accident caused or loss occasioned to third parties during the pendency of the policy cover.

4. The Plaintiff contends that on 7<sup>th</sup> December, 2012, while ferrying passengers( family friends of the Defendant one Edward Kariuki to attend a graduation ceremony at University of Nairobi, the subject Motor Vehicle involved in a road traffic accident along Thika Super Highway near Highpoint Guest House a result of which three passengers sustained fatal injuries and two passengers sustained bodily injuries while one passenger was unhurt, the full particulars of the passengers are as particularised in the Plaintiff as follows:-
  - a. Edward Kariuki- fatal injuries
  - b. Abija Mbula- fatal injuries
  - c. Emily Samu- fatal injuries
  - d. Sellesion Njiru Nyaga- serious injuries
  - e. Agnes Muthoni- serious injuries
  - f. Titus Ngari- unhurt.
5. The Plaintiff argues that it was an express term of the policy that the subject motor vehicle shall not be utilised for purposes of ferrying passengers and that the policy shall not extend to the Defendant's passengers whatsoever or at all. The Plaintiff blamed the Defendant for breaching the terms and conditions of the policy cover at paragraph 8 of the Plaintiff as itemised below:-
  - a. Failing to comply with the express motor private insurance policy terms while using Motor Vehicle Registration Number KBL 746R.
  - b. Using Motor Vehicle Registration Number KBL 746R to carry passengers contrary to the stipulations and representations in the subject Insurance Policy Covering document and proposal.
  - c. Overloading Motor Vehicle Registration Number KBL 746R contrary to the express policy stipulations.
  - d. Using and/or permitting use of Motor Vehicle Registration Number KBL 746R for commercial purposes contrary to the express provisions of the Policy Instrument.
  - e. Permitting passengers to utilize the subject Motor Vehicle when he knew or ought to have known that the same contravened the express and/or implied terms of the Policy Instrument.
  - f. Exposing his passengers to bodily injury when he knew or ought to have known that the same was specifically excluded by the Policy Instrument.
  - g. Permitting use of the subject Motor Vehicle contrary to the express limits of user as per the Policy Instrument.
  - h. Permitting Motor Vehicle Registration Number KBL 746R to illegally and unlawfully ferry passengers contrary to the traffic rules and policy instrument and/or permitting use of Motor Vehicle Registration Number KBL 746R to ferry passengers aboard Motor Vehicle Registration Number KBL 746R despite the fact that the vehicles carrier body was not designed to carry passengers.



- i. Misrepresenting or giving false and untrue particulars of use of the subject Motor Vehicle Registration Number KBL 746R while proposing and applying for the subject insurance policy cover with the Plaintiff.
  - j. Engaging in non-disclosure of true and material facts while proposing for policy cover with the Plaintiff.
  - k. Using or permitting use of Motor Vehicle Registration Number KBL 746R contrary to the terms and conditions of the Policy Cover Form.
  - l. Otherwise using the said Motor Vehicle contrary to and in total breach of the Insurance Policy cover terms and conditions.
  - m. Permitting use of Motor Vehicle Registration Number KBL 746R for carriage of passengers contrary and in breach of the insurance cover.
6. Therefore, the Plaintiff holds that the injuries to the passengers aboard the subject motor vehicle were not insured peril as per the terms and conditions of the policy but was expressly excluded hence liability does not attach to the Plaintiff. The Plaintiff has thus filed the suit seeking the said declaratory orders.
7. The Defendant did not enter appearance and the matter proceeded by way of formal proof on 23<sup>rd</sup> January, 2024 where the court heard the evidence of Ms Cheryl Odiyo, the Legal Officer of the Plaintiff. She indicated that she would rely on her witness statement dated 3<sup>rd</sup> October, 2023 which was adopted as her evidence in chief. She also produced her list of documents dated 18<sup>th</sup> October, 2019 and the Further List of Documents dated 21<sup>st</sup> January, 2024 which the documents were produced as follows:
- a. Police abstract PEXB 1.
  - b. The investigation report PEXB 2.
  - c. The policy document proposal form- PEXB3.
  - d. Motor Vehicle Policy Schedule in respect to Motor Vehicle Registration Number KBL 746R.
  - e. The Proposal form for Private Car Insurance PEXB5.
8. It is her prayer that the court finds the Plaintiff not liable to make payments or indemnify the Defendant for any claim arising under the policy cover in respect of the accident of 7<sup>th</sup> December, 2012.
9. Further, the Plaintiff further filed its Submissions dated 5<sup>th</sup> February, 2024 where the issues for determination were twofold:
- a. Whether there was a breach of the policy cover's terms and conditions.
  - b. Whether the Plaintiff is entitled to the prayers sought.
10. In a nutshell, it is the Plaintiff's argument that parties are bound by the contract between them and since the Defendant breached the agreed terms, it is not liable to indemnify the Defendant for the accident since the motor vehicle was being used to ferry passengers contrary to the terms of the said contract. The Plaintiff has cited various authorities in support of his position, all of which will be considered by the court in its decision herein.

### **Analysis and Determination**

11. Having carefully read through the Plaint, the witness statement by the Plaintiff's witnesses and submissions, this Court finds the issues for determination being:-



- a. Whether the Defendant was in breach of terms and conditions of the Policy Cover No 020/07/1/000001/2000 and or whether the Plaintiff is liable to indemnify him.
  - b. Whether the Plaintiff is entitled to the prayers sought in the Plaint.
12. The legal ambit of this case falls under Section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act*, Chapter 405 of the Laws of Kenya and this is what the Respondent's claim is hinged on. The Section provides as follows -

“Duty of insurer to satisfy judgements against persons insured:

- (1) If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under Paragraph (b) of Section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.
- (2) No sum shall be payable by an insurer under the foregoing provisions of this section –
  - (a) in respect of any judgment, unless before or within fourteen days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings; or
  - (b) in respect of any judgment, so long as execution thereon is stayed pending an appeal; or
  - (c) in connexion with any liability if, before the happening of the event which was the cause of the death or bodily injury giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provisions contained therein, and either
    - (i) before the happening of the event the certificate was surrendered to the insurer, or the person to whom the certificate was issued made a statutory declaration stating that the certificate had been lost or destroyed; or
    - (ii) after the happening of the event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer, or the person to whom the certificate was issued made such a statutory declaration as aforesaid; or
    - (iii) either before or after the happening of the event, but within a period of twenty – eight days from the



taking effect of the cancellation of the policy, the insurer has notified the Registrar of Motor Vehicles and the Commissioner of Police in writing of the failure to surrender the certificate.

(3) .....

4. No sum shall be payable by an insurer under the foregoing provisions of this section if in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular, or, if he has avoided the policy on the ground, that he was entitled so to do apart from any provision contained in it.

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not, thereby, become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely and any person to whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto.

13. In the case of *UAP Insurance Co. Ltd v Patrick Charo Chiro* [2021] eKLR the Court in respect of the act stated thus:-

“The import of the above provision of the law is that for liability to accrue under section 10 of the *Insurance (Motor Vehicle Third Party Risks) Act* CAP 405, there is a 4-fold test to be met. Firstly, that the motor vehicle in question was insured by the appellant; Secondly, that the respondent has a judgement in his favour against the insured; Thirdly, that statutory notice was issued to the insurer either at least 14 days before the filing of the suit wherein judgement has been obtained or within 30 days of filing the suit where judgement has been obtained and finally the respondent was a person covered by the insurance policy.”

14. In the instant case, the main issue in question is whether the Defendant was in breach of The Terms and Conditions of the Policy Cover No 020/070/11/000001/2000 and or whether the Plaintiff is liable to indemnify the Defendant following the accident that occurred on 7<sup>th</sup> December, 2012. The Plaintiff has relied on the case of *Kenyan Alliance Insurance Company Limited v Rose Achieng Abdullah* [2021] eKLR on which the court stated as follows:-

“It is therefore my finding that the Defendant violated the terms and conditions for which the suit vehicle Registration No KCC 043R was insured. As the Defendant’s vehicle was clearly employed for the use for which it was not insured by the Plaintiff, the Plaintiff is not under any legal obligation to honour and/or satisfy the claims arising from and/or to indemnify the Defendant for the bodily injuries sustained by the passengers who at the time of the accident were in the Defendant’s Motor Vehicle Registration No KCC O43R or to compensate any person for any damage or loss to property as a result of the said accident.”



15. The court adopts the decision in the above cited case and agrees with the Plaintiff that since the passengers in the Motor Vehicle Registration No KBL 746R at the time of the accident were not covered under the Policy No 020/070/11/000001/2000 since it is indicated that the vehicle was on hire to ferry them to a graduation ceremony, then the Plaintiff cannot be condemned to indemnify the Defendant as he was in breach of the terms and conditions of the policy cover as itemised at Paragraph 8 of the Plaint. In view of the above findings, the court proceeds to find that the Plaintiff has proved its case on a balance of probability and issue the following orders:-
- a. A Declaration is hereby issued that the Plaintiff is not liable or bound to make any payments or indemnify the Defendant under Insurance Policy Cover Number 020/070/1/000001/2000, in respect to any claim in respect to death or bodily injury to any person or passenger being carried out of road traffic accident which occurred on 7<sup>th</sup> December 2012 along Thika Super highway at Juja near Highpoint Guest house involving the Defendant's Motor Vehicle Registration Number KBL 746R.
  - b. The Plaintiff is also awarded costs of the suit at court rates.

It is so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS ...28<sup>TH</sup> ... DAY OF .....JUNE..., 2024.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

M/S Ombwori counsel for Plaintiff

No appearance for and by Defendants.

Court Assistant - Martin

