



**Fidelity Shield Insurance Co. Ltd v Crescent Services Station Ltd (Civil Case 424 of 2013) [2024] KEHC 8677 (KLR) (Civ) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8677 (KLR)

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

**CIVIL  
CIVIL CASE 424 OF 2013**

**AN ONGERI, J  
JUNE 27, 2024**

**BETWEEN**

**FIDELITY SHIELD INSURANCE CO. LTD ..... PLAINTIFF**

**AND**

**CRESENT SERVICES STATION LTD ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff in this case, Fidelity Shield Insurance Company Ltd (hereafter referred to as the plaintiff only) sued the defendant vide plaint dated 7/10/2013 amended on 23/10/2017 seeking the following prayers;
  - i. A declaration that the plaintiff is and has been entitled to avoid the aforesaid policy of insurance No. MC401105XXXX on the grounds that the said policy of insurance was obtained by:-
    - i. Non-disclosure of a material fact or facts or
    - ii. Representation of fact which were false in material particular or
    - iii. Both (i) and (ii) above.
  - ii. A declaration that the plaintiff is not liable to make any payment under the aforesaid policy of insurance No. MC401105XXXX in respect of any claim against the defendant herein arising out of injuries or loss sustained in the accident of 6<sup>th</sup> November, 2011 involving motor vehicle registration number KAV XXXX.
  - iii. In the alternative, the plaintiff seeks a declaration that it is not liable to pay any claim arising out of the accident on 6<sup>th</sup> November, 2011 involving motor vehicle registration number KAV



XXXX for the reason that the defendant did not report the accident and that the vehicle was being driven by an authorized driver which was contrary to the terms of the policy.

- iv. Costs of the suit.
2. The defendant Hussein M. Ali T/a Crescent Service Station (hereafter referred to as the defendant only) was at the material time the owner of motor vehicle registration no. KAV XXXX which was insured by the plaintiff.
3. The plaintiff averred as follows in the plaint;
4. At all material times, the defendant was insured by the plaintiff for its motor vehicle Registration Number KAV XXXX Isuzu Canter for the period between 12<sup>th</sup> January, 2011 to 11<sup>th</sup> January, 2012 (both dates inclusive) under a Policy Insurance Number MC401105XXXX.
5. It was a term of the Policy that the insured will be covered for loss and injury occurring while the said motor vehicle Registration Number KAV XXXX was being used for the insured's business for carriage of own goods.
6. It was also a term of the policy that-
  - i. The vehicle shall only be driven by authorized drivers
  - ii. The defendant will report to the plaintiff any accident, injury, loss or damage involving the said vehicle as soon as reasonably possible
  - iii. The defendant will inform the plaintiff immediately he becomes aware of any current or future prosecution or proceedings in connection with any event for which there may be any liability under the policy.
  - iv. The information provided in the proposal for the insurance was true and complete to the best of the defendant's knowledge
7. On or about the 6<sup>th</sup> November, 2011, the said vehicle was being driven along Outering Road Nairobi, when it was involved in an accident with Motor Vehicle KAM XXXX resulting into several injuries to passengers in motor vehicle KAM XXXX.
8. The plaintiff avers that-
  - i. The driver driving the said vehicle KAV XXXX at the time of the accident was not an authorized driver within the meaning of the policy.
  - ii. The defendant did not report the accident to the plaintiff
  - iii. The defendant did not report of any proceedings facing him out of the injuries suffered in the accident and the plaintiff only got the information from Third Parties.
  - iv. The defendant had indicated that the motor vehicle is a canter but records at the registrar of motor vehicles show that the vehicle is a pick up Nissan/Datsun.
  - v. The defendant had not transferred the vehicle into his name.
  - vi. The defendant did not offer any information to the plaintiff or the plaintiff's investigator's and was un co-operative during and after the occurrence of the accident
  - vii. The defendant withheld/misrepresented crucial information at the time of taking out the policy



9. The plaintiff avers that, by reason of the matters set out hereinabove, it is and was at all material times entitled to avoid the said policy on the grounds that the said policy was obtained by non-disclosure and/or misrepresentation of one or more material facts and the plaintiff is entitled to avoid and does avoid the aforesaid policy
10. Alternatively, and without prejudice to the foregoing, it is the plaintiff's contention that after the occurrence of the said accident the defendant did not report the accident to the plaintiff and therefore the plaintiff is not liable to meet any claim arising from the said accident and shall seek a declaration to that effect.
11. The plaintiff amended the name of the defendant to Crescent Service Station Limited.
12. The defendants stated in their amended statement of defence as follows;
13. The defendant admits the contents of paragraph 5 in so far as the policy provided that motor vehicle registration number KAV XXXX was limited only to the carriage of own goods. The policy further provided that the insured would be covered for liability to third parties including instances of bodily injury or death damage to third parties' property and medical expenses in respect of any one accident.
14. The defendant denies the contents of paragraph 6 (i) – (iv) and puts the plaintiff to strict proof. The defendant states that motor vehicle registration number KAV XXXX was insured under the commercial vehicle insurance policy and the terms of the policy were as follows;
  - a. The cover was in respect to liability to third parties – death or bodily injury, property damage or medical expenses arising from an accident.
  - b. The territorial limit of the cover was within Kenya.
  - c. The use of the motor vehicle was limited only to the carriage of goods.
  - d. The authorized driver as per the policy included any of the following;
    - i. Defendant
    - ii. Any person driving on the defendant's order or with it is permission provided the person holds a valid driving licence to drive motor vehicle.
  - e. That in case of the theft or criminal act which may give rise to a claim under this policy the insured shall give immediate notice to the police.
15. In response to paragraph 8 the defendant avers that;
  - a. That at the time of the occurrence of the accident the motor vehicle registration number KAV XXXX had been stolen from the defendants garage in Eastleigh shopping centre parking yard.
  - b. The person who stole the motor vehicle KAV XXXX, Bishar Adan Mohamed, was not an employee of the defendant was arrested and a criminal case was instituted against him for theft of the motor vehicle.
  - c. The insured motor vehicle is indeed KAV XXXX Nissan Canter and the defendant never misrepresented itself to the plaintiff.
  - d. The defendant is the beneficial owner of motor vehicle registration number KAV XXXX having entered into an agreement for sale of the said motor vehicle with more trucks limited in 2011, however a transfer of ownership has never been registered.



- e. The defendant only became aware that motor vehicle registration number KAV XXXX was stole after it was involved in the accident and reported the same immediately at the Buru Buru Police Station.
  - f. The defendant avers that all the information that it tendered to the plaintiff and has not misrepresented or concealed any facts.
16. The hearing of this case proceeded on 2/2/2022. The plaintiff called 3 witnesses as follows;
  17. PW 1 no. 58516 PC Masinde produced a police abstract from Buruburu police station dated 20/8/2012. He said at the time of the accident the driver of the motor vehicle registration KAV XXXX was Bishor Aden Mohamed. He was charged in court and fined ksh.5000/=.
  18. PW 2 Samuel Kinamberi Ndenga, private investigator produced a report dated 22/10/2012.
  19. PW 2 confirmed the driver was Bishor Mohamed whom he said had stolen motor vehicle registration no. KAV XXXX.
  20. PW 2 said at the material time the motor vehicle was involved by the plaintiff through their agent World Waivers Insurance Agencies and the motor vehicle was registered in the name of Mothex Ltd.
  21. PW 3 Chrispus Maina said he is the claim analyst of the plaintiff.
  22. PW 3 said the motor vehicle registration no. KAV XXXX was insured by the plaintiff at the time of the accident on 6/11/2011.
  23. He said the driver of the motor vehicle was not authorized and further that the defendant did not report the accident to the plaintiff.
  24. PW 3 also said that the defendant had said the motor vehicle was a canter but records at the registrar of motor vehicles showed it was a Nissan/Datsun.
  25. The defendant called one witness DW 1, Hassan Buralle Isaac who is the Director of the defendant.
  26. DW1 adopted this witness statement dated 6/3/2014 as his evidence in chief.
  27. DW 1 stated in the said witness statement that on 6/11/2011 the motor vehicle registration no. KAV XXXX UD Nissan tanker was stolen from Eastleigh shopping centre where it was normally parked.
  28. DW 1 said he reported the matter to the plaintiff through its Agent World Waivers Insurance Agencies Ltd and at Buruburu police station.
  29. The person who had stolen the motor vehicle one Bishar Adan was arrested and charged in court.
  30. In cross examination DW 1 said he reported to the agent of the plaintiff and they told him they would handle the matter.
  31. DW 1 said he bought the motor vehicle from a company called Moretrack but it had not been transferred to him.
  32. He said the motor vehicle was stolen when they were in the process of transferring the ownership.
  33. The parties filed written submissions as follows; the plaintiff submitted that the defendant has at all material times insured the motor vehicle registration number KAV XXXX Isuzu Canter with the plaintiff under policy Number MC401105XXXX. The term of the policy issued was that the insured will be covered for loss and injury occurring while the motor vehicle is being used for the insured's business of carriage of own goods. The said motor vehicle registration number KAV XXXX



Isuzu Canter was involved in an accident on the 6/11/2011 along Outering Road with motor vehicle registration number KAM XXXX resulting into injuries to passengers in the latter motor vehicle and was not reported to the Plaintiff. At the time of the occurrence of the accident, the motor vehicle registration number KAV XXXX Isuzu Canter was not being driven by a driver authorized to do so by the Defendant and Defendant was not the registered owner of the motor vehicle registration number KAV XXXX Isuzu Canter.

34. The plaintiff submitted that Section 94 of the *Insurance Act* (Chapter 487 Laws of Kenya) provides that no policy of insurance shall be issued on the life or lives of any person or persons or on any other event or events whatsoever wherein the person or persons for whose use benefit or on whose account such policy or policies shall be made shall have no insurable interest. It is thus clear that a person purchasing an insurance policy must have an insurable interest in the property so covered under the policy. The insurance policy documents availed by the Plaintiff confirms that at all material times the insured was the Defendant. A search of the insured motor vehicle dated 21/9/2012 however revealed that the insured motor vehicle is registered under More Trucks Limited.
35. The plaintiff submitted that it is trite that contracts of insurance involve the principle of *uberimae fide* (utmost good faith). This principle 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. The proposal form confirms that the defendants indicated that the body type of the subject motor vehicle is an Isuzu canter lorry/tanker. This differs with a search conducted on 21/9/2012 that revealed that the insured motor vehicle is a Nissan/Datsun pickup registered under More Trucks Limited. The defendant had this information within its knowledge but chose not to disclose to the plaintiff.
36. The plaintiff further argued that from the evidence and documents presented by both parties that the driver who was in control of the subject vehicle at the time of the accident was not an authorized driver within the definition of the insurance policy. Schedule 1 of 2 of the subject insurance policy defines an authorized driver to be either: -
  - i. The Defendant
  - ii. Any person driving on the Defendant's order or permission provided the person holds a valid driving license to drive the motor vehicle or has held and is not disqualified from holding or obtaining such license.
37. The defendant on the other hand submitted that this court does not have jurisdiction to hear and determine this suit by dint of clause 9 of the Commercial Vehicle Insurance Policy between the Plaintiff and the Defendant. PW3 Chrispus Maina admitted during cross examination that the policy between the plaintiff and defendant contained a dispute resolution clause that the plaintiff did not exhaust before proceeding to file the instant suit. In support the plaintiff cited the *National Assembly -v- James Njenga Karume* (1992) eKLR it was stated that where there is a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to.
38. The defendant submitted that DW-I testified that the Plaintiff used to receive payment of premiums for the insurance policy cover from their agent, World Waivers and that the Plaintiff did not even once refuse payment of premiums on account of the fact that it was submitted by the Plaintiff's agent. It is therefore an absurd argument for the Plaintiff to posit to Court that the Defendant did not timely communicate the accident merely because communication was made through its agent-World Waivers. As a result of the Plaintiff's refusal to indemnify the Defendant from losses arising from the accident, various suits have been filed against the Defendant including Civil Suit No. 390 of 2013 *Damaris*



*Munnyiva v Crescent Service Station* and he will incur Immense losses despite having insured the subject motor vehicles and paying the premiums as and when they were due.

39. It is the duty of the plaintiff to prove his case to the required standard in civil cases which is on a balance of probabilities.
40. The issues for determination in this case are as follows;
  - i. Whether the plaintiff is entitled to a declaration that it is entitled to avoid policy no. MC 40116XXXXX.
  - ii. Whether the defendant was in breach of the terms of the contract.
  - iii. Whether the plaintiff is liable to pay any claims arising out of the accident that occurred on 6/11/2011.
  - iv. Who pays the costs of the suit?
41. On the issue as to whether the plaintiff is entitled to avoid the policy I find that there is no evidence that the policy was obtained by non-disclosure of material facts.
42. There is evidence that the policy was in force when the accident occurred.
43. There is evidence that the defendant reported to the plaintiff's agent World Waivers Insurance Agencies who assured the defendant that they would handle the matter.
44. The plaintiff did not deny that World Waiver Insurance Agencies Ltd were their agents.
45. I find that the plaintiff is liable to pay the claims arising out of the accident which occurred on 6/11/2011.
46. The defendant had paid the premiums and there was a valid insurance policy in force.
47. I dismiss the plaintiff's suit with costs to the defendant.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 27<sup>TH</sup> DAY OF JUNE, 2024.**

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**A. N. ONGERI**  
**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant

