



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE. 170 OF 2011
KENYA ORIENT INSURANCE LIMITED.....PLAINTIFF
VERSUS
KELVIN MACHARIA KARANJA
Also known as KELVIN MACHARIA KARANI...DEFENDANT

JUDGMENT

Introduction

1. At the midpoint of this suit are the consequences for an insured who fails to disclose to an insurer at the time of lodging a claim on a policy such facts as the insurer says are material. There is also a question of an insurer's right to repudiate a contract of insurance on the basis of want of an insurable interest on the part of the insured.

Factual background

2. There are common cause facts in this suit.

3. The Plaintiff is an insurance company. It issued a third party private motor vehicle insurance policy to the Defendant on 10 January 2010 through an insurance broker, Stepz Insurance Agency. The policy was to run for one year and accordingly a Certificate of Insurance No. C6668216 for policy Number 701091257TPO was issued in favour of the Defendant. The motor vehicle the subject of the cover was motor vehicle registration number KQY 039. The policy was issued once the Plaintiff approved of the Questionnaire and proposal form filled and signed by the Defendant. The Defendant had confirmed that he was the registered owner of the motor vehicle which was to be used by the Defendant and his employees in the ordinary course of his business.

4. The policy, in so far as is relevant to the claim, contained the following notice:

a. ...

b. The company should be informed immediately of any change of address. If a vehicle is sold or the policy is to be cancelled the insurance certificate(s) must be returned to the company.

c. In the event of the insured motor vehicle(s) being sold policy can only be transferred to the new owner provided a proposal form is satisfactorily completed by him and is accepted by the

company. The vehicle must not be used by the owner until he receives a certificate of insurance in his own name. “

5. The policy was to incept on 10 January 2010 and last for a period of one year, hence lapsing on 9 January 2011. The Defendant duly signed a declaration of truth.

6. On 4 September 2010, the Defendant filled up a Motor Accident Report Form. The subject motor vehicle had been involved in a fatal accident on 27 August 2010. A pedestrian died. One Benson Gathura who was the driver at the material time was also injured. Additionally, the Defendant also disclosed that there had also been three other passengers in the motor vehicle at the material time namely Dominic Marika Mwaura, Maximo Kuria and Edward Muchiri. The accident had occurred within the geographical area of the policy and also within the year. As the local police service investigated the accident to establish if there was any culpability, the Plaintiff also embarked on its own investigations in view of the anticipated third party claims.

7. The Plaintiff's investigations revealed that the accident took place on 27 August 2010 at 9.00 pm. That the driver at the material time was neither the Defendant nor his employee/driver. That the Defendant had on or about 22 July 2010 engaged Dominic Marika Mwaura, who was one of the passengers on the fateful day, in a sale transaction of the subject motor vehicle. The said Dominic was to purchase the subject motor vehicle at an agree price of Kshs. 30,000/=. The investigations revealed that the first payment of Kshs. 20,000/= was made on 22 July 2010 with the final payment of Kshs. 500/= being made on 8 September 2010.

8. In the meantime, in February 2011 two third party claims by the interested party and by Benson Gathura were lodged against the Defendant. Upon receipt of the summons the Plaintiff alleged want of any insurable interest on the part of the Defendant. The Plaintiff also alleged breach of the policy conditions by the Defendant in selling the subject motor vehicle by not advising the Plaintiff to cancel the certificate. The letter effectively reneging on the policy was directed to the insurance broker and copied to the Defendant on 17 March 2011.

The Litigation

9. The Plaintiff then filed the instant suit in May 2011 seeking a declaratory order that it was entitled to repudiate the insurance policy. The Plaintiff also sought orders that it was not liable to indemnify the Defendant against any liability arising from the accident of 27 August 2010.

10. Though served, the Defendant did not contest the claim leaving the Plaintiff to formally prove its claim. The Plaintiff called two witnesses. But in the meantime an interested party Fredrick Njeru Kinyanjui was enjoined to the proceedings, having been a victim of the road traffic accident of 27 August 2010.

The Plaintiff's Case

11. The Plaintiff contended that there was material non-disclosure and failure to act in good faith on the part of the Defendant, when the Defendant failed to disclose that he had sold the subject motor vehicle to a third party. The Plaintiff further asserts that the Defendant made false statements and was indeed fraudulent. In these respects the Plaintiff pointed to non-disclosure of ownership when the Defendant was no longer the owner, failure to disclose lack of insurable interest and misrepresentation that the driver on the material day and time was the Defendant's employee when he was not.

12. The Plaintiff further contended that the Defendant was in breach of the insurance policy contract when he failed to return the Certificate of Insurance for cancellation and continued to claim an insurable interest when he did not have any in the subject motor vehicle.

13. By reason of the alleged non-disclosure of material facts, misrepresentation of facts and lack of an insurable interest the Plaintiff contended that it is entitled to repudiate the insurance policy. The Plaintiff

also asserts that it is not liable to make good or indemnify the Defendant as a result of any claim arising from the accident including the subject motor vehicle on 27 August 2010.

The trial

14. Only the Plaintiff led evidence by calling two witnesses.

15. PW1 Ms. Sarah Mweru, a legal officer with the Plaintiff, testified on the basis of the records kept by the Plaintiff. Producing both the proposal form and the policy documents, PW1 testified that the Defendant had used two names Kevin Macharia Karani and Kevin Macharia Karanja when he applied for the insurance cover which the Plaintiff issued and firmed once the premium of Kshs. 4,560/= was paid. PW1 explained that it was a third party policy cover.

16. PW1 further testified that the Defendant duly filled an accident report form on 4 September 2010 following an accident on 27 August 2010 and availed a police abstract.

17. PW1 explained that the Plaintiff, as was routine, then instructed an investigator who returned a verdict and report that the subject motor vehicle had been sold at the time of the accident. Consequently, the Plaintiff had on 17 March 2011 repudiated the policy through the Defendant's agent.

18. It was PW1's evidence that the Defendant had availed false information to the Plaintiff by claiming that the Defendant's employee was driving the subject motor vehicle at the material time and further that the Defendant had failed to disclose that he had sold the subject motor vehicle to a third party.

19. PW2 was Harrison Mwaura Kuria an insurance investigator ("Harrison"). Harrison testified that he was an authorized and licensed insurance investigator since 2000. His evidence in essence was that having received the Plaintiff's instructions to investigate the accident of 27 August 2010 involving the subject motor vehicle, he proceeded to interview the insured Defendant, recorded statements from all the occupants of the motor vehicle on the material day, obtained documents from the police service, the Defendant and the passengers and finally prepared a detailed report.

20. Harrison produced the investigators report in evidence and concluded that the investigations revealed that both the driver and the deceased pedestrian were to blame for the accident. Harrison was emphatic in his evidence that the subject motor vehicle had been sold to the third party namely Dominic Marika Mwaura and the Defendant did not consequently have any insurable interest as at the time of the accident.

Submissions

21. Both the Plaintiff and the Interested Party filed written submissions.

22. The Plaintiff submitted that it had proven its case to the required standard. According to the Plaintiff, there was adequate evidence that the motor vehicle had been sold by the Defendant as at the time of the accident and thus there was no insurable interest to warrant any indemnity by the Plaintiff.

23. The Plaintiff pointed to the irrefutable report by PW2 which contained evidence of payment of the purchase price by the purchaser of the motor vehicle as well as admission of the sale by the Defendant. The Plaintiff contended that it had proven its case as required under Section 107 of the Evidence Act (Cap 80).

24. The Plaintiff's Counsel relied on the case of **Peters v General Accident Fire & Life Assurance [1938] 2 All ER** for the proposition that there can be no transfer of an insurance policy where the subject insured is transferred. Counsel also relied on the case of **Smith v Ralph [1963] 2 Llyods** for the proposition that a policy of insurance does not extend beyond the time of sale of the insured property as the insurable interest is lost once the insured property is sold.

25. Counsel insisted that the Defendant's lack of interest in the case was itself evidence of the

Defendant's lack of interest in the insured property.

26. The Interested Party's submissions commenced with the firm statement that the Plaintiff was still under a duty to prove its case to the required standard notwithstanding the Defendant's absence.

27. Then relying on the cases of **Steel Rolling Mills Ltd v Jubilee Insurance Co. Ltd [2007] eKLR** and **Gianata Ernesto v Invesco Assurance [2015] eKLR**, the Interested Party submitted that the Plaintiff had not established the required ingredients of non-disclosure which could allow repudiation of the policy. According to the Interested Party, the Plaintiff needed to show that the fact not disclosed was material and was within the insured's knowledge and that if disclosed would have influenced the judgment of a prudent insurer but the Plaintiff had not done so in this case.

28. According to the Interested Party, the Plaintiff had been unable to show misrepresentation of the fact and had also failed to show that the insured property had been transferred at the time of the accident as there was not presented to the court any sale agreement or any evidence that title had passed. The Interested Party was firm that the Plaintiff was not entitled to repudiate the insurance contract.

Discussion and Determination

Issues

29. Two core issues arise for determination based on the pleadings and submissions by Counsel. I isolate them as (a) whether the Defendant is guilty of material non-disclosure and or misrepresentation, and (b) Whether the Defendant had disposed of his insurable interest in the subject motor vehicle at the time of the accident. An affirmative answer to both or either of the issues should dispose of the suit in favour of the Plaintiff. Both issues are majorly issues of fact but it is appropriate to briefly lay out the legal basis.

Material non-disclosure and misrepresentation

30. The duty upon an insured to disclose material facts to the insurer stems from the principle of utmost good faith (*uberrimae fidei*): see **Carter –v- Boehm 97 ER 1162** where Lord Mansfield held that an insurer or proposer was required to disclose all material facts to a risk. So said Lord Mansfield:

“Insurance is a contract based upon speculation. The special facts, upon which the contingent chance is to be computed, like most commonly in the knowledge of the insured only; the underwriter trusts to his representation and proceeds upon the confidence that he does not help back any circumstances in his knowledge, to mislead the underwriter into a belief that the circumstances does not exist, and to induce him to estimate the risk as if it does not exist...Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact, and his believing the contrary”.

31. One has essentially to abstain from bad faith and observe a positive sense of good faith in insurance. The positive sense is achieved through disclosure and candor. Misrepresentation or non-disclosure, once established, leads to inference of breach of the *uberrimae fidei* principle. Any keeping back is fraud and the policy may be avoided.

32. The duty applies and runs both before and after the execution of the contract as the object of disclosure is to inform the parties of matters immediately under consideration. Thus a party is not expected to make fraudulent claims through non-disclosure: see generally, **Black King Shipping Corporation v Massie ‘The Litsion Pride’ [1985] 1 Lloyds R 137** and also **Manifest Shipping & Co. Ltd v Uni- Polaris Insurance Co. Ltd ‘The Star Sea’ [1995] 1 Lloyds R 651** where the courts held the view that commercial good sense dictated that the duty extend beyond execution of the insurance contract and run until after a claim is actually filed in court. Where there is breach then the aggrieved party is entitled to avoid the policy.

33. As to whether or not there has been breach through non-disclosure of material facts, it is a question of

fact to be considered in each case and time. Guidance as to what really constitutes material fact(or)s to be disclosed may however be retrieved from the case of **Pan Atlantic Insurance Co. Ltd & Another v Pine Top Insurance Co. Ltd [1994] 2 Lloyd's R 427** which has been cited severally with approval in our local courts.

34. In **Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co. Ltd & Another (Supra)**, the House of Lords while laying out the objective test stated [per Lord Lloyd at page 466] as follows:

“...Whether an insurer seeks to avoid a contract of insurance or reinsurance on the ground of misrepresentation or non-disclosure, there will be two separate but closely related questions:

1. Did the misrepresentation or non-disclosure induce the actual insurer to enter into the contract on these terms?

2. Would the prudent insurer have entered into the contract on the same terms if he had known of the misrepresentation or non-disclosure immediately before the contract was concluded?

If both questions are answered in favour of the insurer, he will be entitled to avoid the contract, not otherwise.

35. The test is objective. Even post execution of contract, it is objective. It must be as would induce that hypothetical insurer if the non disclosure happens post contract and at the claims stage. The question is whether the non-disclosure as misrepresentation influenced (or could have influenced) the insurer.

36. In the instant case, the Plaintiff accused the Defendant of both non-disclosure and mis-representation.

37. It is stated that the Defendant failed to disclose that he had sold the subject motor vehicle and that he had no insurable interest in the motor vehicle. The Plaintiff relied on the accident report form and the subsequent investigation report commissioned by the Plaintiff. The Accident Report Form was filled by the Defendant on 4 September 2010. It was detailed. It disclosed the Defendant as the insured. It also disclosed the Defendant as the insured. It also disclosed the fatality as well as the fact that a third party was insured. Additionally it disclosed the three persons who were in the subject motor vehicle on the material day. It indicated that the driver was the Defendants employee. It made no mention of the sale by the Defendant of the subject motor vehicle.

38. The sale was detected through the investigator commissioned by the Plaintiff. The report revealed that the sale transaction was entered into on 22 July 2010. That was prior to the accident. The purchase price was Kshs. 30,000/= but the sale was not completed at least the payment of the purchase price until 8 September 2010. That was after the accident. It was also after the Defendant had lodged a claim.

39. There is a basic requirement in insurance law and practice that an insurance contract being one of indemnity there is a mandatory need for the insured to always show loss before seeking to be indemnified. He must show his interest in the subject matter of insurance. He must show an insurable interest: see **Piper –v- Royal Exchange Assurance [1932] 44 Lloyd's 103**. Ownership of property is one way of showing both legal and equitable interest. The Plaintiff has faulted the Defendant and contended that if the Defendant had no insurable interest to lay any claim to indemnity.

40. My view is that at the time of the accident (on 27 August 2010) the Defendant did not possess an insurable interest in the subject motor vehicle which warranted protection. Even though there was a conditional sale where the Defendant was being paid by installments and a substantial part of the purchase price had been paid, the defendant had parted with both the possessory ownership as well as the beneficial ownership. The fact that the Defendant still possessed a nominal interest in the property in the sense that he was entitled to be paid the final balance could not change the fact of ownership. A transfer of a motor vehicle ownership, it is true is only complete where the relevant forms are signed and lodged with the registrar of motor vehicle but in this case the insurance contract was clear that what was to be disclosed was the sale and under the Sale of Goods laws, a sale is complete and the risk passed upon

delivery of the chattel.

41. Additionally, even though evidence of transfer and endorsed log book would be appropriate to prove ownership, the law allows prove to the contrary when Section 8 of the Traffic Act states that:

“The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.”

42. I am not convinced that where parties are still in the process of consummating the agreement of sale (one party waiting final payment) it may be said that the sale has not taken place. It depends on the circumstances of each case and in the instance case it is evident that the Defendant had let go of his interest in the subject motor vehicle. The Plaintiff did not need to avail a logbook record to show that the Defendant’s interest in the motor vehicle had ceased. The agreement of sale as well as the admissions of the transaction told it all that the Defendant had let go of his interest in the property by way of sale.

45. The Defendant consequently needed to and ought to have disclosed that the sale had taken place at the point of reporting the accident. He then had no interest in the subject matter.

44. I hold the view that a disclosure of the fact of sale would have influenced a prudent hypothetical insurer and affected the decision to indemnify the Defendant or any third party claims.

45. The Plaintiff has also sought to avoid the insurance contract with the Defendant on the basis of breach of contract on the Defendant’s part.

46. Breach of a condition in an insurance contract should lead to avoidance.

47. The alleged breach is the failure by the Defendant to return the Certificate of Insurance No. 701091257TPC. The Defendant was duty bound to return the Certificate once he sold the motor vehicle. I have found that as at the date of accident the motor vehicle had been sold. The Defendant needed to surrender or return the certificate for cancellation.

48. The Plaintiff finally faulted the Defendant for misrepresenting in the claim form that the driver at the material time was the Defendant’s employee. Evidently, it was untrue. The driver was never the Plaintiff’s employee

49. The misrepresentation was evidently fraudulent and intended to mislead the insurer. The misrepresentation tainted the claim.

Conclusion

50. I find that the Plaintiff has proven its claim to the required standard. The Plaintiff is entitled to avoid the policy by reason of the non-disclosure of material fact, misrepresentation and want of an insurable interest on the part of the Defendant. The cover is noted was a third party cover which effectively did not peg itself to the motor vehicle but stretched to any claimant third party.

51. Additionally, I also find that the Defendant was in breach of the policy when he failed to surrender to the Plaintiff the policy of insurance once he sold the motor vehicle.

52. Judgment is entered for the Plaintiff as prayed in the amended Plaint dated 16 October 2016.

53. The Defendant will also pay the costs of the suit.

Dated, signed and delivered at Nairobi this 12th day of May, 2017.

J.L.ONGUTO

JUDGE