

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**[COMMERCIAL DIVISION]**

**CIVIL SUIT No. 442 OF 2013**

10 **HAJJI KAVUMA HAROON ::::::::::::::::::::::::::::::::::::::::::::::::::::::: PLAINTIFF**

**VERSUS**

**FIRST INSURANCE COMPANY LTD ::::::::::::::::::::::::::::::::::::::::::::::: DEFENDANT**

**BEFORE: HON. MR. JUSTICE B. KAINAMURA**

15 **JUDGMENT**

The plaintiff brought this suit against the defendant seeking orders for; a) UGX 250,000,000/= being the sum insured and the subject of indemnity and the insured value of subject matter of the insurance contract vide; Motor vehicle No. UAP 988Q Mercedes Benz Station Wagon,(b) special damages UGX 250,000/= as motor vehicle hire fees per day from the date of the accident till  
20 settlement of his claim by the defendant,(c) general damages, (d) interest on (a) from the date of filing this suit till payment in full,(e) interest on (b) and (c) from the date of judgment until payment in full,(f) costs of the suit (g) any other reliefs the court may deem fit.

The facts as briefly set out in the amended plaint are that the plaintiff purchased a motor vehicle Mercedes Benz Cross Country registration No. UAP 988Q from Mwanje Ratib in March 2011.  
25 The vehicle however at the time of purchase had been subjected to upgrades first by the then owner Mwanje Ratib, who caused installation of automated leather car seats, back leather seats, video head rest, AMG carpets, Zenon Blue ray, fitting and wiring. Upon purchase of the motor vehicle, the plaintiff then up graded to a G55 series with enhanced spare parts including rear lamps, side lamps, tyre cover steel, door handle cover, fender grill, general lamp led silver G-

Glass, muffler, pillar moulding chrome, hind bumper sensors, visual sensor panel, remote control with alarm, control units, bull bars, mahogany strings, dash board parts, music system, computer cables and connectors, air cleaner. Fuel filter, Fan coupling, engine oil, belt damper, door glass, front brake pads, locks among others, which were installed. The plaintiff thereafter desired to

5 insure his vehicle and got in touch with the defendant. At the request of the defendant, the plaintiff provided particulars of the said motor vehicle and availed the vehicle for inspection, examination and assessment by the defendant to enable the defendant determine whether to insure the vehicle and if so on what terms. The defendant then proposed to insure the plaintiff's vehicle at an ascertained and agreed insurable value of UGX 250,000,000/=. Upon agreeing to

10 the terms, the defendant prepared a contract of insurance in form of a private car motor insurance policy No. PO4/DIR/0111 which was duly executed by both the plaintiff and defendant on 15<sup>th</sup> day of June 2012 and running for the period 15<sup>th</sup> June 2012 to 14<sup>th</sup> June 2013. The plaintiff was under an obligation to pay the requisite premium for the insurance contractual duration on the insurable value assessed by the defendant in the sum of UGX 11,016,000/= which the plaintiff

15 duly paid on execution of the insurance contract. Under the said contract, the defendant insured the plaintiff against loss or damage to the motor vehicle and its accessories and spare parts resulting from accidental collision or overturning, fire, lighting, burglary, housebreaking or theft, malicious acts whilst in transit, and covenanted to pay in cash or repair, reinstate or replace the motor vehicle. These were covenants set out by the defendant in its own prepared contract.

20 Unfortunately on 16/04/2013 and during the insurance contractual period, the subject matter of insurance was involved in an accident along Gulu-Kampala road at a place called Kakengere, whereof it caught fire and got damaged beyond repair. The matter was reported to the defendant and registered as claim No. MC/0092/DIR/13. The plaintiff was in the mean time offered Mercedes Benz Reg. No. UAQ 166W on 27<sup>th</sup> June 2013 to use pending the investigations. The

25 plaintiff realized the vehicle was not in good mechanical condition and in fear of causing accidents returned it that very day. The plaintiff has followed the matter with his lawyers but has been tossed and not been indemnified. The plaintiff hence filed this suit to be indemnified.

The defendant filed a written statement of defence in which it was averred that the suit is premature and unreasonably commenced by the plaintiff before conclusion of the investigation

30 process of the plaintiff's claim which was duly communicated to the plaintiff. The defendant contended that the alleged risk was not fortuitous and/ or the alleged loss was not accidental

making the plaintiff's claim untenable. The defendant has since the entering of the insurance contract with the plaintiff elected to avoid the said contract for fraud, non-disclosure and/or misrepresentation thereby rendering it void and unenforceable at law. The defendant further stated that if it knew the truth about the facts not disclosed and those misrepresented by the plaintiff, such knowledge would have affected its decision on whether to insure the impugned motor vehicle or not, and if so, the premium to charge. In conclusion, the defendant contended that the plaintiff's actions aforesaid entitled the defendant to avoid the insurance contract and the plaintiff is not entitled to indemnification.

At the commencement of the trial the following issues were framed;

- 1) *Whether the defendant breached the contract it executed with the plaintiff*
- 2) *Whether the plaintiff is entitled to being indemnified by the defendant as claimed*
- 3) *If so, whether the plaintiff is entitled to indemnification by payment of the sum of UGX 250,000,000/=*
- 4) *Whether the plaintiff is entitled to the relief sought*

At the trial, Mr. Joseph Kyazze appeared for the plaintiff, and the defendant was represented by Mr. Anthony Wabwire.

***Issue one - Whether the defendant breached the contract it executed with the plaintiff***

The plaintiff testified as PW1 and the only witness for the plaintiff's case.

PW1 stated that the he specifically informed the defendant that whereas the said motor vehicle had been purchased by its then owner Mwanje Ratib as a G300 series, it had been upgraded to a G55 series. He also stated that he is not aware of any repudiation of his claim as neither he nor his lawyer has ever been served with a letter repudiating the insurance contract.

In cross examination PW1 stated that he did not give information about the upgrades because the forms did not provide for that information.

Counsel for the plaintiff submitted that the defendant claims fraud, non-disclosure and/or misrepresentation against the plaintiff and therefore refuses to settle the claim under breach of

contract. Counsel however argued that the burden lies upon the defendant to prove the allegations according to **Section 103 of the Evidence Act**. Counsel added that the allegation of arson is criminal and carries a standard of proof beyond reasonable doubt according to the case of *Longway Suitcase Manufacturing Company Ltd Vs UAP Insurance (U) Ltd HCCS No. 417*  
5 **of 2010**. Additionally Counsel submitted that regarding fraud, the standard of proof is beyond probabilities as was held in the case of *Mugisha Vs Chartis (U) Ltd HCCS No. 190 of 2009*. In conclusion, Counsel submitted that the defendant had not proved the allegations and the reports made were rather speculative and premised on conjecture.

The defendant called two witnesses. Dr. Karanja Athiong'd who testified as DW1 and Mr.  
10 Rangarirai Veranga as DW2.

DW2 testified that after carrying out the necessary investigations to the claim, he wrote a letter to the plaintiff repudiating his claim for the following reasons;

- i) *Non-disclosure of upgrades prior to taking up the policy*
- 15 ii) *The purported upgrades especially the dashboard do not compact with the type of engine installed on the vehicle and on several occasions requested the plaintiff that they go together to Matugga Police Station where the salvage is being kept so that issues are explained of which he declined.*
- iii) *That the theory that the plaintiff left the engine running is not supported by the findings on the ground.*
- 20 iv) *Several steps were not taken when faced with such a situation of the accident, for instance; immediately notifying the next of kin particularly the wife, requesting particulars of the good Samaritan and ordinarily making sure that the vehicle was safe rather than abandon it.*

Counsel for the defendant submitted that upon the plaintiff's claim for indemnification arising  
25 out of a contract of insurance for Motor Vehicle Reg. No. UAQ 166, a Mercedes Benz G300, the defendant examined the claim and repudiated the contract of insurance on account of misrepresentations, failure to disclose material facts and the loss not being fortuitous. Counsel argued that according to evidence of Mr. Rangarirai Veranga (DW2) the plaintiff registered the particulars of the insured vehicle as a Mercedes Benz G55 whereas its registration particulars

note a G300. Counsel further stated that the original engine of the vehicle had been replaced without the knowledge of the manufacturer. Counsel cited the case of ***Pan Atlantic Insurance Company Ltd Vs Pine Top Ins. Co. [1995] A.C 501*** where the position of the law regarding non-disclosure was that the assured must disclose to the insurer all material facts to an insurer's appraisal of the facts which are known by the assured breach of which entitles the insurer to avoid the policy as long as it can show that the non-disclosure induced the making of the contract in the relevant terms. Counsel emphasized that an insurance contract is a contract of utmost good faith-***uberrimae fides***. Counsel submitted that the plaintiff did not act with utmost good faith which entitled the defendant to avoid the contract. Addressing misrepresentation, Counsel submitted that the plaintiff misrepresented the vehicle to be a Mercedes G 55 whereas not and was valued at UGX 250,000,000/= instead of being valued at UGX 25,000,000/= the value that was declared for tax purposes when the vehicle was imported which made the defendant elect to avoid the contract. Counsel for the defendant also argued that the plaintiff's conduct is devoid of any other logical conclusion apart from the fact that the plaintiff willfully and recklessly courted the risk of fire which disentitles the plaintiff from pleading accident in the instant case. In conclusion, Counsel submitted that the defendant was entitled to repudiate the suit policy and was not in breach of the suit policy hence prayed that the first issue be resolved in the negative.

Counsel for the plaintiff in rejoinder stated that the defendant failed to prove that there was non-disclosure. Counsel added that the plaintiff was clear in his evidence that he disclosed all facts to the defendant's agent Fatima.

The facts of this case as set out in the pleadings show that the plaintiff and defendant entered into an insurance contract and duly executed an insurance policy running for the period of 15<sup>th</sup> June 2012 to 14<sup>th</sup> June 2013 for a motor vehicle Mercedes Benz Cross Country Reg. No. UAP 988Q. The plaintiff's vehicle however got an accident which he reported to the defendant. The defendant for various reasons decided to repudiate the contract on grounds of fraud, non-disclosure and/or misrepresentation in a letter dated 26<sup>th</sup> August 2013.

Breach of contract is defined in ***Black's Law dictionary, 8<sup>th</sup> Edition, page 200*** as;

*“Violation of contractual obligation by failing to perform one's own promise by repudiating it or interfering with another party's performance”*

In analysis of issue one, the burden lies upon the plaintiff to prove the extent of breach by the defendant and the defendant on the other hand to prove the allegations of fraud, misrepresentation and non-disclosure. (See **Section 103 of the Evidence Act**)

5 It was the plaintiff's testimony that he filed a claim and was given a vehicle which was not in good mechanical condition pending investigations which he returned. The plaintiff has never been indemnified to date. The defendant wrote a letter of repudiation which is on record on grounds of breach of principle of utmost good faith.

In the case of **Carter Vs Boehm (1766) 3 Burr 1905**, addressing the principle of utmost good faith, Lord Mansfield held that;

10           *“Insurance is a contract based upon speculation. The special facts, upon which the contingent chance is to be computed, the most commonly in the knowledge of the insured only; the underwriter trusts to his representation and proceeds upon the 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*  
15 *did 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.”*

The defendant alleged fraud, non-disclosure and misrepresentation on the part of the plaintiff.

20 In the case of **Umilla Vs Barclays Bank International Ltd & Anor (1979) KLR 76**, it was held that the allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt.

The defendant argued that the plaintiff registered the particulars of the insured vehicle as a Mercedes Benz G55 whereas its registration particulars note a G300. The argument was that this changed the valuation of the vehicle which affected the amount insured.

25 This is a fact which the plaintiff did not deny. It is on record that he did not inform the defendant about the fact that the vehicle was not originally a G300. The vehicle was therefore valued at UGX 250,000,000/= basing on its make. In **Mac Gillivray on Insurance Law at page 438** regarding over-valuation states that;

*“Excessive over-valuation of the subject matter of the insurance for the purpose of a valued policy is a material fact which ought to be disclosed. A valuation will be declared excessive for this purpose if it changes the character of the risk from a business risk to a speculative risk.....”*

5 That being the case, it is my opinion that the non-disclosure of the adjustments of the vehicle insured greatly changed a number of things such as the valuation done. The argument that certain facts were not requested for does not stand in my opinion since the plaintiff clearly knew about the history of the vehicle which he concealed.

The non-disclosure and misrepresentation claimed by the defendant amounts to the fraud alleged  
10 constructively.

In the case of *HIH Casualty and General Insurance Ltd Vs Chase Manhattan Bank [2003]* UKHL Rix L.J regarding non-disclosure and fraud held that;

*“I am conscious that in Carter Vs Boehm itself Lord Mansfield does seem to have considered that there was a difference between the concealment which the duty of good  
15 faith prohibited and mere silence.....As a result, non-disclosure in the insurance context in the early years was referred to as “concealment”, and the doctrine has sometimes been viewed and explained as constructive fraud.*

## 20 **Courting of the risk**

There was evidence led by the defendant that the plaintiff could have set the vehicle on fire. The defendant’s case is that the plaintiff courted the risk which was proved by unusual conduct of the plaintiff at the time of accident, i.e leaving the car’s engine running, the absence of a fire starting mechanism in form of a spark on the vehicle and the dislodgement of the fuel tank from the car  
25 and could not support the theory that the fire was accidental.

The report done by Bengal Trading Co. Ltd on the instruction of the plaintiff showed a deduction that the suit vehicle fell into a valley and later caught fire.

As earlier stated, the burden of proof in this matter lay upon the defendant and on a standard higher than a balance of probabilities. In my opinion, it was an allegation which was not fully proved to the satisfaction of court that the risk was courted by the plaintiff.

5 However, the non-disclosure and misrepresentation alleged and proved by the defendant go to the root of the contract as they were in breach of utmost good faith. Therefore, it is my considered opinion that as was held in the case of **Carter Vs Boehm** (supra) the breach of this duty renders the contract voidable, there was no breach of contract done by the defendant as it exercised its right to terminate the contract because of the dishonesty of the plaintiff. The breach done in my opinion was done by the plaintiff who breached his duty of utmost good faith.

10 In conclusion, issue one is answered in the negative.

**Issue Two - Whether the plaintiff is entitled to being indemnified by the defendant as claimed**

15 Counsel for the plaintiff submitted that there is evidence showing that the plaintiff entered a contract with the defendant to be indemnified in case of a risk. Counsel added that there is no doubt that the plaintiff is entitled to being indemnified by the defendant following the terms of the contract and given the fact that an accident happened which was caused by a peril insured. Counsel cited the case of **Scorpion Holdings Limited Vs Lion Assurance Co. Ltd HCCS No. 221 of 2013**.

20 In reply, Counsel for the defendant submitted that the plaintiff is not entitled to indemnification as he claims.

Counsel for the plaintiff submitted that the contract was never repudiated and in any case there was no evidence to prove so.

25 There was evidence of a letter (DEX 2) repudiating the claim dated 26<sup>th</sup> August 2013 addressed to the plaintiff which his lawyer acknowledged to have received. In addition based on the fact that the first issue was resolved in the negative, I resolve the second issue in the negative.

**Issue Three - If so, whether the plaintiff is entitled to indemnification by payment of the sum of UGX 250,000,000/=**



Counsel for the plaintiff argued that the plaintiff is entitled to be indemnified by virtue of the contract of insurance between the plaintiff and defendant and occurrence of the event that had been insured against.

Counsel for the defendant stated that this issue should be resolved in the negative. Additionally,  
5 Counsel argued that in the unlikely event this court finds the defendant liable to indemnification, the defendant should be entitled to reinstating the plaintiff's vehicle as payment of the policy UGX 250,000,000/= was not mandatory.

Counsel for the plaintiff in rejoinder submitted that a reinstatement of the vehicle is not possible where the vehicle was rendered a total loss.

10 Having resolved the first and second issue in the negative, the third is also resolved in the negative.

***Issue Four - Whether the plaintiff is entitled to the relief sought***

Counsel for the plaintiff submitted that the plaintiff is entitled to the following remedies as prayed for in the amended plaint;

- 15           *a) UGX 250,000,000/= being the sum insured and the subject of indemnity and the insured value of subject matter of the insurance contract*
- (b) Special damages UGX 250,000/= as motor vehicle hire fees per day from the date of the accident till settlement of his claim by the defendant*
- (c) General damages*
- 20           *(d) Interest on (a) from the date of filing this suit till payment in full*
- (e) Interest on (b) and (c) from the date of judgment until payment in full*
- (f) Costs of the suit*
- (g) Any other reliefs the Court may deem fit*

Counsel for defendant submitted that in the unlikely event that this court is inclined to find in favour of the plaintiff, and then the Court might exercise discretion and order reinstatement or replacement of the motor vehicle in accordance with the insurance contract.

5 Counsel also stated that on the matter of special damages for the motor vehicle hire, the defendant provided a courtesy vehicle which the plaintiff chose to return. Counsel added that the special damages claimed were not strictly proven. In support of this, Counsel relied on the decision in *Captain Phillip Ongom Vs Catherine Nyero Owota SCCA No.14 of 2001*.

10 Counsel for the defendant argued that the plaintiff cannot succeed on account of an action founded on deliberate breach of the penultimate principle of Insurance Law which is the duty to act in utmost good faith. Counsel argued that for these reasons the claim for interest should be disallowed. In conclusion, Counsel submitted that the costs follow the event and as it was the plaintiff placed himself in a position leading to avoidance of the insurance policy by the defendant. Counsel for the defendant invited court to find that the plaintiff has not proved his case and should be dismissed with costs.

15 In rejoinder, Counsel for the plaintiff reiterated his earlier submissions and prayers.

Having resolved the first, second, and third issue in the negative, I resolve the fourth issue in the negative also. The plaintiff is not entitled to any of the reliefs sought.

I accordingly dismiss the suit with costs to the defendant.

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**B. Kainamura**

**Judge**

**07.05.2018**