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Case Action:	Judgment
Judge:	Aaron G Ringera
Citation:	Blue Shield Insurance Co. Ltd v Richard M. Mbondo (Being Sued as the Legal Representative of the Estate of Late Elija Mbondo Ntheketha) & 3 others [2004]eKLR
Advocates:	-
Case Summary:	-
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History Magistrates:	-
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Advocates Against:	-
Sum Awarded:	-
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INSURANCE

- Interpretation of Section 10 (4), Cap. 405.
- Whether policy may be obtained in the name of a deceased person.
- When policy may be avoided or repudiated, when is policy null and void ***ab initio***"

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 492 OF 2001

BLUE SHIELD INSURANCE CO. LTD..... PLAINTIFF

VERSUS

1. RICHARD M. MBONDO

(Being sued as the legal Representative Of the Estate of late

ELIJA MBONDO NTHEKETHA.....1ST DEFENDANT

2. RUTH ANYANGO ODHIAMBO 2ND DEFENDANT

3. DAVID MATHINA.....3RD DEFENDANT

4. PETER MWANIA 4TH DEFENDANT

JUDGEMENT

In a plaint dated 15.9.99 and amended on or about 5th November, 2002, Blue Shield Insurance Co. Ltd (hereinafter referred to as the insurer) avers that at all material times the plaintiff did insurance business in Nairobi and elsewhere in Kenya and that Elijah Ntheketha Mbondo (Elijah) was the registered owner of motor vehicle KTL 625 Isuzu Canter (the insured vehicle). It is further averred as follows. Elijah died on 27.6.95 and left the insured vehicle at his premises in unserviceable state. In or around the year 1997, Richard Mbondo, who is being sued as the legal representative of the estate of Elijah, (Richard), solely or jointly with others sold the insured vehicle to Peter Mwanja (the 4th defendant) and Mulwa Kitevu who repaired and took possession of the same. Richard either solely or jointly with the said Peter Mwanja and others mistakenly, wrongly, unlawfully or fraudulently applied for a 3rd party insurance cover from the insurer in the name of Elijah without disclosing to the insurer that the purported policy holder was already dead. On the basis of the application, the insurer issued a third party policy No. BSI/080/1/04/000 4231/97 in the name of the deceased Elijah Mbondo Ntheketha. The particulars of

mistake, wrongfulness, unlawfulness or fraud pleaded are

(i) the 1st defendant failed, neglected and/or refused to inform the plaintiff of the demise of the purported policy holder,

(ii) executed proposal form which formed the basis of the policy purporting to be the deceased while well aware that the deceased was nowhere to execute the form,

(iii) misrepresented to the plaintiff that the deceased had capacity to enter into a contract of insurance, which he did not have,

(iv) allowed the buyers to take control of the motor vehicle and use it without entering into any insurance contract with the plaintiffs,

(v) failed to inform the plaintiff that the said motor vehicle had been sold to Peter Mwanja and Mulwa Kitevu and possession thereof given to them,

(vi) colluded with the buyer to use a policy in the name of the deceased without any transfer of the said policy, which was not transferable in any event, and

(vii) when the vehicle was involved in an accident, the 1st defendant signed claim forms purporting that the same were signed by the deceased.

It is further pleaded that the plaintiff is entitled to avoid the said policy as it was unlawfully obtained by fraud misrepresentation or through a fundamental mistake and to a declaration that it is not liable to honour claims under the said policy No. BSI/080/1/04/004231/97 (the policy) as it was not in any event transferable to a third party. It is further pleaded that on or about 1st March 1998 at about 1 a.m. the insured vehicle was being driven by the said buyer's driver servant agent one David Albus Mathina (the 3rd defendant) when it was involved in a collision with motor vehicle registration number KAJ 060J as a result of which the 2nd defendant's husband, one Daniel Ouma Odhiambo died. The plaintiff claims that it is entitled to repudiate all claims arising from the said accident including the 2nd defendant's claim as the policy is null and void for the reasons given above. In those premises, the insurer prays for Judgment for (a) a declaration that it is entitled to avoid or repudiate the policy or any addendums, endorsements and renewals thereof, (b) a declaration that the insurer has no contractual or legal liability to satisfy any judgment obtained pursuant to the said accident by the 2nd defendant or any other claimant against the late Elijah or the 1st defendant or any of them, (c) costs of the suit, and (d) any other and/or alternative relief.

The 1st defendant, Richard, filed an amended statement of defence on 15.11.02. He pleads that at the time of the accident the insured vehicle was being driven by David Mathina, 3rd defendant, in the course and scope of his employment by Peter Mwanja, the 4th defendant, who had obtained the said vehicle from one Mulwa Kitevu (now deceased). He denies having unlawfully and fraudulently taken insurance cover for the vehicle prior or subsequent to the death of Elijah, his late father, or at all. He avers that there were three administrators of his late father's estate and denies being aware of the insurance cover of the said vehicle or that he continued to take cover of the said vehicle in the name of the deceased and states that in the premises he had no duty to inform the insurer of the death of his late father. He denies having sold the said vehicle or putting it under cover. He states he was not a party to the application or issuance of any policy of insurance by the plaintiff. He further avers that although he was not in possession of any policy of insurance from the plaintiff he signed the alleged claim form as the legal representative of the estate of his deceased father. He avers that his late father owned several vehicles

including the insured vehicle which became unserviceable and was parked as a scrap at his slaughter house and remained there until and after his death on 27.6.95 at Nairobi Hospital. He further avers that the plaintiff is not entitled to the relief it seeks and contends that the policy was not transferred to any one at all and the plaintiff should be ordered to honour its obligations thereunder. He prays that the plaintiff's suit be dismissed but that in the event liability is found against him in favour of the plaintiff and/or the 2nd defendant, judgment should be entered against the 3rd and 4th defendants for indemnity to him. He also prays for costs of the suit and interest thereon.

The 3rd and 4th defendants also filed an amended defence on 15.11.02. They deny that the policy was unlawfully or fraudulently obtained as alleged or at all and contend that the plaintiff is not entitled to the declarations sought. They blame the accident on the negligence of the deceased owner/driver of motor vehicle KAJ 060J. The third defendant claims damages for injuries, pain and suffering and medical expenses resulting from the accident and the 4th defendant claims damages for the loss of his insured vehicle and the goods damaged at the time of the accident. They contend that the plaintiff is not entitled to the prayers sought and it should be ordered to honour its obligations under the policy in force at the time of the accident. They aver that they will repudiate any claim by the 2nd defendant but they join hands with Richard to claim from the plaintiff the value of the vehicle under the policy of insurance and all the resultant damages.

At the commencement of the trial before me, Counsel for the parties agreed on the following three issues for trial: (i) was motor vehicle KTL 625 insured by the plaintiff on the date of the accident on the night of 31.3.98/1/4/98", (ii) was policy no. BSI/080/04/004221 [after the amendment to the plaint the reference should be to policy No. BSI/080/1/04/0004231/97] issued by the plaintiff valid or was it null and void" And (iii) was the plaintiff entitled to avoid and/or repudiate the said policy" And (iv) costs of the suit.

The plaintiff called three witnesses: Kennedy Moseki (PW1), the Assistant Claims Manager, Shadrack Musyoki Mbatha (PW2), an investigator and Geoffrey Ndavu, (PW3), another investigator. Mr. Moseki produced in evidence the proposal form (1 exh. 1), the debit note in the sum of Kshs.5,600/= being insurance premium (P. exh. 2), the receipt for the premium (P exh.3), the policy issued (P. exh.4), the certificate of insurance (P. exh. 5) and the claim/motor accident report form (P. exh. 6). On the face of those documents, it would appear as if Elijah M. Ntheketha, did on 10.4.97 make a proposal to the insurer to insure motor vehicle KTL 625 for a period of 12 months from 14.4.97 to 13.4.98. The policy sought was a new one if due regard is paid to the answers to questions 12 and 13 in the proposal form. He was debited with premium in the sum of Kshs.5, 600/=, paid the same and was issued with the commercial vehicle policy sought on 7.5.97. Then on 1.3.98, the insured vehicle while being driven by David Mathina was involved in an accident on Jogoo Road, Nairobi and a claim form was duly lodged on 26.3.98 under the purported hand of the policy holder. Mr. Moseki testified that after the claim was made, a firm of investigators called "counterstrike" was instructed to investigate. In the course of investigations it was established that the purported policy holder, Elijah, had died on 27.6.95 and that Richard was the Administrator of the estate of Elijah. It was further established that the logbook of the vehicle was in the name of Elijah but the vehicle itself had been sold to Peter Mwanja and that the driver at the time of the accident was David Mathina, an employee of Peter Mwanja. He testified that the ownership of the vehicle was a material fact and that at the time of completing the proposal form, the proposer is required to indicate the name of the owner of the vehicle. He added that even if the proposal is made on behalf of the estate of a deceased person, it was necessary to disclose the owner of the vehicle. In the instant case, it was not disclosed at any time that the owner of the vehicle was dead. The policy was in his view procured by fraud or misrepresentation for the purported proposer was dead at the time of the proposal. That was a misrepresentation. The payment receipt also showed the deceased as the insured who paid the premium and the claim was purported to have been lodged by the deceased. It is for those reasons that the declarations prayed for were sought.

In cross examination, he accepted that there were three administrators of the estate of Elijah Mbondo Ntheketha. They were Ruth Mbondo, Serah Mbondo, and Richard Mbondo. He stated that since the proposer was dead at the time of the proposal, the insurance company assumed the proposal was done by his estate. He did not however know which Administrator filled the form. On the suggestion by Counsel for the defendants that the proposal form was signed by Richard, the witness said he would agree with it if Counsel said so. He further agreed that a grant of letters of administration puts the administrators in the shoes of the deceased. He denied that the claim form was signed on behalf of the policy holder. He accepted that if Richard signed the proposal form and/or the claim form on behalf of the estate of the deceased, he was innocent and not fraudulent. However, he testified, at the time the claim form was signed, the vehicle had been transferred to Peter Mwanja and although the logbook was not clear, he did not agree with Counsel that the ownership of the insured vehicle passed from the estate of Mbondo on 31.2.98.

In re-examination, the witness conceded that he did not know as a matter of fact whether the proposal form or the claim form was signed by Richard Mbondo. He accepted it could have been signed by the purchaser. He added that the Administrator was under a duty to indicate he signed any form on behalf of the estate. He further testified that from their investigations the vehicle was sold to Peter Mwanja in 1997 when part of the purchase price was paid. He added that even if Elijah himself had been alive, he would not have been able to transfer the policy of insurance to someone else. The person who filled the claim form on 26.3.98 did not indicate whether the vehicle had been sold.

PW2, Shadrack Mbatha, did not adduce any useful evidence as he came to testify on the contents of an investigation report of which he was not the author. It was ruled that he could neither produce such a report or testify on the contents thereof. PW3, Geoffrey Ndavu, one of the signatories of the investigation report produced it a plaintiff exhibit 7 and testified thereon. He said according to their investigation, Elijah died on 27.6.95 at Nairobi Hospital. After he died, the vehicle was not operational for various mechanical reasons. It was sold in August 1997 for Kshs.120,000/= to Mulwa Kitevu and Peter Mwanja in the condition in which it was.

The defendants called two witnesses, Richard Mwema Mbondo (PW1) and Peter Mwanja (DW2). Richard testified in chief that he was the son of Elijah Mbondo Ntheketha, deceased. His late father was a prominent farmer and businessman. He had more than five vehicles and tractors. He had a prominent slaughter house at Tala. His father died on 27.6.95 and he obtained a grant of letters of Administration to his estate together with Ruth Mbenge Mbondo and Sera Muthyo Mbondo, his step mothers, on 14.3.97. The grant enabled him to step into the shoes of his father. The same was confirmed on 2.6.98. It was produced in evidence as D exh. 1. Motor vehicle KTL 625 was a meat carrying vehicle. It was dumped after his father's death. When his father was alive, he had an employee called Julius Kitevu Mutiso, who used to assist him in the management of his business. Mutiso was also in charge of the fleet of vehicles and could suggest which required repairs and he could even sell some of them as scrap. KTL 625 was sold by family members who were in charge of his father's estate. He came to know of the sale in 1998 when Peter Mwanja was using the vehicle. He admitted that the motor claim form (P exh. 6) bore his signature in the column of statement by owner or policy holder and the declaration of truth about the particulars in the form. He testified that it was Peter Mwanja who approached him after the accident took place and requested him to sign the claim form. At the time of the accident, the vehicle was in the name of his late father. He signed the claim form not to cheat the insurer but as a son of Elijah and the Administrator of his estate. He stated the contents of his statement to the investigators which he produced in evidence as D exh. 2 was true. He said his father's estate did not expect anything from the Insurance Company in connection with the vehicle.

In cross examination, he stated that at the time a certificate of confirmation of the grant to his father's

estate had been issued on 2.6.98, the insured vehicle was not part of the estate of the deceased. He was not the one who signed the policy proposal form and he did not know who had signed it. He accepted signing the motor claim form and stated that he had not indicated thereon that he was signing the same on behalf of or for his father's estate or anybody else. He also confirmed that the proposal form did not show it was made on behalf of someone else. As of 1998, when the accident occurred, the vehicle was not an asset of the estate of Elijah. It was the property of one Peter Mwanja. He did not sign the claim form to assist Peter Mwanja, he did so because the vehicle was in his father's estate. If the claim had succeeded it would have been Peter Mwanja who would have benefited. When his attention was drawn to the fact that in his statement to the investigators (D exh. 2), he had said he was using the vehicle for the business of buying and selling milk at Kibera and that David Mathina was his driver, he denied that he was engaged in such business and affirmed that David Mathina was Peter Mwanja's driver. He further testified that he did not know which policy was in force in respect of the vehicle before the accident. He agreed that at the time of the accident, the vehicle did not belong to Elijah's estate as it had been sold but he could not recall whether at the time of the proposal for insurance, the vehicle still belonged to the estate. He agreed there was nothing to show that the Insurance Company had been notified of change of ownership of the vehicle and that when he signed the claim form he did not indicate any change of ownership.

In re-examination, he said he could not recall whether at the time of the accident, the vehicle had been sold and transferred. He stated he signed the proposal form and that it was brought to him by Peter Mwanja for signature. He did not know who wrote the particulars in it. In response to a question by counsel for the plaintiff, he clarified that what he signed was the accident report form not the proposal form.

Peter Mwanja (DW 2) testified in chief that in April 1997, one Mulwa Kitevu, a friend of his and a son of Julius Kitevu, the Manager of Elijah Mbondo's estate, sent him to get an insurance cover for motor vehicle KTL 625. He was given the logbook. He filled the proposal form with the assistance of an Insurance Clerk and signed it. A cover was issued and he took it to Mulwa Kitevu. At the time he was signing the proposal form, he had no interest in the vehicle. Thereafter the vehicle was repaired at Elijah's home. Mulwa Kitevu then asked him if he knew someone in Nairobi who could operate it for business. He suggested his cousin David Mathina. He and Mulwa then drove the vehicle to Nairobi and entrusted it to David Mathina. He later developed an interest to purchase the vehicle jointly with Mulwa. They agreed to purchase it for Kshs.120,000/= in instalments. The vehicle was to be transferred to them when the instalments were fully paid. The accident occurred before the instalments were completed. The claim form was made by Richard Mbondo. At the time of making the claim, the witness had a purchaser's interest in the vehicle but it had not been transferred to him. The balance of the purchase price was paid to Julius Kitevu. Richard was told to fill the claim form by Julius Kitevu, he was not persuaded by the witness to do so. The vehicle was formally transferred to him on 31.3.98 after he paid the purchase price. He did not want to produce his statement to the investigators in evidence. In cross examination, he stated that his partner in the purchase of the vehicle, Mulwa Kitevu, died in October, 1997. The said Mulwa was not an Administrator of the estate of the deceased but his father Julius Kitavu was the Administrator. He accepted that the appointed Administrators of the estate were Richard, Ruth and Sera and that Julius Kitevu was only managing the affairs of the estate. He reiterated that he was sent by Mulwa Kitevu to obtain cover for the insured motor vehicle.

It was Mulwa who gave him the money to pay the premium. It was the witness who wrote down the name and address of the proposer and signed the declaration. The other particulars were filled by an insurance official. He admitted that he did not indicate in the proposal form whether Elijah Mbondo Ntheketha was dead. He added that he did however tell the insurance official so. He agreed that nowhere in the proposal did he mention the name Mulwa. He further testified that Mathina was employed

by Mulwa Kitevu and that the vehicle was repaired in 1997 after Mulwa Kitevu bought it. It was around that time that he was sent to buy the policy for it in April, 1997. In his opinion, David Mathina, was employed by Elijah Mbeketha through his representative. In re-examination, the witness testified that he bought the vehicle in March, 1998 and took possession of it in April.

After the evidence was adduced, the respective Advocates exchanged and filed written submissions. They also spoke to them in Court. Having considered those submissions and the evidence adduced, I make the following findings of fact and law. As regards the facts, it is not and it cannot be disputed that Elijah Mbondo Ntheketha died on 27.6.95. At the time of his death he was the registered owner of motor vehicle KTL 625. On his demise, two of his widows, Ruth and Sera and one of his sons, Richard Mbondo, were appointed administrators of his estate on 14.3.97. It is also not disputed that on 10.4.97, a proposal was made for the insurance of motor vehicle KTL 625 ostensibly in the name of Elijah and that pursuant to that proposal, a certificate of insurance and subsequently a policy were issued in his name. The said policy, it is clear from the proposal and on its face, was not a renewal of any pre-existing policy but a new policy altogether. It is also not in dispute that the insured vehicle was while being driven by one David Mathina along Jogoo road in Nairobi on 1.3.98 involved in accident with another motor vehicle KAJ 060J. As regards the circumstances in which the policy was applied for and obtained, I accept the evidence of Richard that he does not know how and when the said policy was obtained and that he did not fill or sign the proposal form. I also accept his evidence that after his father's death, the insured vehicle was dumped at the Tala slaughter house in an unserviceable condition. I further accept his evidence that sometimes after his father's demise, the said vehicle was sold by some family members who were in charge of his father's estate to Peter Mwanja, the 4th defendant, and that he came to know of the sale sometime in 1998 when the said vehicle was being used by Peter Mwanja. I also accept his evidence that when the accident occurred in March 1998, the vehicle though still registered in the name of his father was the property of Peter Mwanja. I found Richard on the whole an honest witness and the only point on which I did not believe him was his assertion that when he signed the motor accident/claim form, he did not do so in order to assist Peter Mwanja but solely because the vehicle was registered in his father's name. Such assertion was manifestly contradicted by the fact that it is Peter Mwanja who sought him out and requested him to fill the said form and also by the witness's own statement that his late father's estate did not expect to benefit from the claim and that had the said claim succeeded, it was Peter Mwanja who would have benefited. On who then made the proposal form in the name of the late Elijah, I accept the evidence of Peter Mwanja that he is the one who made the proposal and obtained the policy. He admitted he is the one who filled in the name of the proposer and his address and signed the proposal form. What I don't accept is his evidence to the effect that at the time he was signing the proposal form, he had no interest in the vehicle and that he was doing so on the instructions of Mulwa Kitevu. I also don't believe that he informed the unnamed insurance official that the purported proposer was dead. It is also significant that nowhere in the proposal form did he mention that the vehicle was owned by Mulwa Kitevu or that he was signing the proposal form on behalf of the said Mulwa Kitevu or any body else. The impression I got of Peter Mathina was that he was a largely untruthful witness who was determined not to be associated with the ownership of the insured motor vehicle at the time of the accident for he, as a police officer, knew very well what the consequences of such ownership would be when it was found out that he had taken the policy in the name of a deceased person. In the premises, there is no evidence that Richard solely or jointly with the said Peter Mwanja unlawfully, fraudulently or otherwise applied for the insurance cover of the insured motor vehicle as pleaded or at all. It is Peter Mwanja who did so and did so without the instructions of Richard or any other Administrator of the estate of Elijah Mbondo. If he is to be believed, he did so on the instructions of Mulwa Kitevu, who was not an Administrator of the estate. It is clear on the evidence that the estate of the deceased was not concerned with obtaining Of the cover for the vehicle and the benefit of the said cover was not for the benefit of the estate but for Peter Mwanja and possibly Mulwa Kitevu before he died on October, 1997. I believe the obtaining of the cover for the insured motor vehicle was a business venture by Peter Mwanja and Mulwa

Kitevu in the interlude between their purchase of the said vehicle and the formal transfer of the same to them. They could not obtain cover in their own names as the vehicle was still in the name of the deceased and so they opted to obtain cover in the name of the deceased without disclosing the fact of the deceased's death and/or their interest in the vehicle. I also find that Richard Mbondo was brought into the picture to help Peter Mwanja (who had no policy in his name) obtain any benefits, including indemnity for personal injury claims that might result from the policy. In light of those findings, I wish to revert now to the principal issues.

1. Was motor vehicle KTL 625 insured by the plaintiff on the date of the accident" Whether the accident was on 31.3.98/1/4/98 (as Counsel framed the question) or 1.3.98 (as the documentation and evidence discloses) I find that the policy herein was to run from 14.4.97 to 13.4.98 and accordingly, the answer is yes, the insured vehicle was covered by the plaintiff company on the date of the accident.

2. Was Policy No. BSI/08/1/04/0004231/97 issued by the plaintiff valid or was it null and void" My answer is this: The policy was taken in the name of a deceased person without disclosure of the fact. It is Peter Mwanja who obtained it. He did not purport to do so on behalf of the estate of Elijah Mbondo and he could not indeed even purport to do so on behalf of the estate as he was not an Administrator of the said estate and he was not sent to obtain the said policy by either Richard, Sera or Ruth Mbondo, who each had the capacity to bind each other as co administrators of the estate. If his word is to be believed, he was sent by Mulwa Kitevu who had no capacity to bind the estate in any respect. Further more, at the time the policy was obtained, there is no evidence that the estate of Elijah Mbondo Ntheketha had any insurable interest in the vehicle the same having been sold to Peter Mwanja and/or Mulwa Matevu. In those premises, I am impelled to find that the policy herein was not a valid one and it was null and void **ab initio** for three reasons: First, it purported to be obtained by Elijah Mbondo Ntheketha, who as a citizen in the hereafter, had no capacity to contract; secondly, the same could not have been obtained on behalf of his estate as the sale of the insured vehicle to Peter Mwanja and/or Mulwa Kitevu had divested his estate of any insurable interest in the said vehicle even though it remained registered in his name; and thirdly, the policy was not as a matter of fact sought by or obtained by his estate as neither of the Administrators of the estate applied for the same directly or through an agent.

3. Was the plaintiff entitled to avoid and or repudiate the said policy" One of the issues canvassed by Counsel for the defendants at length in his written submissions and squarely met by Counsel for the plaintiff is whether the plaintiff is entitled to a declaration that he is entitled to avoid the policy on the ground that it was obtained by the non disclosure of a material fact or a misrepresentation of fact which was false in some material particular, or, if he had avoided the policy on that ground, that he was entitled to do so apart from any provision contained in it.

The debate turned on the interpretation of Section 10 (4) of the Insurance (motor vehicles Third Party Risks). Should the suit in which the declaration is sought be filed before or after a suit in which the Judgement whose consequences are sought to be avoided was filed" Happily, the Court of Appeal answered that question in **INTRAFRICA ASSURANCE COMPANY LTD V SIMON N. NJOROGE & ANOTHER** [CIVIL APPEAL NO. 111 OF 1996] (unreported). The Court held that all an insurer needs to do is to file the declaratory suit either before or within 3 months of the claim being filed. Accordingly, the plaintiff's suit is not misconceived or incompetent merely for the reason that no third party had filed any suit before the plaintiff filed its claim. So the real question is whether as a matter of fact the plaintiff is entitled to the declaration sought on the ground that the policy was obtained by the non disclosure of a material fact or by a false representation of a material fact. In that respect, I think the identity and legal status of the proposed insured is a material fact for on such fact partly depends the decision whether to take the risk and if so at what premium. In the instant matter whether the fact that Elijah Mbondo Ntheketha, the purported proposer, was not alive was a very material fact which was not disclosed.

Had it been disclosed, the insurer would have said, "sorry, we do not and will not give cover to the dead: they have no legal capacity to enter into insurance contracts. And they are immune from earthly liabilities." And if the policy was sought in the name of the estate of the deceased, the insurer would have insisted in knowing the identity of the Administrator(s) who alone had the capacity to contract. As it were, the policy was obtained on a false representation that Elijah Ntheketha, a businessman, whose proposals for insurance had never been rejected, who had not previously taken insurance for any other vehicle, and who was the sole and absolute proprietor of the vehicle sought to be insured, was alive and well at Tala. That representation was made two years after his death by Peter Mwanja who signed the proposal form purporting to be the said gentleman. In that scenario, the only conclusion open to the Court is, yes, the plaintiff is entitled to avoid and/or repudiate the policy as prayed.

Last, but not least, I turn to the issue of costs. The plaintiff has established its entitlement to the declarations sought. However its case was predicated on the assumption that it is Richard Mbondo, the 1st defendant, who solely or jointly with others was the devil. The evidence has established that Richard was not the villain of the piece. The villain was Peter Mwanja. Yet the plaintiff did not sue Peter Mwanja. He was brought in the suit as fourth defendant by a device invented by Counsel for the defendants regarding which the less we speak the better and which device received the grace of the Court on 25.3.2003 when it was ordered that David Mathina and Peter Mwanja be added as the 3rd and 4th defendants to the suit on terms that they shall not claim any costs in any event against the plaintiff and the plaintiff will also not claim any costs against them. In those premises, I don't think either Richard Mbondo or the 2nd defendant (against whom no material allegations were made and who did not participate in the suit) or the 3rd and 4th defendants should be burdened with the plaintiff's costs.

In the result, the plaintiff is granted the declarations prayed for in the plaint that it is entitled to avoid and/or repudiate the policy number BSI/080/01/04/0004233/97 and that it has no contractual or legal liability to satisfy any judgement obtained pursuant to the accident in question by the 2nd defendant or any other person against the late Elijah Ntheketha Mbondo or the 1st defendant or any of them. I would in the circumstances add further that the plaintiff is not under any obligation to satisfy any judgement that may be obtained against the 3rd and 4th defendants by any claimant as a result of the accident in question. Every party shall bear their own costs of the present suit.

Those, then, are the orders of this Court.

DATED at NAIROBI this 21st day of January, 2004.

A.G RINGERA

JUDGE



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