



REPUBLIC OF KENYA



KENYA LAW
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**Heritage Insurance v Kagwanja (Civil Suit 6 of 2020)
[2022] KEHC 3014 (KLR) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 3014 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL SUIT 6 OF 2020
HK CHEMITEI, J
JUNE 23, 2022**

BETWEEN

HERITAGE INSUARANCE PLAINTIFF

AND

PETER MARI KAGWANJA DEFENDANT

RULING

1. By a plaint dated 3rd January 2020, the plaintiff herein instituted this suit against the defendant seeking the following orders:
 - a) A Declaration that it is not bound to pay /or satisfy judgment in any suit arising from the said accident and /or indemnify the Defendant against any claim in respect of bodily injury to any person, damage to property or satisfy any claim whatsoever arising out of the accident which allegedly occurred on 14th April 2019 along the Eldoret-Nakuru Road; involving the Defendant's Motor Vehicle Registration Number KCH 406S.
 - b) A Declaration that it is not bound to pay /or satisfy judgment in Molo CMCC No. 335 of 2019 and Molo CMCC No. 336 of 2019 /or indemnify the Defendant against any claim in respect of bodily injury to any person, damage to property or satisfy any claim whatsoever arising out of Molo CMCC No. 335 of 2019 and Molo CMCC No. 336 of 2019.
 - c) Costs of the suit.
 - d) Interest on (c) above at Court rates.
 - e) Any other or further relief that this honourable court may deem just, expedient and fit to grant.
2. This suit is as a result of a proposal by the defendant requesting the plaintiff to issue him an insurance policy cover for his motor vehicle registration number KCH 406S Toyota Isis which according to his representation was a private motor vehicle. It is averred that on 9th April 2019, pursuant to the said



- proposal request, the plaintiff issued the defendant with a motor vehicle Insurance Policy Number 101977001337 upon payment of the requisite premium and the same was to expire on 8th April 2020.
3. It is averred further that under the terms of the said insurance policy cover, the plaintiff would indemnify the defendant in the event of loss/damage/claims arising from a road traffic accident caused or arising from the use of the motor vehicle registration number KCH 4068. The main use of the said vehicle was private and not to carry any fare paying passengers, for hire or reward. Additionally, that the said insurance cover did not cover any Third Party Risks or claims by passengers aboard the subject motor vehicle for hire or reward.
 4. It is also averred in the plaint that on or about 14th April 2019 the defendant's subject motor vehicle was involved in a road traffic accident along the Eldoret-Nakuru Road at Sachangwan area and the same was damaged and passengers aboard the said motor vehicle injured. That the defendant did report the said accident to the plaintiff, as required by the terms of the said policy, but concealed material facts and/or misrepresented information and therefore willfully breached the terms of the subject insurance policy cover materially and the status of the injured passengers. That further, according to the police abstract and records from preliminary investigations, the defendant's motor vehicle had aboard it fare paying passengers, which action was materially against the subject insurance policy cover which was for private use.
 5. The defendant did not enter appearance or file any defence denying the claim and apparently did not attend court during the hearing despite being served. What is before this court is the plaintiff's evidence as well as its written submissions as directed by the court.
 6. PW1 Steve Muturi Mwangi, testified on behalf of the plaintiff and he adopted his witness statement on record and documents dated 3rd April 2021 and 2nd March 2020 respectively. He testified that the defendant was their client who insured his vehicle KCH 406S and the cover was third party only and the same was from 9th April 2019 to 8th April 2020 under policy number 101977001337.
 7. He testified further that the said vehicle was involved in a road accident along Nakuru-Eldoret road on 14th April 2019 and the passengers filed claims namely Number Molo CCM 335/2019, 336/2019. That the claimants stated that they were fare paying passengers. It was his testimony that the defendant was not authorized to carry fare paying passengers but for domestic use. He produced as exhibits P1, P2 (a) (b) and P3 in support of the plaintiff's case and prayed that judgment be issued against the defendant as per the plaint.
 8. After closing its case the court directed that the plaintiff files its submissions which it has done.
 9. In its submissions the plaintiff identified two issues for determination namely; whether the defendant breached the terms of the policy of insurance between him and the plaintiff. It was submitted for the plaintiff that motor vehicle policy between the plaintiff and the defendant produced as PEX1 stated that motor vehicle registration number KCH 4065S was for private use and in connection with the Defendant's business dealings. That the defendant therefore breached the material terms of the motor vehicle policy which expressly did not include hire and reward. The plaintiff submitted that the said policy materially did not cover third party risks involving passengers aboard the subject motor vehicle and the defendant consequently breached material terms of the contract.
 10. It is further the plaintiff's submission that it was not legally obliged to indemnify the defendant for any accident, loss, damage or liability caused or sustained whilst the vehicle was used for hire and reward as the same was outside the aforesaid purpose. It placed reliance on the provisions of section 10 (4) of the *Insurance (Third Party Motor- Vehicle Risk) Act* and the case of *Paul Mutisya v Jubilee Insurance Company of Kenya Limited* [2018] eKLR where the court dismissed the plaintiff's claim against the



- defendant where he sought the court to compel the defendant to honour the agreement and to pay the people who sued him for compensation for vehicle loss.
11. Lastly, on whether the defendant is bound to satisfy judgment in Molo CMCC No. 335 of 2019 and Molo CMCC No. 336 of 2019 the plaintiff submitted that it had proved its case on a balance of probability that the defendant breached the terms and conditions of the Insurance and in particular that at the material time when the accident occurred the vehicle was being used for hire and reward against the motor vehicle policy terms.
 12. It submitted further that the provisions of section 10 of the *Insurance (Third Party Motor- Vehicle Risk) Act* were relevant in terms of legal requirement for filing a disclaimer suit disclaiming liability. It also cited the cases of *Monarch Insurance Company Limited v Swaleh Moi Juma* [2020] eKLR and *British American Company Limited v Daniel Amoth Owino* [2021] eKLR.
 13. In conclusion, it submitted that the policy was to indemnify the defendant under strict terms of an accident arising from the use of the motor vehicle for private use and in connection with the defendant's business dealings.
 14. In view of the foregoing, the substantive issue is whether in the sum total of the evidence on board one can conclude that there was a valid policy of insurance between the plaintiff and the defendant. If this was the case did the defendant breached the same as alleged by the plaintiff? Is the plaintiff entitled to the prayers sought in the plaint.?
 15. Having looked at the plaint and the annexures therein, it is evident that there was a valid policy of insurance between the plaintiff and the defendant. That clause M055 of the policy covered "social, domestic, pleasure, business and profession purposes and not for racing competition, rallies or trails or carriage of passengers for hire or reward". It is clear that the defendant by carrying fare paying passengers as was indicated in the police abstract annexed in the plaint was in total contravention of the said policy of insurance. The defendant has not presented any evidence to challenge the evidence adduced in this court and for this reason the suit against him ought to be allowed.
 16. In the case of *Karuru Munyororo v Joseph Ndumia Murage & Another* Nyeri HCCC No. 95 of 1988, the court held that:

"The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross- examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon."
 17. In view of the above, the plaintiffs suit is hereby allowed as prayed in the plaint with costs to the plaintiff.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 23RD DAY OF JUNE 2022.

H K CHEMITEL.

JUDGE

