



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. E005 OF 2021**

**1. TAHMEED TRANSPORTERS LIMITED**

**2. TAHMEED COACH LIMITED.....PLAINTIFF**

**VERSUS**

**AFRICA MERCHANT ASSURANCE CO.....LIMITED..DEFENDANT**

**JUDGMENT**

1. The Plaintiffs through a **Plaint** dated **28<sup>th</sup> January, 2021** have sued the Defendant claiming for the following: -

**a) That a declaration do hereby issue that the Defendant is bound to indemnify the Plaintiffs' of the respective Judgments and/or Decree namely Kikuyu CMCC No.134 of 2015 - Nancy Wairimu –vs- Tahmeed Transportes Limited; Machakos CMCC No.531 of 2016 - Peter Ndunda Mutua –vs- Edward Irungu & Tahmeed Transporters Limited and Machakos CMCC No.660 of 2018 - Peter George Gitonga –vs- Tahmeed Coah and Fondu Kazungu failure of which the respective Decree Holders and/or Creditors be at liberty to initiate a liquidation petition as against the Defendant/Respondent herein.**

**b) That a declaration hereby do issue compelling the Defendant to satisfy for the loss of user of the attached assets namely KBT 452F and KBT 536U in satisfaction of the Judgment and Decree in Mariakani CMCC No.28 of 2015 - Bin Juma Omar –vs- Tahmeed Coach Limited in favour of the 2<sup>nd</sup> Plaintiff herein as at the date of attachment on the 12<sup>th</sup> of September, 2018 accruing a loss of Kshs.138,800/= on a daily basis.**

**c) Pecuniary Damages for breach of contract.**

**d) Costs and interest from the date of filing suit at the current commercial rates.**

2. Despite the Defendant having been served with Summons to Enter Appearance, it has never done so, hence the matter proceeded undefended, and on the **24<sup>th</sup> March, 2021**, the Plaintiffs were ordered to proceed on formal proof.

3. On the **11<sup>th</sup> May, 2021**, the Plaintiffs proceeded on formal proof and called two witnesses who adopted their witness statements as their evidence in chief. Thereafter the Plaintiffs closed their case.

4. The Plaintiffs' claim that the Defendant was at all times the insurer of their two assets under Policy Insurance Contract covers **AM1/080/1/031797/ 2013 KBU 710H; AM1/085/1/010904/ 2012; AM1/080/1/029786/ 2012 KBD 517F and AM1/085/1/ 010904/2012 KBT 536U.**

5. It is the Plaintiffs' claim that they paid premiums to the Defendant through the Plaintiffs' one-time Insurance brokerage firm, Customer Corporate Insurance Agencies.

6. That subsequently, the 1<sup>st</sup> Plaintiff was sued in various divergent matters and Judgment entered in the case of **Kikuyu CMCC No.134 of 2015 - Nancy Wairimu –vs- Tahmeed Transportes Limited; Machakos CMCC No.531 of 2016 Peter Ndunda Mutua –vs- Edward Irungu & Tahmeed Transporters Limited and Machakos CMCC No.660 of 2018 - Peter George Gitonga –vs- Tahmeed Coach and Fondu Kazungu.** The Plaintiffs state that it was their expectation that they would be indemnified by the Defendant who are bound by the Insurance Policy Contracts.

7. It is stated that the various suits were brought to the Defendant's attention by their brokerage firm, **Customer Corporate Insurance**

**Agencies.** That after being informed of the same, the Defendants agreed to pursue the matters through its hired panel of lawyers, but the same was never done thus dishonoring its end of the policy contract to indemnify the Plaintiffs despite them having paid their respective premiums in compliance with the policy contract.

8. The result of this is that warrants of attachment have been issued against the assets of the 1<sup>st</sup> Plaintiff and threats to execute and sell the said assets have been levelled. Further, proclamations and warrants of attachment have been levied against the assets of the 2<sup>nd</sup> Plaintiff's being two buses namely **KBT 452F** and **KBT 536U** despite several notifications to the Defendant to indemnify and/or fulfill its part of the bargain by settling the Judgment and decree based on the Policy cap limit of **Kshs.3,000,000/=**.

9. The Plaintiffs' claim that they have incurred losses to a tune of **Kshs.138,800/=** from the attachment of their buses. It is stated that the said losses had accrued on a daily basis from the date of attachment which was the **12<sup>th</sup> September, 2018**.

#### **Directions of the Court**

10. Directions were taken that the suit be canvassed by way of written submissions and the Plaintiffs indicated that they would be relying on the said written submissions. The Plaintiffs' submissions dated **28<sup>th</sup> May, 2021** were filed on **31<sup>st</sup> May, 2021**.

#### **The Plaintiffs' Submissions**

11. It is the Plaintiffs submission that they have produced Certificates of Insurance for **Motor Vehicles Registration No.KBU 719H, KBD 517 F** and **KBT 536U** as **Exhibit 1** and the **Police abstracts** in relation to the vehicles associated with the accidents as **Exhibits 2, 3** and **4**, thus it is not in dispute that the Plaintiffs were insured by the Defendants.

12. The Plaintiffs have submitted that the Defendant was aware of the Judgments and Decrees entered against them as shown through **Exhibits 7, 8** and **9** wherein the Defendants instructed an Advocate to defend the Plaintiffs interests in the court cases but has failed and/or neglected to settle the decretal amounts thus causing the Plaintiffs financial loss.

13. According to the Plaintiffs, the Defendant is responsible for the decretal sums arising from the three Judgments and any further consequential losses suffered by the Plaintiffs as a result of the attachment.

14. The Plaintiffs have stated that their case against the Defendant is uncontroverted and thus the Defendant is liable as provided for under **Section 10** of the **Insurance (Motor Vehicles Third Party Risks) Act**. It is stated that for the Defendant to avoid liability, it needs to prove that there is a stay of execution of the Judgment in the primary suit pending Appeal and that the Policy was cancelled by mutual consent as between the parties, which scenarios have not been shown to this court.

15. It is submitted that the intention of **Sections 5(b)** and **10(1)** of the **Insurance (Motor Vehicles Third Party Risks) Act** is to ensure that a third party who is injured and the family of those that die are compensated for their suffering, loss and inconvenience, if the owner of the Motor Vehicle and/or driver have no means to settle such claims. To support this point, reliance has been placed on the cases of **Blueshield Insurance Co. Ltd –vs- Samuel Nyaga Ngurukiri [2008]eKLR** and **Cannon Assurance Company Limited –vs- Peter Mulei Sammy [2020]eKLR**.

16. The Plaintiffs have submitted that with regard to lost earnings for **Motor Vehicles Registration No.KBT 536U** and **KBT 452F** which were attached as a result of a Decree in the case of **Mariakani RMCC No.28 of 2015**, they have attached a manuscript as **Exhibit No.5** that shows the projected earnings and the losses incurred since the vehicles were proclaimed on the **12<sup>th</sup> September, 2018**. The loss is said to have been incurred daily to the tune of **Kshs.138,800/=**, a claim which is uncontroverted.

17. Lastly, the Plaintiffs have claimed that they have proven their case on a balance of probabilities and pray that their claim be allowed as prayed.

#### **Analysis and Determination**

18. I have very carefully considered the Plaintiff, the Plaintiffs' witness statements adopted as PW1 and PW2's evidence in chief, attached documents produced as exhibits, and the submissions filed. I find the issue arising thereto for consideration is *whether the Defendant is liable to satisfy the decretal amounts awarded against the Plaintiffs*.

19. In this case, the Plaintiffs have shown evidence of being insured by the Defendant and the fact that various Judgments have been entered against them which they believe ought to have been indemnified by the Defendant as provided under **Section 10(1)** of the **Insurance (Motor Vehicles Third Party Risks) Act**.

20. This case is thus a declaratory suit in which the Plaintiffs require the Defendant to indemnify them against the Judgments as issued in **Kikuyu CMCC No.134 of 2015 - Nancy Wairimu –vs- Tahmeed Transportes Limited; Machakos CMCC No. 531 of 2016 Peter Ndunda Mutua –vs- Edward Irungu & Tahmeed Transporters Limited** and **Machakos CMCC No.660 of 2018 - Peter George Gitonga –vs- Tahmeed Coach and Fondu Kazungu**.

21. Further, the Plaintiffs require compensation for the proclaimed **Motor Vehicles Registration No. KBT 536U** and **KBT 452F** which were attached as a result of a decree in the case of **Mariakani RMCC No.28 of 2015**.

22. It is noteworthy that for a declaratory suit to succeed, it must be shown that the party applying for the said Judgment has complied with

**Section 10** of the **Insurance (Motor Vehicles Third Party Risks) Act**, and more specifically the exceptions as provided under **Section 10(2)** of the **Insurance (Motor Vehicles Third Party Risks) Act** which provides: -

*(2) No sum shall be payable by an insurer under the foregoing provisions of this section –*

*a) in respect of any judgment, unless before or within fourteen days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings; or*

23. From the above provision, it is clear that for an insurance company to pay or be obligated to the Judgment sum decreed in a primary suit, it must have had a notice of bringing or instituting of the proceedings or suit, 14 days before or 14 days after the suit was filed.

24. In this suit, the Plaintiffs have not shown that they had served the Defendant with a statutory notice as required under **Section 10(2)(a)** of the **Insurance (Motor Vehicles Third Party Risks) Act**. The Plaintiffs claim that the various suits being **Kikuyu CMCC No.134 of 2015 - Nancy Wairimu –vs- Tahmeed Transportes Limited; Machakos CMCC No. 531 of 2016 - Peter Ndunda Mutua –vs- Edward Irungu & Tahmeed Transporters Limited** and **Machakos CMCC No.660 of 2018 - Peter George Gitonga –vs- Tahmeed Coach and Fondu Kazungu** were brought to the attention of the Defendant by a brokerage firm, **Customer Corporate Insurance Agencies** but no evidence has been brought before the court to show that indeed the Defendant was aware of the suits against the Plaintiffs 14 days before their institution or 14 days after their institution. Further, **Customer Corporate Insurance Agencies** is not a party to the suit herein so it can corroborate the claims of the Plaintiffs to confirm compliance of **Section 10(2)(a)** of the **Insurance (Motor Vehicles Third Party Risks) Act**.

25. In their submissions, the Plaintiffs have referred the court to Exhibits 7, 8 and 9 as proof of a Statutory Notice. A good look at those exhibits shows that they are Judgments from the primary suits where the decretal amounts arose. There is no proper evidence of service of a statutory notice nor of those Judgments to notify the Defendant of the existence of the primary suits.

26. Further, the Plaintiffs referred the court to the various Police Abstracts of the accidents which were indeed served upon the Defendant. The same cannot also serve as Statutory Notices for the various suits against the Plaintiffs, as a Police Abstract is only evidence that the accident was reported but does not indicate the desire of a party to institute a suit.

27. It is not in dispute that the Plaintiffs had third party insurance covers from the Defendant as there is uncontroverted evidence of the policy to confirm the same. However, having established that one of the exemptions under **Section 10(2)(a)** of the **Insurance (Motor Vehicles Third Party Risks) Act** is available to the Defendant, the resultant conclusion is that the orders as sought in the Plaintiff cannot issue as there is no proof that the Defendant was aware of the various suits against the Plaintiff to be able to indemnify them.

28. In view of the foregoing, I find no merit in the **Plaint** dated **28<sup>th</sup> January, 2021**. The same is therefore dismissed with no orders as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 24<sup>TH</sup> DAY OF SEPTEMBER, 2021.**

**D. O. CHEPKWONY**

**JUDGE**

**IN THE PRESENCE OF:**

**MR. WAFULA COUNSEL HOLDING BRIEF FOR M/S ARIKA COUNSEL FOR PLAINTIFF**

**NO APPEARANCE FOR AND BY DEFENDANT**

**COURT ASSISTANT - WINNY**