



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL SUIT NO. 28 OF 2015**

**THE MONARCH INSURANCE COMPANY LIMITED.....PLAINTIFF**

**VERSUS**

**SWALEH MOI JUMA.....DEFENDANT**

**Coram: Hon. Justice R. Nyakundi**

**Mose, Mose & Milimo Advocates for the plaintiff**

**Swaleh Moi Juma for the defendant**

**JUDGMENT**

The plaintiff insurer sued the defendant, the insured seeking a declaration from this court that it is not bound to make payments or indemnify the defendant under the said insurance policy cover in respect of any claim, in respect of death or bodily harm to any person or passenger being carried, arising out of the Road Traffic Injury accident which occurred on 8.9.2014 along Hola-Garsen Road involving the defendants Motor Vehicle Registration Number KBQ 980G.

**Costs of the suit**

The defendant was duly served with the suit papers but failed to enter appearance or defence to the claim. That upon entry of an interlocutory Judgment, the claim proceeded for formal proof.

**Brief facts**

The plaintiff is a limited liability company carrying on the business of insurance within Kenya. That on or about 6.8.2014, the defendant applied to the plaintiff to be issued with a third party only vehicle insurance policy cover for motor vehicle registration number KBQ 980G Toyota Probox.

That the details of the policy cover number **MSA/0700/000515/2014** with effect from 6<sup>th</sup> August 2014 and expiring on 5.8.2015 was in respect of the defendant motor vehicle.

That the policy terms both express or implied did not cover Third party risks or liability in respect of the death of or bodily injury to passengers being covered in or upon entering into or alighting from the subject motor vehicle at the time of the occurrence of the event out of which any claim or consequential loss is payable to such claimants.

That the policy did not insure the life of Third party who may be in use of the vehicle as passengers.

That on 8.9.2014, the defendants motor vehicle Registration Number KBQ 980G while in the course of engaging in a transport business was involved in a Road Traffic Accident along Garsen – Hola wherein three passengers were injured.

That the prayer for declaration is to repudiate the policy for breach of the terms and conditions of the policy cover.

According to the only witness for the plaintiff, **Barke Salim (PW1)**, a branch manager for the plaintiff insurer, she told the court that upon the accident being reported by the insured an investigations was carried out to ascertain the circumstances of the accident along Hola-Garsen Road.

The investigations report dated 18.3.2015 annexed as to the claim details evidence showing that the defendant motor vehicle was in the business of ferrying fare paying passengers along the said road when the accident occurred.

That the policy subject matter of the claim was issued on very clear terms to the defendant. That the conditions of public service transport was excluded or any claim arising from any such injury or death.

**PW1** further testified that the defendant by engaging in carrying fare-paying passengers on the material day shoulders the entire liability and therefore renders the policy null and void.

### **Analysis and determination**

#### **The Law:**

Section 5(b)(11) of the Insurance Motor Third Party Risks Act Cap 403 Laws of Kenya is the operative Section on the specifics of the Insurance Policy of Insurance;

*(i). Which insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death or bodily injury to, any person caused by or arising out of the use of the vehicle provided that the policy in terms of this Section shall not be required to cover.*

*(ii). Except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event of which the claim arose.*

Subsequent to this provisions the case of **Thomas Muthoka & Another v Insurance Company of East Africa Limited {2008} eKLR, Onyancha J** held:

*“The position to the above immediate provision excludes persons who die or sustain injury while in their course of employment or if their liability is contractual it however includes and preserves liability in respect of persons of persons being carried as passengers for hire or reward in or upon or entering or getting on to or alighting from the insured’s vehicle at the time of the accident. The proviso also now excludes liability of the relevant person above mentioned if the sum is beyond 3 million as per an amendment made by Act No. 11 of 2006 Section 34.”*

Pursuant to Section 10 of the Act an insurer can obtain a declaration that although the policy apparently covered the liability it would be repudiated by non-disclosure of a material fact.

The authoritative interpretation of the right to repudiate the policy upon discovery non-disclosure and its importance is a question which has received prominence in the following cases **Cooperative Insurance Co Ltd v David Wachira Wambegu CAppeal No. 66 of 2008 2010 eKLR, Jubilee Insurance Co. Ltd v John Semalengo {1965} EA 233.**

Simulatively in **Ziwa v Pioneer General Assurance Society Ltd {1974} EA 141** citing the principles on **Albert v Motor Insurers Bureau {1971} 2 ALL ER 1345** held that:

*“There is no evidence before the court to show that the insured before the accident, was in the habit of carrying passengers in his motor vehicle so as to make it, a vehicle in which passengers are carried for hire or reward, within the meaning of Section 99 (b) (11) of the Act. However, the use of a motor vehicle even on an isolated occasion to carry persons for hire or reward makes that vehicle one in which passengers are carried for hire and reward.”*

In making a determination whether to issue a policy cover to the insured, insurance contract being of special class and unique in nature are depended upon the principles of utmost good faith, disclosure of material facts by the assured and non-misrepresentation or giving wrong answers in the proposal form.

By the design of the contract the issuance of the policy is founded on the principle in the case of **Seaton v Heath {1899} 1 QB 782** where the court interalia stated:

*“Contracts of insurance are generally matters of speculation, where the person desiring to be insured has the means of knowledge as to the risk, and the insurer has not the means or use the same means.”*

In addition to the above guidance a contract of insurance is also voidable for misrepresentation of material facts which impairs the meeting of minds of the two contracting parties.

The Learned authors **Goff and Jones the Law of Restitution {1966}** states:

*“A contract which is voidable for misrepresentation is intermediate between one which is void abinitio and one which is liable to be brought to an end; for a crucial voidable for misrepresentation stands until some action is taken by the innocent party to bring it to an end, though once that action is successfully taken, the contract is not simply determined but is avoided abinitio.”*

In my judgment based upon the bare evidence before me that the defendant falsely represented to the plaintiff insurer that the motor vehicle in question would be used for social, private and pleasure purposes and not to carry fare paying passengers. To be able to avoid the policy under the Act, the plaintiff has shown by way of evidence that the representation was material for purposes of the offer the proposal form and setting the premiums.

The uncontroverted evidence were far enough in establishing a link and a connecting factor between the insurer and the insured for purposes for which the vehicle will be used and the contract continued in the policy.

The court in a persuasive authority of **Robert v Anglo – Salon Insurance Association 1927 (27 Lloyds List Law Rep 313, Bankers L. J said:**

*“In the first place I do not think we can get away from the words warranted only, I do not attach undue importance to warranted, but when I find warranted used in conjunction with only, it seems to me impossible to get away from the conclusion that it is there definitely stated by the parties as a condition, that the user of this vehicle shall be only for the purposes indicated reading those two answers together with warranted used only for the following purposes, I think that used in the policy means to be used. It is will be used is quite capable of being interpreted as to be used, but it is to be used only.” What is the effect of that? Looking myself at the policy and the declaration... it seems to me that, that is a promissory declaration as to the risk.” I will insure you in certain circumstances, but only in certain circumstances.”*

The position of the matter as set out in the evidence by the plaintiff witness establishes non-disclosure of all material facts to the insurer at the time of appraisal and filling the proposal form to induce the making of the contract to cover the subject motor vehicle registration number KBQ 980G.

That being the view of the matter, the plaintiff was entitled to repudiate the policy on account of misrepresentation and non-disclosure of material facts. The facts not disclosed was material to induce the plaintiff insurer to decline not to enter into a contract with the defendant.

Therefore, I uphold the plaintiff’s claim and for a declaration to repudiate the cover on liability against any risks or claims filed under the policy of insurance. These are the orders of the court.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 30<sup>TH</sup> DAY OF JANUARY 2020**

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**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

1. Ms. Mettoh for Kirui for Mogaka Omwenga Advocates