



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 20 OF 2016

KENYA ORIENT INSURANCE COMPANY LIMITED.....PLAINTIFF

VERSUS

SALIM JUMA KILEMA.....DEFENDANT

J U D G M E N T

Introduction

1. In its Amended plaint amended on the 25.12.2016, the plaintiff in this suit claims breach of terms and conditions of an insurance policy cover by the defendant as well as misrepresentation of material facts.
2. The defendant did not enter appearance though he was served with the plaint as per the affidavit of service sworn on 26.4.2016
3. In the plaint, the plaintiff prays for judgement against the defendant for as follows:

a) a declaration that the Plaintiff is entitled to avoid the insurance Contract and/or Policy in respect of policy number MSA /0700/101814/2014 and consequently not oblige and or legally bound to settle any claim or to honour any Judgment and all consequential orders arising from either the policy number MSA /0700/101814/2014 or at all or any other claim in respect of motor vehicle registration number KBY 540J.

b) a declaration that the Plaintiff is not obliged and/or legally bound to settle any claim or to honour any Judgment obtained in respect of the accident that occurred on or about the 6.8.2014 involving motor vehicle registration number KBY 540J and Motor vehicle Registration Number KAN OO8N/ZC 2017 during which period the Defendant's Motor Vehicle Registration Number KBY 540 J was not covered and/or insured by the Plaintiff.

c) A declaration that the plaintiff is not obliged and/or legally bound to settle any claim or to honour any Judgment obtained in respect of policy number MSA /0700/101814/2014.

d) Cost of this suit;

e) Any other or further relief that this Honourable Court may deem fit to grant.

Plaintiff's Case

4. The plaintiff case was laid out by the evidence of two witnesses PW1 and PW2. PW1, a manager at the Plaintiff's Mombasa branch testified that he had recorded his statement on the 3.2.2016 and filed all the documents in support of the Plaintiff's case which he adopted by this court. It was PW1's testimony that the Plaintiff sought to repudiate policy number **MSA /0700/101814/2014** for reasons that the Defendant had misrepresented material facts as to an accident which he reported to have occurred on the 24.8.2014.

5. PW1 testified that upon investigation by **proactive Risk solution limited** a firm instructed by the Plaintiff, it was discovered that the accident occurred on the 6.8.2014 involving the Defendant's insured car **KBY 540 J** and another Motor Vehicle **KAN 008N ZC 2017**. A report of the said accident was made in Kilifi and not at Bamburi police station as alleged by the Defendant.

6. Further, PW1 testified that it was established that the Defendant's vehicle had been hired and was being used to ferry passengers, which was contrary to **Clause MOT005/01** of the policy number **MSA /0700/101814/2014**. Consequently, the Plaintiff seeks to repudiate policy number **MSA /0700/101814/2014** because of breach of utmost good faith and the use of the motor vehicle contrary to and in breach of the

disclosed use for which the motor vehicle was insured.

7. PW2 testified that he was instructed by the plaintiff to investigate the accident alleged to have occurred on 24.8/1/2017 and involved insured motor vehicle registration number **KBY 540J**. He prepared a report signed and dated 24.9.2014 which he produced as an exhibit in Court.

8. It was PW2's testimony that the aforementioned insured motor vehicle had rammed into motor vehicle registration number **KAN 008N/ZC 2017** at Kwa Mwando area in Kilifi county while ferrying passengers contrary to the policy terms on the 6.8.2014 and that on the material day the Defendant was not driving motor vehicle KBY 540J as alleged.

Plaintiff's Submissions

9. Learned Counsel for the Plaintiff submitted that subject insurance policy was subject to monthly renewal but the Defendant failed to renew the same between 8th June 2014 and 10.8.2014 but was renewed for the period 11th August to 10.9.2014. Subsequent to the renewal, the Defendant reported that an accident had occurred on the 24.8.2014. Investigations conducted revealed that the accident had indeed occurred on the 6.8.2014 and therefore the Defendant had fraudulently misrepresented facts relating to the accident to the Plaintiff and as a result of the non-disclosure of material facts, the insurer was entitled to avoid the insurance contract.

10. The plaintiff relied on the case of **Pan Atlantic Insurance Co. Ltd & Another v Pine Top Insurance Co. Ltd [1994] 2 Lloyds R 427** where the House of Lords while laying out the objective test stated [per Lord Lloyd at page 466] as follows:

"...Whether an insurer seeks to avoid a contract of insurance or reinsurance on the ground of misrepresentation or non-disclosure, there will be two separate but closely related questions:

1. Did the misrepresentation or non-disclosure induce the actual insurer to enter into the contract on their terms?

2. Would the prudent insurer have entered into the contract on the same terms if he had known of the misrepresentation or non-disclosure immediately before the contract was concluded?

If both questions are answered in favour of the insurer, he will be entitled to avoid the contract, not otherwise.

Issues for Determination

11. The issues for determination in this matter have been identified as follows: -

a) Whether there was breach of the insurance contract by the defendant; and if so,

b) Whether the plaintiff is liable to indemnify the defendant.

Analysis & Determination

12. As the Defendant did not participate in the proceedings herein, this court takes the firm view that the facts as given by PW1 and PW2 relating to the accident, the issuance of the Insurance Policy and the motor accident claim form were true as they were not rebutted and/or controverted.

Whether there was breach of the insurance contract by the defendant; and if so,

13. On perusal of the motor accident claim form found on page one (1) of the Plaintiff's list of documents, I note that the period of insurance cover was between 11.8.2014 to 10.9.2014. It is also indicated that the insured motor vehicle **KBY 540J** was not being used for hire at the time of the accident and Defendant was personally driving the insured motor vehicle at the time of the accident. When read with the investigations report, it emerges that the date given was inaccurate because the accident had occurred on 6.8.2014 before the policy was effected and the motor vehicle was used by a third party carrying passengers.

14. Clause MOT005/01 of policy number **MSA /0700/101814/2014** provides as follows:

"...the policy does not cover use for racing competitions, rallies or trials (or use for practice for any of them) or use for hire or reward, commercial traveling, the carriage of goods in connection with any trade or business or business or use for any purposes in connection with the Motor Trade"

15. Accordingly, having considered the evidence that was tendered by the Plaintiff herein and its Written Submissions, it is clear that the insured motor vehicle had been involved in an accident on the 6.8.2014 which was prior to the commencement of the insurance period and therefore that at the time of the accident, the Defendant was uninsured.

16. Consequently, I find that there was misrepresentation and non-disclosure of material facts on the part of the Defendant, which induced the plaintiff into the insurance contract and had the Plaintiff discovered before entering into the insurance contract, then it would have not issued the Defendant with policy number **MSA /0700/101814/2014**. See. **Pan Atlantic Insurance Co. Ltd & Another v Pine Top Insurance Co. Ltd (supra)**. I find that by the time the Insurance was renewed the risk had occurred and the policy cannot be made to act

retrospectively.

Rendition

17. For the foregoing reasons, the Plaintiff has proved its case on a balance of probabilities and is entitled to avoid the policy on account of the fact that there was no insurance on the date of accident and further on account of breach by the Defendant. The upshot of this court's decision is that the Plaintiff's suit in the Amended Plaint dated 15.12.2016 is merited for which reason judgment is hereby entered in favour of the Plaintiff against the Defendant in terms of prayer **a, b, & c** of the amended Plaint together with costs of the suit.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF JANUARY 2020

P.J.O. OTIENO

JUDGE