



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NUMBER 128 OF 2010

CORPORATE INSURANCE COMPANY LIMITED.....PLAINTIFF

VERSUS

MONICA WAMAITHA KAMAU (Administratrix of the Estate of

JOSEPH NDIRANGU MAIGUA (DECEASED)1ST DEFENDANT

PETER MWANIKI KAMAU (Administrator of the Estate of

JOSEPH NDIRANGU MAIGUA (DECEASED).....2ND DEFENDANT

J U D G M E N T

1. On 25th November 2008 Corporate Insurance (the plaintiff) issued a comprehensive cover for motor vehicle registration number KBF 567A number CO1/080/1/901723/2008 for Ksh. 1,000,000. The insured was Joseph Ndirangu Maigua.
2. On 18th January 2009 the motor vehicle was involved in a road traffic accident along Mulot Narok road. The insured died. He had in the motor vehicle another passenger, John Muchina who also died, and Mary Wangui who sustained injuries.
3. On 31st May 2010 the plaintiff filed this suit seeking orders;

(a) A declaration that the Plaintiff is not bound to pay and/or indemnify the insured against any claim in respect of death, bodily injury to any person, damage to property or any claim whatsoever arising out of the accident which occurred on 18th January 2009 along Mulot-Narok Road involving the insured's Motor Vehicle Registration Number KBF 567A.

(b) Costs of this suit.

(c) Interest on (b) above at Court rates.

(d) Any other or further relief that this Honourable Court may deem just, expedient and fit to grant.

against Monica Wamaitha Kamau (Administratrix of the estate of Joseph Ndirangu Maigua (Deceased) and Peter Mwaniki Kamau (Administrator of the estate of Joseph Ndirangu Maigua (Deceased).

4. The gist of the suit is that the insurance policy did not cover third party claims by passengers aboard or boarding or alighting from the subject motor vehicle. That "A fortiori the plaintiff was to only indemnify the insured for 3rd party claims arising from the rightful use of the Motor Vehicle (i.e. commercial purposes)."
5. The defendants filed defence on 16th March 2011. Referring to the same policy document they denied all the allegations in the plaint and put the plaintiff to strict proof thereof and in particular; that the deceased insured and the passengers were not covered by the policy contending that said policy covered the accident that occurred. Their prayer was that the suit be dismissed.
6. The matter proceeded for hearing on 3rd December 2019 in the absence of defendants whose counsel had for unknown reasons continuously received hearing notices in protest but without taking any appropriate action.

7. **PW1 Joseph Kiamba** testified as the claims manager of the plaintiff. He relied on his statement made on 18th October 2019. He testified that the policy was for a commercial motor vehicle and the motor vehicle would only be used for carrying goods. He said the policy had exceptions; one of which was the carrying of passengers. That following the road traffic accident the motor vehicle was indemnified, but the policy it did not cover the insured or his passengers.

8. **PW2 Jonathan Mwalili** was the investigator assigned the accident. He compiled a report dated 24th February 2009 which he produced.

9. Thereafter the counsel for plaintiff filed submissions citing several authorities with regard to exemption clauses.

10. The issue for determination is whether the plaintiff has, on a balance of probabilities proved its case.

11. The plaintiff's claim is that the policy did not cover the insured or the two (2) passengers who were with him in that motor vehicle. It is noteworthy that PW1 in his testimony made no reference to any specific clause in the policy. PW2 did not interview the only survivor of the road traffic accident. He never established what the two passengers were doing in the vehicle. The source of information in his report regarding who the passengers were and what they were doing with the deceased insured is not known, and appears to be his own opinion. For instance, he says the insured was doing extensive farming in Transmara near Mara River, and on that day that he was going to visit his farm to prepare for planting, that John was his friend and owned a tractor, and that the other passenger was the insured's lady friend. How did he come into this information? It was not from the interview of any known witness, and the sources of this information are not stated. This was crucial as two (2); insured and John died. The lady friend was never found.

12. It was submitted that under the exceptions clause 2 the policy expressly excludes liability against the plaintiff where injuries and death is caused to a passenger aboard the insured's motor vehicle.

13. What does the policy document say?

“Where the insurance provided is “comprehensive all sections of this policy are operative.”

Section 2 on liability to Third Parties states:

“1. The Company will subject to the Limits of Liability Indemnify the insured in the event of accident caused by or arising out of the use of the Motor Vehicle or in connection with the loading or unloading of the Motor Vehicle against all sums including claimant's costs and expenses which the insured shall become legally liable to pay in respect of

(a) death of or bodily injury of any person

(b) damage to property

2. In terms of and subject to the limitations of and for the purposes of this Section the Company will indemnify any Authorised Driver who is driving the Motor Vehicle provided that such Authorised Driver

(i) shall as though he were the insured observe fulfil and be subject to the terms of this policy insofar as they can apply.

(ii) it is not entitled to indemnity under any other policy.

3. In the event of the death of any person entitled to indemnity under this Section the Company will in respect of the liability incurred by such person indemnify his personal representatives in terms of and subject to the limitations of such Section provided that such representatives shall as though they were the insured observe fulfil and be subject to the terms of this policy in- so-far as they can apply.

4. The Company will pay all costs and expenses incurred with its written consent.

5. In the event of an accident involving indemnity under this Section to more than one person the limits of liability shall apply to the aggregate amount of indemnity to all persons indemnified and such indemnity shall apply in priority to the insured.

6. The Company may at its own option

(a) arrange for representation at any inquest or fatal inquiry in respect of any death which may be the subject of indemnity under this Section.

(b) undertake the offence of proceeding in any court of law in respect of any act or alleged offence causing or relating to any event which may be the subject to indemnity under this Section.”

(c)

14. The relevant exceptions to clause II are highlighted

“(ii) death of or bodily injury to any person in the employment of the insured arising out of and in the cause of such employment.

(iii) death of or bodily harm to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon or entering or getting onto or alighting from the motor vehicle at the time of occurrence of the event out of which any claim arises.

(iv) Death of or bodily injury to a member of the same household as the insured.”

and the general exceptions.

“(b) Whilst Motor Vehicle

(i) being used otherwise than in accordance with the Limitations as to use.”

15. The question is, what evidence was placed before the court to establish that these people fell within these specific exceptions?

16. Starting with the insured deceased, Section II, Clause 2 provides for the indemnity of the authorized driver. The plaintiff suggests that the motor vehicle was not being used in accordance with the “limitations as to use clause” but provided no such evidence except for the stories and suppositions in the investigation report.

17. With regard to the passengers the exception states:

(iii) death of or bodily harm to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon or entering or getting onto or alighting from the motor vehicle at the time of occurrence of the event out of which any claim arises.

18. This exception suggests that a passenger carried by reason of or in pursuance of a contract of employment is an exception.

19. I did not find any evidence to show that the two persons who were in the motor vehicle did not fall within that exception.

20. From the record it is not clear whether any suits have been filed against the insured for any claim, but until it is established that the so called passengers fell within the category of exceptions, this suit cannot stand, as it is based on speculation.

21. I agree with the submission which address clear matters of law regarding exceptions. The only thing is that the evidence upon which these exceptions would be premised was not presented before me. The plaintiff’s witnesses merely established that a road traffic accident occurred, that the insured had two “passengers” in the motor vehicle, one of whom died, the other survived but can be found, but they were required to bring evidence to place them outside the specific exception (iii). For failing to do so, I find that the claim have not been established and the suit is dismissed with costs.

Delivered, Dated and Signed at Nakuru this 30th day of April, 2020.

Mumbua T. Matheka

Judge

In the presence of:- Via email by consent of:

Mukite Musangi & Company Advocates for the plaintiff

C. Mwangi Gachichio & Company Advocates for the defendants

Edna Court Assistant