



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

COMMERCIAL & TAX DIVISION

HIGH COURT CIVIL SUIT 346 OF 2013

KENYA ORIENT INSURANCE LIMITED.....PLAINTIFF

VERSUS

JOSEPH MAINA NJOGU.....DEFENDANT

JUDGMENT

The Plaintiff filed Plaintiff on 7th August 2013. The claim is that the Defendant filled a Proposal Form and requested the Plaintiff to issue the Defendant with a Commercial Motor Vehicle Policy in respect of Motor Vehicle Registration Number **KAC 623 B** belonging to the Defendant as described in the Proposal Form.

The Defendant in the Proposal Form and Declaration, made true representations and made payments of premiums as agreed in issued Commercial Motor Vehicle policy of Insurance No **THK/102/004087/11** for the period of 12 months with effect from 10th December 2011 to 9th December 2012.

The Policy of Insurance and Proposal Form formed part of Contract of Insurance between the Plaintiff Insurance Company and the Defendant Insured and both were duly filled and signed by the Defendant. One of the terms of Insurance was that the Defendant would use the insured motor vehicle for purposes of carriage of defendant's goods only and not for carrying hired goods.

On 12th July, 2012, the Defendant's authorised driver in motor vehicle Reg No KAC 623 B, while carrying sand along Thika- Matuu Road near Gatuanyaga. He was involved in an accident with motor vehicle Reg KBL 465 M which is the subject of **Civil Suit Thika SRMCC 297 of 2013**, a case filed by a passenger in the other car arising from the accident.

The Plaintiff sought declaration arising out of breach of contract of Insurance because the Defendant failed to disclose material facts to the Plaintiff. The Defendant's insured motor vehicle Reg No KAC 623 B was involved in improper use contrary to the Insurance policy terms. The Defendant's motor vehicle was involved in transporting goods on hire and not personal goods as contracted in the Insurance Policy.

The Plaintiff sought declarations;

- a) The Plaintiff Insurance Company is entitled to avoid the Policy of Insurance THK/102/024087/11 and any provision as the term of the policy was breached by Defendant.
- b) The Plaintiff is not liable to make any payment under the aforesaid Policy THK/102/024087/11 in respect of any claims by the Defendant arising out of injuries sustained in the accident on 12th July ,2012 involving motor vehicle KAC 623B & KBL 465M and/or from any accident involving the vehicle during the pendency of the said Policy.
- c) That Motor Vehicle Reg No KAC 623 B was being used contrary to the policy terms on 12th July,2012 and therefore the Plaintiff is not liable to pay any claims arising out of the said accident of even date.

Upon service of Plaintiff and Summons, the Defendant's advocate filed Memorandum of Appearance on 30th June 2014. The Defence if filed is not part of the Court record for the Court to consider its contents on merit.

On 22nd October 2019, both Counsel for parties were present. Mr. Khamala holding brief Mr. Kioko for the plaintiff and the Firm of S.W. Ndegwa for the Defendant. The Court was informed by holding brief that Mr Kioko was unwell. The matter was scheduled for hearing on 18th November 2019. As the Court record shall confirm, this matter was adjourned severally; on 14th March 2019; parties did not attend Court, on 25th July 2019, the Defendant was not served and the matter was adjourned.

On 18th November 2019, the hearing proceeded *ex parte*, the Court was satisfied the Defendant was aware of the hearing date as it was taken in the presence of both Counsel on 22nd October 2019 and service was not legally necessary. On the hearing date there was no appearance by Defendant or Counsel or Representative, no circumstances, reasons or explanation was advanced for the court to consider. The hearing proceeded.

PW1 Ms Maureen Wangechi, Legal Officer of Plaintiff Company testified and relied on her Written Statement filed on 4th March 2019. She produced as Exhibits the Policy document and an Investigation Report.

The Plaintiff relied on the Motor Commercial Vehicle Proposal Form that the Defendant in Clause 2 ticked that the motor vehicle would be used for carriage of own goods. The Investigation Report of 31st October 2012 by Counter Strike Limited contains the driver of motor vehicle KAC 623B; one Patrick Njenga Jane's written/typed statement. He admitted he was an employee of the Defendant as driver of the said vehicle. On 12th July 2012 he was on hire to fetch sand from Ndonyo Sabuk and transport it to Thika. The Investigation Report disclosed investigations by Police blamed the Defendant's driver and vehicle for the road traffic accident between KAC 623B & KBL 465M.

It is the disclosure by the driver was on hire to transport sand at the time that contravenes the disclosure in the Policy document that of the accident, the Defendant would use the vehicle to transport own goods and not for hire that amounts to breach of the Insurance contract. The Plaintiff is of the view that any liability cannot attach in view of breach of contract by Defendant.

The Defendant failed to appear or attend Court, his advocate failed to attend court and/or to participate in proceedings and/or file any documents to controvert the Plaintiff's claim. As it stands the Plaintiff's claim is not contested.

DISPOSITION

From the above consideration, in the absence of any evidence from the Defendant for the Court to consider, the Court grants the Plaintiff's prayers for declarations as outlined in the Plaintiff filed on 7th August 2013.

DELIVERED DATED & SIGNED IN OPEN COURT ON 28TH APRIL 2020.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF :

MURIITHI NDONYE ADVOCATES FOR PLAINTIFF

S.W.NDEGWA & CO FOR DEFENDANT