



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO 205 OF 2016

JJ (a minor suing through JKG

And JMJ His father and mother as next friends).....1ST PLAINTIFF

FJ (a minor suing through JKG

And JMJ her father and mother as Next friends).....2ND PLAINTIFF

VERSUS

GENERAL ACCIDENT INSURANCE COMPANY LTD.....DEFENDANT

JUDGMENT

INTRODUCTION

1. In their Plaint dated 1st August 2016 and filed on 3rd August 2016, the Plaintiffs sought the following reliefs from the Defendant:-
 - a) **A declaration that the Defendant is under a statutory duty to satisfy the judgment in Nairobi HCCC Number 236 of 2010 (JJ & Another vs Akamba Public Road Service Limited & Another);**
 - b) **An mandatory injunction directed at the Defendant requiring them to pay the decretal sum in Nairobi HCCC Number 236 of 2010 (JJ & Another vs Akamba Public Road Service Limited & Another) costs and interest thereon in terms of the judgment delivered by Mbogholi Msagha on 3rd December 2015;**
 - c) **Costs of this suit;**
 - d) **Interest on c) above at court rates from the date of judgment until payment in full; and**
 - e) **Such other and further relief that this honorable court may deem just and fit to grant.**
2. The Defendant filed its Memorandum of Appearance dated 12th August 2016 on 22nd August 2016. Its Statement of Defence, List of Witnesses and Witness Statement were all dated and filed on 31st August 2016. The Defendant subsequently filed a Witness Statement of Simon Lariak and a Supplementary List and Bundle of Documents on 6th December 2017. The said Simon Lariak also filed an additional Witness Statement dated 6th February 2018 on 7th February 2018.
3. The Plaintiffs' Written Submissions were dated 9th December 2018 and filed on 13th February 2018 while those of the Defendant were dated and filed on 19th March 2018.
4. Notably, Mbogholi Msagha J was initially seized of this matter. Before he could render his decision herein, he considered himself conflicted as he had previously entered judgment in favour of the Plaintiffs herein against (Akamba Public Road Service Ltd, (hereinafter referred to as "the Defendant's Insured") in **HCCC No 236 of 2010** and on 13th June 2016, he deferred this file to another judge in the High Court of Kenya Milimani Law Courts Civil Division to write the

judgment based on the evidence that had been tendered and submissions filed by the parties herein. It was on that basis that this court became

seized of this matter.

5. When the matter came before it on 8th November 2018, both parties requested it to render its decision based on their respective Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

THE PLAINTIFFS' CASE

6. The suit herein was filed pursuant to the provisions of Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 (Laws of Kenya) (hereinafter referred to as "the Act"). It was their submission that the Defendant herein was obligated by that provision to settle the judgment that had been entered in their favour against the Defendants Insured in **HCCC No 236 of 2010**.

7. They argued that the Defendant could not purport that its Insured was covered under the COMESA yellow card as the insurance policy under which it had insured it had not been cancelled.

THE DEFENDANT'S CASE

8. The Defendant's case was that it had not covered the risk alleged by the Plaintiffs because its liability was limited to claims arising in Kenya and that since their claim occurred outside its jurisdiction, in Tanzania, then they could only look for compensation under the COMESA Yellow Card Scheme and Reinsurance Pool Claims Operational Manual.

LEGAL ANALYSIS

9. There is no dispute that judgment was entered in favour of the Plaintiffs against the Defendant's Insured in **HCCC No 236 of 2010** and that the same had never been set aside or overturned by the appellate court. What this court determined to have really in issue herein is whether or not the Defendant could avoid settling the said judgment on the ground that the claim arose in Tanzania and was covered by a COMESA Yellow Card policy which was valid and in place at the time of the material accident on 5th May 2017.

10. The Plaintiffs had contended that the Defendant could not purport to raise the defence of COMESA cover because the same amounted to appealing the Judgment that was delivered in their favour against its Insured, the issue having been raised in **HCCC No 236 of 2010**.

11. They added that the Defendant did not take out proceedings under Section 10 (4) of the Act to avoid the claim, which ought to have been done within three (3) months of filing of **HCCC No 236 of 2010**.

12. They placed reliance on the case of **Jason Nyawira Kagu & Another vs Intra Africa Assurance Co Ltd [2014] eKLR** where Gikonyo J held that the failure by the defendant therein to file an action seeking a declaration that it was entitled to and was absolved from liability arising from the insureds act or under the policy could not afford it a defence under Section 10 (4) of the Act.

13. It was their argument that since interlocutory judgment was entered against the Defendant's Insured, liability attached against it on a hundred (100%) per cent basis and hence the Defendant's defence was merely postponing an obvious eventuality.

14. On its part, the Defendant argued that the COMESA Yellow Card cover was an insurance cover that was totally detached from the insurance policy it held over its insured's Motor Vehicle Registration No KAT 240 Scania Bus (hereinafter referred to as "the bus") as the accident occurred in Tanzania. It was emphatic that the Plaintiffs were fully aware of the procedure of seeking compensation, the information having been communicated to them vide a letter dated 27th June 2017.

15. It contended that the COMESA Yellow Card was established under the Northern Corridor Transit and Transport Agreement (hereinafter referred to as "NCT-TA") that was signed in August 2007, Lusaka Protocol on establishment of Third Party Motor Vehicle Insurance 981.

16. It added that the National Bureau of Kenya- COMESA Yellow Card wrote to the Plaintiffs advocates advising them to forward their claim to Tanzania National Insurance Bureau which had the mandate to handle the claim.

17. In considering the Plaintiffs' submission that the Defendant ought to have filed a declaratory suit within three (3) months of their institution of **HCCC No 236 of 2010**, this court had due regard to the provisions of Section 10 (4) of the Act.

18. The said Section 10 (1), (2), 3A, 4 of the Act provides as follows:-

(1) If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

Provided that the sum payable under a judgment for a liability pursuant to this section shall not exceed the maximum percentage of the sum specified in section 5(b) prescribed in respect thereof in the Schedule...

(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 thirty days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings; or

(b) in respect of any judgment, so long as execution thereon is stayed pending an appeal; or

(c) in connexion with any liability if, before the happening of the event which was the cause of the death or bodily injury giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provision contained therein, and either—

(i) before the happening of the event the certificate was surrendered to the insurer, or the person to whom the certificate was issued made a statutory declaration stating that the certificate had been lost or destroyed; or

(ii) after the happening of the event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer, or the person to whom the certificate was issued made such a statutory declaration as aforesaid; or

(iii) either before or after the happening of the event, but within a period of twenty-eight days from the taking effect of the cancellation of the policy, the insurer has notified the Registrar of Motor Vehicles and the Commissioner of Police in writing of the failure to surrender the certificate.

(3A) No judgment or claim shall be payable by an insurer unless the claimant had, before determination of liability at the request of the insurer, subjected themselves to medical examination by a certified medical practitioner.

(4) No sum shall be payable by an insurer under the foregoing provisions of this section if in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto.

19. It therefore follows from the above that notwithstanding that an insurer is entitled to avoid or cancel or may have avoided or cancelled the policy, it shall pay to the persons entitled to the benefit of the judgment.

20. However, this is not a blanket provision. It is conditional. Settlement of the claim will be made provided that:-

1. The sum payable shall not exceed the maximum percentage of the sum specified in Section 5(b) of the Act prescribed in the Schedule.

2. The insured must have had notice of at least thirty (30) days' notice of commencement of the suit in which the judgment has been obtained.

3. There must be no stay of execution pending an appeal.

21. On the other hand, no sum shall be payable to the claimant by an insurer under the following circumstances:-

1. If the policy had been cancelled by mutual consent of the insurer and the insured before the happening of the event which was the cause of death or injury giving rise to the liability.

2. If the certificate had been surrendered by the insured to the insurer before the happening of the event which was the cause of death or injury giving rise to the liability.

4. If after happening of an event, but before the expiration of fourteen (14) days, the certification was surrendered to the insurer or the person who was issued with a certificate made a statutory declaration as aforesaid.

5. If either before or after the happening of an event, but within twenty eight (28) days of the taking effect of the cancellation of the policy, the insurer notifies the Registrar of Motor Vehicles and the Commissioner of police in writing of the insured's failure to return a certificate.

6. If the claimant will have not have submitted himself or herself for medical examination by a certified medical practitioner.

7. If within three (3) months after institution of the suit in which judgment has been delivered, the insured had obtained a declaration to avoid the policy on the ground that:-

- a. The policy was obtained by false representation in some material particular;
- b. He had avoided the policy on the ground that he was entitled to do so apart from any provision contained in it.
- c. The insured will only benefit from the provisions of Section 10 (4) of the Act if before or within fourteen (14) days after the commencement of the proceedings, it has notified the Plaintiff in the said proceedings specifying the non-disclosure or false representation on which it proposes to rely and also given notice of such action to any other person, it thinks fit to be made a party to the suit therein.

22. A clear reading of the aforesaid provision of Section 10 (4) of the Act shows that the same comes into play when an insured wants to avoid and cancel a policy either by the policy been cancelled by mutual consent of the insurer and the insured, by the insurer due to non-disclosure of material fact or false misrepresentation of a material fact or when he surrenders the certificate.

23. The circumstances of this case are distinguishable from a case in which an insured avoids or cancels a policy under the conditions set out in Section 10 (4) of the Act. The issue of it repudiating liability did not arise in the circumstances of the case herein as the Defendant had not avoided or cancelled the policy it had with its Insured. Its assertion was that it was liable to settle the judgment arising out of the accident that occurred in Tanzania as the claim was covered by the COMESA Yellow Card Scheme. The Plaintiffs' submissions that the Defendant ought to have filed a declaratory suit so as to avoid settling the judgment in HCCC No 236 of 2010 were therefore misplaced, immaterial and irrelevant.

24. In determining whether or not the Defendant's Insured was obligated to pay the Plaintiffs' claim, this court had due regard to Section 4 (1) of the Act. The same stipulates as follows:-

“Subject to this Act, no person shall use, or cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Act.”

25. Section 5 of the Act further provides that:-

In order to comply with the requirements of section 4, the policy of insurance must be a policy which—

- a. is issued by a company which is required under the Insurance Act, 1984 (Cap. 487) to carry on motor vehicle insurance business; and
- b. 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 of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road (emphasis court):

Provided that a policy in terms of this section shall not be required to cover—

- i. liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or
- 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 out of which the claims arose; or
- iii. any contractual liability; liability of any sum in excess of three million shillings, arising out of a claim by one person.

26. In Section 3 of the Act “road” is defined as:-

“any public road within the meaning of the Public Roads and Roads of Access Act (Cap. 399), and includes any other road or wharf to which motor vehicles are capable of being driven.

27. Section 2 of the Public Roads and Roads of Access Cap 399 of the Laws of Kenya defines “public road” as:-

- a. any road which the public had a right to use immediately before the commencement of this Act;
- b. all proclaimed or reserved roads and thoroughfares being or existing on any land sold or leased or otherwise held under the East Africa Land Regulations, 1897, the Crown Lands Act , 1902, or the Government Lands Act (Cap. 280), at any time before the commencement of this Act;
- c. all roads and thoroughfares hereafter reserved for public use.

28. It is evident to this court that the term “road” envisaged in Section 4 of the Act relates to roads in Kenya. In the absence of any contrary indication, insurance cover that has been issued to a vehicle in Kenya by virtue of Section 5 of the Act only extends to public roads within the jurisdiction of Kenya which is further emphasised by the Public Roads and Roads of Access Act. In other words, the territorial jurisdiction of any insurance cover issued to an insured, unless otherwise provided for, is limited to Kenya only.

29. This court’s conclusion in this respect has been reinforced by the Jurisdiction Clause in the policy that the Defendant issued to its insured Policy No 2008-100-9002-90-3491 for the period from 1st January 2007 to 3rd September 2007 that was adduced in evidence. The said Clause provided that:

“It is hereby directed that the policy territorial jurisdiction is Kenya.”

30. The question that now arose was, since the Insured’s bus had to ferry lawful fare paying passengers beyond the Kenyan jurisdiction, how were they to be compensated on the happening of an event that caused them death or injury?

31. Where there is a COMESA Yellow Card cover, such passengers are covered under the COMESA Yellow Card Scheme and Reinsurance Pool. The Northern Corridor Transit and Transport Agreement (hereinafter referred to as “the Agreement”) that was entered into on 6th October 2007 takes cognisance of the inter-dependence between the transport sector and that neither government nor private enterprise can singularly assume all risks of investment, maintenance and operation of transport hence requiring close co-ordination between the government and private sector.

32. Under Section 1 Article 1 of the Agreement, COMESA Yellow Card has been defined as follows:-

“The Third Party Motor Vehicle Insurance system prescribed under the Protocol to that effect attached to the treaty establishing the common market for Eastern and Southern Africa.”

33. According to Section 1 (1.2) of the Yellow Card Scheme and Reinsurance Pool, Yellow card is an equivalent of a policy of insurance recognised as a valid motor insurance certificate and evidence of a guarantee to provide the compulsory minimum insurance cover required by the laws of the participating states party to the Scheme, in which accidents have occurred in respect of vehicles from other member countries.

34. The same Section and Article defines a “carrier” as:-

“a legal or natural person who is authorized in accordance with the national laws and regulations of the Contracting Parties to carry goods by rail or road or any other mode of transport for hire (emphasis court).

35. Domestic transport means the transport of goods and passengers within the territories of the contradicting parties. Article 5(a) of the Agreement grants **“citizens of the respective contracting parties engaged in trade, free movement within their territories and the right to transit through each other’s territories under the conditions specified in this Agreement and its protocols.”**

36. Article 35 of the Agreement stipulates as follows:-

“The contracting parties shall take necessary steps for the insurance of their means of transport to cover third party liability incurred in the course of interstate traffic and traffic in transit. In accordance with the provisions the Third Party Motor Vehicle Insurance regime established by the Common Market for Eastern and Southern Africa known as the COMESA Yellow Card. Provided that if the COMESA Yellow Card Scheme ceases to exist, the contracting parties shall establish a Northern Corridor Motor Third Party Insurance Scheme.”

37. A careful perusal of the Protocol on the establishment of a Third Party Motor Vehicle Insurance (Lusaka 1981) (hereinafter referred to as “the Lusaka Protocol”) and noted that the same provided for the establishment of a Third Party Motor Vehicle Liability Scheme that will be based on a PTA Yellow Card issued by the National Bureau.

38. Article 3 of the Lusaka Protocol provides as follows:-

1. The third party motor vehicle liability insurance scheme established by the Protocol shall have, as its legal, technical and financial basis, the guarantees which are afforded to motorists proceeding to PTA Member States by taking out an insurance policy on the usual terms with an insurer authorized to undertake this type of business in the country which is the point of departure for the journey.

2. The scheme shall be based materially on a PTA Yellow Card as defined in the provisions of Article 6 of this Protocol.

3. The PTA Yellow Card shall be issued by a National Bureau in accordance with the provisions of Article 13 of this Protocol. The card shall be issued to motorists through the insurers with whom they have taken out a valid liability insurance policy when driving in their own country.

4. Each National Bureau shall settle, on behalf of its member insurers, claims arising from accidents caused abroad by holders of the cards it has issued and shall also handle claims arising from accidents caused in its country by holders of cards issued by the National Bureaux of other parties to this Protocol.

5. The legal, administrative and financial operation of the scheme established by the Protocol shall be co-ordinated and supervised by a Council of Bureaux of which all the National Bureaux of the parties to this Protocol shall be members in accordance with the provisions of Article 16 of this Protocol.

39. Claims on behalf of the member states are therefore to be settled by each National Bureau and that the legal administrative and financial operation of the scheme shall be co-ordinated by a Council of Bureaux. The provisions of the Article are couched in mandatory terms due to the use of the word “shall”. There can be no discretionary application of the provisions where there is a COMESA Yellow Card cover.

40. Going further, the COMESA Operations Manual of the Yellow Card Scheme and Reinsurance Pool provides the procedure for lodging a claim, handling and settlement of the same.

41. In proceeding with the laid down procedures, this court noted that COMESA Yellow Card National Bureau of Kenya wrote to the Defendant on 24th August 2007 calling for the Yellow Card of the Insured’s bus.

42. The Defendant alluded to several letters in its Supplementary List of Documents but this court did not see the same. This court however, saw the letter dated 27th April 2016 from the Defendant’s advocates to the Plaintiffs’ advocates and adduced in evidence by the Plaintiff and notes that the former had notified the latter that the bus had been insured under the COMESA Yellow Card cover.

43. Noteworthy, Article 2(5) of the Constitution of Kenya, 2010 provides that:-

“The general rules of international law shall form part of the law of Kenya.”

44. Article 2(6) of the Constitution of Kenya further provides that:-

“Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”

45. It therefore follows that being a signatory of the Agreement and the Protocols in respect of the said Agreement and on the establishment of a third party motor insurance to facilitate intra-regional transport and trade within Sub-Saharan Africa, Kenya is bound by the provisions therein. Once an insured has a COMESA Yellow Card and an accident occurs outside the jurisdiction of the country it has a primary insurance cover as aforesaid, the National Bureau of the country where the accident occurred processes the claim. In this case, that bureau was the National Bureau in Tanzania.

46. Having carefully analysed the oral and documentary evidence that was adduced by the parties during trial, this court came to the firm conclusion that it could not grant the Plaintiffs the declarations they had sought in their suit on the following two (2) grounds:-

1. The policy territorial jurisdiction of Police No P-2008-100-9002-90-3491 issued by the Defendant to its insured for the bus was in Kenya.

2. The applicable cover at the material time of the accident herein was under the COMESA Yellow Card Scheme as the accident occurred in Tanzania.

DISPOSITION

47. For the foregoing reasons, the upshot of this court’s decision was that the Plaintiffs’ suit was filed 3rd August 2016 was not merited and the same is hereby dismissed with costs to the Defendant.

48. It is so ordered.

DATED and DELIVERED at NAIROBI this 14th day of March 2019

J. KAMAU

JUDGE