



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO 34 OF 2016

APA INSURANCE LIMITED.....PLAINTIFF

VERSUS

DAAH SAFARIS LIMITED.....DEFENDANT

JUDGMENT

INTRODUCTION

1. In its Complaint dated 21st October 2015 and filed on 9th February 2015, the Plaintiff sought the following reliefs from the Defendant herein:-

1. A declaration that the Plaintiff was and had at all material times been entitled to avoid the policy insurance dated 24th June 2013 apart from any provision contained therein on the grounds that the said policy of insurance was obtained herein by non-disclosure of material facts and/or representation of facts which were false in some material particular.

2. A declaration that the Plaintiff had effectively avoided the policy No AA804/0000510/000 and it was not liable under the said policy to satisfy any third party claim under Chapter 405 of the Laws of Kenya.

3. Costs of the suit.

4. Any or further relief that the Honourable Court may deem fit or just.

2. The Plaintiff amended its Complaint on 8th August 2016. The Amended Complaint was filed on 10th August 2016. The reliefs against the Defendant herein remained unchanged.

3. Despite having been served with the Summons to Enter Appearance and Complaint, the Defendant did not enter appearance and/or file a Defence.

4. The matter therefore proceeded for formal proof on 12th February 2018 when the Defendant still failed to attend court despite having been served with a Hearing Notice for the said date.

5. The Plaintiff's Written Submissions were dated and filed on 19th February 2019. It requested this court to deliver its decision based on the said Written Submissions which it relied upon in its entirety. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

6. Rina Walemba (hereinafter referred to as "PW1"), the Plaintiff's Legal Officer, testified on behalf of the Plaintiff herein. She adopted her Witness Statement dated 23rd January 2019 and filed on 24th January 2019 as her evidence in chief. She also adduced in evidence a Bundle of Documents dated 2nd January 2019 and filed on 17th January 2019 in support of the Plaintiff's case.

7. Her testimony was that at all material times relevant to the case herein, the Defendant was the registered owner of Motor Vehicle Registration Number KBV 861L - Toyota Station Wagon (hereinafter referred to as the "subject motor vehicle"). She stated that at the instance of the Defendant, the Plaintiff issued it (the Defendant) with a Commercial Vehicle Policy No AA804/0000510/00.

8. The Defendant was issued with a Certificate of Insurance on 24th June 2013 which was to run until 23rd June 2014. The same was

renewed on 24th June 2014 and was to expire on 23rd June 2015.

9. She averred that on or about 8th September 2014, the Defendant's driver, one George Felix Ojwang', was driving the subject motor vehicle when it was involved in an accident in which two (2) passengers sustained injuries. The accident was reported at Kasarani Police Station. The Defendant was issued with a Police Abstract Form and it duly completed the Claim Form on 19th September 2014 in which it annexed a sketch plan thereto.

10. She contended that its upon their investigators carrying out investigations to establish the circumstances of the said accident that it emerged that the Defendant's said driver did not have a valid driving license but that he had held an interim driving license for seventeen (17) days prior to the accident which she averred, made him grossly incompetent to have driven the said subject motor vehicle.

11. She pointed out that in the Commercial Vehicle Proposal Form, the Defendant was required to give details of the experience of all persons who were to drive the subject motor vehicle.

12. It was her evidence that the Defendant had indicated that the subject motor vehicle would be driven by a driver holding Public Service Vehicle (PSV) as per the provisions of the Traffic Act and the express provisions of the Insurance Policy.

13. Her further evidence was that the Plaintiff was entitled to avoid the policy on the ground that the Insurance Policy was obtained by the Defendant by non-disclosure and/or misrepresentation of material facts and was therefore of no effect.

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

15. The court looked at the Commercial Vehicle Proposal Form Plaintiff's Exhibit 1 on Pages 2 – 5 and noted that the Defendant had indicated that the subject motor vehicle would be driven by **“any authorized and licensed driver.”**

16. The Policy Schedule clearly defined an **“authorised driver”** as follows:-

“Any of the following (a) The Insured (b) Any Person driving on the Insureds order or with his permission provided the person driving hold a license to drive the motor vehicle or has held and is not disqualified from holding or obtaining such a license. The term “license” means a license or other permit required by the licensing or other laws or regulation.”

17. The said Commercial Vehicle Proposal Form further showed that the type of policy to be issued was comprehensive for Public Service Vehicle (PSV). The subject motor vehicle was to ferry passengers for hire and reward. It therefore followed that any person who drove the subject motor vehicle had to have a valid PSV license.

18. Notably, Section 98(1) of the Traffic Act Cap 403 (Laws of Kenya) stipulates as follows:-

“A person shall not drive or act as the conductor of a public service vehicle on a road unless he is licensed for the purpose under this Part, and a person shall not employ or permit any person who is not so licensed so to do (emphasis court):

Provided that this subsection shall not apply to any person who has hired a public service vehicle for the purpose of driving the vehicle himself and whose passengers, if any, are not carried for hire or reward, nor to any driver or conductor of a public service vehicle which is not carrying passengers.

19. In view of the fact that the driver at the material time of the accident did not have a PSV license, the Defendant not only contravened the Traffic Act by permitting an unlicensed driver to drive the subject motor vehicle but he also breached the express terms of the Policy. The Plaintiff was thus entitled to avoid the policy as has been stipulated in Section 10(4) of the Insurance (Motor Vehicle Traffic Rules) Act, (405).

20. Section 10(4) of the Insurance (Motor Vehicle Third Party Risks) Act stipulates as follows:-

“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.

21. This court fully associated itself with the holding in the case of **Kenya Orient Insurance Limited vs Kelvin Macharia Karanja [2017] eKLR** that was relied upon by the Plaintiff herein to the effect that an underwriter assumes the risk on the basis that an insured does not mislead it to believe certain circumstances exist.

22. Accordingly, having considered the evidence that was tendered by the Plaintiff herein and its Written Submissions, this court found and held that the Plaintiff had proved its case on a balance of probability and was entitled to avoid the policy on account of breach by the Defendant.

DISPOSITION

23. For the foregoing reasons, the upshot of this court's decision was that the Plaintiff's Amended Plaint dated 8th August 2016 and filed on 10th August 2016 was merited. Consequently, it is hereby directed that judgment be and is hereby entered in favour of the Plaintiff against the Defendant for:-

1) A declaration that the Plaintiff was and had at all material times entitled to avoid the policy insurance dated 24th June 2013 apart from any provision contained therein on the grounds that the said policy of insurance was obtained therein by non-disclosure of material facts and/or representation of facts which were false in some material particular.

2) A declaration that the Plaintiff had effectively avoided the policy No AA804/0000510/000 and it is not liable under the said policy to satisfy any third party claim under Chapter 405 of the Laws of Kenya.

24. The Defendant will bear the Plaintiff's costs of this suit.

25. It is so ordered

DATED and DELIVERED at NAIROBI this 30th day of September 2019

J. KAMAU

JUDGE