



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 141 OF 2008

CORPORATE INSURANCE COMPANY LIMITED.....PLAINTIFF

-VERSUS-

KENETH CHEGE NJENGA.....DEFENDANT

JUDGEMENT

1) Corporate Insurance Co. Ltd, the plaintiff herein, filed an action against Kenneth Chege Njenga, the defendant herein, vide the plaint dated 20th March 2008 in which it sought for judgment in the following terms:

a) A declaration that it is and has at all material times been entitled to avoid the Commercial Vehicle policy of insurance no. C01/080/1/001493/2005 issued on 24th March 2005 apart from any provision contained therein on the ground that the said policy of insurance was obtained by the non-disclosure of material facts and/or by the representations of facts which were false in some material particular or particulars.

b) A declaration that the plaintiff is not liable to indemnify the defendant for claims by the passengers injured or killed as a result of the said accident under the said policy or under the insurance (Motor Vehicles Third Party Risks) Act, Cap. 405.

c) Costs of and incidental to this suit and interest thereon at court rates.

2) The plaintiff obtained a default judgment against the defendant upon his failure to file an appearance and a defence.

3) This suit proceeded for hearing as a formal proof. The plaintiff summoned One Tiberius Nyang'au (PW1) as a witness in support of its case. He told this court that the plaintiff being an insurer under the Insurance Act (Cap 487 Laws of Kenya) as read with the Insurance (Motor Vehicle Third Party Risks) Act (Cap 405 Laws of Kenya) renewed an insurance cover it issued to the defendant on 24th March 2005 to cover third party risks in respect of motor vehicle registration no. KXA 643. PW1 identified insurance policy no. C01/080/1/001493/2005 as the cover which was renewed by the plaintiff to cover third party risks.

4) He stated that the aforesaid policy excluded passengers who may be injured whilst in the defendant's motor vehicle as passengers. PW1 stated that the aforesaid insurance cover was confined to use of carriage of the defendant's own goods. PW1 said that he was not liable to indemnify the defendant for claims by passengers who could be injured and or died while in the said motor vehicle, either under the insurance contract between him and the defendant or under Cap 405.

5) PW1 said that in taking the policy, the defendant failed to disclose material facts and or represented facts that were false in particulars but which were material to be known to the plaintiff in truth and fact. It is said that the defendant on diverse dates during the existence of the policy and particularly on 6th June 2007 used the said motor vehicle for carriage and or conveyance of passengers.

6) PW1 further stated that on 6th June 2007, during the currency of the policy the defendant's motor vehicle registration no. KXA 643 was involved in an accident in which a passenger who was on board was fatally injured. The legal representatives of the deceased estate filed a compensatory suit i.e. Nairobi C.M.C.C. no. 3141 of 2011 against the defendant on grounds that the fatal injury suffered by the deceased was caused by the negligent driving of the defendant's motor vehicle.

7) The plaintiff also averred that it is entitled to avoid the policy on the ground that in taking the policy the defendant failed to disclose to the plaintiff that the aforesaid motor vehicle would be used for carriage of passengers while the policy document expressly excluded the use of the said motor vehicle for carriage of passengers for hire and reward.

8) Having considered the plaintiff's evidence and the submissions it is apparent that the main issue which commends itself for determination is whether the plaintiff is entitled to avoid the insurance policy on the grounds stated by the plaintiff. I have examined the insurance policy no. C01/080/1/001493/2005 which was produced by the plaintiff as an exhibit.

9) In clause (iii) Exceptions to Section II of the Insurance contract it is expressly provided as follows:

“The company shall not be liable in respect of

i.

ii.

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 on to or alighting from the motor vehicle at the time of the occurrence of the event out of which any claim arises.”

10) In the case filed against the defendant before the Chief Magistrate’s Court i.e Nairobi C.M.C.C. no. 3141 of 2011, the passenger who perished is described in paragraph 4 of the plaint as “was lawfully travelling as a passenger in motor vehicle registration no. KXA 643.”

11) In the demand letter written to the defendant by the advocate of the legal representatives it is expressly stated that the driver of the aforesaid motor vehicle was driven by one Peter Thiru Wanjiru while Wilson Kabutha Thairu deceased was a passenger.

12) I am satisfied that the deceased was a passenger in motor vehicle registration number KXA 643. I am also convinced that the insurance contract executed by the plaintiff and the defendant was confined to the carriage of goods only excluding passengers other than those in the employment of the defendant. I am also satisfied that the policy taken by the defendant was meant to enable the plaintiff to indemnify the defendant against liability arising from accidents out of the use of the said motor vehicle in which third parties other than passengers in the defendant’s employment incur death or bodily injuries. The plaintiff has tendered credible evidence which show that the defendant had on diverse dates during the pendency of the insurance policy allowed the insured motor vehicle to be used for carriage of passengers in breach of the insurance contract.

13) For the above reasons I am satisfied that the plaintiff is entitled to avoid the aforesaid policy on the basis that the defendant obtained the policy by non-disclosure and or misrepresentation of facts and therefore the plaintiff is not obliged to indemnify any passengers travelling on the insured motor vehicle.

14) In the end, judgement is entered in favour of the plaintiff and against the defendant as follows:

i. A declaration that it is and has at all material times been entitled to avoid the Commercial Vehicle policy of insurance no. Co1/080/1/001493/2005 issued on 24th March 2005 apart from any provision contained therein on the ground that the said policy of insurance was obtained by the non-disclosure of material facts and/or by the representations of facts which were false in some material particular or particulars.

ii. A declaration that the plaintiff is not liable to indemnify the defendant for claims by the passengers injured or killed as a result of the said accident under the said policy or under the insurance (Motor Vehicles Third Party Risks) Act, Cap. 405

iii. Costs given to the plaintiff.

Dated, signed and delivered at Nairobi this 27th day of September, 2019.

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J. K. SERGON

JUDGE

In the presence of:

.....**for the Appellant**

.....**for the Respondent**