



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 142 OF 2008**

**CORPORATE INSURANCE CO. LIMITED.....PLAINTIFF**

**VERSUS**

**SAMUEL KAMAU NG'ANG'A.....DEFENDANT**

**GEOFFREY WARUIRU MAGUA.....INTERESTED PARTY**

**JUDGMENT**

1. The plaintiff herein instituted the suit against the defendant by way of the plaint dated 7<sup>th</sup> April, 2008 on the basis of a motor vehicle insurance cover taken out by the defendant with the said plaintiff on 6<sup>th</sup> April, 2007 for a period of one (1) year.

2. The plaintiff pleaded that pursuant to the aforesaid cover described as Policy Number C01/080/1/001935/2006, the plaintiff had undertaken to cover third party risks pertaining to the motor vehicle registration number KAV 459Q (*“the subject motor vehicle”*) belonging to the defendant, adding that pursuant to the terms of the policy, liability was confined to carriage of the defendant’s own goods and did not extend to injuries sustained by passengers on the defendant’s said motor vehicle.

3. The plaintiff further pleaded that in the course of taking out the insurance cover with it, the defendant failed to disclose material facts to it. That sometime on or about 29<sup>th</sup> September, 2007 while the said defendant used the subject motor vehicle to carry a passenger (*“the interested party herein”*), an accident occurred involving the subject motor vehicle and which accident resulted in injuries to the interested party.

4. It was also pleaded in the plaint that the interested party went ahead to seek damages against the defendant for the injuries sustained vide PMCC NO. 1430 OF 2008 on the grounds of negligence.

5. Consequently, the plaintiff is seeking the following orders from this court as against the defendant:

(i) *A declaration that it is and has at all material times been entitled to avoid the Commercial Vehicle Policy Insurance No. C01/080/1/001935/2006 renewed on 6<sup>th</sup> April, 2007 apart from any provision contained therein on the ground that the said policy was obtained by non-disclosure of material facts and/or representation of facts which were false.*

(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 of the suit and interest thereon at court rates.*

6. Going by the record, the defendant was served with summons and a copy of the suit documents but failed to enter appearance and/or file a statement of defence. Consequently, an interlocutory judgment was entered against him on 24<sup>th</sup> September, 2008 at the request of the plaintiff. The matter therefore proceeded for formal proof.

7. Tiberius Nyang’au through his evidence as *PW1* testified that he at all material times worked for the plaintiff as a Legal Officer. He then went ahead to adopt his witness statement signed on 29<sup>th</sup> April, 2019 and further produced copies of the plaintiff’s list and bundle of documents as *P. Exhibits 1-6*.

8. The witness further testified that on 29<sup>th</sup> September, 2007 the defendant reported a claim to the plaintiff in respect to the accident involving the subject motor vehicle but failed to disclose that there was a passenger on the material day, which passenger happened to be the interested party. The witness clarified that it is only later on when the plaintiff was served with a demand letter and statutory notice that it came to learn of the interested party’s involvement in the accident as a passenger and that the interested party filed

PMCC NO. 1430 OF 2008 against the defendant.

9. The witness, in closing, testified that the plaintiff instructed its advocate to institute the present suit against the defendant in a bid to avoid liability in respect to the suit filed by the interested party.

10. The plaintiff filed written submissions on 4<sup>th</sup> July, 2019 reiterating the averments made in the plaint and the evidence presented by PW1. The plaintiff further argued that pursuant to Section II of the Policy Document, liability would not extend to death or injuries sustained by persons carried in the subject motor vehicle at the time of the accident, other than passengers carried by reason of a contract of employment.

11. It was also submitted by the plaintiff that at the time of taking out the insurance policy with it, the defendant failed to disclose material facts and/or represented facts that were false as set out hereunder:

i) At all material times the subject motor vehicle would be used for carriage of or transportation of passengers.

ii) The defendant on diverse dates during the existence of the policy allowed the subject motor vehicle to be used for the carriage/transportation of passengers in contravention of the terms of the policy.

12. The plaintiff contended that it is therefore entitled to avoid the policy on the above grounds of non-disclosure and/or misrepresentation of facts and the fact that the subject motor vehicle was used to transport a fare paying passenger in contravention of the policy terms. Reference was made to various authorities that have addressed the subject.

13. I have considered the evidence adduced before me at the trial as well as the filed submissions and cited authorities. The relevant statute in this instance is the *Insurance (Motor Vehicles Third Party Risks) Act, Cap. 405 ("the Act")*. Section 5 of the same stipulates the requirements for issuance of a policy as follows:

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

***...***

***(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:***

***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."***

14. From my understanding of the above, policy covers taken out pursuant to Section 5 (*supra*) do not cover passengers who are not being transported on the basis of a contract of employment. I have studied the plaint filed by the interested party and attached to the plaintiff's list and bundle of documents on page 35; the same confirms that the interested party had indicated he was travelling aboard the subject motor vehicle as a lawful passenger. There is nothing to show that he was an employee of the defendant, which essentially supports the position taken by the plaintiff. Also, it is noteworthy that the plaintiff's evidence remains uncontroverted.

15. The above provision was incorporated into the policy agreement entered into between the plaintiff and defendant under the title "Exception to Section II" thereby confirming that the policy did not extend to the carriage of passengers save for those falling within the category of Section 5 (b) (ii) (*supra*) and further strengthening the plaintiff's argument that the defendant took out the policy cover on the basis of misrepresented and/or undisclosed facts.

16. Turning to Section 10 of the Act, the same expresses thus:

***"(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."***

**Sub-section 4** of the aforesaid Section goes on to provide the following:

***"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.”*

17. Once again, my understanding of the above section is that whereas an insurer is obligated to satisfy a judgment issued against its respective insured in line with the provisions of Section 5 (b), an insurer is entitled to decline to make any payments arising out of a judgment in instances of non-disclosure or misrepresentation of facts.

18. Be that as it may, I wish to reiterate **Section 5 (b)** (*supra*) which elaborates that a policy cover does not extend to instances of death or injury of a passenger in the insured’s vehicle, as is the case here. Faced with similar circumstances, the courts have previously held that an insurer cannot seek to avoid a policy on the basis of non-disclosure or misrepresentation of facts since death or injury to a passenger does not constitute a liability which ought to be covered under Section 5 (b). In fact, the plaintiff cited **Gateway Insurance Company Limited v Sudan Mathews [2003] eKLR** and **Gateway Insurance Co. Ltd v Nganga Njuguna [2005] eKLR**. In **Gateway Insurance Company Limited v Sudan Mathews** (*supra*) the court rendered as follows:

*“As regards the ambit and scope of Section 10, it is clear to me that the insurer is under a duty to satisfy only such judgements as have been obtained against persons who are insured against such liabilities as are required to be covered by a policy under paragraph (b) of Section 5 and which are actually covered by the terms of the policy. And one of the circumstances in which the insurer may escape liability for such a judgement is where it has obtained a declaratory order that it is entitled to avoid the policy on the basis that the same was obtained by the non-disclosure or misrepresentation of a material fact. That being so, it is not open to the plaintiff to seek such declaratory relief in the circumstances of this case as the risk of injury to a passenger in the defendant’s vehicle was not a liability required to be covered by the policy under paragraph (b) of Section 5.”*

The above was reinforced in **Gateway Insurance Co. Ltd v Nganga Njuguna** (*supra*) in the following manner:

*“...the Plaintiff is not entitled to a declaration as sought in prayer (a) of the plaint in that the risk of death or injury to a passenger in the motor vehicle was not a liability required to be covered by the policy of insurance under section 5(b) of the Act.”*

19. In view of the foregoing, I take the reasoned view that whereas the plaintiff has demonstrated that there was non-disclosure or misrepresentation of facts on the part of the defendant at the time of taking out the policy, the plaintiff cannot seek a declaration to avoid the policy for the reasons set out above.

20. In the end, I find that the plaintiff is entitled to the reliefs captured under *prayer (ii)* of the plaint stating that it is not liable to indemnify the defendant. As earlier indicated, *prayer (i)* sought in the plaint is rejected. The plaintiff is equally entitled to the costs of the suit as sought under *prayer (iii)* of its plaint.

Dated, signed and delivered at **NAIROBI** this 24<sup>th</sup> day of October, 2019.

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**L. NJUGUNA**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant