



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL CASE NO. 10 OF 2015

BRITISH AMERICAN INSURANCE CO. (KENYA) LIMITED.....-PLAINTIFF

=VRS=

WAMBURA JOSEPH MAROA.....DEFENDANT

JUDGEMENT

On or about 21st August 2012 the plaintiff through Equity Insurance Agency issued an insurance policy dubbed “**BIMA YA LORRY (OWN GOODS) FOR FINANCED EBL CLIENTS**” to the defendant in respect of motor vehicle KBQ 053J Mitsubithi Lorry FH2. The same was a comprehensive policy to cover “**Accidental loss or damage to insured motor vehicles and/or death, bodily injury or loss or damage to property of third parties arising out of use of motor vehicles owned and/or operated by the insured**” for the period 23rd August 2012 to 22nd August 2013.”

On 24th March 2013 during the subsistence of the insurance policy the said vehicle was involved in a self-involving accident at a place called Riensune along the Keroka – Sotik road causing fatal injuries to one of the passengers. The defendant duly reported the accident to the police and to the plaintiff and admitted that at the time of the accident the lorry was hauling cattle for a third party for hire. Following that revelation, the plaintiff filed a suit in the High Court at Kisii and sought the following declarations: -

“(a) A declaration that it is and has at all material times been entitled to avoid the aforesaid policy of insurance No. 590/080/00003 COMP apart from any provision contained therein on the ground that the said policy of insurance was obtained by the Defendant by: -

- (i) The non-disclosure of a material fact or facts or
- (ii) Representations of facts which were false in material particulars or
- (iii) Both (i) and (ii) above

(b) A declaration that the Plaintiff is not liable to make any payment under the aforesaid policy on insurance No. 590/080/00003 COMP in respect of any claim against the Defendant herein arising out of injuries or fatalities sustained in the accident on 24th March 2013 involving motor vehicle registration number KBQ 053J.

(c) In the alternative, the Plaintiff seeks a declaration that it is not liable to pay any claim arising out of the accident on 24th December, 2001 involving motor vehicle registration number KZA 526 for the reason that the same was being used for uninsured purposes specifically carriage of passengers, which was contrary to the terms of the policy.

(d) In the alternative that the Plaintiff is entitled to avoid the policy of insurance No. 590/080/00003 COMP on the ground that the subject vehicle was at the material time being used for uninsured purposes being carriage of goods for hire and reward.

(e) Costs of the suit.”

Despite being served with summons to enter appearance the defendant did not enter appearance wherefore on 20th June 2014 the plaintiff sought and obtained interlocutory judgement. Thereafter and upon the establishment of a High Court in Nyamira the file was transferred to this court. The plaintiff lost contact with the file until 6th June 2018 when they were served with a Notice to show cause why the suit could not be dismissed for want of prosecution. Counsel for the plaintiff duly attended court and showed cause and the matter was then fixed for formal proof. However, on 30th May 2019 this court set aside the interlocutory judgements entered on 20th June 2014 and 14th March 2019 for being irregular and fixed the suit for hearing on 20th June 2019. This court directed the plaintiff to serve the defendant with a hearing notice although he had not entered appearance.

The defendant did not attend the hearing but this court being satisfied by the affidavit of service, that he was duly served proceeded with the hearing ex-parte. The plaintiff called one witness Fredrick Omondi Opere who testified and produced documents to the effect that the defendant's motor vehicle was insured only in respect of carriage of own goods. He stated that the plaintiff was repudiating the claim because of the usage of the vehicle at the time of the accident which as disclosed by the documents adduced in evidence went against the insurance policy.

In the submissions filed herein on 11th July 2019 Counsel for the plaintiff submitted that the suit herein was brought pursuant to **Section 10 (4) of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 Laws of Kenya** and urged this court to grant the declaratory orders sought in the plaint and award the plaintiff the costs of the suit.

The defendant did not defend this suit and did not attend the hearing despite being served with a hearing notice. The plaintiff's averments in the plaint which are supported by the testimony of the Pw1 and the documents produced in evidence was therefore not rebutted. After the accident the driver of the defendant's motor vehicle recorded a long statement in which he admitted that at the material time the vehicle was transporting cattle for a third party who had hired it for Kshs. 30,000/= . That statement is attached to the investigations report produced as Exhibit P9. The same clearly demonstrates that at the time of the accident the motor vehicle was being used for a purpose other than that covered by the policy. On the evidence placed before it this court finds that the plaintiff has proved its case on a balance of probabilities and is entitled to avoid the policy. Accordingly, there shall be judgement for the plaintiff against the defendant for:-

(i) A declaration that the Plaintiff is not liable to make any payment under the aforesaid policy on insurance No. 590/080/00003 COMP in respect of any claim against the Defendant herein arising out of injuries or fatalities sustained in the accident on 24th March 2013 involving motor vehicle registration number KBQ 053J.

(ii) In the alternative, a declaration that the plaintiff is not liable to pay any claim arising out of the accident on 24th December, 2001 involving motor vehicle registration number KZA 526 for the reason that the same was being used for uninsured purposes specifically carriage of passengers, which was contrary to the terms of the policy.

(iii) Costs of the suit.

It is so ordered.

Signed, dated and delivered in Nyamira this 28th day of November 2019.

E. N. MAINA

JUDGE