



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CIVIL SUIT NO. 20 OF 2019**

**TRIDENT INSURANCE COMPANY LTD.....PLAINTIFF**

**VERSUS**

**AMOS NJENGA GITAU T/A YOUNG ACHIEVERS SCHOOL....DEFENDANT**

**RULING**

1. The Plaintiff **TRIDENT INSURANCE COMPANY LTD** by its notice of motion seeks the following orders-

**a. Spent**

**b. That this Honourable Court do grant leave to the Applicant/Plaintiff to file a declaratory suit against the Defendant out of time.**

**c. Spent**

**d. That upon the hearing and determination of this suit there be a stay of proceedings in Tawa SRMCC Nos 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 273 and 274 of 2018.**

2. The Plaintiff is the Insurer of Motor Vehicle Registration No. KBY 892L (hereinafter referred to as THE suit vehicle). The Insurance cover was from 21.5.2018 up-to 20.6.2019. The insured is the Defendant herein. It was also a provision of the Insurance Policy that the Insured vehicle was to be used for public service use for ferrying school pupils and members of staff; the suit vehicle was not to be used for hire and reward and that the policy does not cover any accident, injury, loss, damage or liability if the vehicle is carrying more than its capacity.

3. The defendant herein was sued in **Tawa SRMCC Nos 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 273 and 274 of 2018**, as the registered owner of the suit vehicle for an accident that occurred on 1.6.2018 whereby various persons were injured. The Plaintiff, as the Insurance Company has instructed a firm of Advocates to defend those suits.

4. An investigation carried out by Actual Assessors established that at the time of the accident, the defendant had hired out for pay the suit vehicle to Mrs Florence Mutanu and her entire family to be ferried to Mbooni for a funeral ceremony and the passengers were not staff/students of Young Achievers Primary School. The investigations revealed that at the time of the accident the suit vehicle was overloaded and the driver could not control the vehicle with its weight hence the accident occurred. The plaintiff then wrote to the defendant a letter dated 20.12.2018(Exhibit MB 5) notifying the defendant of the breach and informing him to deal with the suit **Tawa SRMCC Nos 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 273 and 274 of 2018** for the defendant was in breach of the policy.

5. The Plaintiff herein in the affidavit in support to the notice of motion deposed by Martin Bett on 3.6.2.19 stated it is not liable to any claim emanating from the accident and that Section 10(4) of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 provided a 3 months period for an action to avoid a policy. On the face of the notice of motion, the plaintiff stated that the delay in filing a declaratory suit was caused by lack of material information necessary to do so as the plaintiff had instructed a private investigator to establish the circumstances of the accident and upon learning that the defendant had breached the policy terms and conditions notified the defendant of the same and repudiated the claims. It was stated that unless the proceedings in **Tawa SRMCC Nos 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 261, 262, 263, 264, 265, 266,**

267, 268, 269, 270, 271, 273 and 274 of 2018 are stayed then loss will be occasioned to the plaintiff.

6. In reply to the application, the defendant filed a replying affidavit wherein he averred that the suit vehicle was on a commercial vehicle insurance policy cover for the period ending 20.3.2019 and that on 1.6.2018 the vehicle was being used for a school-related activity. He averred that the passengers on the suit vehicle on the date of the accident were authorized passengers as envisaged by the policy and the contract consisted in the policy obligated the plaintiff to represent all matters pertaining to **Tawa SRMCC Nos 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 273 and 274 of 2018**. It was averred that in seeking to avoid the insurance policy No. 030/080/1/024500/2018 issued in favour of the defendant, the plaintiff seeks to circumvent its obligations under the policy and that the plaintiff is relying on the investigation report that was exaggerated, speculative and based on conjecture.

7. The application was canvassed vide oral submissions. Counsel Moturi submitted that the 3<sup>rd</sup> party claimants paid for the use of the suit vehicle to attend a funeral and this was contrary to the insurance policy. Counsel submitted that the defendant did not inform the plaintiff that he received money from 3<sup>rd</sup> parties for purposes outside the insurance policy and the issue of privity of contract between the plaintiff and the defendant ought to be determined.

8. In reply, counsel Mose submitted that the plaintiff may sue the defendant for breach of contract separately and leave the claimants who should be compensated. Counsel submitted that the plaintiff is seeking to avoid its obligations and that the investigation report being relied upon is 13 months late and ought to have been filed immediately after the suit was filed. Counsel added that there was no evidence that the suit vehicle was hired and thus there was no point to grant leave for a declaratory suit to be filed as the suit will serve no useful purpose. He urged the court to dismiss the application and allow the Tawa matters to proceed.

9. Having considered the pleadings and the respective submissions, the issue for determination is whether the court may grant the orders sought in the application. Section 10 of Cap 405 provides that the Insurer has a duty to satisfy a judgment against the person insured. That obligation however is detached from an Insurer who obtains declaration that he can avoid the Policy of Insurance.

10. Section 10(4) of Cap 405 provides-

**“S.10(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.”**

11. It is the plaintiff's case that the defendant breached the insurance contract and that it made the discovery more than 3 months after the commencement of the proceedings hence sought leave to file a declaratory suit. Breach of contract is defined in **Black's Law dictionary, 8th Edition, page 200** as;

**“Violation of contractual obligation by failing to perform one's own promise by repudiating it or interfering with another party's performance”**

12. The burden lies upon the plaintiff to prove the extent of breach, misrepresentation and non-disclosure by the defendant. (See Section 106 of the Evidence Act).

13. In the case of **Carter v Boehm (1766) 3 Burr 1905**, Lord Mansfield held that;

**“Insurance is a contract based upon speculation. The special facts, upon which the contingent chance is to be computed, the most commonly in the knowledge of the insured only; the underwriter trusts to his representation and proceeds upon the confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact, and his believing the contrary.”**

14. In the case of **HIH Casualty and General Insurance Ltd Vs Chase Manhattan Bank [2003] UKHL Rix L.J** regarding non-disclosure and fraud held that;

**“I am conscious that in Carter Vs Boehm itself Lord Mansfield does seem to have considered that there was a difference between the concealment which the duty of good faith prohibited and mere silence.....As a result, non-disclosure in the insurance context in the early years was referred to as “concealment”, and the doctrine has sometimes been viewed and explained as constructive fraud.**

15. In this regard, in order to consider the plaintiff's right to be heard, it would meet the interests of justice to allow the plaintiff ventilate its concerns in the main suit thereby give it a chance to meet its standard of proof in the main suit, as to whether indeed the defendant breached the contract and was guilty of non-disclosure as well as not acting in good faith, failure of which the suit shall be dismissed. The Plaintiff has given adequate explanation, in my view, why it did not file the declaratory suit within the period provided under Section 10(4). The defendant on the other hand has not given any explanation why the leave sought should not be granted. It is for that reason that I find the orders sought are deserving. The Applicant will be given a short timeline within which to lodge the intended suit which should be canvassed on priority basis without unduly delaying the matters already filed by third parties against the intended Defendant.

16. In the result the application dated 3.6.2019 is allowed in the following terms:

**a. Leave is hereby granted to the Plaintiff to file a declaratory suit against the Defendant/Respondent within fourteen (14) days from this date hereof.**

**b. Stay of Tawa SRMCC Nos 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 273 and 274 of 2018 is hereby granted pending the hearing and determination of the intended declaratory suit. For the avoidance of doubt such stay shall automatically be lifted/vacated if the Plaintiff shall not file the intended declaratory suit within fourteen (14) days from today's date.**

**c. Costs hereof shall abide the outcome of the intended declaratory suit.**

It is so ordered.

**Dated and delivered at Machakos this 19<sup>th</sup> day of December, 2019.**

**D. K. Kemei**

**Judge**