



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CIVIL APPEAL NO.8 OF 2011

KENYA ORIENT INSURANCE CO. LTD.....APPELLANT

VERSUS

SAMUEL KIPYEGON KENDUIYWO.....RESPONDENT

(Appeal from the judgment and decree in Bomet PMCC No.122 of 2010 by Hon. T. Okello)

JUDGMENT

1. This appeal relates to the rights of an insurer to repudiate a policy of insurance where the insured is in breach of the terms of the policy. The appellant was the plaintiff in Bomet PMCC No. 122 of 2010. In the said suit, it had sought a declaration that it is not liable to indemnify the defendant and/or pay any amount in respect of any third party claim arising out of Bomet PMCC No. 34 of 2010, and/or any suit that is to arise in future connected to the accident involving motor vehicle registration number KAY 948S which occurred on 17th May 2009. It had also sought the costs of the suit and any other relief the court may deem fit to grant.
2. The facts leading to the filing of the suit as they appear in the plaint are that the defendant, the respondent in this case, had requested the plaintiff, the appellant in this case, to issue him with a private vehicle third party only policy for his vehicle registration number KAY 946 S. The appellant issued him with a policy No. 10/080016 TPO, certificate No. 101080016. The policy was to commence on 22nd January 2009 and expire on 22nd January 2010.
3. On 17th May 2009, the respondent's motor vehicle was involved in an accident along the Bomet – Narok road while carrying fare paying passengers. As a result of the accident, a pedestrian, one Sharon Chepkurui Langat, sustained fatal injuries. Janet Chemutai, the legal representative and administrator of the estate of the deceased, filed Bomet PMCC No. 34 of 2010 against the respondent, his agents, servants, driver or employees.
4. The appellant averred in its suit that at the time of the accident on 17th May 2009, the motor vehicle was being used outside the terms of the contract as it was being used as a matatu (taxi) to transport fare paying passengers, thus breaching the terms and conditions of the insurance contract between the appellant and the respondent.
5. The appellant further alleged in its plaint that on 16th April 2010, the defendant, his employee, driver, servant or agent recorded a statement at the Bomet Traffic Base averring that the motor vehicle was being used to transport fare paying passengers. According to the appellant, this implied that the motor vehicle was being used, on the material date, in a manner contrary to the terms and conditions of the insurance contract between the appellant and the respondent. Its case therefore was that due to the said breach of the terms and conditions of the policy of insurance, it was not liable to indemnify the defendant for death or bodily injury suffered by the passengers aboard the motor vehicle as a result of the accident on 17th May 2010.
6. The plaint was filed together with a verifying affidavit sworn by Mercy Kiana, the Head of the Claims Department of the appellant who stated she was competent and authorized to swear the affidavit.
7. Though duly served, the respondent did not enter appearance or file a defence, and interlocutory judgment was entered in favour of the appellant and the suit proceeded to formal proof.
8. In his judgment dated 21st January 2011, Hon. T. Okello, PM, dismissed the appellant's suit on the basis that he had found no proof of breach of the terms of the policy especially as against the deceased who was a pedestrian. He further ruled that the appellant must meet its obligations and that the insurance cover that the defendant took was valid as at the time of the accident. The court considered the policy and the user of the vehicle, and noted that the deceased was a pedestrian. He noted further that a vehicle insurance, whether it has a third party or comprehensive cover, is to indemnify third parties and in the case of comprehensive cover, the insured. He was also of the view that the

person who had signed the affidavit verifying the plaintiff, the Head of Claims, Mercy Kiana, should have filed an authority allowing her to swear the affidavit. For these reasons, the trial court dismissed the appellant's claim.

9. Dissatisfied with the judgment of the trial court, the appellant has filed the present appeal in which it raises the following grounds:

- 1. That the learned trial magistrate erred in law and fact by failing to hold that the appellant was not liable to indemnify the respondent in respect of any claim against the respondent arising out of any injuries sustained in the accident on 17/5/2009 involving motor vehicle reg. no.946S.**
- 2. That the learned trial magistrate erred in law and fact by failing to hold that the appellant was entitled to avoid the policy of insurance no.10/088016 on the ground that the said policy of insurance was obtained by the respondent by the respondent by non-false in material particulars.**
- 3. That the learned trial magistrate erred in law and fact by failing to hold that the appellant is not liable to make any payment under the policy of insurance No.10/088016 in respect of any claim against the respondent arising out of any injuries sustained in the accident on 17/5/2009 involving motor vehicle reg. No.KAY 946S.**
- 4. That the learned trial magistrate erred in law and fact by failing to hold that the respondent was in breach of the policy condition on limitation of use of the suit motor vehicle.**
- 5. That the learned trial magistrate erred in law and fact by failing to hold that the terms and conditions of the policy of insurance were binding on the respondent.**
- 6. That the learned trial magistrate erred in law and fact by failing to issue orders in respect of suits/cases that may arise in future from the same accident in accordance to section 10 (4) of the Insurance (Motor Vehicles Third Party Risks) Act Cap 405 Laws of Kenya.**
- 7. That the learned trial magistrate erred in law and fact by holding that the appellant ought to have filed an authority authorizing the deponent to swear the verifying affidavit accompanying the plaintiff.**
- 8. That the learned trial magistrate erred in law and fact in failing to consider the appellant's submissions and the authorities.**
- 9. That the learned trial magistrate erred in law and fact failing to find and hold that the appellant had not proved its case on a balance of probability.**
- 10. That the learned trial magistrate's decision albeit, a discretionary one was plainly wrong.**

10. The appellant prayed that the appeal be allowed, the judgment of the court dated 21st January 2011 set aside and judgment be entered in its favour as prayed in the plaintiff, together with costs of the appeal.

11. As the first appellate court, I am under a duty to re-evaluate the evidence and reach my own. The suit before the trial court proceeded by way of formal proof. PW1, Anthony Muriithi Njeru, was the appellant's Eldoret Branch Manager. He produced the insurance policy between the appellant and the respondent in respect of motor vehicle KAY 946S. The insurance was a private party insurance of a private car for private use. The policy indicated that the vehicle was for social, domestic and pleasure purposes, and was not to be used for hire or reward.

12. Following the accident on 17th May 2009, the appellant had involved an insurance investigator who found that the vehicle was being used contrary to the terms of the policy, and that it was being used to ferry fare paying passengers from Bomet to Narok. He produced a copy of the investigation report and prayed that the court issues a declaration that the appellant is not liable to indemnify the respondent in respect of the claim in Bomet PMCC No. 34 of 2010 and any other claim arising out of the said accident.

13. The appeal was first fixed for directions on 18th September 2013 when the parties did not appear. It came up next before the court on 12th July 2017 following a notice of dismissal for want of prosecution. The court granted the appellant time to prosecute the appeal, and gave directions for the filing of submissions. The appellant filed submissions which are undated but were filed in court on 25th July 2017. The respondent did not appear or file submissions.

Analysis and Determination

14. I have considered the appellant's submissions on the matter, as well as the record of appeal. At the core of this appeal is the question whether the appellant was entitled to avoid liability under the policy of insurance No. 101080016 issued in favour of the respondent. As I understand the judgment of the trial court, the suit was dismissed for two reasons: first, failure by the appellant to file an authority by the Head of Claims showing that she was authorized to swear the affidavit in support of the plaintiff.

15. Secondly, that as the deceased in respect of the claim in Bomet PMCC No. 34 of 2010 was a pedestrian, even though there may have been non-disclosure of material facts, the appellant was not entitled to repudiate the policy.

16. The appellant identified three issues for determination as follows:

i) Whether there was non-disclosure of material facts on the use of the respondent's vehicle.

ii) Whether the appellant was entitled to repudiate the policy.

iii) Whether there was a need to file the primary suit together with a letter of authority.

17. I will consider each of these three issues in rendering judgment in this matter.

Non-disclosure of material facts

18. The appellant has relied on the decision in **Kenya Orient Insurance Co. Ltd vs Kelvin Macharia Karanja (2017) eKLR** with respect to the duty of an insured to disclose the material facts to its insurer. It submitted that in this case, while the respondent took out a private third party insurance, the motor vehicle was not, at the time of the accident, being used in accordance with the terms of the policy. There was a limitation on the use of the vehicle for social, domestic and pleasure purposes. It did not cover use for hire or reward. The appellant submitted that from the report of the insurance investigator, the respondent had knowingly misled the appellant to believe that he was insuring the vehicle for private use, while he was using it to carry fare paying passengers. In the circumstances, there was non-disclosure of material facts, and the appellant was entitled to avoid the policy.

19. I have considered these submissions against the decision of the trial court and I am satisfied that the appellant's grievance on this point has merit. The respondent had a private third party insurance policy with the appellant. At the time of the accident on 17th May 2009, he was using the motor vehicle to ferry fare paying passengers. *Ipso facto*, he was in breach of his policy of insurance with the appellant. By representing in his proposal form that he required third party insurance cover for private use, he was guilty of material non-disclosure. I would therefore respond on the first issue in the affirmative.

Whether the appellant was entitled to repudiate the policy

20. The second issue is whether the appellant was entitled to repudiate the policy. As noted earlier, the trial court seemed to take the view that the policy could be avoided in respect of the passengers in the vehicle who were being carried for hire and reward, but not in respect of the pedestrian who was hit while the vehicle was being used in breach of the terms of the policy. The appellant observed that the trial court had taken the view that the authorities it had relied on were not relevant to its case. However, in its view, had the court considered the authorities relied on, it would have found that they were relevant to the present circumstances and that the appellant was entitled to repudiate the respondent's claim.

21. I have considered the authorities relied on by the applicant in the lower court. In **Corporate Insurance Company Ltd vs Elias Okinyi Ofire [1999] eKLR** the Court of Appeal considered the effect of changing the use of a vehicle. In that case, the vehicle in question was a pick up that had been insured for use in business, but had at the time of the accident been used as a matatu. The court stated as follows:

“There can be no doubt that the vehicle was being used as a "matatu". But was it insured as a "matatu"? The policy of insurance produced as an exhibit by the appellant's witness one Mr. Zacharia who is a senior executive assistant employed by the appellant, shows that the same is a Commercial Vehicle Policy. It is described in the schedule to the policy as a Toyota pick-up with carrying capacity of one ton and carries the following limitation:

"Use in connection with insured's business. Use for the carriage of passengers in connection with the insured's business.

The vehicle was therefore insured as a commercial vehicle for use in connection with the insured's business which business is described as "Farmer/Business." It is not the insured's business to run "matatus". If that was his business he would have had to obtain a different insurance cover namely that of carrying passengers for hire and reward.

If an insured after obtaining an insurance cover for a commercial vehicle for use in connection with his business changes the nature of the vehicle to that of a "matatu" the nature of the policy remains that of a commercial vehicle policy and such change does not and cannot make the insurer liable to the passengers who are thereafter carried in the vehicle for reward (fare). If this were the case most insurers would decline to issue a commercial vehicle policy.”

22. Similarly, in **Corporate Insurance Company Limited vs Ibrahim Gichuhi Mugo [2015] eKLR** Ochieng J found that once a vehicle was used for a purpose other than that stated in the policy, the insurer was entitled to void the cover. The judge held that:

“The policy of insurance covered the vehicle when it was being used for social, domestic or pleasure purposes. That is what the insured had asked for, and that is what the insurer provided. Therefore, when the vehicle was being used for hire for reward, the policy of insurance did not provide cover. In the event, the plaintiff was entitled to avoid the policy because the insured used the vehicle for a purpose other than that which he had declared it would be put to.”

23. I agree with the views of the court in the two matters above. Once an insured person changed the user of the vehicle from that for

which he had obtained cover, then the insurer was entitled to repudiate the policy.

Whether there was a need to file the primary suit together with a letter of authority

24. The last issue is whether the suit should have been dismissed on the basis that the deponent of the affidavit in support of the plaint had not annexed an authority to swear the affidavit verifying the facts in the plaint. The appellant has relied on the decision in **Leo Investment Ltd vs Trident Insurance Co. Ltd (2014) eKLR** in which the court held that while Order 4 Rule 1 (4) of the Civil Procedure Rules provided that where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the corporation duly authorized to do so under the seal of the company, there is no requirement that the authority given to the officer should be filed. Further, that the mere failure to file the authority with the plaint does not invalidate the suit. In its view, the finding of the trial court was not supported by the law.

25. I have considered this issue against the provisions of under Order 4 Rule 1 (4) of the Civil Procedure Rules, which provides as follows:

Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.

26. In his decision in **Leo Investments Limited vs Trident Insurance Company Limited [2014] eKLR** Gikonyo J, after citing Order 4 Rule 1 (4) of the Civil Procedure Rules, observed as follows:

“Clearly from the foregoing provision, nowhere is it required that the authority given to the deponent of the verifying affidavit be filed. The failure to file the same, in my view, may be a ground for seeking particulars assuming that the said authority does not form part of the plaintiff’s bundle of documents which commonsense dictates it should. Of course, if a suit is filed without a resolution of a corporation, it may attract some consequences. The mere failure to file the same with the plaint does not invalidate the suit. I associate myself with the decision of Kimaru, J in Republic vs. Registrar General and 13 Others Misc. Application No. 67 of 2005 [2005] eKLR and hold that the position in law is that such a resolution by the Board of Directors of a company may be filed anytime before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as he suit. Its absence, is therefore, not fatal to the suit.”

27. I agree with the views of my brother Gikonyo J on this point. I am satisfied that the trial court erred in striking out the appellant’s suit on the basis that the authority to swear the affidavit verifying the suit had not been filed with the plaint.

28. In the circumstances, and in view of my findings in respect of the other two issues raised in this appeal, I am satisfied that the appeal is merited. It is hereby allowed with costs to the appellant.

Dated Delivered and Signed at Kericho this 18th day of May 2018.

MUMBI NGUGI

JUDGE