



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CIVIL CASE NO. 14 OF 2017

BRITAM GENERAL INSURANCE CO ((KENYA) LIMITED.....APPLICANT

VERSUS

JOSEPHAT ONDIEK.....DEFENDANT

JUDGEMENT

The plaintiff Britam General Insurance Company Kenya Ltd, filed a suit against Joseph Ondiek, herein after referred as the defendant seeking: A declaration that it is not bound to pay/or satisfy judgement Kajiado CMCC No. 625 of 2016 and /or indemnify the defendant against any claim in respect of death, bodily injury to any person, damage to property or satisfy and claim whatsoever arising out of the accident which allegedly occurred on 3rd April, 2015 along Loitoktok Emali road at Ishara area involving the defendant's motor vehicle registration No. KBN 894G, Toyota Probox Station Wagon:

- a. Costs of this suit.
- b. Interest on misrepresenting the plaintiff the purpose for which he would use the vehicle.
- c. Any other or further relief that this Honourable Court may deem just, expedient and fit to grant.

Background of the claim

The plaintiff insurance company entered into an agreement with the defendant to issue an insurance policy cover for his motor vehicle registration KBN 894G Toyota probox station wagon. Looking at the plaint the motor vehicle was to be used for private, social domestic, personal pleasure, business or professional purposes.

The appendix to the conditions annexed to the policy cover were that the plaintiff would indemnify the defendant in the event of an accident caused or arising from the use of the motor vehicle as a private vehicle but not for use of carriage of passengers for hire or reward.

It was pursuant to the said proposal and schedule of conditions the plaintiff issued to the defendant policy number PD BND MP 45950/912 upon payment of the requirement provisions for a total period of 1year commencing from 24th July, 2014 to 23rd July, 2015.

By the month of April on or about 3rd April, 2015 the defendant subject motor vehicle was reported to have been involved in an accident along Loitoktok Emali road. As a consequence, the defendant filed suit CMCC No. 625 of 2016 seeking general and special damages for the loss. According to the plaintiff they are not obliged to honour the claim because the defendant breached the policy terms and conditions of using the said motor vehicle for hire or for reward. Secondly, the defendant concealed a material factor and misrepresented the reason and purpose for which the vehicle was to be used during the term of the policy. Thirdly, the defendant failed at all times to use the vehicle for personal and private use against the terms of the policy.

Defendant's defence

In the defendant statement of defence and counterclaim dated 19th November, 2017 he denied all particulars of breach of the terms and conditions in the policy. The defendant admits existence of a policy referenced as PD BND MP 459 50/912 validly listed by the plaintiff.

The defendant contends that the subject motor vehicle registration No. KBN 894G was involved in a traffic road accident along Emali loitoktok road. That in the said accident his motor vehicle was damaged and the passengers on board suffered personal injuries upon which the claim in CMCC No. 625 of 2015 at Kajiado court is premised.

In the counterclaim the defendant states that based on the valid insurance cover the plaintiff is liable to indemnify him for the loss arising out of the road traffic accident that the plaintiff has at all material times failed to release the policy document to the defendant. That in failing to release the policy the contents and conditions annexed to the agreement were not brought to his attention.

That it would be impracticable for the defendant to be accused of breaching the terms of the policy which were not within his knowledge and belief. Pursuant to the policy and insurance cover the defendant sought a declaration that the plaintiff is liable to indemnify him of all the damage and loss occasioned arising out of the accident that occurred on 3rd April, 2015.

The plaintiff's evidence

From the evidence of Evans Maina, the plaintiff deposed that a policy of insurance was issued to the defendant in respect of motor vehicle KBN 894G. According to Evans Minda though he did not see the proposal form, the defendant was issued with a certificate of insurance. Further the witness testified that the comprehensive insurance cover so issued was to cover the period between 24th July, 2014 to 23rd July, 2015.

According to Minda the plaintiff quarrel with the defendant arises from the investigations report carried out by PW2 – Alex Moseti under instructions from the plaintiff. In a matter such as this Evans Minda told the court that the plaintiff normally commences investigations to verify and ascertain the cause of the accident. In his evidence Evans Minda told the court that the investigator PW2 in his report came up with findings that the defendant motor vehicle at the time of the accident was for hire and reward. This was contrary to the terms and conditions in the policy document. It was further the testimony of Evan Minda that due to the breach of the terms of the policy the plaintiff is not liable to indemnify the defendant for the damage and loss arising from the accident.

Defendant evidence

The defendant Josephat Ondiek, testified and denied that he was in breach of any of the terms of the policy insurance issued by the plaintiff. According to the defendant there was a valid contract of insurance with the plaintiff at the time the accident occurred involving his motor vehicle. It was further his evidence that the motor vehicle was used for the intended purpose of private, social, domestic uses all the time it got involved in the accident. He denied the evidence that investigations report generated by Pw2 which said that he had hired the vehicle for reward when the accident occurred. The defendant further stated that upon occurrence of the accident he approached the plaintiff to make good the claim but to his surprise no settlement on any particulars of damage has been paid.

Submissions by the plaintiff

Ms. Kimacia on behalf of the plaintiff filed written submissions touching on the issues of the dispute with the defendant. Ms. Kimacia contended that in a case like this one the court should be governed by the terms and conditions of the policy to find that the defendant was in breach. Ms. Kimacia dwelt on the argument that an assessment of the investigators report PW2 detailed conclusively that the validity of the insurance policy was violated by the defendant rendering it inoperative. In support of the submissions learned counsel placed reliance in the following cases:

Geminia insurance co. Ltd v Kenjap Motors Ltd 2017 eKLR, Corporate insurance Co. Ltd v. Stephen Kariuki Wamutwe 2014 eKLR

Defendant's submissions

On behalf of the defendant Mr. Momanyi submitted the evidence by the plaintiff witnesses PW1 and PW2 does not invalidate the contract of insurance duly entered into with the defendant. Mr. Momanyi, argued and submitted that the impugned policy document was never issued to the defendant with respect to the certificate of insurance. Mr. Momanyi pointed out that it had no conditions attached to it that in the event of breach the plaintiff would avoid the policy.

Mr. Momanyi on submitting on the particulars given in the plaint contended that the claim is statute barred and should be struck out. Mr. Momanyi submitted that in reference to Section 10(4) g Cap. 405 of the laws of Kenya expressly provides a time line of three months for the plaintiff to have brought and filed declaratory suit. On this ground Mr. Momanyi relied on the authorities of: ***Pacis insurance company Ltd v Mohammed F. Hussein 2017 eKLR, Gateway Insurance Co. Ltd v Evans Njenga Gitau & Another 2014 eKLR***. Further Mr. Momanyi submitted that the plaintiff breached the law and frustrated the contract with the defendant. Mr. Momanyi invited the court to appraise the evidence on change over between the plaintiff businesses of insurance which were taken over by Real Insurance without notice to the defendant. Learned counsel further relied on the following cases to support his list of submissions and legal proposals on the issues raised: ***Imara Steel Mills Ltd v Heritage Insurance Co. Kenya Ltd 2016 eKLR, Nkuene Dairy Farmers co-operative Society & another v. Ngacha Ndeiya 2010 eKLR, Jairus Njogu Mwangi v Gateway Insurance co. Ltd 2010 eKLR***.

Analysis

I have considered the evidence on this matter and submissions by both the plaintiff and the defendant counsel there are many issues as determination as deduced from the pleadings. However, to me the contract issue is whether on assessment of the claim brought by the plaintiff the suit is statute barred. The written law of governing this contract of insurance is found in the Act.

Insurance (motor vehicles third party risks cap. 405) to determine the property or otherwise of this suit I have to set out the relevant section in this Act. In section 10 (1) and (4) of the Act it provides as follows

“(1) if after a policy of insurance has been effected, judgement is respect of any such liability as is required to be covered by a policy under paragraph 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 judgement any sum payable there under in respect of the liability, including any amount payable in respect of lost and any sum payable in respect on that sum by virtue of any enactment relating to interest on judgement”

“(4)No sum shall be payable by an insurer under the foregoing provisions of this section if, in an action commenced before, or within time mention after the commencement of the proceedings in which the judgement was given, he has obtained a declaration that, apart from any provisions 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 provide that an insurer who has obtained such declaration as a foresaid in an action shall not thereby become entitled to the benefit of this sub-section as respects any judgement 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 of 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 to”

Exception to section 10(4) provide interalia that the insurer shall not be liable to pay or satisfy any judgement in respect of accident loss, damage or liability caused, sustained or incurred while the insured is guilty of non-disclosure of a material fact or by a representation of a fact which is false in some material particulars.

The procedure provided under Section 10(4) of the Act as I understand it presents the following scenarios, first, it creates an obligation on the part of the insurer to avoid the policy in respect of liability and anything arising from the accident which is in breach of the policy agreement. Secondly, it creates a condition precedent to the insurer right of action to the in breach by bringing an action within 3 months of the claim against the insured being instituted. Thirdly, the claim to indemnify the insured or third party insurance which falls within the exceptions provided in the policy of insurance. Fourthly, the proviso that Section 10(4) stipulates that the insurer shall not be liable in respect of the accident, loss or liability unless before or within the days he gives notice to the insurer in the said proceedings.

In the present case the accident occurred on 3rd April, 2015 and by 11th May, 2015 the plaintiff had already received the investigators report from Pw2 on the findings on the occurrence and cause of the accident. The defendant filed the motor accident report in a clear form received by the plaintiff on 27th April, 2015.

As I have already stated the defendant and third parties filed suit referenced as CMCC No. 625 of 2015 on 15th December, 2015. There is no evidence that the plaintiff made an application before the respective court for stay of proceedings for leave to file this declaratory suit. It is in this suit the plaintiff seeks to repudiate the claim. The conditions for commencement of a declaratory suit are time bound as stipulated in Section 10(4) of the Act.

In the case of *Techra v. United Insurance Co. Ltd 2005 KLR* the court stated as follows on this issue. ***“At this time of the institution of the suit, the plaintiff had given the defendant notice dated 8th August, 1997. Was it valid and in conformity with section 10(2) of the Insurance Motor Vehicles Third Party Risks Act. The Act requires the insurer to have had notice of institution of the suit. Section 10(2) focuses on receipt of the notice by the insurer. From the evidence captured by the plaintiff and defendant witnesses there had been no application made to seek a declaration to avoid the policy.”***

In this connection I refer to the decision and dicta on the case of *Rawal v Rawal 1990 KLR 275* where the court held ***“the object of any limitation enactment is to present a plaintiff form pursuing stale claims on one hand, and on the other protect a defendant after he had lost evidence for his defence from being disturbed and after a long lapse of time. It is not to extinguish claims”***.

The subject of this suit is governed by Section 10(4) of the Act. It is not clear to me whether the plaintiff in safeguarding of their interest had made attempts of secure the declaration within the three months’ period upon receipt to the notice.

As was held in *Iga v Makerere University (1972) EA* time was of essence where the statute sets a limitation period. Further as a matter of construction the court held as follows: ***“A plaint which is barred by limitation is a plaint barred by law. A reading of the provisions of section 3 and 4 of the limitations Act cap. 70 together with order 7 Rule 6 of the civil procedure Rule of Uganda which has same provisions with limitations Act of Kenya seems clear that unless the applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption the court shall reject his claim. The limitations Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred, the court cannot grant the remedy or relief”***

Applying these principles to the present case I am of the view that this is one of those cases which the relief respect to the plaintiff is statute barred. I have no hesitation to rule that section 10(4) of the Act was not complied with as to limitation period. While I agree with the claim on the matter by the plaintiff I cannot accept the submission that the party relying on provisions of the law can circumvent the same statutory requirement to apply for a declaration to repudiate and avoid the policy.

In the present claim if the plaintiff wished to take the benefit of section 10(4) of the Act. It was mandated to apply for a declaration after receiving notice of the claim from the defendant and upon delivery of the notice of the suit. By filing a plaint outside the 3-month period the plaintiff lost its right to rely on the statute.

On the basis of this section the failure not to file the same within 3 months before or within the commencement of the proceedings has not been explained by the plaintiff. The section is couched and worded in mandatory terms. I also note that on 11th May, 2015 the plaintiff became and aware the defendant had concealed some material factor during the time he filed the accident claim form. This was a finding

made by the investigating officer. However, there was no notice issued to the defendant that at the time of the accident the vehicle was being driven by unauthorized driver and it was also being used for purposes of hire and reward in breach of the policy by virtue of section 10(4) of the Act. The plaintiff did not seek for leave of the superior court for the proposed suit to be filed outside the stipulated period of 3 months.

Indeed, the facts presents a picture of the plaintiff who has been aware of the proceedings and claims way back on 27th April, 2015. They took the defendant in circles in respect to material damage of the vehicle and only brought this suit after being served with the summons in CMCC 624 of 2017.

I am quite clear that this suit is inoperative within the provisions of Section 10(4) of the Act. Further I am of the conceded view that notwithstanding the provisions of Section 10(4) of the Act the plaintiff went ahead to seek a declaration to repudiate the policy. It would be contrary to the letter and spirit of the provisions of Cap. 405 to allow the plaintiff to have his way of setting aside the contract without complying with Section 10(4) of the Act.

I am therefore satisfied that the plaintiff has not discharged the balance of proof on a balance of probabilities and more specifically the requirements of section 10(4) of the Act to stand on the way of the relief sought against the defendant. It follows therefore that the suit dated 15th August 2017 is fatally defective and non-suited by statute.

Accordingly, it is struck out with costs to the defendant.

Dated, signed and delivered in open court at Kajiado this 28th day of September, 2018.

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R. NYAKUNDI

JUDGE

In the presence of:

Mr. Momanyi for the plaintiff

Mr. Kiplagat for Njage for the defendant