



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CIVIL SUIT NO. 7 OF 2015

MONARCH INSURANCE CO. LIMITED.....PLAINTIFF

VERSUS

WYCLIFFE ONYANGO ODENDA.....DEFENDANT

AND

SIMON MUKHABI OMBOGO.....1ST INTERESTED PARTY

TRIVIAN AKINYI.....2ND INTERESTED PARTY

JUDGEMENT

1. On 21st April, 2014 motor vehicle registration number KAD 679Q belonging to Wycliffe Onyango Odenda was involved in an accident along Busia-Kisumu road. It is alleged that Simon Mukhabi Ombogo, the 1st Interested Party and Trivian Akinyi, the 2nd Interested Party who were passengers in the motor vehicle sustained injuries.

2. The interested parties sued the owner and the driver of the said motor vehicle in Busia Chief Magistrate's Court and obtained judgements in their favour. They then filed declaratory suits against the Plaintiff, Monarch Insurance Co. Ltd which had insured the motor vehicle at the time of the accident.

3. The Plaintiff reacted to the declaratory suits by commencing these proceedings in which its main prayer is:

“A declaration that the Plaintiff is not liable or bound to make payments or indemnify the Defendant under the said insurance policy of cover in respect of any claim in respect of death or bodily injury to any person or passenger being carried arising out of the road traffic accident which occurred on 21st April, 2014 along Busia-Kisumu involving the Defendant's Motor Vehicle Registration Number KAD 679Q.”

4. According to the Plaintiff, the third party policy issued in respect of the Defendant's motor vehicle was issued on the understanding that the motor vehicle would be used for domestic purposes only. The Plaintiff asserted that it was an express and or implied term of the policy cover that the insurance provided covered third parties only and did not cover liability or risks in respect of death of or bodily injury to passengers in the motor vehicle. It is therefore the Plaintiff's case that it is not bound to indemnify the Defendant for the injuries sustained by the interested parties herein.

5. The Plaintiff's case as per the plaint dated 13th May, 2015 and amended on 30th September, 2016 is that the Defendant breached the terms and conditions of the insurance policy by:

“(a) Failing to comply with the Third Party Only, Private Vehicle Insurance policy terms while using or hiring the Motor Vehicle Registration Number KAD 679Q.

(b) Using Motor Vehicle Registration Number KAD 679Q to carry passengers other than for private purposes only as stipulated and represented in the subject Insurance Policy Covering document and proposal.

(c) Misrepresenting or giving false and untrue information while proposing and applying for the subject insurance policy cover with the Plaintiff.

(d) Engaging in non-disclosure of true and material facts while proposing for policy cover with the Plaintiff.

(e) Using or permitting use of Motor Vehicle Registration Number KAD 679Q contrary to the terms and conditions of the Policy Cover Form.

(f) Otherwise using the said Motor Vehicle contrary to and in total breach of the Insurance Policy cover terms and conditions.”

6. The Defendant opposed the Plaintiff's case through a defence dated 20th September, 2016 filed in court on 21st September, 2016. The Defendant's position was that he never engaged in the business of private hire and or transport for reward using his motor vehicle. He averred that the persons injured in the accident were passengers who were duly covered by the insurance policy. Further, that the Plaintiff had a legal and statutory obligation to meet liabilities arising from the accident.

7. The interested parties also filed responses in which they opposed the Plaintiff's claim.

8. One witness, PW1 Obed Kariuki Ireri, an assistant claims manager with the Plaintiff testified in this matter. A summary of PW1's evidence was that at the time of the accident on 21st April, 2014 the Plaintiff had issued the Defendant with a standard third party only insurance policy cover number HDO/0700/003777/2014 for the period 4th April, 2014 to 3rd April, 2015 in respect of the Defendant's Motor Vehicle registration No. KAD 679Q Landrover Discovery. That when applying for the policy, the Defendant had indicated that the motor vehicle would specifically be used for private purposes only.

9. According to PW1, at the time of the accident the Defendant's motor vehicle was ferrying passengers on hire and for reward hence the Plaintiff was not liable to pay or indemnify the Defendant against liability in respect of the bodily injuries sustained by three passengers during the accident.

10. PW1 testified that when filing the claim form with the Plaintiff on 19th June, 2014, the Defendant had indicated he had given a lift to four people while travelling from his rural home in Busia to Nairobi. He testified that this was not correct as the passengers had paid for the transport.

11. PW1 testified that the Plaintiff had appointed a private investigator to investigate the accident and by the time the investigation was concluded a number of suits had been filed against the Defendant. The investigation consequently revealed that the passengers injured during the accident were being carried for hire and reward. As a result of the investigation, the Plaintiff's advocates issued notices under Section 10(4) of the Insurance (Motor Vehicles Third Party Risks) Act, Cap. 405 (the Act) to the parties who had instituted claims against the Defendant. As the Plaintiff had appointed advocates to act for the Defendant in the suits that had been filed against him, the Plaintiff instructed the advocates to cease acting for the Defendant.

12. After conclusion of the trial the advocates for the parties were directed to file and exchange submissions. The process was not concluded by the time I was transferred to Malindi from Busia in April, 2017. Through an order dated 10th May, 2018 Justice Kiarie W. Kiarie directed the Deputy Registrar, Busia to forward this file to me for purposes of writing a judgement. I apologise to the parties for the time it has taken for this matter to be finalised.

13. It is only the advocates for the Plaintiff and the interested parties who filed submissions in this matter. I do not find any submissions on record by counsel for the Defendant.

14. Counsel for the Plaintiff submitted that the Plaintiff had proved that the Defendant breached the terms and conditions of the insurance policy and had also failed to disclose that he was ferrying passengers for hire and reward in the claim form filed with the Plaintiff. Reliance was placed on the decisions in **Charles Momanyi Mageto v Co-operative Insurance Company of Kenya Ltd [2016] eKLR** and **Day Break Limited v Monarch Insurance Co. Limited [2013] eKLR** in support of the assertion that a breach of the terms and conditions of the policy by an insured entitles the insurer to repudiate liability incurred by the insured.

15. On his part, the 1st Interested Party took the position that under Section 4 of the Act (I suspect he meant Section 10(4) of the Act), the Plaintiff ought to have commenced this action within three months from the date of the institution of the claim against the Defendant. It is the 1st Interested Party's position therefore that this suit is time-barred.

16. Counsel for the 2nd Interested Party submitted this suit is statutorily barred by the provisions of Section 10(4) of the Act. According to the 2nd Interested Party, the Plaintiff filed this suit over one year after receiving a demand notice from her. Further, that the Plaintiff had failed to issue her with a disclaimer notice within 14 days from the date she commenced her claim against the Defendant. On this submission reliance was placed on the decisions in **APA Insurance Limited v Theodora Atieno Okal [2012] eKLR** and **APA Insurance Limited v David Okiki Amayo [2014] eKLR**.

17. The second point taken up in opposition to the claim is that the 2nd Interested Party was a third party as defined by the insurance policy and that the policy covered the Defendant, his authorized driver and any person in or getting into or out of the motor vehicle in respect of death or bodily injury. It is the 2nd Interested Party's position that even if she was being carried for hire and reward, she was nonetheless insured under the policy. The decision of the Court of Appeal in **Gateway Insurance Co. Ltd v Catherine Ndinda [2016] eKLR** was cited in support of this assertion.

18. Finally, it was submitted for the 2nd Interested Party that the Plaintiff was estopped from denying that it was liable to settle her claim as it

had defended her claim against the Defendant herein and participated in those proceedings to conclusion. The decision in **United Insurance Co. Ltd v Lawrence Ruthi Mwangi [2004] eKLR** is cited in support of the submission.

19. The issue to be determined in this matter is whether the Plaintiff has met the conditions for the grant of the declaration sought.

20. Section 10(4) of the Act states:

“(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:

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.”

The cited provision is clear that a suit like the one before this court should be commenced within three months from the date a suit is commenced against the insured. A perusal of the plaints exhibited by the interested parties show that they instituted their suits against the Defendant in December, 2014. After they obtained judgements, they filed declaratory suits against the Plaintiff herein in late 2015.

21. The investigation report that the Plaintiff seeks to use to repudiate liability is dated 28th November, 2014 and was received by the Plaintiff on 3rd December, 2014 as per the stamp on the face of the report. However, the Plaintiff filed this suit on 5th June, 2015 about six months after receiving the report. The chain of events confirms that the suit was statute- barred by Section 10(4) of the Act by the time the Plaintiff filed it. It was filed over three months after the interested parties had commenced their suits against the defendant. I need not say more. This matter is dismissed with costs to the Defendant and the interested parties.

Dated and signed at Malindi this 30th day of May, 2018.

W. KORIR

JUDGE OF THE HIGH COURT

Dated, signed and delivered at Busia this 26th day of Sept., 2018.

KIARIE W. KIARIE

JUDGE OF THE KHIGH COURT