



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL SUIT NO. 4 OF 2015

BETWEEN

KENYA ORIENT INSURANCE COMPANY LIMITED.....PLAINTIFF

AND

MARTHA ANGILA CYNTHIA.....DEFENDANT

JUDGMENT

1. The plaintiff seeks a declaration against the defendant that it is not bound to pay and or indemnify the defendant against any claim in respect of death or bodily injury to any person or damage to property or any claim whatsoever arising out of an accident which occurred on 27th August 2014 at Nyansiongo along Keroka – Sotik road involving the defendant’s motor vehicle registration number KBZ 894G Toyota Wish.

2. The grounds for the plaintiff seeking the declaration are that the defendant, while completing the claim form as a result of the accident, breached the principle of utmost good faith as she failed to give the true and correct facts about the accident and the use of the motor vehicle at the time of the accident.

3. According to the particulars set out in the plaint, the defendant had stated in the claim form that the vehicle was being used by herself on the material day to go to a funeral, but in her written statement she stated that she had given the vehicle to her nephew to attend a funeral she did not know about. Her driver, Robert Orwaru Agagi, stated that the defendant engaged the motor vehicle for hire and reward contradicting the defendant’s statement that she was engaged in dealing in cereals. The plaintiff also pleaded that contrary to the defendant’s statement that her driver was earning Kshs. 10,000/- per month as her driver, the driver disclosed that he would normally be paid Kshs. 1,000/- per day to offer driving services to the defendant’s clients. The plaintiff also pointed to the fact that the defendant claimed that she was residing at Kahawa Wendani while her driver stated that she was a resident of Kahawa West. In addition, the plaintiff relied on the defendant’s statement that her driver was single and resident in Kabete yet he stated that he was married with three children and resident in Ndumbuini in Uthiru.

4. In the statement of defence and counterclaim, the defendant admitted that she was a valid holder of the policy number MSA/0700/105311/2014 with the plaintiff in respect of the subject motor vehicle but denied that allegation of breach made by the plaintiff. She also admitted that her vehicle was involved in the accident at Nyansiongo along the Keroka – Sotik road on 27th August 2018. The defendant stated that she was entitled to full indemnity and as such prayed for a declaration that the plaintiff was bound to pay and or indemnify the defendant against any claim in respect of death or bodily injury to any person or damage to property or any claim whatsoever arising out of the accident that had taken place involving her motor vehicle.

5. I set the matter down for hearing after pleadings closed. Kevin Otieno Okeya (PW 1) testified on the plaintiff’s behalf. After the close of the plaintiff’s case, counsel for the defendant applied for an adjournment and leave to file a witness statement on behalf the defence witness. I granted leave for the witness statement to be filed within 7 days in default of which the counterclaim would stand struck out. When the matter came up for further hearing, neither the defendant nor her counsel appeared in court and since the witness statement had not been filed as I had directed, I struck out the counterclaim and reserved the matter for judgment.

6. The fact that the defendant’s vehicle was insured by the plaintiff and that it was involved in an accident on the material day is not in dispute. The issue for determination is whether the plaintiff was entitled to avoid the policy and repudiate the claim on the basis of the particulars of breach pleaded in the plaint. According to PW 1, the plaintiff forwarded to the defendant the letter dated 4th December 2014 setting out the grounds for repudiation which were that there were material inconsistencies in the defendant’s statement and her claim form and the narration of witnesses. The plaintiff also stated that the vehicle was being used for hire and reward contrary to the terms of the policy.

7. PW 1 testified that the plaintiff, in taking the position it did, relied on the report of Uptown Loss Assessors (K) Limited which was instructed to investigate the matter after the defendant lodged the claim following the accident. According to the report, the defendant’s driver, Robert Orwaru disclosed that the plaintiff was offering car hire services to clients and had a fleet of three vehicles including the

subject motor vehicle registration number KBZ 894G. He also stated that he would be paid Kshs. 1000/- after taking the clients to their destination.

8. The report by Uptown Loss Assessors (K) Limited was clearly hearsay and would not be admitted without calling the maker thereof. Further the statement by third parties would also amount to hearsay without calling the persons who made the statements relied upon. However, the position in this case was that the evidence was produced and admitted without objection by the defendant. It was therefore admitted and could be relied on by the plaintiff to prove its case.

9. The plaintiff's evidence was not controverted and the fact that the defendant used the car for hire and reward was proved on the balance of probabilities. This was in contravention of Clause MOTO05/01 of the policy which provides for limitations of use as follows:

Use only for social, domestic and pleasure purposes in connection with the insured's business and profession.

The policy does not cover use for racing competitions, rallies, trials (or use for practice for any of them) or use for hire or reward, commercial travelling, the carriage of goods in connection with any trade or business or use for any purpose in connection with Motor trade.

10. The other issues regarding inconsistencies in narrations by the defendant and other persons regarding matters of family status, resident and nature of business is not in my view material to entitle the plaintiff to avoid liability under the policy.

11. The plaintiff is entitled to the declaration sought in the plaint. I therefore enter judgment for the plaintiff against the defendant as follows;

a. A declaration be and is hereby issued that the plaintiff is not bound to pay and or indemnify the defendant against any claim in respect of death or bodily injury any person or damage to property or any claim whatsoever arising out of an accident which occurred on 27th August 2014 at Nyansiongo along Keroka – Sotik road involving the defendant's motor vehicle registration number KBZ 894G Toyota Wish.

b. The defendant counterclaim is hereby dismissed.

c. The defendant shall pay costs of the suit and counterclaim which I assess at Kshs. 50,000/- only.

DATED and DELIVERED at KISUMU this 26th day of September 2018.

D.S. MAJANJA

JUDGE

Ms Sambu instructed by Sheth and Wathigo Advocates for the plaintiff.

Ms Nyanaro instructed by C. R. Sagwa and Company Advocates for the defendant.