



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CIVIL CASE NO.37 OF 2015

BETWEEN

INVESCO ASSURANCE COMPANY LIMITED.....PLAINTIFF

AND

ERASTO OBONYO ORIEDO.....DEFENDANT

JUDGMENT

1. By a **plaint** dated 23rd September, 2015 filed on 24th September, 2015, INVESCO ASSURANCE COMPANY LIMITED(*hereinafter referred to as the Plaintiff*)has sued ERASTO OBONYO ORIEDO(*hereinafter referred to as the Defendant*)seeking the following orders:

a) A declaration that the contract of insurance/indemnity agreed to between the Plaintiff and the Defendant summarized in the Policy of Insurance Number 065/0804/1/000143/2013/07 had lapsed as at the date of the accident and that the Plaintiff be duly and fully discharged from its effect

b) An order that the plaintiff is under no obligation whatsoever to make payments on behalf of the Defendant under the terms of the contract of insurance/indemnity herein on account of the accident of 30th May, 2015 involving Defendant's Motor Vehicle KAS 457J as no liability attaches under the provisions of the Insurance (Motor Vehicle Third Party Risks) Cap 405 Laws of Kenya

c) Alternatively, an order directing the Defendant to repay to the Plaintiff any such sums applied to the satisfaction of the Third Party Claims arising out of the accident of 30th May, 2015 involving Defendant's Motor Vehicle KAS 457J

d) Costs of and incidental to this suit

e) Interest at court rates on (c) above

2. By a defence dated 16th December, 2015 filed on 18th September, 2018, the defendant denied the claim and urged the court to dismiss the respondent/plaintiff's claim with costs.

Plaintiff's case

3. **PW1 GORDON ODERO OMBAE**, plaintiff's Western Region Manager testified that plaintiff insured Defendant's Motor Vehicle KAS 457J between 7.7.13 to 17.1.15 and that the plaintiff was therefore not liable to satisfy the Third Party claims in **MasenoPMCC Case Numbers 98 to 114 of 2015** arising out of the accident of 30th May, 2015 involving Defendant's Motor Vehicle KAS 457J. The witness stated that Certificate of Insurance No. A6289074 for the period 26.5.15 to 26.5.15 relates to an insurance policy Number 065/0804/1/011610/2015/02 which was different from the one issued to the defendant and denied that it was issued by the plaintiff.

4. In support of the plaintiff's case, the witness tendered the following documents as **PEXH. 1:-**

i. Policy of Insurance Number 065/0804/1/000143/2013/07

ii. Proposal form dated 4.7.13

iii. Provisional debit note for Kshs. 7,857.00 dated 4.7.13 for period 7.7.13 to 6.8.13

iv. Receipt No. 678433 for Kshs. 7,857.00 dated 4.7.13

v. Provisional debit note for Kshs. 7,817.00 dated 7.9.13

vi. Certificate of Insurance No. A5876519

vii. Receipt No.712699 for Kshs. 7,817.00 dated 7.8.13

viii. Provisional debit note for Kshs. 7,817.00 dated 18.3.14

ix. Receipt No.866456 for Kshs. 7,817.00 dated 18.3.14

x. Certificate of Insurance No. A6140735

xi. Provisional debit note for Kshs. 7,817.00 dated 15.12.14

xii. Receipt No.1031250 for Kshs. 7,817.00 dated 15.12.14

xiii. Certificate of Insurance No. A6504627

5. In cross-examination by Mr. Bagada for the defendant, the witness conceded that Certificate of Insurance No. A6289074 was purported to have been signed by one Dinah, an employee of the plaintiff but that the signature thereof was a forgery. He also conceded that no action had been taken to have the alleged forgery investigated.

Defendant's case

6. The Defendant denied the plaintiff's claim and urged court to find that as at 30th May, 2015 when his Motor Vehicle KAS 457J was involved in an accident, it was insured by the plaintiff under Certificate of Insurance No. A6289074 for the period 26.5.15 to 26.5.15 **DEXH.1**.The defendant further stated that he reported the accident to PW1 and one Joshua Odongo and also paid an excess of Kshs. 30,000/- but was not issued with a receipt nor was he requested to fill a claim form.

SUBMISSIONS BY THE PARTIES

7. At the close of the defence case, the court directed parties to file written submissions but only the plaintiff complied

Plaintiff's submissions

8. The plaintiff holds the view that Certificate of Insurance No. A6289074 for the period 26.5.15 to 26.5.15 related to an insurance policy Number 065/0804/1/011610/2015/02 produced as **DEXH. 1** is a forgery. Plaintiff placed reliance on **Kenindia Assurance Company limited v Jacob OndaraMogaka [2009] eKLR.**

ANALYSIS AND DETERMINATION

Burden Of Proof

9. It is trite law that "whoever alleges must prove". **Section 107 of the Evidence Act, Chapter 80 Laws of Kenya** stipulates this in the following terms:

1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts, must prove that those facts exist. 2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person

10. Further **Section 109** in narrowing down to proof of particular facts, stipulates:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

11. **Section 110** further provides that:

The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

12. Regarding the incidence of burden, **Section 108** provides that:

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

13. The plaintiff alleges that Certificate of Insurance No. A6289074 for the period 26.5.15 to 26.6.15 **DEXH.1** is a forgery. The plaintiff has however failed to discharge the burden to prove the forgery and the defendant bears no burden of proving the contrary. The fact that the plaintiff has to date never reported the alleged forgery to relevant authority for investigations leads to the presumption that the allegation of forgery is untruthful.

14. At paragraph 10 of the plaint, the plaintiff lists Maseno PMCC Case Numbers 98 to 114 of 2015 filed out of the accident of 30th May, 2015 involving Defendant's Motor Vehicle KAS 457J.

15. At paragraph 11 of the plaint, the plaintiff pleads as follows:

“The plaintiff having been served with the summons to enter appearance in the said cases by the defendant”

16. The plaintiff having pleaded that it was served with the summons, the plaintiff cannot rely on either section 10(2) of the Insurance (*Motor Vehicle Third Party Risks*) Cap 405 Laws of Kenya nor did Kenindia Assurance Company Limited v Jacob Ondara Mogaka [2009] eKLR to avoid liability.

DISPOSITION

17. In the end and for the reasons given on the assessment above, the plaintiff's case is found to have no merit and it is dismissed with costs to the defendant.

DATED AND SIGNED IN KISUMU THIS 25th DAY OF October, 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

For the plaintiff - Mr Otieno

For the defendant - Mr Olel/Mr Kowinoh