



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL SUIT NO. 116 OF 2014

BETWEEN

JOSEPH ZACHARY MACHOGU ABUTA.....PLAINTIFF

AND

KENINDIA ASSURANCE COMPANY LIMITED.....DEFENDANT

JUDGMENT

1. The plaintiff suit seeks indemnity based on an insurance policy issued by the defendant for judgment entered against him in a suit filed against him by a passenger injured while travelling in his motor vehicle. The plaintiff seeks the following relief against the defendant:

A declaration that motor vehicle registration no. KAN 967 S was at the time of the accident herein duly covered by the Defendant and was being used within the limits of the policy cover hence the Defendant be compelled to satisfy the decree and all attendant costs in Nyando PMCC No. 171 of 2007 Edward K. Amiller v Joseph Z. M. Abuto.

2. The defendant defence to the action was that it could not indemnify the plaintiff as he did not disclose that a passenger was injured in the accident when he reported the material damage claim and that he failed to notify the defendant that any person was injured in the accident. The defendant further stated that it was totally unaware of the existence of any suit or claim and was thus a stranger to the suit filed against the plaintiff.

3. Several facts are common ground. The subject motor vehicle, registration number KAN 967 S belonged to the plaintiff and was insured by a comprehensive policy issued by the defendant for the period between 1st July 2005 to 30th June 2006. The vehicle was involved in an accident on 30th December 2015 and on 4th February 2006, the plaintiff lodged a claim for compensation for material damage to the vehicle as a result of the accident. The defendant settled the material damage claim.

4. After the accident, Edward Kabaka Amiller filed a suit, *Nyando PMCC No. 171 of 2007*, against the plaintiff claiming that he was a passenger in the vehicle when the accident occurred and that he sustained injuries. The case was concluded by judgment in which the claimant was awarded Kshs. 252,000/- as damages with costs and interest.

5. The only issue for determination in this case is whether the plaintiff is liable to satisfy the judgment in *Nyando PMCC No. 171 of 2007*. Put in another way, whether the defendant was entitled to avoid liability under the policy.

6. Under the provisions of **sections 107, 108 and 109** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. Since the policy and the accident were not disputed, it fell upon the defendant to prove the reasons for avoiding or repudiating the policy.

7. The defendant's legal officer, Simon Kioko (DW 1), produced the claim for 4th January 2006. The claim set out the nature of the accident and disclosed that the vehicle was damaged. In the part where the plaintiff was required to fill in whether the accident caused any to anyone the plaintiff reported "None." He also stated that no third party claim had been made against him. The Claim Form was received at the defendant branch office in Kisumu on 5th January 2006 together with a Police Abstract issued by Nyando Police Station. The police abstract stated that one Kabaka had been injured. The defendant's position is that the plaintiff failed to disclose material facts hence it was entitled to repudiate liability.

8. When the Claim form was put to the plaintiff, he admitted that he is the one who signed the Claim Form but could not recall whether he is the one who gave the defendant the police abstract. He told the court that when he reported the accident at Ahero Police Station, he was never told that there was any person who was injured. When cross-examined, the plaintiff admitted that he did not disclose that there was an injured passenger in the vehicle as he was not aware. He recalled that he only received summons to enter appearance in the Nyando suit about 4 months after the accident and when he took the same to the defendant's offices at Kisumu, the defendant refused to accept the same.

9. The duty to disclose material facts is a fundamental duty in an insurance contract. Once these facts came to the attention of the defendant, it was entitled to repudiate the contract (see *Day Break Ltd v The Monarch Insurance Co., Ltd Milimani HCCC No. 225 of 2007 [2013]eKLR* and *Heritage Insurance Co., Ltd v Alex Migore ELD HCCC No. 173 of 2002(UR)*).

10. In the present case, the plaintiff did not disclose in the claim form that there was a person who was injured in his motor at the time of the accident although the police abstract that accompanied the claim form indicated that one person was injured. Moreover, the claim form stated that there were 3 passengers in the vehicle. DW 1 stated in cross-examination that indeed they received the claim form and police abstract from the plaintiff and that the defendant knew of the third party from the police abstract but they chose not to investigate the matter because the plaintiff had confirmed that no one was injured in the accident. The defendant thus proceeded to settle the material damage claim. The plaintiff, on his part, took the position that at the time he reported the accident no one was injured in the accident.

11. I hold that the plaintiff can only disclose what he knew at the material time and according to his knowledge, no one was injured. The defendant knew of the non-disclosure as the police abstract that accompanied the claim form indicated as much. The defendant had a right to repudiate the policy upon discovery of the non-disclosure but it did not. It affirmed the contract and settled the material damage claim. It is therefore duty bound to settle the claim by the third party as this was within its knowledge and it chose not to investigate or repudiate the contract.

12. I allow the plaintiff's claim and issue the declaration in terms of prayer (a) of the plaint. The plaintiff shall also have costs of the suit.

DATED and DELIVERED at KISUMU this 27th day of April 2017.

D.S. MAJANJA

JUDGE

Mr Kimanga instructed by Kimanga and Company Advocates for the plaintiff.

Mr Maganda instructed by L. G. Menezes and Company Advocates for the defendant.