



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**CIVIL SUIT NO. 138 OF 2013**

**GEMINIA INSURANCE CO. LIMITED.....PLAINTIFF**

**- VERSUS -**

**KENJAP MOTORS LIMITED.....DEFENDANT**

**JUDGEMENT**

1. The plaintiff, **GEMINIA INSURANCE CO. LIMITED**, brought this case, seeking a declaration that it was under no obligation to satisfy any judgement or claim arising from the defendant's use of the insured vehicle.
2. The insured vehicle was Registration No. **KBS 532W**, and the defendant is **KENJAP MOTORS LIMITED**.
3. It is common ground that the defendant had asked the plaintiff to issue it with a Policy of Insurance in relation to the insured vehicle. The said policy was for liability to Third Party Risks.
4. The parties are in agreement that the insurance cover provided to the defendant was a personal contract between them.
5. On its part, the plaintiff said that it accepted and relied upon the truth of the representations which the defendant made in the Proposal Form and in the Declaration.
6. The defendant admitted the fact that the plaintiff had placed reliance on the representations made by the defendant.
7. The defendant added, that when it made the representations to the plaintiff, it did so in good faith and in the honest belief that the same were correct.
8. The plaintiff asserted that the Proposal Form and the Declaration signed by the defendant, were the basis of the policy of insurance and that they were deemed to have been incorporated into the policy.
9. However, the defendant denied that assertion, and put the plaintiff to strict proof.
10. Whilst the plaintiff asserted that the defendant had made false representations in the Proposal Form and in the Declaration, the defendant denied that assertion.
11. The particular representation alluded to was that the defendant would use the **K G** Plates for purposes

of ferrying new vehicles from the port of Mombasa, to its yard, for motor trade.

12. It was the plaintiff's case that the defendant used the vehicle for ferrying fare-paying passengers, and also for carriage of goods, along the Mombasa-Nairobi Highway.

13. In the defence there is an admission that the insured vehicle was involved in an accident on 24<sup>th</sup> August 2012.

14. The defendant admits that at the time of the accident, the vehicle was ferrying passengers. However, the defendant categorically denied that the passengers aboard the insured vehicle had been carried for hire or reward.

15. Finally, the defence was to the effect that this suit was premature, because the plaintiff had not exhausted the mechanism which the parties had agreed upon, to resolve any disputes between them. According to the defendant, the dispute should have been resolved through arbitration.

16. It had therefore been the intention of the defendant to apply for the stay of these proceedings, so as to allow the dispute to be referred to arbitration.

17. Notwithstanding the expression of the intention to make an application to refer the dispute to arbitration, the defendant failed to actualize its said intention.

18. At the trial, the plaintiff called 2 witnesses, whilst the defendant did not call any witness.

**19. PW1, ANTHONY MWANGI**, was a legal officer at Geminia Insurance Company Limited. He testified that the plaintiff provided insurance only for vehicles for either Private or Domestic use.

**20. PW1** emphasized that the plaintiff did not undertake the insurance for Public Service Vehicles.

21. In this instance, the defendant sought and was provided with a **K G** plate, which was to be used when the defendant was transporting new vehicles from the port of Mombasa, to the defendant's yard in Nakuru.

22. I note that in the Proposal Form, the plaintiff asked the defendant to;

**“State fully the purpose for which the vehicles will be used and the general nature of the goods to be carried”.**

23. In response, the defendant provided the following answer;

**“To Transport and test drive vehicles”.**

24. As the defendant made it clear that the insurance cover was only in respect of the time when the vehicles were being transported or when the vehicles were being taken through test-drives, it follows that the insurance policy did not extend to cover situations in which the vehicles ferried passengers.

25. Indeed, it did not matter whether or not the passengers were being ferried for hire or reward. The policy simply did not contemplate the ferrying of passengers as one of the purposes to which the vehicles would be used.

26. From the evidence adduced by the plaintiff, it is clear that the driver of the insured vehicle was convicted for the offence of Causing Death by dangerous driving. Of greater significance is that the driver was convicted on his own plea of guilty.

27. That evidence confirms that at the time of the accident, the vehicle was ferrying passengers. Such usage of the vehicle was contrary to what the defendant had told the plaintiff.

**28. PW2, STEPHEN NJURU KAMAU**, worked with Proficient Insurance Investigators. He and **ASAPH KAROGI** (*deceased*) investigated the accident in issue.

29. When he interviewed the driver, the latter stated that he had carried seven (7) passengers in the insured vehicle. The driver also told the investigators that the passengers were to pay their respective fares to him, upon reaching their destinations.

30. It is through **PW2** that the plaintiff procured the Statement which the driver had recorded with the police; the Police Abstract; and the record of the proceedings in Voi Traffic Case **No. 474 of 2012**.

31. All the evidence produced by the plaintiff proved that at the time when the accident occurred, the vehicle was being used to ferry fare-paying passengers.

32. Therefore, it means that the vehicle was being used for a purpose which was not covered by the policy of insurance which the plaintiff had given to the defendant.

33. In the circumstances, I have no doubt that the plaintiff is under no contractual obligation to satisfy any claim or judgement arising out of the use of the motor vehicle **KBS 532W (K G 4325)**.

34. In effect, the plaintiff is entitled to repudiate the Insurance Policy **No. MT/01/125 4259/1**, which was evidenced by Certificate of Insurance **No. B5673890**.

35. In other words, judgement is granted in favour of the plaintiff as prayed in the plaint.

36. The costs of the suit shall be paid by the defendant, to the plaintiff.

**DATED, SIGNED and DELIVERED at NAIROBI this 18<sup>th</sup> day of September 2017.**

**FRED A. OCHIENG**

**JUDGE**

***Judgement read in open court in the presence of***

*No appearance for the Plaintiff*

*Shah for Maramba for the Defendant*

*Mr. C. Odhiambo, Court clerk.*