



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL CASE NO. 31 OF 2010

THE CHAIRMAN BOARD OF GOVERNORS

ST. AUGUSTINE KANDEGE SEC. SCHOOL.....PLAINTIFF

VERSUS

INTRA AFRICA ASSURANCE COMPANY LIMITED.....DEFENDANT

JUDGMENT

1. The Plaintiff is a body incorporated under the Education Act and is the registered owner of Motor Vehicle KAW 936Z.
2. The Defendant is an Insurance Company and offers insurance to its clients.
3. By a plaint filed herein on 9th March 2010 the Plaintiff brought this suit against the Defendant seeking:-

a) “declaration that Motor Vehicle No. KAW 936Z was at all material times being used within the limits of its Policy No. 88CO73470 with the Defendant and hence the Defendant be compelled to satisfy the judgments and decrees in the following cases –

1. KISUMU CMCC NO. 15 OF 2009

JACOB OLAWO ODUOGO –VS- PLAINTIFF

2. MASENO SRMCC NO. 03 OF 2008

JOSEPH ODONGO –VS- PLAINTIFF

3. MASENO SRMCC NO. 164 OF 2009

GORDON OCHIENG OBEMBI –VS- PLAINTIFF

4. MASENO SRMCC NO. 02 OF 2008

FREDRICK NYAIDHO –VS- PLAINTIFF

5. KISUMU CMCC NO. 184 OF 2008

JOYCE ANYANGO NOI –VS- PLAINTFF

6. KISUMU CMCC NO. 183 OF 2008

PETER NOI ORWA –VS- PLAINTIFF

7. MASENO SRMCC NO. 47 OF 2008

JOAN ATIENO –VS- PLAINTFF

8. MASENO SRMCC NO. 48 OF 2008

MAURICE OUMA –VS- PLAINTIFF

9. MASENO SRMCC NO. 56 OF 2008

ROSE OBONG’O –VS- PLAINTIFF

10. MASENO SRMCC NO. 67 OF 2008

PAUL OWINO OKUMU –VS- PLAINTIFF

11. MASENO PMCC NO. 124 OF 2008

SARAH ANYANGO OYOLO –VS- PLAINTIFF

12. MASENO SRMCC NO. 171 OF 2008

PENINA ACHIENG –VS- PLAINTIFF

13. MASENO SRMCC NO. 174 OF 2008

JANE A. OSOO –VS- PLAINTIFF

14 KISUMU CMCC NO. 375 OF 2008

JOSHUA OMENDA ODERA –VS- PLAINTFF

15. KISUMU CMCC NO. 374 OF 2008

PAUL OWUOR ONYANGO –VS- PLAINTIFF

16. KISUMU CMCC NO. 373 OF 2008

MARGARET OCHUMA JAJI –VS- PLAINTIFF

17. KISUMU CMCC NO. 96 OF 2008

JOSEPH NYERERE –VS- PLAINTIFF

18. KISUMU CMCC NO. 97 OF 2008

WILSON OPIYO HAWA –VS- PLAINTIFF

19. KISUMU CMCC NO. 99 OF 2008

SAMUEL OUMA ABUNGU –VS- PLAINTIFF

20. MASENO SRMCC NO. 165 OF 2008

PAMELA ATIENO AGIK –VS- PLAINTIFF

21. MASENO SRMCC NO. 166 OF 2008

OWINO ONDIEK ODIEMBO –VS- PLAINTIFF

22. MASENO SRMCC NO. 168 OF 2008

JULIA MUGA OLERO –VS- PLAINTIFF

23. MASENO SRMCC NO. 168 OF 2008

DIANA EMILY OGEU –VS- PLAINTIFF

24. MASENO SRMCC NO. 169 OF 2008

ISABELA ONYANGO OYOO –VS- PLAINTIFF

25. MASENO SRMCC NO. 137 OF 2008

TABITHA ADOYO OPIYO –VS- PLAINTIFF

26. MASENO SRMCC NO. 138 OF 2008

ZILPAN ACHIENG OLOO –VS- PLAINTIFF

27. MASENO SRMCC NO. 139 OF 2008

ANNA ANYANGO OLOO –VS- PLAINTIFF

28. MASENO SRMCC NO. 140 OF 2008

PAMELA PIYO ODONGO –VS- PLAINTIFF

29. MASENO SRMCC NO. 141 OF 2009

ANNE AOKO –VS- PLAINTIFF

30. MASENO SRMCC NO. 142 OF 2009

PHOEBE OMONDI –VS- PLAINTIFF

31. MASENO SRMCC NO. 143 OF 2009

DORINE OTIENDE –VS- PLAINTIFF

32. MASENO SRMCC NO. 144 OF 2008

DORKA ACHOLA –VS- PLAINTIFF

33. MASENO SRMCC NO. 145 OF 2008

SUSAN ODERA OUDU –VS- PLAINTIFF

34. MASENO SRMCC NO. 146 OF 2008

GEORGE JAMES AUMA OKULU –VS- PLAINTIFF

35. MASENO SRMCC NO. 147 OF 2008

MONICA JUDITH ODIWUOR –VS- PLAINTIFF

36. MASENO SRMCC NO. 148 OF 2008

CALEB OKUMU AGUTU –VS- PLAINTIFF

37. MASENO SRMCC NO. 149 OF 2008

PEREZ AGOLA ORUOCH –VS- PLAINTIFF

38. MASENO SRMCC NO. 150 OF 2008

JENNIPHER ADIKA MUGA –VS- PLAINTIFF

39. MASENO SRMCC NO. 152 OF 2008

PRISCA ACHIENG MUGOYA –VS- PLAINTIFF

40. MASENO SRMCC NO. 152 OF 2008

DOKSILA NDHINE OLOO –VS- PLAINTIFF

40. MASENO SRMCC NO. 153 OF 2008

JEREMIAH AMIMO ONDIEK –VS- PLAINTIFF

b) Costs of the suit.

c) Any other relief deemed expedient so to grant.”

4. In its written statement of Defence the Defendant denied ever entering into an Insurance Policy No. 88C073479 in respect of Motor Vehicle KAW 936Z with the Plaintiff and also denied that the said policy was valid on 8th December 2007. The Defendant also denied the particulars of claims lodged in various courts against the Plaintiff and further averred that even if such a policy existed the Plaintiff was in breach of the same, and this suit should therefore be dismissed with costs. Notice of intention to sue was also denied.

5. Although this suit was filed on 9th March 2010 it was not until 5th April that its hearing commenced and even then it proceeded exparte as neither the Defendant nor its Advocate on record attended the hearing despite being duly served with a hearing notice.

6. George Stephen Opiyo (PW1), the Principal of the Plaintiff school testified that he was the Deputy Principal of the Plaintiff school; That on 8th December 2007 their school bus Registration Number KAW 936Z was involved in a collision with a Motor Vehicle Registration No. KAY 811X at a place called Kombewa in Seme. He stated that the bus was insured by Intra Africa Assurance Company Limited, the Defendant vide a Policy No. 88C073470 and that the policy provided for indemnity to the insured in the event of accidents arising from use of the motor vehicle. He stated that at the time of the accident the bus

was going for a school function. He explained that the school is a public school but sponsored by the Catholic Church and that it was ferrying students and church members to a Christian Rally. He stated that after the accident was duly reported to the Defendant it issued a discharge voucher worth 1800,000/= for repairs to the bus and returned the bus to the school after the repairs.

7. However the Defendant refused to indemnify the school in respect of claims against it by forty one (41) people who were involved in the accident saying that the policy did not cover social events. In fact the Defendant instructed its Advocate to withdraw from acting for the school in those claims and advised the school to get another Advocate. He disputed that the bus was used for a wrong purpose and contended it was used within the limits of the insurance cover. He stated that the claims listed at paragraph 3 of this judgment are awaiting judgments in the Maseno Court. He further stated that the choice of the Insurance Company was given to the school by the government and contended that it should be compelled to pay all the claims arising from the accident. He also urged this court to award it the costs of this suit and any accrued interest.

8. The Defendant did not adduce evidence at the hearing. Neither did it file written submissions as directed despite being duly notified.

9. For the Plaintiff it was submitted that it is apparent from correspondences exchanged between the Plaintiff and the Defendant Insurer that the Plaintiff had a valid insurance cover and that the vehicle was being used on a school activity. It was submitted that some of the claimants were in the matatu which collided with the Plaintiff's bus and that is within Third Party risks and the Defendant cannot repudiate its obligation and responsibility through letters. Counsel contended that to repudiate the claim Section 10(1) (4) and (5) of Cap 405 requires that the defendant first get a declaratory judgment to that effect otherwise repudiation of a policy cannot be through a letter. To buttress this assertion Counsel relied on two cases –

a) Eldoret HCCC No. 3 of 2008

Gateway Insurance Company Limited V. Moses Luvai & 5 Others

b) Nairobi HCCC No. 1064 of 2001

Invesco Assurance Company Limited V. Anderson Kiago Wanjoi

Counsel submitted that as the Defendant did not file a declaratory suit or even lodge a Counterclaim in this case the Plaintiff is entitled to the prayers sought. He urged this Court to find that the suit has been proved on a balance of probabilities and enter judgment for the Plaintiff as prayed.

10. On 30th July 2010 Counsel for the Plaintiff's Advocate filed the following statement of Issues –

1. “Was the plaintiff the owner of motor vehicle registration No. KAW 936Z as at the time of the accident?

2. Did the defendant issue an insurance policy cover to the Plaintiff in respect of motor vehicle registration No. KAW 936Z?

3. If so was the policy valid at the time of accident?

4. If the defendant did issue a policy of insurance to the plaintiff, then was the vehicle being used for the purpose for which it was insured?

5. Have several cases been filed against the plaintiff as a result of an accident which occurred on the 8th December, 2007 involving motor vehicle registration Nos. KAW 936Z and KAY 811X?

6. Is the plaintiff entitled to the prayers sought in the plaint?

7. Who is to pay the costs of the suit?"

11. Having heard the Plaintiff's evidence this court is satisfied that the Plaintiff was at all material times the owner of Bus Registration No. KAW 936Z.

12. Whereas the policy document exhibited by the Plaintiff does not refer to the Plaintiff or the registration number of the bus I am satisfied from the correspondences between the Plaintiff and the Defendant that this bus was in fact insured by the Defendant. In one such letter dated October 13, 2008 the Defendant writes,

"Re: Accident Involving KAW 936Z on 8-12-07

..... As per your confirmation that the repairs are complete and satisfactory we are pleased to enclose herewith our Cheque No. 011929 for Kshs.1,739,620.00 in full settlement of the claim"

This also confirms that as at 8th December 2007 when the bus was involved in an accident the insurance policy was valid.

13. That several cases were filed against the Plaintiff following that accident is also admitted in the correspondences and so issue No. 5 above is also answered in the affirmative. The point for determination then is whether the Defendant is liable to satisfy the judgments against the Plaintiff in those matters.

14. The Commercial Vehicle Policy (EXB.1) between the Plaintiff and the Defendant seems to have provided the Plaintiff with what is commonly referred to as a Comprehensive Cover. Under Section I of the Policy the Defendant agreed to indemnify the Plaintiff for loss or damage to the Motor Vehicle and its accessories and spares in the event of a collision. The correspondence I referred to above is proof that the Defendant indemnified the Plaintiff in respect to the damage to the bus and indeed these proceedings do not contain a claim in respect of the bus.

15. Under Section 11 the Defendant agreed to indemnify the Plaintiff and its driver against claims by Third Parties. This is of course subject to limitations as contained in the policy and in the schedule. The policy states –

1. "Indemnity to the Insured

The Company will subject to the Limits of Liability and the Jurisdiction Clause indemnify the Insured in the event of an accident caused by or arising out of the use of the Motor Vehicle or in connection with the loading or unloading of the Motor Vehicle against all sums including claimant's costs and expenses which the Insured shall become legally liable to pay in respect of:-

a) Death of or bodily injury to any person.

b) Damage to property."

16. The Limits of liability and the Jurisdiction Clause which form the exceptions to the policy are contained at page 4 of the Policy document. Firstly the judgment to be satisfied must have been obtained from a court of competent jurisdiction and secondly exception (IV) of EXCEPTIONS TO SECTION II is categorical that the Defendant would not be liable in respect of **"death or injury to any person being carried in or entering or getting onto or alighting from the motor vehicle at the time of the occurrence of the event out of which any claim arises"**. My understanding of the foregoing exception is that the passengers travelling in the bus were not covered by the policy. Secondly whereas the bus

could be used for social, domestic, pleasure purposes, and for the Plaintiff's business the Defendant was emphatic that the policy would not cover use for carriage of passengers or goods for hire or reward. This is as provided under the clause of LIMITATION AS TO USE at page 6 which states:-

“Use for social, domestic and pleasure purposes and for the Insured's business. The policy does not cover use for racing competitions, rallies or trials (or the carriage of passengers or goods for hire or reward.”

17. I have perused the complaints in the Plaintiff's bundle. All the complaints listed from Number 20 to 41 under paragraph 8 are all of persons who allege to have been travelling in the bus. In all of them the Plaintiffs aver that at the time of the accident they were lawful fare paying passengers in the defendant's (meaning the Plaintiff herein) motor vehicle KAW 936Z. The relevant paragraphs in all those complaints is 4 which states –

4. “On or about the 8/12/2007, while the plaintiff was a lawful fare paying passenger in the defendant motor vehicle registration number KAW 936Z ISUZU BUS, along KISUMU – BONDO ROAD at Kolenyo Bridge, the defendant's said motor vehicle was carelessly and recklessly driven controlled and/or managed by the defendant/servant/deriver and/or agent thereby causing and/or permitting the same to loose control and/or veered off the road, hitting/colliding with M/V REG. NO. KAY 811X TOYOTA HIACE MATATU and as a consequent the plaintiff sustained serious injuries thereof.”

18. It is my finding that given the exceptions and limitation to use contained in the policy much as the Plaintiffs were going to a school function the fact that firstly that they were passengers in the motor vehicle and secondly that they were fare paying passengers automatically excludes them from the terms of the policy. In regard to this category of claimants (those in the bus) and who were also being carried for hire or reward, I do not agree with Counsel's submission that in order to avoid liability the Defendant must have first obtained a declaratory judgment. Section 10(1) of the Insurance (Motor Vehicles Third Party Risks) Act upon which Learned Counsel's submission is based makes reference to Section 5 of the Act. Section 5 expressly provides that a policy for Third Party risks shall not be required to cover a person(s) carried in the vehicle except in the case of a vehicle in which passengers are carried for hire or reward or what in traffic parlance are called Public Service Vehicles. The Plaintiff's motor vehicle, a school bus was not a public service vehicle: it was not a matatu so to speak. Liability to persons being carried in the vehicle is therefore not a term of the policy. To the contrary it is excluded and that being the case the Defendant Company is not liable to indemnify the Plaintiff against the claims by the people who were riding in the bus and is not therefore under a duty to satisfy the judgments that may come out those cases.

19. As regards the remaining claims I noted that save for No. (12) **Maseno SRMCC No 171 of 2008 Penina Achieng V. St. Augustine Kandege Secondary School** and No. (13) **Maseno SRMCC No. 174 of 2008 – Jane A. Osoo V. St. Augustine Kandege Secondary School** no complaints were attached and No. (2) (**Maseno SRMCC No. 3 of 2008 – Joseph Odongo V. Kandege Secondary School**) where the school sued is not the Plaintiff in this case the rest of the claims are by third parties who were travelling in a vehicle described as a matatu Registration No. KAY 811X Toyota Hiace. Risks to such persons are provided in the terms of the Policy and more specifically under Section 11. The Defendant would be under a duty to satisfy judgments against the Plaintiff in respect of claims by those third parties only subject to Section 10(2), (3) and (4) of the Insurance (Motor Vehicles Third Party Risks) Act. The Defendant did not adduce any evidence that it was entitled to avoid or had avoided the policy under any of the provisions set out in Section 10 of the Act. Accordingly my finding is that should any judgments be made against the Plaintiff in the suits listed as 13, 5, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 19 in paragraph 8 of the complaint the Defendant shall be under a duty to satisfy those judgments and the decrees arising therefrom.

20. As for the costs of this suit the Plaintiff has succeeded only partly and shall therefore get half the costs. It is so ordered.

Signed, dated and delivered in Kisumu this 21st day of December 2017

E. N. MAINA

JUDGE