



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
CIVIL SUIT NO. 2 OF 2016
THE MONARCH INSURANCE COMPANY LIMITED.....PLAINTIFF
VERSUS
OBUDHO ERICK OTIENO.....DEFENDANT

JUDGMENT

1. The Plaintiff's claim against the Defendant is for:-

“(a) A Declaration that the Plaintiff is not liable or bound to make payments or indemnify the Defendant under the Insurance Policy No. KSM/0700/000848/2012 Third Party only, in respect of any claim in respect to death or bodily injury to any person or passenger being carried arising out of the road traffic accident which occurred on 7th July 2015, along Homa Bay – Kendu Bay road involving the Defendant's Motor Vehicle Registration Number KBM 186M.

(b) Costs of the suit.

(c) Interest on (b) above.”

2. Briefly the Plaintiff's case is that on 12th November 2014 the Defendant applied and was issued with a Third Party Motor Private Insurance cover No. **KSM/0700/000848/2012** for his motor vehicle Registration Number KBM 186M – Toyota Fielder by the Plaintiff Insurance Company. The policy was to commence on 12th November 2014 and expire on 11th November 2015 and the motor vehicle was to be used for private purposes. The Plaintiff averred and gave evidence that the policy covered Third Party risks only but did not cover liability or risks in respect of the death of or bodily injury to passengers being carried in the vehicle for hire and reward.

3. The court heard that on 7th July 2015 at about 7PM the motor vehicle was involved in an accident at a place called Samanga along Kendu Bay – Homa Bay road. The Defendant lodged a claim but when the Plaintiff sent investigators to the scene it was discovered that at the time of the accident the motor vehicle was being used to ferry hospital staff for a fee. Obed Kariuki Ileri (PW1) the Plaintiff's Assistant Claims Manager stated that they therefore filed this suit to avoid liability in a matter that is being heard in the lower court. He stated that the investigator the Plaintiff hired was Factline Insurance Investigators and that the Plaintiff relies solely on that investigator's report.

4. Stephen Kiringu Nduaruihiu (PW2) confirmed that his firm was hired by the Plaintiff to carry out

investigations into the accident that occurred on 7th July 2015. He stated that pursuant to those instructions he travelled to Homa Bay where the Insured/Defendant resides, and/or carries on taxi business and gathered some information before proceeding to Kendu Bay Sub-District Hospital where he got information that the Insured motor vehicle was occasionally hired by the hospital management to ferry field staff. He also stated that upon interviewing the Defendant he the Defendant admitted that he occasionally used the vehicle for hire and reward but maintained that on the material day he had used the vehicle to drop a friend at the Kendu Bay Sub-District Hospital. Stephen Kiringu (PW2) further testified that he personally visited Homa Bay Hospital and saw the motor vehicle and then found out it was being used to ferry staff. He stated that he went to the hospital gate and confirmed from the security guards that the vehicle entered the hospital frequently. He stated that he even obtained the gate passes. He contended that although they were not able to get concrete evidence that the passenger in the vehicle at the time it fatally injured a pedestrian was a hospital staff he had a strong suspicion that he was. He stated that since he was denied access he was not able to establish from the hospital if it hired the Defendant's vehicle to transport its staff.

5. In support of its case the Plaintiff produced a police abstract (EXB.1), the Investigations Report (EXB.2), the Insurance Policy (EXB.3), a schedule thereof (EXB.4) and the Proposal Form (EXB.5).

6. Erick Otieno Obudho (DW1) the Defendant testified that he is a shopkeeper in Homa Bay Town and is the owner of Motor Vehicle KBM 186M which was insured by the Plaintiff. He stated that he took out the Third Party Risks Cover in 2012 and was issued with a Certificate of Insurance No. C 11733498 (EXB.D1). He stated that after the Motor Vehicle was involved in an accident on 7th July 2015 he promptly reported it to Kendu Police Station and obtained a police abstract. He also reported the accident to the Plaintiff. Thereafter he was called to testify in an inquest. He stated that at the time of the accident he was with his friend Clifford Abuyu who he has known since 2010. He contended that the insurance cover was valid and that Clifford worked at Kendu Bay Hospital and he used to visit him often. He further stated that on the material day he was headed to Kendu Bay to drop Clifford at his house. He disputed that Clifford was a fare paying passenger and stated that he was taking him home as a friend. He stated that he was sued in Oyugis Principal Magistrate's Court Civil Case No. 84 of 2016 in connection with the accident and that the Plaintiff is liable to indemnify him as his cover was valid.

7. Clifford Abuyu (DW2) confirmed that at the material time he was working at Kendu Bay Hospital. He denied that he was travelling in the Defendant's car as a fare paying passenger and stated that the Defendant was his friend and was going to drop him at his (DW1'S) house at Kendu Bay Hospital.

8. The Defendant filed a counter claim in which he seeks the dismissal of the Plaintiff's case and a declaration that the Plaintiff is liable and bound to indemnify him against any claim of death or bodily injuries to any person arising out of the accident that occurred on 7th July 2015. He also prayed that the Plaintiff's case be dismissed and that the costs of the suit and of the Counterclaim be awarded to him. He reiterated that his insurance cover with the Plaintiff was valid at the time of the accident and that the passenger he was carrying was a friend but not a fare paying passenger. On being shown the proposal form he stated that he never indicated whether his motor vehicle would be used for hire or reward. He also contended that the contract did not bind him not to carry passengers. He further disclosed that as at 31st July this year the motor vehicle was still insured by the Plaintiff. He produced a Certificate of Insurance to that effect (EXB.D4).

9. Learned Counsel for the parties elected to sum up by way of written submissions but as at the time of writing this judgment none had been received.

10. There is no dispute that on 12th November 2014 the Plaintiff insured the Defendant's Motor Vehicle KBM 186M under a Policy No. **KSM/0700/000848/2012**. There is also no dispute that the policy covered the Defendant's Motor Vehicle in respect of Third Party Risks only. Further there is no dispute that on 7th July 2015 the Plaintiff's motor vehicle was involved in an accident with a pedestrian along the Kendu Bay – Homa Bay road and that the pedestrian sustained fatal injuries.

11. The issue for determination in both the main suit and the Counterclaim is whether or not the Plaintiff is liable to indemnify the Defendant for any claim(s) arising from the accident that occurred on 7th July 2015.

12. The terms of the cover issued by the Plaintiff to the Defendant are contained in the MOTOR PRIVATE INSURANCE POLICY and the POLICY SCHEDULE both produced in evidence as EXB.1. The said Policy defines Third Party as

“any person other than you or your authorized driver who has been injured or whose property has been damaged”.

Liability to Third Parties is set out in Section 11 and the Plaintiff undertakes at Section 11 – 1 to indemnify the insured or his authorized driver or any person getting into or getting out of the vehicle against legal liability for damages for inter alia -

“a) Death or bodily injury to any person.”

13. At first glance from this provision it is evident that the policy covered the Defendant against claims as would arise from the accident of 7th July 2015. However there are exceptions and those are set out under General Exceptions where the Insurer categorically states that it will not be liable in respect of any accident, loss, damage or liability caused, sustained or incurred if the vehicle is used contrary to the limitations as to use clause – (See 1(b) of the General Exceptions). The Limitation to use clause is contained in the POLICY SCHEDULE and it states:

“Use only for social, domestic and pleasure purposes and for your business and profession. The policy does not cover use for racing, competition, rallies or trials (or use for practice for any of them of the carriage of passengers for hire or reward.”

14. The Plaintiff seeks to rely on this clause in its quest to avoid liability. In so doing it has called an Investigator (PW2) and produced an investigator’s report as evidence that the Defendant’s Motor Vehicle, was at the time of the accident, being used for carriage of a passenger for hire or reward.

15. Having considered the evidence of the investigator carefully I am not satisfied that it was proved that at the time of the accident the insured motor vehicle was being used contrary to the limitation as to use Clause. The Investigator (PW2) candidly told this court that although he had a strong suspicion the motor vehicle was being used to ferry hospital staff he did not have proof. Indeed PW2 stated that he interviewed the person who was in the motor vehicle when the accident occurred but did not ask him if he paid any fare. That person – Clifford Abuya and the Defendant both denied he was a fare paying passenger – and as the investigator (PW2) did not adduce evidence to the contrary this court is bound to believe them. It is also instructive that the Appendix I referred to in the Investigations Report and which allegedly contains a statement of the Defendant admitting he occasionally used the vehicle for hire or reward was not annexed. The upshot therefore is that the Plaintiff has not discharged its burden of proof and this court is not persuaded that the Defendant acted in breach of the terms of the policy. The suit by the Plaintiff is therefore dismissed with costs to the Defendant and the Counterclaim is allowed with costs to the Plaintiff. It is so ordered.

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

E. N. MAINA

JUDGE