



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 223 OF 2009

CORPORATE INSURANCE COMPANY LIMITED.....PLAINTIFF

VERSUS

STAR GENERAL CONTRACTORS LIMITED.....DEFENDANT

JUDGMENT OF THE COURT

1. The Plaintiff filed the claim herein vide its plaint dated 21st July, 2009 and filed herein on 22nd July, 2008 seeking the following orders;

a. A Declaration that it is and has at all material times been entitled to avoid the Commercial Vehicle Policy of insurance No. C01/080/1/001935/2006 renewed on 6th April, 2007 apart from any provision contained therein on the ground that the said policy of insurance was obtained by the non-disclosure of material facts and/or by the representations of facts which were false in some material particular or particulars;

b. A Declaration that the Plaintiff is not liable to indemnify the defendant for claims by the passengers injured or killed as a result of the said accident under the said policy or under The Insurance (Motor Vehicles Third Party Risks) Act, Cap 405.

c. Costs of and incidental to this suit and interest thereon at Court rates.

2. The Plaintiff's case is that it is an authorized insurer within the meaning of ***The Insurance Act (Cap 487)*** as read with ***The Insurance (Motor Vehicles Third Party Risks) Act (Cap 405)*** (hereinafter called "Cap 405") of the Laws of Kenya and by a commercial motor vehicle cover issued by the Plaintiff to the Defendant on the 22nd day of March, 2008, and subsequently renewed, the Plaintiff undertook to cover third party risks in respect of a motor lorry registration number KVZ 091 belonging to the Defendant and described in Policy Number C01/ 080/ 1/ 901272/ 2008 . The liability to third party risks aforesaid specifically excluded passengers who may be injured while in the insured's motor vehicle as passengers. The Plaintiff contends that the said Insurance Policy No. C01/080/1/901272/2008 was confined to the carriage of the Defendant's own goods and by taking the policy the Plaintiff agreed that for the period of the existence of the insurance cover it would indemnify the Defendant against liability to third parties that is to say that it would indemnify the Defendant in the event of accident caused by or arising out of the use of the said motor lorry in which third parties other than passengers carried in the said motor lorry (either fare-paying or otherwise) against all sums including costs and expenses which the Defendant should become legally liable to pay in respect of death of or bodily injury to any person being a liability as is required to be covered by a policy of insurance under paragraph(b) of **Section 5 of Cap 405**. The Plaintiff therefore contends that it was not liable to indemnify the Defendant for claims by passengers who could be injured while in the said lorry, either under the insurance contract between it and the

Defendant or under the said **Cap 405**. In pursuance of the said policy in accordance with the provisions of Section 7 of the Act of the Plaintiff delivered to the Defendant a Certificate of Insurance. The Plaintiff avers that in taking the said policy, the Defendant failed to disclose material facts and/or represented facts that were false in material particulars in the plaint, that is, that at all material times the motor vehicle was used for carriage and/or transportation of passengers. The Defendant on diverse dates during the existence of the said policy and particularly on the 20th day of June, 2009 used the said motor lorry for the carriage and/or conveyance of passenger/s in contravention of the clear terms and conditions of the said policy.

3. On the 20th day of June, 2009 during the currency of the said Commercial Vehicle policy and while it was in full force and effect the defendant's said motor lorry was involved in an accident at MBIIANI along MBUMBUNI-TAWA road in which passengers travelling therein suffered injuries. The said injured passengers have now instituted civil proceedings against the defendant being S.R.M.C.C. Nos. 137 and 138 at Tawa Law Courts, claiming damages against the defendant on the grounds that the injuries sustained by the said passengers were caused by the negligent driving of the defendant's said motor vehicle by its servant or agent and/or driver and that the claims are in respect of such a liability or liabilities as is or are required to be covered by the terms of the said policy. By reason of the provisions of **sub-section (4) of Section 10** of the said Act the Plaintiff claims that apart from any provision contained in the said policy it is and at all material times was entitled to avoid the same on the grounds that the said policy was obtained by the Defendant by the non-disclosure and/or misrepresentations of the material facts referred to in paragraph 2 above.

4. The defendant controverted the Plaintiff's claim vide a Defence and Counter-claim dated and filed herein on 14th August, 2009.

5. The Defendant admits it was insured by the Plaintiff vide Policy Number C01/080/1/901272/2008 and the said policy was a comprehensive policy covering third party risks and the said insurance policy was subject to third party excess clause. The defendant categorically denied that the aforesaid cover exempted the Plaintiff from liability to Third Party risks and specifically excluded passengers or that it did not include authorized passengers as alleged in Paragraph 4 of the plaint and puts the Plaintiff to strict proof thereof. The Defendant contends that the aforesaid Policy was a Third Party Policy and that it covered the alleged accident that occurred on 20th June, 2009 involving the insured motor vehicle and the Plaintiff is liable to pay the claims arising therefrom. The Defendant denies that during the existence of the said policy and particularly on the 20th June, 2009, that the said motor lorry was used for carriage and/or conveyance of passengers in contravention of the terms and conditions of the policy and puts the Plaintiff to strict proof thereof. The defendant's case is that if there were any passengers at all, they were authorized passenger as contemplated in the Insurance Policy. The Defendant further denied that it failed to disclose material facts and/or represented facts that were false and further denies in singular all the alleged false particulars/facts as set out in the Plaint. Further, the Defendant denies that the Plaintiff by reasons of provision of **sub-section 4 of Section 10 Cap 405**, is entitled to avoid the aforesaid policy. The Defendant counter claims against the Plaintiff, stating that the Plaintiff is liable to pay the claims arising out of civil claims against the Defendant being SRMCC NOS. 137,138 and 140 of 2009 at Tawa Law Courts.

6. The defendant in its Counter-claim prays:

a. That the Plaintiff's suit be dismissed with costs.

b. A declaration that the Plaintiff is liable to satisfy all civil suits arising from an accident on 20.6.209 which occurred during the pendency of commercial vehicle Policy Insurance No. C01/080/1/001935/2006.

*c. A declaration that the Plaintiff is liable to indemnify the Defendants claims for passengers injured and killed as a result of the said accident or under the Insurance (**Motor Vehicle Third Party Risks**) Act **CAP 405**.*

d. A declaration that the Defendant has not breached any terms or conditions of the aforesaid policy.

e. Costs of and incidental to this suit and interest thereon at court rates.

7. The Plaintiff filed a Reply to Defence and Counter-Claim on 24th August, 2009 and denied the allegations contained in the defence and counter-claim and restated the claims in the Plaintiff.

8. The Plaintiff filed its list of witness on 15th July, 2015 and a list of documents and its issues on 22nd November, 2010. There is no evidence on record that the Defendant filed any documents in compliance with **Order 11** of the **Civil Procedure Rules** or that it filed its list of witness. After the filing of defence there appears to have been little if any, participation by the defendant in this suit.

9. The suit was listed for hearing on 18th July, 2016 by the court in the presence of the Plaintiff's counsel and in the absence of the defence. The said hearing notice was served upon the defendant's Advocates M/S Anne W. Thoronjo & Co. advocates on 6th August, 2016 and was received in that firm on the same date. An affidavit of service was filed on 18th July, 2016. Being satisfied that the service of notice of hearing was done and properly so, this court allowed the plaintiff to proceed with the case in the absence of the defendant.

10. The Plaintiff called one witness PW1 who adopted his statement and reiterated the content of the Plaintiff as the truth. He also adopted the Plaintiff's Bundle of documents.

11. The Plaintiff testified that the defendant had abrogated the terms of the policy of insurance which it had with the plaintiff by carrying passengers, which was not allowed in the policy. The witness prayed that the suit be allowed as prayed.

12. I have carefully considered the suit. I will adopt the issues raised by the Plaintiff for determination, and these are

a. Whether the Commercial vehicle Policy No. C01/080/1/901272/2008 spelt out the terms and conditions of the cover.

b. If the answer to 1 above is affirmative, was Motor Vehicle registration Number KVZ 091 being used within the said terms of the insurance policy at all material times?

c. Did the defendant use the said Motor Vehicle registration No. KVZ 091 in contravention of the terms and conditions of the subject commercial vehicle policy and if so, is the plaintiff entitled to avoid the policy in terms of prayer (1) in the plaintiff?

d. Did the defendant fail to disclose material facts when taking the said policy No. C01.080/1/901272/2008 and if so, is the plaintiff entitled to avoid the policy in terms prayed in the Plaintiff?

e. Is the plaintiff liable to compensate claims arising out of the subject accident involving Motor Vehicle Registration No. KVZ 091?

f. Is the Defendant entitled to be indemnified by the Plaintiff in terms of the prayers made in the amended defence and counter-claims?

g. Who should meet the costs of this case?

13. I will address all those issues together in this judgment. The Plaintiff is an authorized insurer within the meaning of **The Insurance Act (Cap 487)** as read with **The Insurance (Motor vehicles Third Party**

Risks) Act (Cap 405) (hereinafter called “Cap 405”) of the laws of Kenya and by a renewed commercial motor vehicle insurance cover issued by the Plaintiff to the Defendant on the 22nd day of March, 2008, the Plaintiff undertook to cover third party risks in respect of a motor lorry registration number KVS 091 belonging to the Defendant and described in Policy Number C01/080/1/901272/2008. The liability to 3rd Party risks in the said insurance cover specifically excluded passengers who may be injured whilst in the Defendant’s motor vehicle as passengers as can clearly be seen in the exceptions to **Section II at page 8** of the said document. The Commercial Vehicle Policy Document No. 1 in the filed List. The sub clause No. (iii) provides as follows;

The Company shall not be liable in respect of;

(iii) Death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contact of employment) being carried in or upon or entering or getting on to or alighting from the Motor Vehicle at the time of the occurrence of the event out of which any claim arises.

14. The Plaintiff submits that the said Insurance Policy No. CO1/080/1/901272/2008 which was renewed annually was confined to the carriage of goods only and excluded passengers other than those in the employment of the Defendant and by taking the policy the Plaintiff agreed that for the period of the existence of the cover it would indemnify the Defendant against liability to third parties that is to indemnify the Defendant in case of accident caused by or arising out of the use of the said motor vehicle in which 3rd parties, other than passengers in the Defendant’s employment incur death or bodily injuries. In pursuance to the said policy and in accordance with the provisions of Section 7 of Cap 405 the Plaintiff delivered to the Defendant a certificate of insurance. The Plaintiff further submits that in taking the said policy, the Defendant failed to disclose material facts and/or represented facts that were false in particulars set out in the Plaintiff.

15. On the 20th June, 2009 during the currency of the said Commercial Vehicle policy and while it was in full force and effect the Defendant’s said motor lorry was involved in an accident as a result of which passengers travelling therein (**Jackson Kilonzo Kimatu and Ngila Mulyungi**) allegedly suffered injuries – (***See Plaints Listed as document No. 2 in the List where in paragraph 6, it is pleaded that the Plaintiffs were lawfully travelling as passengers in the said motor Lorry KVZ 091.***) The said Plaintiffs have sued the insured’s driver for negligent driving and the insured in turn claims that the liability or liabilities sued are required to be covered by the terms of the said policy. Statutory Notices issued under **Section 10 of Cap 405** and served on the plaintiff herein are filed and listed at pages 22, 25 and 28 of the list. The plaintiff submitted that it is entitled to avoid the said Policy on the ground that the said policy was obtained by the Defendant by the non disclosure and/or misrepresentations of facts and secondly, under the said policy it cannot and is not obligated to indemnify any passengers travelling in the said motor vehicle.

16. Arising from the foregoing, it is the finding of this court that the plaintiff has proved its case on a balance of probability. The court has considered the defence and counter-claim. The defendant never tendered any evidence to controvert that of the plaintiff. This court is entitled to believe that the defendant had no evidence to challenge the evidence of the Plaintiff. In essence therefore, the Defence and Counter-Claimed is herewith dismissed out and Judgment is hereby entered in favour of the Plaintiff in the following terms;

a. A Declaration that it is and has at all material times been entitled to avoid the Commercial Vehicle Policy of insurance No. C01/080/1/001935/2006 renewed on 6th April, 2007 apart from any provision contained therein on the ground that the said policy of insurance was obtained by the non-disclosure of material facts and/or by the representations of facts which were false in some material particular or particulars;

b. A Declaration that the Plaintiff is not liable to indemnify the defendant for claims by the passengers injured or killed as a result of the said accident under the said policy or under The

Insurance (Motor Vehicles Third Party Risks) Act, Cap 405.

c. Costs of and incidental to this suit and interest thereon at Court rates.

That is the judgment of the court.

DATED, SIGNED AND DELIVERED THIS 26TH DAY OF OCTOBER, 2016

E.K.O. OGOLA

JUDGE

In the presence of;

Mr. Nyandieka holding brief for Mr. Muturi for Plaintiff

Court Assistant – Mr. Munyao