

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 476 OF 2009

**TAUSI ASSURANCE COMPANY LIMITED.
APPELLANT**

VERSUS

PATRICIA MIDIKA KIDOGO.

**(ADMINISTRATOR AND/OR PERSONAL REPRESENTATIVE OF THE ESTATE OF
RICHARD ODANGA MUKOBERO).....**

..... RESPONDENT

J U D G M E N T

This appeal arises from a Ruling of Ms Maina, Senior Principal magistrate (as she then was) in Nairobi Milimani, CMCC No 8819 of 2007 in a Chamber summons dated 17th March, 2009. In Milimani CMCC No. 4613 of 2005, the Respondent had obtained a judgment for a sum of Kshs.1,119,220/- as damages with costs and interest, arising from a motor vehicle accident. That is the amount the Respondent as a Plaintiff sought to have declared as a judgment in his favour in Milimani CMCC No. 8819 of 2007.

The Appellant, an Insurance Company was the Defendant in the said suit. It had insured the motor vehicle No. KAN 259P owned by Mohammed Hassan against whom a judgment for the above amount had been entered in favour of the Respondent in CMCC no. 4613 of 2005. A declaratory suit No. 8819 of 2007 was intended to recover the Judgment Sum under Section 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405 of the Laws of Kenya.

In the amended Defence filed to an Amended Plaintiff in CMCC no. 8819 of 2007, the Appellant had stated in paragraphs:

6). The Defendant shall contend that the motor vehicle in question being a private motor vehicle, its insurance policy was not under Section 5 of the Insurance (Motor Vehicles Third party Risks) Act (Cap 405 of the Laws of Kenya) required to cover liability in respect of death of or bodily injury to passengers travelling in it, which the deceased is alleged to have been and the Defendant shall put the Plaintiff to strict proof of such requirement.

8) In answer to paragraph 8 of the Defendant contends that Section 10(1) of Cap 405 aforesaid, only applies in respect of such liability as is required to be covered by a Policy under paragraph (b) of Section 5 and passenger liability required to be so covered in respect of the motor vehicle herein, and therefore the said Section is not applicable in this matter and the Defendant puts the Plaintiff to strict proof of its applicability.

In the meantime, from the record, it is not in dispute that the deceased was travelling as a passenger in motor vehicle Registration No. KAN 259P and that the same was involved in the alleged accident which led to his death. It is also not in dispute that the respondent had insured the said motor vehicle with the Appellant at the material time. There is also no dispute that the motor vehicle KAN 259P was a private motor vehicle whose insurance policy was not by law required to cover liability in respect of death of or body injuries to passengers travelling in the said motor vehicle (See **OKEYO & PHOEBE ANYANGO AKEYO VS KENYA ALLIANCE INSURANCE CO. LTD**, and Court of Appeal, Civil Appeal No. 1010 of 2000 – **MARIA CIABAITARU & OTHERS VS BLUE SHIELD INSURANCE COMPANY LTD**).

The Respondent had not filed any reply to the Amended Defence suggesting that he joined the issue or did not oppose the issue therein raised. Nor did the Respondent/Plaintiff therein aver that the deceased was a fare paying passenger or was travelling in the said motor vehicle by reason of or in pursuance of a contract of employment.

The view this court takes is that Section 10 of the Insurance (Motor Vehicles third Party Risks) Act allow for declaratory suits when judgment exists for risks required to be covered by Section 5. There may be, in my view, (and I make no final finding) no requirement in law for a passenger cover for a vehicle not used to carry passengers for hire or reward or by reason of or in pursuance of a contract of employment.

The Appellant in his pleadings clearly made the above interpretation of Sections 10 and 5 of the Act an issue which, in my view would only be properly canvassed during a full trial. The application to strike out the Amended Defence in such circumstances would, therefore, only be intended to deny the Defendant/Appellant the entitled right to defend the suit. At the end of the day, that is what the trial magistrate actually did when he struck out the amended Defence.

As I have already stated the amended Defence raised triable legal issues which should have been left to go to trial. Having come to this conclusion the court finds no need to delve into other grounds of appeal raised in this appeal. The appeal has merit and is hereby allowed. The court hereby sets aside the Ruling of the Trial magistrate and thereby reinstates the Amended Defence. The suit is ordered to proceed to full trial in the normal way before a magistrate with jurisdiction. Costs of this appeal are to the Appellant. Orders accordingly.

Dated and delivered at Nairobi this 23rd day of April, 2015.

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D A ONYANCHA

JUDGE