



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 569 OF 2003

GATEWAY INSURANCE COMPANY LIMITED ::::::::::::::: PLAINTIFF

VERSUS

KABOYKEK FARMERS CO-OPERATIVE

SOCIETY LIMITED ::::::::::::::: 1ST DEFENDANT

J U D G E M E N T

1. The Plaintiff filed the suit herein on 16th September 2013 which was amended on 24th July 2004, seeking the following orders:-

1. ***A declaration that the Plaintiff is and has at all material times been entitled to avoid the aforesaid policy of insurance no. 051/081/055033/2002/01 apart from any provisions contained therein on the ground that the said policy of insurance was obtained by:-***
2. ***A non-disclosure of a material fact or facts or***
3. ***Representatives of fact which were false in material particulars or***
4. ***Both (i) and (ii) above.***
5. ***A declaration that the Plaintiff is not liable to make any payment under the aforesaid policy of insurance no. 051/081/055033/2002/01 in respect to any claim against the Defendant herein arising out of the fatal and other injuries sustained in the accident of 9th February 2002 involving Ford Tractor and Trailer registration number KAC 592Z/ZA 6611.***
6. ***A declaration that motor vehicle KAC 592Z/ZA 6611 was being used for non-insured purposes on 9th September 2002 and therefore the Plaintiff is not liable to pay any claim arising out of the accident on 9th February 2003.***
7. ***Cost of this suit.***

2. The Defendant entered an appearance on 16th April 2004 and a statement of defence was filed on 3rd May 2004. In the defence, the Defendant completely denied the allegations contained in the Plaint and all the prayers and the Plaintiff was put to the strict proof of the allegations. On 19th September 2005 the parties filed agreed statement of issues. The Defendant filed its list of documents on 16th January 2006 while the Plaintiff filed its amended list of documents on 30th November 2011. The parties' advocates listed the matter for hearing on 29th January 2014. However, on that day a M/s Langat for the Defendant sought adjournment of the hearing on the grounds that their firm no longer had instructions on the matter and that they were seeking to cease acting for the Defendant. The court, in allowing the application, directed the said advocate to serve the Defendant with that application. There is no evidence that the said advocates ever made the said application to withdraw from representing the Defendant. The court record shows that on 11th March 2014 the Plaintiff took an ex-parte hearing date for 10th July 2014. The notice

of the hearing date was served upon Mitey & Associates, Advocate for the Defendants on 26th March 2014 by Samson K. Mulei, a process server who filed an affidavit of service on 30th May 2014. The notice was received and stamped by the said Mitey & Associates Advocates on 26th March 2014. Being satisfied that the hearing notice was duly served, I allowed the Plaintiff to proceed with the hearing on the suit on 10th July 2014.

3. The Plaintiff called one witness Geoffrey Marigga Ngetie (PW 1) who relied on his witness statement filed in court on 14th October 2013. The witness testified that he is the officer in charge of undermining at the Plaintiff's Head Office, a job he had done for 18 years. He was in charge at the time the issues herein took place and so he was conversant with the matter. It was the Plaintiff's case that it issued the Defendant with a commercial vehicle policy of insurance against Third Party Risks in respect of a Tractor and Trailer Registration No. KAC 592 Z/ZA6611 for a period of 12 months from 9th January 2002. The proposal form was attached to the list of Plaintiff's documents and it constituted the terms under which the parties contracted.

4. Once the Plaintiff confirmed that the proposal was in order, a Certificate of Insurance number B1800659 and B1800660 for the tractor and trailer respectively, were issued to the Defendant specifying the period of cover to before 9/01/2002 to 8/01/2003. The same was produce in court.

5. The insurance obtained by the Defendant and as is exhibited by the Policy Document produced in evidence hereof indicated that the Defendant's motor vehicle was to be used for carrying own general goods. The Defendant did not intimate to the Plaintiff that he intended to use the vehicle for purposes other than the ones declared in the proposal form to wit, to carry own goods. The Defendant further agreed to abide by the terms and conditions of the policy of insurance number 051/081/055037/2002/07.

6. Under the said policy, the Plaintiff is entitled to avoid the policy should the vehicle be used otherwise than in accordance with the limitations as to use. The policy provided that the vehicle would be used for agriculture and forestry purposes and the policy would not cover any use for the carriage of passengers for hire or reward.

7. The Plaintiff's witness further testified that on 9th February 2002, the insured vehicle was involved in an accident along Kericho – Muhoroni road while ferrying farmer's sugarcane when at Kaguta Area passengers boarded the Tractor without the driver's authorization which was outside the purpose given in the proposal form. The said passengers mounted the Tractor without the consent of the driver and further they were not workers or employees of the insured.

8. As a result, a passenger by the name of Morris Juma was fatally injured and Michael A. Otieno and William Otieno Oruko were seriously injured. The Plaintiff knew of the accident after receiving summons and plaints in Nyando SRMCC NO. 48 and 49 of 2002.

9. The Plaintiff later instituted investigations through Prodigy Commercial Assessors who submitted an investigations Report confirming that indeed, the insured vehicle was involved in an accident along Kericho – Muhoroni road on 9th February 2002 while ferrying farmer's sugarcane with three passengers aboard without authorization which was outside the purpose given in the proposal form. On the strength of this finding, the Plaintiff did not honour the summons and plaints. The use of the vehicle to ferry farmer's sugarcane with three passengers aboard without authorisation was in contravention with the terms of the policy and indeed there was no passenger cover for the policy. The witness stated that Section 5 (b) of the Insurance (Motor Vehicle Third Party Risk) Cap 405 entitles the Defendant to avoid the said policy on the grounds that the persons on board the insured tractor were not insured. The Defendant's authorised driver made misrepresentation and failed to disclose that he would use the vehicle for hire and reward and/or to carry passengers. The Plaintiff cannot therefore be called upon to honour claims arising from a risk that did not form part of the insurance contract and in any event, the contract of insurance provided that the Plaintiff was entitled to avoid the policy if there was breach of any terms. The witness stated that the Plaintiff had proved their case on a balance of probabilities for the court to issue the orders sought in the Plaint.

10. I have considered the Plaintiff's evidence. The evidence is not challenged. The presumption therefore is that the Plaintiff's witness is telling the truth. However, that notwithstanding, I have considered the defence filed herein and the agreed issues filed by the parties on 19th September 2004. The defence appears to be a sham defence, and most of the agreed issues favour a finding for the Plaintiff. I am satisfied that the Plaintiff has proved his case on a balance of probabilities, and in the absence of any contrary evidence from the Defendant I believe the Plaintiff is entitled to the orders sought in the Plaintiff.

11. In the case of **GATEWAY INSURANCE CO. LTD VS ALBERT J. N. NJAGI , NAIROBI HCCC NO. 9 OF 2004**, the Defendant applied for and was issued with a Commercial Vehicle policy of Insurance for his Toyota Hilus pick-up registration number KSW 814. According to the Proposal Form, the vehicle was to be used for carriage of own goods. The vehicle was involved in an accident while being used to ferry fare-paying passengers. While holding that the Plaintiff was entitled to avoid the policy and not pay claims arising therefrom, Ochieng J, stated that in *so far as the vehicle had been put to use other than that for which it was insured, the Defendant did obtain the policy through non-disclosure of a material fact and accordingly the Plaintiff cannot be under an obligation to honour its part of the contract of insurance.*

12. In the case of **GATEWAY INSURANCE CO. LTD VS MUSYOKA MUTHENGI, NAIROBI HCCC NO. 666 OF 2004**, while applying for a Full Third Party cover by the Plaintiff, the Defendant filed a Proposal Form stating that his Motor vehicle registration number KYS 357 shall be used for carrying own good and that he did not require any cover for passengers. Later an accident occurred while it was being used as a "matatu" and a claim was brought by a "passenger". The court held that the Plaintiff was not liable to make any payment under the policy as the *Defendant had violated express terms and conditions of the Insurance Contract stipulating that the vehicle could not be used for carrying own goods.*

13. The upshot of the above is that Judgement is hereby entered for the Plaintiff in terms of the said Amended Plaintiff. Costs shall also be for the Plaintiff.

That is the Judgement of the court.

READ, DELIVERED AND DATED AT NAIROBI THIS 17TH DAY OF OCTOBER 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Macharia holding brief for Kinyua for the Plaintiff

No appearance for the Defendants

Irene – Court Clerk