



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 530 OF 2011

EXPLICOINSURANCE CO. LTD.....PLAINTIFF

VERSUS

SAMUEL NYAKERI.....DEFENDANT

JUDGMENT

1. The plaintiff company filed this suit against the defendant essentially seeking a declaration that it was not the insurer of motor of motor vehicle registration number KAU 531T (*'the vehicle'*) and it is therefore not liable for any claims, third party or otherwise relating to the said vehicle and more particularly, claims arising from the accident that occurred on 7th March, 2011. The defendant did not enter appearance in this suit. Interlocutory judgment was therefore entered against the defendant on 13th June, 2013 and the matter proceeded for formal proof.

2. The facts in support of the claim are that a road traffic accident occurred on 7th March, 2011. The defendant herein was sued in Milimani Commercial Courts CMCC No. 2650 of 2011 as the owner of the vehicle. The plaintiff was on 1st August, 2011 issued with a statutory notice dated 18th May, 2011 pursuant to Section 10(2) of the Insurance (Third Party Risks) Act (Cap 405) Laws of Kenya. The underwriting documents in respect of the defendant's vehicle could not be traced by the plaintiff's officers. A step was then taken to investigate the existence of the certificate of insurance by the Association of Kenya Insurers (*'AKI'*). The certificate was found to be non-existent. A further investigation by Infolink Insurance Investigation Company (*'Infolink'*) revealed that the plaintiff was not the insurer of the defendant's vehicle and that the defendant's insurance cover for the vehicle was fraudulently obtained.

3. The plaintiff's legal officer, Reuben Albanus Kioko testified that the AKI confirmed that the defendant's insurance cover was spurious and the investigations by Infolink revealed that there was no privity of contract between the plaintiff and the defendant. Mr. Albanus produced a letter dated 27th October, 2011 from AKI (P. Exhibit 2) and a report dated 17th November, 2011 by Infolink (P. Exhibit 3) in support of the plaintiff's allegations. He further stated that the defendant was given an opportunity to explain how he got the insurance cover to no avail.

4. The plaintiff filed written submissions. It was argued that an insurance cover envisaged to third party risks can only be issued following a valid contract of insurance with a licensed insurer. The procedure for entering such a contract requires that the person requiring the cover completes a proposal form, pays premium and is issued with a certificate corresponding to the cover proposed for and which is governed by terms and conditions contained in the policy which must be signed by the insured. The certificate of insurance must also be in a prescribed form and the policy number must be indicated on the certificate.

5. I have considered the plaintiff's pleadings, the evidence adduced as well as the plaintiff's submissions.

6. The police abstract relied on in Milimani Commercial Courts CMCC No. 2650 of 2011 indicate that the vehicle was insured by the plaintiff under policy number P/No. 01/070/1/003364/1. The plaintiff has however furnished this court with sufficient evidence i.e. a certificates of insurance for the period 3rd June, 2011 to 2nd July, 2011 and 3rd July, 2011 to 29th March, 2012 for motor vehicle registration number KAD 047S proving that in fact the holder of the said policy number is one, Leonard Kamwamba. AKI's conclusion to the investigation was that they had no certificate with the serial number 6448 held by the defendant. With regard to the said serial number, Infolink made an inference that insurance certificates have seven (7) digits and not four (4) as portrayed in the defendant's certificate. The defendant on the other hand was not available to controvert the plaintiff's claim and evidence. I am in the circumstances satisfied that the plaintiff has discharged the burden of proving that there was no privity of contract between it and the defendant.

7. In view of the foregoing coupled with the Court of Appeal's sentiments with regard to interlocutory judgment in *Felix Mathenge v. Kenya Power & Lighting Co. Ltd Civil Appeal (2008) eKLR* where it was said:

“The role of the court after entering the interlocutory judgment was only to assess damages since interlocutory judgment having been regularly obtained there can never be any doubt that judgment was final with regard to liability and was unassailable. It was only interlocutory with regard to the quantum of damages.”

8. I find and hold that the plaintiff's claim is meritorious and accordingly declare that:

- a. The plaintiff was not the insurer of motor vehicle registration number KAU 531T and hence not liable for any claims, whether for third party or otherwise relating to the said vehicle.
- b. Costs awarded to the plaintiff.

Dated, Signed and Delivered in open court this 21st day of November, 2014.

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant