REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Case 225 of 2007

DAY BREAK LIMITED……..……...…PLAINTIFF

VERSUS

THE MONARCH INSURANCE CO. LIMITED…….....DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit by way of a Plaint dated 3rd May 2007 and filed in Court on the same day. The brief facts of the case are as follows;

2. At all material times the Plaintiff was the owner of motor vehicle KAQ 059B Isuzu Lorry while the Defendant had provided an insurance cover for the said motor vehicle. The Plaintiff's motor vehicle was a petroleum tanker whose business was to transport fuel. The insurance policy on the said vehicle, which was comprehensive was taken out with the defendant under policy no. 2006 080 007537 and it stated that it covered among other things;

'accidental damages to the vehicle by collision, fire or explosion. The Policy also covers theft as well as third party liability occasioned by use of the insured vehicle.'

3. On or about the 27th day of October 2006, the Plaintiff's motor vehicle was involved in a road accident along Embu-Meru Road while transporting fuel as a result of which the vehicle burst into flames occasioning total loss of the said motor vehicle.

4. The Plaintiff's case is that it was incumbent upon the Defendant to compensate them for loss of the motor vehicle at the insured value which was Kshs. 4,000,000/= together with other losses incidental to the loss incurred. The Plaintiff's claim is for a declaration that the defendant is bound to compensate the Plaintiff for the loss of the motor vehicle herein and to the tune of the sum assured and all other losses arising.

5. The Plaintiff prays for the following:-

i) A declaration that the defendant should compensate the plaintiff pursuant to the contract of insurance.

ii) Judgment be entered for Kshs. 4,140,080.00.

iii) Cost and interest till payment in full.

6. The Defendant filed a defence dated 31st May 2007 and filed in Court on 4th June 2007. In its defence, the defendant does not dispute having issued the Plaintiff with an insurance cover. According to the Defendant the contract was based on the information that, among others, the vehicle would not be hired out.

7. The defendant does not also dispute that the vehicle was involved in a road accident on or about 27th of October 2006. However the defendant denies the loss as claimed by the Plaintiff. The defendant claims that the plaintiff hired out the vehicle to Mountain View transporters Limited contrary to the insurance contract. Therefore, the said contract being one of utmost good faith, the plaintiff was guilty of material misrepresentation or non-disclosure as a result of which it forfeited all benefit it was entitled to under the contract. The defendant also avers that the sum of Kshs. 4,000,000 was not the 'insured value' but the sum insured meaning that it would have been the limit of the liability of the defendant under the contract were the plaintiff's claim payable.

8. The defendant's case is that the plaintiff is not entitled to any relief against it as sought in the plaint or at all.

9. The Plaintiff filed a Reply to defence on 14th June 2007 and denied the allegation that it hired out the motor vehicle to Mountain View transporters limited. The Plaintiff averred that it had only entered into a management agreement with M/s Mountain View Transporters Limited.

10. The hearing commenced on 13th March 2012 with Mr. Joseph Mbugua, the Managing Director of the Plaintiff Company testifying as PW1. Mr. Mbugua reiterated the facts of the case as stated in the Plaint. He averred that the vehicle was never on hire to Mountain View Transporters Ltd. He further averred that they had a collaboration contract agreement with Mountain View on work. He went ahead to explain the nature of the Plaintiff's business and stated that the truck would transport the Plaintiff's products based on Mombasa road and transport products for others who were doing similar business. His testimony was that when they transported third party goods, they did not hire out the truck but just offered transport services to those who needed them when they did not have work of their own. He further testified that on the material day of the accident the truck was transporting products belonging to Mountain View Transporters ltd. He also testified that the defendant had not issued the Plaintiff with the policy document up to date.

11. On cross-examination, Mr. Mbugua testified that the driver of the truck was employed by Mountain View Transporters ltd in accordance with the collaboration agreement between the Plaintiff and Mountain View. He further testified that the products being transported on the day of the accident were from Total, the invoice was addressed to the truck no. KAQ 059B and the transporter's name was Mountain View.

12. On re-examination, Mr. Mbugua testified that Mountain View was like the Plaintiff's agent and the Plaintiff used them to access business. He averred that the Collaboration agreement was not a document for hire and that if the Plaintiff wanted to hire the vehicle they could have entered into a clear Hire Agreement. He referred to paragraph (c) of the proposal form on use of the vehicle which stated thus:

"do you carry other people's goods for hire or reward?"

The plaintiff answered the above in the affirmative. He further referred to paragraph (f) in the said form which asked the Plaintiff whether they would let the vehicle for hire. The Plaintiff answered the said question in the negative.

13. Mr. Michael Ndungu, a motor assessor t/a Fineline Motor assessor testified as PW2. He essentially highlighted his assessment report dated 15th March 2007 and filed in Court as one of the Plaintiff's bundle of documents.

14. The defence case commenced on 24th May 2012 with Mr. Peter Mwaniki, the deputy claims manager with the defendant company leading evidence as DW1. He confirmed that the defendant had indeed insured the plaintiff's motor vehicle. He testified that the proposal form as filled and signed by the plaintiff acted as a contract. He referred to paragraph 6 (f) of the proposal form which asked the Plaintiff whether the vehicle would be let for hire. It was his testimony that since the plaintiff answered the same in the negative, the defendant rated the risk as motor commercial policy in which the usage of the vehicle would be limited to the control of the insured.

15. He further testified that the defendant's investigations through inter-Africa Security Consultants revealed that at the time of the accident the vehicle was being used contrary to article 6 (f) of the proposal form.

16. On cross examination, DW 1 averred that if the defendant had been informed about the collaboration agreement, they would have insured the vehicle under a different class.

17. The defendant called two other witnesses that is Mr. Samson Mbugua, the proprietor of inter-Africa Security Consultants and James Karanja, who described himself as a mechanical engineer and does motor loss assessment for consolid insurance Assessors. Both witnesses testified on how they arrived at their various reports filed in court.

18. However, on cross-examination, Mr. Mbugua, DW 2 admitted that the conclusion he made in his report was not correct since the document he had referred to as the proposal form was actually not a proposal form. He went ahead to state that the opinion he had made to the defendant not to pay the loss was misinformed and he wished to recant the same. He further stated that his advice not to settle the claim was based on a policy which he had never seen to date. He referred to the document marked 'G', sent by the defendant to the financier, CFC which he had relied on in his investigation report and testified that the same was not binding to the plaintiff as it had not been sent to them.

19. The parties filed a statement of agreed issues dated 11th September 2007 and filed in Court on the same day. The parties also filed their written submissions as ordered by the court at the close of the hearing.

20. I have considered the pleadings on record, the evidence adduced and the submissions filed by both parties. From the records, it is not in dispute that the Plaintiff's vehicle was involved in an accident and that as a result there was total loss of the vehicle. It is also not disputed that the plaintiff's vehicle was insured by the defendant. The dispute is as to whether under the contract the defendant is liable/bound to compensate the plaintiff for the loss.

21. The issues that arise for determination therefore are:-

· **Whether or not the failure by the Plaintiff to disclose to the defendant about the collaboration agreement amounted to material non-disclosure.**

· **Whether or not the insured motor vehicle was let for hire.**

· **Whether or not the defendant is liable for the loss suffered by the plaintiff as a result of the accident.**

22. On the first issue, the Plaintiff has indicated that there was a Collaboration agreement between themselves and Mountain View Transporters Limited. The Plaintiff has also admitted that they did not inform the Defendant about the said agreement. This was a material fact because under the said agreement it meant that the insured was not in full control of the vehicle. It is trite law that one of the principles in an insurance contract is *uberrima fides* that is utmost good faith is required. Therefore the Plaintiff by failing to disclose to the defendant the existence of the collaboration agreement breached the insurance contract.

23. On the second issue, it is hotly contested between the parties whether or not the motor vehicle in question was let for hire on the material day of the accident.

24. The collaboration agreement dated 16th May 2005 indicated that after the plaintiff purchased the vehicle from Mountain View Transporters Ltd, the said vehicle would be retained in the fleet of Mountain View Transporters Ltd with normal operation runs. The collaboration agreement further indicated that on operations the truck driver and the turn boy would answer to Mountain View Transporters Ltd and that payments would be made monthly to the plaintiff by cheque. In essence according to this agreement the vehicle was owned by the plaintiff but controlled by Mountain View Transporters Ltd. The insured being the Plaintiff in this case was not in control of the said vehicle. Whether this amounts to hire or not is debatable.

25. Be that as it may, I am of the view that the circumstances surrounding the operation of the suit vehicle clearly show that the same was let for hire. By retaining the vehicle in the fleet of Mountain View transporters limited and receiving monthly payments the same amounted to hiring out the vehicle. In the circumstances, the Plaintiff breached a condition/term of the contract. The implication of this is that the insurer is entitled to repudiate the contract. In the case of **HERITAGE INSURANCE CO. LTD VS ALEX MIGORE HCCC NO. 173 OF 2002**, Justice M.K Ibrahim held that an insurer is not in law obliged to indemnify an insured for an accident, loss or damage or liability caused or sustained whilst the insured motor vehicle is used for purpose outside the purpose for which the vehicle was insured.

26. On the third and last issue, it is discernible from the foregoing that the defendant is not liable for loss suffered by the plaintiff as a result of the accident. In the proposal form which formed part of the insurance contract, it was clear at paragraph 6 (f) of the form that the vehicle was not to be let for hire.

27. In view of the foregoing, I do find and hold that the Plaintiff breached the insurance contract and therefore the defendant is not liable for the loss suffered by the plaintiff as a result of the accident. In the upshot, the Plaintiff's case is hereby dismissed with costs.

That is the judgment of the Court.

DATED, READ AND DELIVERED AT NAIROBI

THIS 6TH DAY OF FEBRUARY 2013

E.K.O OGOLA
JUDGE

Present:

Mutahi H/B for Macharia for Plaintiff

Nyawira for Defendant

Teresia – court clerk