



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO.415 OF 2009

**CORPORATE INSURANCE CO.
LIMITED.....PLAINTIFF**

VERSUS

**RAINBOW CABS & CAR HIRE
LIMITED.....DEFENDANT**

JUDGMENT

The Plaintiff in this case has sued the Defendant under a Complaint dated 9th June 2009, praying for judgment of the court as follows:-

- (a) A declaration that it is and has at all material times been entitled to avoid the private car policy of insurance No. C01/075/1/900137/2007 issued on 20th 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 on some material particular or particulars.**
- (b) A declaration that the Plaintiff 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 3rd Party Risks) Act Cap 405**
- (c) Costs of and incidental to this suit and interest thereon at court rates**

The suit arises out of a comprehensive policy on Insurance No. C01/075/1/900137/2007, said to have

been issued by the Plaintiff to the Defendant (the insured) on or about 20th April 2007, in respect of the defendant's motor vehicle registration No. KAX 972 N. The policy was issued through the Plaintiff's agents, High Vision Business & Insurance Agency, in accordance with **Section 7** of the Insurance (Motor Vehicle third party Risks) Act (Cap 405 of the Laws of Kenya) as read with the **Insurance Act (Cap 487)**. It is stated in paragraph 3 of the Plaintiff that the policy was specifically meant to cover eventualities as would lead to death or personal injuries suffered by third parties and authorized passengers whilst the subject motor vehicle was being used for the insured's private purposes.

The policy was renewed from time to time between 13th April 2008 to 12th April 2009, on the same terms and conditions. On 14th September 2008, while the policy was in force the subject motor vehicle was involved in an accident in which a passenger, James Muriuki died. It is then that it emerged that the vehicle had been hired by the deceased's employer, Forecast Electronic Solutions Limited to transport the deceased on official duty. This, the Plaintiff contends, was in contravention of the express terms and conditions of the policy.

The estate of the deceased passenger having issued a notice of intention to sue the Plaintiff herein for damages arising out of the fatality, the Plaintiff filed this suit on the basis that it is entitled to avoid the said policy for reasons that when taking the same, the Defendant failed to disclose material facts and/or represented facts that were false in that, at all material times the motor vehicle was used for hire and reward and that on diverse dates during the currency of the private car policy and particularly on 14th September 2008, the Defendant allowed the subject motor vehicle to be used by third parties for hire and reward. The Plaintiff relies on the provisions of **Section 10 (4)** of the Insurance Motor Vehicle Third Party Risks) Act which states as follows:-

“10 (4) No sum shall be payable by an insurer under the foregoing provisions of this section if, in an action commenced before, or within here months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provisions contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the Plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto”.

The Defendant Company neither entered appearance in the suit nor did they file a defence despite, being served with the summons by way of substituted service, efforts to trace them for personal service having failed. The suit therefore proceeded ex-parte under **Order 1XB** of the **Civil Procedure Rules** (2009 Revised Edition). The Plaintiffs' claims manager, Anna Mwangi testified on behalf of the Plaintiff and produced the following documents in evidence:

1. A certified true copy of a Private Car Policy No. C01/075/1/900137/2007 (exhibit 1)
2. Certified true copy of the Policy Renewal Cover note for the period of 13th April 2008 to 12th April

2009(exhibit 2)

3. Claim Notification dated 16th September 2008 (exhibit 3)
4. Police Abstract dated 26th September, 2008 (exhibit 4)
5. A copy of a demand letter Dated 13th March 2009 from Forecast Electronic Solutions Ltd to the Plaintiff
(exhibit 5)
6. A demand letter dated 28th July, 2009 from Arusei & Co. Advocates to the Plaintiff (exhibit 6)

I have perused the policy document (exhibit 1) and noted that, as rightly submitted by counsel for the Plaintiff in his written submissions filed herein, paragraph 3 of the clauses attaching to and forming part of the policy, under “Limitations as to use – Private Vehicles”, Clause 2, imposes a limitation as follows:

“2. Use only for social, domestic and pleasure purposes and by the insured in person in connection with his business or profession”.

It goes to provide further that

“The policy does not cover use for racing competitions rallies or trials (or use for practice for any of them) or use for hire or reward commercial traveling the carriage of goods in connection with any trade or business or use for any purpose in connection with the motor trade”.

The accident and fatality are not disputed. From the demand letters received by the Plaintiff it is clear that the deceased was traveling in the subject motor vehicle while the same had been hired by M/S Forecast Electronic Solutions Limited to ferry him to work. This was a form of user expressly excluded by the policy document itself.

The Plaintiffs have cited 4 authorities to support their case as follows;-

1. **Corporate Insurance Co. of Kenya –vs- Elias Okinyi Ofire Civil Appeal No. 12 of 1998**
2. **Gateway Insurance Co. Ltd –vs- Sudan Mathews H.C.C.C. No. 1078 of 2000**
3. **Gateway Insurance Co. Ltd –vs- Azar Jamil Anwar H.C.C.C. No. 1770 of 2001**
4. **Gateway Insurance Co. Ltd –vs- Nganga Njuguna H. C. C. C. No. 22 of 2003**

I have read the copies of the above decisions furnished by counsel and do find that the same support the position taken by the Plaintiffs in as far as the law is concerned. Although the Defendant did not make any attempt to challenge the suit, I am not satisfied that the allegations made by the Plaintiff’s against the Defendants have been proved in the absence of the proposal form presented to the Plaintiff when the policy was issued. That would be the basis upon which the court can determine with certainty that the

Defendant is guilty of material non-disclosure or misrepresentation. Indeed, the citation at page 1 of the policy document states that the proposal and declaration “*shall be the basis of [this] contract and is deemed to be incorporated [therein]*” (alterations by court).

The schedule to the policy clearly states that the insured is Rainbow Cabs & Car Hire Limited and its occupation is given as “*Business*”. The claim notification produced as exhibit No. 3 herein was made by the same Insurance Agency who procured the Insurance Cover. The notification was to report a loss, it gave circumstances of the accident and stated that “*claim form and documents (would) follow*”.

Could it be, that the Defendant requested for a Commercial Insurance Policy but was issued with a private one, hence the leaving out of the proposal form in the course of the hearing? There is nothing at all produced before court to show that the Defendant accepted the terms as appearing in the private policy document shown to the court.

In view of the above, I find that the Plaintiff has not proved its case on the balance of probabilities and the same is hereby dismissed with no order as to costs.

SIGNED and DELIVERED at NAIROBI this 17TH day of FEBRUARY, 2011.

M. G. MUGO

JUDGE

In the presence of:

Mr. Were holding brief for Mr. Muturi

For the Plaintiff

No Appearance

For the Defendant