



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL CASE NO. 168 OF 2005**

**CO-OPERATIVE INSURANCE CO.**

**LTD.....PLAINTIFF**

**-VERSUS-**

**BRIDGESTONE CONSTRUCTION CO.**

**LTD.....DEFENDANT**

**JUDGMENT**

The Defendant owned motor vehicle registration number KAV 507V. Sometimes in 2006, it approached the plaintiff to insure it. Pursuant to the proposal the plaintiff agreed and issued to the defendant insurance cover for the period 19<sup>th</sup> January, 2006 and 18<sup>th</sup> December, 2006 upon payment of course of the requisite premium amount. It was a term of the policy however, that the defendant's motor vehicle aforesaid was designated and or covered for any risk it may be involved in the course of carrying owner's goods. Indeed the policy in its schedule section clearly indicated that the said motor vehicle was to be used for local delivery of the defendant's own goods only. However on or about 3<sup>rd</sup> February, 2006 at about 2.30p.m or thereabouts the said motor vehicle was involved in a road traffic accident along Kisumu-Oyugis road. Apparently, the motor vehicle was carrying passengers who were in the campaign trail of **Mr. Eng. Tom Okoko**, an aspirant for Kasipul Kabondo By-election who happened to be the proprietor of the defendant. From the police abstract tendered in evidence the human cargo aboard the motor vehicle which was a Nissan Pickup were 17 people. These were the passengers who were spilled out of the motor vehicle following the accident causing considerable injuries to all of them and killing two. Those injured were subsequently treated and those who passed on buried.

Fearing that it may be inundated with suits by those injured and the dead to recover appropriate damages and in abilit to wriggle out of such suits, the plaintiff mounted this suit claiming that by carrying passengers as aforesaid, the defendant had breached the terms of the insurance cover thereby entitling the plaintiff to repudiate liability to pay and or indemnify the defendant against the claims for any death, injuries sustained, damage to property and or any other claims whatsoever. The defendant had breached

the terms of the policy cover by using the motor vehicle for purposes other than for which it was insured by transporting persons who were not in any way connected with the defendant company and using the motor vehicle contrary to and in total breach of the policy of insurance. In penultimate paragraphs the plaintiff prayed for:

***“...a) a declaration that the plaintiff is not bound to pay and or indemnify the defendant against any claim in respect of death, bodily injury to any person, damage property or any other claim whatsoever arising out of the accident which occurred on 3<sup>rd</sup> February, 2006 at Nyapalo along the Oyugis – Kisumu road involving the defendant’s motor vehicle registration number KAV 507C Nissan pickup,***

***b) Costs of this suit.***

***c) Interest on (b) above at court rates.***

***d) Any other or further relief as the court may be pleased to grant...”***

In its defence, the defendant averred that the plaintiff having issued a comprehensive insurance cover in respect of the motor vehicle, it was not open to it to unilaterally rescind or vary the terms of the insurance policy. It further claimed that the accident occurred when the motor vehicle was carrying employees of the defendant for purposes relating to construction works being undertaken by the defendant and not otherwise. The suit was therefore frivolous, vexatious and otherwise amounted to abuse of the due process of the court as the arbitration clause had not been invoked, pleadings did not disclose any reasonable cause of action, pleadings and representation were prohibited by dint of section 134 of the **Evidence Act**, the plaintiff’s advocates were guilty of Professional Etiquette, doctrine of Estoppel applied and finally, that the suit was barred by section 10(4) of Cap 405.

I heard the case on 22<sup>nd</sup> March, 2011. Through **Edward Odhiambo Owido**, the plaintiff’s branch manager at Kisii, the plaintiff testified that it had insured motor vehicle KAV 507V under commercial vehicle policy third party only. The cover was in respect of third party liabilities and property damage and for insured’s goods only. The use of the motor vehicle was for transportation of owner’s goods only. The motor vehicle was also supposed to carry only 3 people. The motor vehicle was subsequently involved in a road traffic accident. From the list of people in the police abstract, they were 17 in total travelling in the motor vehicle. Their presence in the motor vehicle was therefore against the insurance cover as the motor vehicle was only authorized to ferry goods of the owner and not passengers. The cover given did not include a class to carry passengers whether construction workers or not. He therefore prayed for orders in terms of the plaint.

Cross-examined by **Mr. Oguttu**, learned counsel for the defendant, he stated that indeed there was a contract of insurance between the parties. He did not know whether after the accident the plaintiff demanded and was paid excess fee by the defendant. He conceded that they were served with statutory notices but he did not know whether summons in respect of the suits were ever served on them. He did not know as well whether suits were filed against the defendant. On the material day however, the motor vehicle was carrying passengers. That then marked the close of the plaintiff’s case.

The defendant opted not call any witnesses to buttress its defence. Accordingly, the plaintiff’s evidence stands uncontroverted.

So what are the issues for determination in this suit? In my view there are basically three:-

- **Whether the defendant breached the terms of the insurance cover**
- **Whether the plaintiff is entitled to a declaration in that regard**
- **Costs.**

With regard to issue number one, the evidence by the plaintiff that the defendant breached the terms of the insurance by carrying passengers instead owners goods only as required by the terms of the cover was neither rebutted nor challenged. Looking at the insurance proposal form tendered in evidence, the cover sought was commercial vehicle third party only and the vehicle was to be used for local delivery of proposer's own goods. It cannot therefore be correct as the defendant claims that the motor vehicle was comprehensively insured. The fact that the motor vehicle was ferrying 17 passengers was not discounted by the defendant. However, the motor vehicle was only authorized to carry three passengers in terms of the insurance cover. Therefore the fourteen or so passengers in the motor cannot pass for owner's goods. The defendant alleged those passengers were its employees and were being ferried for purposes relating to and or concerning its construction works. This was a mere allegation unsupported with any evidence at all. The burden of proving that the insurance policy, admittedly issued by the plaintiff, was comprehensive or extended to cover liability relating to those 17 or 14 passengers aboard the motor vehicle rested with the defendant. It has failed to discharge that burden. The documents tendered in evidence by the plaintiff speak for themselves. They cannot be contradicted by oral evidence. In any event such oral evidence was lacking. A positive assertion was made by the plaintiff that the policy was purely third party commercial policy for the carriage of owner's goods only. It did not cover passengers. The plaintiff led evidence in that regard. The defendant was obligated to counter such assertions with cogent evidence. It did not do so. It has however attempted to do so through its written submissions. That is not acceptable as it amounts to evidence from the bar.

In a similar situation as obtaining herein, the court of appeal had this to say in the case of **Maria Ciabaitaru M'mairanyi & 11 others V Blue shield Insurance Co. Ltd, civil appeal no. 101 of 2000(UR)** "... *that the appellant's were carried in the pickup as an act of kindness on an isolated occasion and that the pickup was not a vehicle in which passengers were normally or habitually carried for hire or reward. On that finding we are bound to make a consequential finding that there was no obligation under section 5(b) cap 405 on the part of the insured to cover the appellant's and by extension for the insurer to satisfy the decree obtained against the insured under section 10(1) of the Act...*". In the circumstances of this case the motor vehicle was by the terms of the cover to be used for local delivery of proposer's own goods and not for hire or reward or the carriage of defendant's employees if at all. Accordingly, the risk of injury or death to passengers therein on the material day was not compulsorily required to be covered under cap 405. And indeed from the unrebutted evidence of the plaintiff such a risk was not actually covered. That being the case, the plaintiff is not obliged to indemnify the defendant against any claim by the said passengers. In nutshell, the answer to issue one framed is that the defendant breached the terms of the insurance cover.

With regard to issue number two, the plaintiff's contention is that the injured and the dead following the accident involving the insured motor vehicle were passengers not covered under the terms of the policy it had issued. This fact the plaintiff managed to prove on balance of probability. The injured persons were passengers not insured. Thus the plaintiff as the insurer would not be under duty to satisfy any claim and or judgment, in favour of such liabilities, which were not required to be covered by section 5(b) of the **Insurance (motor vehicles third party risks) Act**. As correctly submitted by **Mr. Oguttu**, in the instant case, the plaintiff is seeking a declaratory relief to avoid payments of any claims that may arise or be lodged by the passengers who were aboard the motor vehicle. However, to the extent that the insurance policy in question, is said not to have extended to passengers, it is not open to the plaintiff to seek declaratory relief in the circumstances of this case as the risk of injury or death to the passengers in the vehicle was not a liability covered and or required to be covered by the policy under section 5(b) of cap 405. Essentially that was the holding by **Ringer J** (as he then was) in **Gateway Insurance Company**

**Limited V Sudah Mathews, Nairobi Hccc no. 1078 of 2000 (UR)** with which I entirely agree. In view of the foregoing and in so far as the plaintiff contends that the passengers were not insured, then the declaratory order cannot issue. Indeed the issue of non – disclosure and or misrepresentation of material facts, does not arise. In the premises I decline to issue the declaration sought.

With regard to costs, it is trite law that costs are in the discretion of the court and ordinarily follow the event. In this case, the plaintiff has only succeeded in half of his claim. I will therefore order that it be paid ½ costs of the suit.

Judgment **dated, signed** and **delivered** at Kisii this 4<sup>th</sup> day of May, 2011.

**ASIKE-MAKHANDIA**

**JUDGE**