



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**

**Civil Suit 24 of 2008**

**IN THE MATTER OF THE INSURANCE (MOTOR VEHICLE THIRD PARTY RISKS) ACT (CAP 405 LAWS**  
**OF KENYA)**

**BLUE SHIELD INSURANCE COMPANY LIMITED.....PLAINTIFF**

**VERSUS**

**GODWIN JUMA SIAKILO.....1<sup>ST</sup> DEFENDANT**

**FRANCISCA J. KAMUREN.....2<sup>ND</sup> DEFENDANT**

**AUTO SELECTION (K) LTD.....3<sup>RD</sup> DEFENDANT**

**CAROLINE LUTTA MUMIA.....4<sup>TH</sup> DEFENDANT**

**SALOME SITAKA MUKHWANA.....5<sup>TH</sup> DEFENDANT**

**FREDRICK O. ONYANGO.....6<sup>TH</sup> DEFENDANT**

**EDMOND W. WANYAMA.....7<sup>TH</sup> DEFENDANT**

**EVALINE AKINYI.....8<sup>TH</sup> DEFENDANT**

**COLLINS W. SIAKILO.....9<sup>TH</sup> DEFENDANT**

**RULING**

By an Originating Summons dated 6<sup>th</sup> March 2008 and filed on 10<sup>th</sup> March 2008 the applicant Blue Shield (*the Insurer*) sought the following orders:-

(1) That this Honourable Court be pleased to grant and/or issue a declaration that Blue Shield Insurance Company Limited, the plaintiff herein, is not liable or bound to settle any claims or decretal sums or judgment that may be or have been obtained by the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, or 9<sup>th</sup> defendants herein or any claim or judgment for contribution or indemnity obtained by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants against the 1<sup>st</sup> defendant herein.

(2) That this Honourable Court be pleased to declare that the plaintiff herein is entitled to avoid Policy No. B31/080/1/09/001488/2006 issued to the 1<sup>st</sup> defendant herein as contemplated under section

10(4) Cap 405.

(3) The provisions be made as to the costs of this suit.

The Originating Summons is supported by the Affidavit of one Harrison Mwangi Kamau and the grounds on the face thereof.

When this matter was argued before me on the 20<sup>th</sup> January 2010 **Mr. Matiri** Counsel for the applicant relied on the grounds and the said Supporting Affidavit of Harrison Mwangi Kamau. He also relied on the decisions of the Court of Appeal in **Corporate Insurance Company Limited vs. Elias Okinyi Ofire Civil Appeal No. 12 of 1998 (Nakuru)** and **Intra Africa Assurance Company Limited vs. Simon N. Njoroge & Anor Civil No. 111 of 1996 (Nairobi)**. In both of those cases the Court of Appeal found the insurance companies not liable to indemnify the respondents as there was a breach of the terms of the respective policies of insurance.

The Application was opposed by the Respondents. **Mr. Juma** Counsel for the Respondents relied upon the Replying Affidavit of the 1<sup>st</sup> Respondent **Godwin Juma Siakilo** sworn on 8<sup>th</sup> July 2008 and 2<sup>nd</sup> Respondent Francisca Jelagat Kamuren sworn on 15<sup>th</sup> September 2008.

The facts are summarized in the Supporting Affidavit of the Insurer's General Manager the said Harrison Mwangi Kamau. The 1<sup>st</sup> Defendant Godwin Juma Siakilo is the registered owner of motor vehicle KAH 266W which the Plaintiff/Applicant Insured on the basis of a proposal form made on 27<sup>th</sup> September 2006 and policy made subject to the conditions that the vehicle shall not be used for hire or reward. The Insurer pleads that the Respondents were passengers in the said motor vehicle and not entitled to indemnity.

The 1<sup>st</sup> defendant admits in paragraph 5 of his affidavit that the 4-9<sup>th</sup> Defendants were passengers in his motor vehicle, and that they were lawful passengers covered under the policy.

The issue for determination is whether the Insurer is entitled to avoid the policy as against the 4<sup>th</sup>-9<sup>th</sup> Defendant on the grounds that they were not lawful passengers in motor vehicle KAH 266W within the terms of the policy. The policy limited the use of the motor vehicle in these terms:-

**"Use in connection with Insured's business and this included-**

- *Use for the carriage of passengers in connection with the insured's business (common among construction business).*
- *Use for social domestic, and pleasure purposes.*
- *The policy did not cover the use of motor vehicle for hire or reward."*

The 1<sup>st</sup> respondent has in paragraph 6 of his Replying Affidavit contended that the policy did cover the category of the 4-9<sup>th</sup> Defendants and explained in paragraphs 7-12 the circumstances how those Defendants came to be passengers

in the motor vehicle and the motor vehicle was not in use for hire or reward.

The question is would **Section 5** of the **Insurance (Motor Vehicle Third Party Risks) Act (Cap 405 Laws of Kenya)** exclude these defendants from the Insurance cover? Reliance was put by Mr. Matiri to the provisions of the proviso to that section. That proviso must be read together with the preceding provision namely **section 5(a) & (b)** which give validity to an insurance policy as required by **Section 4** of the Act. Under the said **section 5** of the Act for a policy to be valid it must be:

**(a) issued by a company which is required under the Insurance Act, 1984 to carry on motor vehicle insurance business; and**

**(b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road.”**

The proviso thereto states that a policy in term of this section shall not be required to cover-

**“(i) ...**

**(ii) except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arose; or**

**(iii) any contractual liability.”**

In the instant case, and as explained in the replying affidavit of the 1<sup>st</sup> respondent it is quite clear that the 4<sup>th</sup> – 9<sup>th</sup> Defendants were passengers in the 1<sup>st</sup> Defendant’s motor vehicle but that they were not fare paying passengers. In terms of the limitation of the use of the motor vehicle they were persons who were in the motor vehicle **“for a social and domestic purpose”**. The 1<sup>st</sup> Defendant received a distress call on 2<sup>nd</sup> September 2007 from the 7<sup>th</sup> Defendant one of his assistants in his welding business seeking help to ferry his wife who was expectant to the Provincial General Hospital Nakuru and that, since it was late he requested the 9<sup>th</sup> Defendant to accompany him to the 7<sup>th</sup> Defendant's home. On reaching there he found the 8<sup>th</sup> defendant was in labour pain and required urgent hospitalization. He took her together with the 4<sup>th</sup> and 5<sup>th</sup> Defendants (*the two ladies*) who were attending to her (9<sup>th</sup> Defendant) and who carried her to the vehicle and the 6<sup>th</sup> Defendant was the 7<sup>th</sup> Defendant's neighbor and drove slowly to the Provincial General Hospital Nakuru and that before reaching the hospital at around State House the motor vehicle KAH 266W was involved in an accident due entirely to the negligence of the 2<sup>nd</sup> Defendant.

In these circumstances I would have no hesitation in stating that these passengers were in the motor vehicle **for a social/domestic purpose** - accompaniment of a neighbor to hospital, a neighbor, a lady in labour pains, whom they had been attending to. This journey cannot be said to be a purpose not covered under the proviso to **section 5** of the **Insurance (Motor Vehicle Third Party Risks) Act Cap 405 Laws of Kenya**.

In conclusion therefore I do not agree with the submissions of counsel or the Insurer that this is a case covered by the provisions of **section 10 (4)** of the **Insurance (Motor Vehicle Third Party Risks) Act Cap 405 Laws of Kenya**. Being of that view the Applicants Originating Summons dated 6<sup>th</sup> March 2008 is hereby dismissed with costs to the 1<sup>st</sup> - 9<sup>th</sup> Defendants.

**Dated, delivered and signed at Nakuru this 29<sup>th</sup> day of January 2010**

**M. J. ANYARA EMUKULE**

**JUDGE**