



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANICOMMERCIAL COURTS)

Civil Case 2 of 2006

GEMINIA INSURANCE CO. LTD. .... PLAINTIFF

VERSUS

JOHN MUKELE MUSILI ..... 1<sup>ST</sup> DEFENDANT  
KIOKO BENJAMIN MWETU ..... 2<sup>ND</sup> DEFENDANT  
INVESCO ASSURANCE CO. LTD. .... 3<sup>RD</sup> DEFENDANT

JUDGMENT

This suit arises out of a road traffic accident which is alleged to have occurred on 5<sup>th</sup> August, 2005 involving, *inter alia*, motor vehicle registration No. KAH 506 P owned by the 2<sup>nd</sup> defendant and driven at the material time by the 1<sup>st</sup> defendant. Consequent upon that accident, the plaintiff, an authorized insurer within the meaning of **Section 5** of the **Insurance (Motor Vehicle Third Party Risks) Act, Cap. 405 Laws of Kenya**, received

various demand letters and statutory notices purportedly by claimants injured in the alleged accident.

By a plaint dated 6<sup>th</sup> January, 2006 and filed in court on the same date, the plaintiff prays for judgment against the defendants for:-

- (a) *A declaration that the plaintiff is not entitled to settle any personal injury claims arising out of the alleged accident as the Policy No. 00/089/48974 and/or the Certificate of Insurance No. A2443853 were not issued by it.*
- (b) *Costs of the suit and interest thereof.*
- (c) *Such further or other relief as this court may deem just.*

On 2<sup>nd</sup> November, 2007, the plaintiff filed a notice dated 30<sup>th</sup> October, 2007 withdrawing the suit as against the 3<sup>rd</sup> defendant entirely. By a letter dated 13<sup>th</sup> October, 2009, Mr. Kelvin Mogeni for the plaintiff, invited M/S Kinyua Musyoki & Co., Advocates for the defendants, to attend at the Registry on 2<sup>nd</sup> November, 2009 with a view to fixing an early hearing date in this case, but the latter did not attend. The matter was accordingly fixed for hearing on 10<sup>th</sup> February, 2010, and a hearing notice was duly dispatched to the defendants' Advocates by registered post on 11<sup>th</sup> December 2009. This is confirmed by an affidavit of service sworn and filed by the plaintiff's Advocate on 26<sup>th</sup> January, 2010.

When the suit was called out on the day fixed for hearing, only the plaintiff attended. Satisfied that the hearing notice was duly served in sufficient time for the defendants to attend, the court elected to proceed ex parte.

The only issues for determination in this matter are whether the plaintiff issued the policy or certificate of insurance in respect of

motor vehicle registration No. KAH 506 P, and the corollary is whether the plaintiff insured that vehicle. The plaintiff's Claims Manager, Mildred Wamaya, who testified as PW1, told the court that from 28<sup>th</sup> October, 2006, the plaintiffs received a number of notices and demand letters from lawyers in respect of claimants who were allegedly involved in the accident herein above first referred to. The demand letters were notifying the plaintiff of injuries to various claimants, and of those claimants' intention to institute suits against the owner of the vehicle who was allegedly insured with the plaintiffs under Policy No. 00/089/48974. The plaintiffs checked their records but noted that this policy number did not correspond with their system of numbering and therefore could not have originated from the plaintiffs. They also checked their records from the computer and found that motor vehicle registration No. KAH 506 P was not insured with them. They thereupon appointed Arcane Investigators to ascertain the circumstances under which the plaintiffs were alleged to have insured the subject vehicle while their records did not reflect that they had done so.

According to this witness, the Investigators gave the plaintiffs the serial number of the certificate which appeared on the subject motor vehicle's windscreen as No. A2443853, and the number of another sticker which was also on the windscreen but which had expired, as No. A2184372. The plaintiffs then wrote to the Association of Kenya Insurers on 15<sup>th</sup> November, 2005 and the latter confirmed by a letter dated 16<sup>th</sup> November, 2005 that Certificate No. A2443853 belonged to a series of numbers issued to Invesco Insurers. However, the A2184... was confirmed as not issued by the Association of Kenya Insurers. A copy of the plaintiff's file copy of the letter dated 15<sup>th</sup> November, 2005 was produced as plaintiff's exhibit 3, and the response from the Association of Kenya Insurers dated 16<sup>th</sup> November as plaintiff's exhibit No.4. Their Investigators also gave them a report which was produced as plaintiff's exhibit 7. She urged the court to grant the declaratory orders sought in the plaint together with costs of the suit.

Mohammed Arif Khan, the Managing Director of Arcane Insurance Investigators Ltd, testified as PW2. He told the court that his investigations took him to Kitui Police Station where the accident in question was reported. He enquired about the Certificate of Insurance which, fortunately, was still in the Police File. It was No. A2443853. The first thing he noticed was that it was marked "PSV MATATU" and yet the plaintiffs did not undertake insurance for matatus. Secondly, the normal seal put in place by the Association of Kenya Insurers appeared not to be genuine. He brought these two issues to the attention of the police whereupon it was decided to forward the matter to CID for further investigation. In the process of investigation, he compiled a report which he produced as exhibit 7. From his observations as a result of his investigations, he formed the opinion that the Insurance Certificate appearing on vehicle KAH 506 P at the time it was involved in the accident on 5<sup>th</sup> August, 2005 was fake and was not issued by the plaintiffs.

Against this evidence, the Certificate of Insurance displayed on a motor vehicle's windscreen is *prima facie* evidence that the said motor vehicle is insured by the Insurance Company which issued that certificate. In this case, there is ample evidence to negate that presumption since the plaintiffs did not undertake matatu insurance. Even if they undertook such insurance, the Number on the certificate belonged to a series which had been issued to Invesco Assurance Company Ltd., and not to the plaintiffs. In the circumstances, since the plaintiffs did not issue that Certificate of Insurance, it follows as well that they did not issue the policy. For that reason, there was no privity of contract between the plaintiff and the two defendants, and in the absence of such privity of contract the plaintiffs cannot be held liable in respect of any injury or damage suffered by the plaintiffs in the alleged accident. The plaintiff is accordingly entitled to judgment as prayed.

I therefore make the following orders:-

- 1. THAT the plaintiff is not bound to settle any personal injury claims arising out of the accident involving motor vehicle KAH 506 P on 5<sup>th</sup> August, 2005, as Policy No. 00/089/48974 and/or Certificate of Insurance No. A2443853 were not issued by the plaintiff.**

*2. The defendants will bear the costs of this suit together with interest thereon at court rates from the date of judgment until payment in full.*

**DATED** and **DELIVERED** at **NAIROBI** this 18<sup>th</sup> day of March, 2010.

**L. NJAGI**

**JUDGE**