



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 17 OF 2008

**AFRICAN MERCHANT ASSURANCE CO.
LTD.....APPELLANT**

=VERSUS=

**ROBERT OMONDI ONYANGO AND
ELIZABETH ANYANGO
ODONGO.....RESPONDENTS**

JUDGMENT

This is an appeal by **African Merchant Assurance Co. Limited** (hereinafter “**the appellant**”), the defendant in the declaratory suit. The appeal is from the judgment and decree of the Resident Magistrate (**I. Maisiba**) whereby the learned Resident Magistrate allowed the respondents’ claims with costs. **Robert Omondi Onyango** (hereinafter “**the Respondent**”), was the plaintiff in Eldoret Chief Magistrates Court Civil Case No. **882 of 2006** and **Elizabeth Okoth Odongo** (hereinafter “**the 2nd respondent**”) was the plaintiff in Eldoret Chief Magistrates Court Civil Case No. **883 of 2006**. The two suits were consolidated for hearing. The respondents had claimed general damages for pain, suffering and loss of amenities, specific damages, costs and interest as a result of injuries they sustained in a road traffic accident involving motor vehicle registration number KTL 556 along Kapsabet – Eldoret road near Moi International Airport.

The 1st respondent had originally obtained judgment in Eldoret CMCC No. 662 of 2004 and the 2nd respondent in Eldoret CMCC No. 480 of 2004 against **Washington Otula Nyakundi**, the owner of the said vehicle who had insured the same with the appellant. The issue before the learned Senior Resident Magistrate was straight forward. It was whether the appellant was liable to satisfy the said judgments under the insurance policy it had issued in respect of the said motor vehicle. The respondents contended that at the time of the accident the said motor vehicle was being used in connection with the insured’s business i.e transportation and the appellant was therefore liable. The appellant on its part contended that the vehicle was being insured for hire and reward and for fare paying passengers which risks were not covered under the policy of insurance.

The learned Resident Magistrate found in favour of the respondents. In his own words:-

“ In my considered opinion after considering submissions of both sides, I find that the defendant’s company cannot escape liability and the defendant’s company is bound by law to settle the decrees in Eldoret CMCC NO. 662/2004 and CMCC No. 480 of 2004”

With regard to the defence put forward by the appellant, the learned Resident Magistrate held as follows:

“The defence witness confirmed that the motor vehicle subject matter of this suit was insured under a 3rd party Insurance Policy. It came out clear that it is the insured motor vehicle which was being used in connection with the insured’s business of transportation”.

The appellant has challenged the Resident Magistrate’s judgment on 6 grounds which were argued together. The entire appeal however revolves around the first three (3) grounds which are that:-

- 1). The learned Magistrate erred in law and in fact in holding that the insured motor vehicle was being used in connection with the insured’s business of transportation.
- 2). The learned Magistrate erred in law and fact by misinterpreting the provisions of commercial 3rd party insurance policy.
- 3). The learned Magistrate erred in law and fact in failing to find that the insured motor vehicle had been used for hire and reward against the policy conditions.

When the appeal came up for hearing before me on 26th October 2010, counsel maintained the positions they had taken when they appeared before the learned Resident Magistrate.

I have considered the record of the learned Resident Magistrate, the grounds of appeal and the submissions made by counsel before me. Having done so, I take the following view of the matter. The facts herein are really not in controversy. It is common ground that the respondents have obtained judgment against the appellant’s insured **Washington Otula Nyakundi**. It is also common ground that the respondents were in the motor vehicle when it was involved in a road traffic accident. What is not agreed is whether the Insurance Policy issued by the appellant in respect of the said vehicle covered the respondents at the time of the accident. The appellants contend that the policy covered the use of the vehicle, in connection with the insured’s business which business did not include the transportation of a dead body and mourners. According to the appellant, such use was in fact contrary to the command not to use the vehicle for hire or reward. The respondents, while admitting that the vehicle was used to transport a corpse and mourners, contend that the use was in accordance with the limitations as to use under the policy document. That contention was made because the policy document allowed the use of the vehicle in connection with the Insured’s business which was transportation.

If indeed the business of the insured was transportation, it is not easy to appreciate how such business would be performed without the vehicle being hired for reward. The appellant’s witness at the trial unequivocally admitted that the insured’s business was transportation. In his own words:-

“I see DMFI 4. It is a Motor accident report form. It was filed by our Insured Washington Otula Nyakundi. Washington was doing transportation business. On the claim, Washington was transporting a body”.

The policy document did not describe the type of transportation business the policy would cover. The facts of this case are therefore clearly distinguishable from the facts in **Corporate Insurance Company Ltd –v- Elias Okinyi Ofire Nakuru CA No. 12 of 1998 (UR)**. There, the insured motor vehicle was being used as a “matatu” at the time of the accident but had not been insured as such. The vehicle could also be used in connection with the insured’s business which business was not “matatu” business. The insured was in fact described as “a farmer/business”. In this case the appellant accepted that the insured’s business was transportation but did not describe the type of transportation the assured was doing. The Insurance Policy was drawn up by the appellant. It cannot benefit from any ambiguity in the

document. If the vehicle was being used to transport a dead body and mourners but not generally for carrying fare paying passengers as does a “matatu”, I have no doubt in mind that the appellant were liable to the respondents. It is unfortunate that an actual copy of the Insurance Policy was not produced at the trial of the declaratory suit. What appears to have been produced was a sample of a Commercial 3rd party car policy.

My above findings conclusively determine all the grounds of appeal raised by the appellant. None of them have any merit. The appeal is dismissed with costs.

Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 23RD DAY OF NOVEMBER 2010

F. AZANGALALA

JUDGE

Read in the presence of:-

Songok for the appellant.

F. AZANGALALA

JUDGE

23/11/2010