



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

Civil Suit 173 of 2002

HEAD-NOTES

INSURANCE LAW

- **Declaratory suit under the provisions of Section 10 of the Insurance Motor Vehicle (Third Party Risks) Act, Cap 405, Laws of Kenya.**
- **Repudiation of liability by an Insurer under an insurance policy held by an insured.**
- **An insurer is not in law obliged to indemnify an insured for an accident, loss or damage or liability caused or sustained whilst the insured motor vehicle is used for purpose outside the purposes for which the vehicle was insured.**
- **At the time of the accident the vehicle was driven by an unauthorized driver who was also unlicensed. As a result the insured had breached the insurance policy. The insurer was not bound to indemnify the insured.**

OBITER

- **The effect of filing Agreed Issues for determination by the Court – once parties agree in writing on issues to be determined by Court then the same is binding on them. It amounts to a contract.**

HERITAGE INSURANCE CO. LIMITED PLAINTIFF

VERSUS

ALEX MIGORE DEFENDANT

JUDGEMENT

The Plaintiff in its Amended Plaintiff amended on 23rd January, 2008 seeks the following orders against the Defendant:-

- (a) A declaration that the Plaintiff is not bound to pay and/or indemnify the Defendant against any claim whatsoever arising out of the accident which occurred on 2nd February, 2002, along Kipkabus – Eldoret road involving the Defendant’s motor vehicle Registration Number KAD 365A, Toyota Corolla.
- (b) Costs of the suit.
- (c) Interest on (b) above at Court rates.
- (d) Any other or further relief as this Honourable Court may be pleased to grant.

It is the Plaintiff's case that by a proposal dated 9/7/2001 the Defendant requested to be issued with an insurance cover for his motor vehicle Registration Number KAD 365A Toyota Corolla which was to be used as a private vehicle in connection with the insured's business, use in carriage of passengers in connection with the insured's business and for domestic and pleasure purposes, without reward or hire. That pursuant to the proposal the Plaintiff issued policy number KO 167 MOU9 to the Defendant upon payment of requisite premium for a total period of one (1) year commencing 9/7/2001 to 8/7/2002.

The Plaintiff further pleaded that:-

- It was a term of the policy cover that the Plaintiff would indemnify the Defendant in the event of an accident caused or arising from use of the motor vehicle as a private vehicle in connection with the insured's business, use of carriage of passengers in connection with the insured's business and/or for domestic and pleasure purposes, without reward or hire.
- It was a further term of policy cover that such indemnity would only be payable if the insured motor vehicle was being driven by an authorized driver at the time of the accident and such driver being a holder of a valid licence to drive the insured motor vehicle.

The Plaintiff averred that on about 2nd February, 2002 the insured motor vehicle was involved in a road accident along Kipkabus – Eldoret road. That at the time of the said accident the insured motor vehicle was being used as a taxi for purposes of carrying the following people for hire and reward.

- (a) Charles Mwangi Nduati
- (b) Zacharia Waruiru Leonard
- (c) Nathaniel Kiprono Tarus

The Plaintiff alleged in the Amended Pleat that at the time of the accident the suit motor vehicle was being driven by one Julius Wanjohi – who was at the time of the accident not a holder of a valid driving licence.

The Plaintiff further pleaded that arising from the foregoing, the Defendant breached terms of the Insurance Policy thereby entitling the Plaintiff to repudiate liability to pay for any death, injury sustained, damage to property, costs and/or other claim whatsoever arising from the said accident. The particulars of the alleged breach of the terms of the policy of insurance were set out by the Plaintiff as follows:-

- (i) Using Motor Vehicle Registration Number KAD 365A for a purpose other than for private transport, that is transport of the insured, carriage of passengers in connection with the insured business or for domestic, pleasure or social purpose.
- (ii) Using the said motor vehicle as a taxi and for hire and reward.
- (iii) Transporting persons not covered under the policy.

- (iv) Using the insured vehicle for purpose not connected in any way with private use.
- (v) Using the said vehicle as a public service transport vehicle.
- (vi) Entrusting the driving and control of the said vehicle upon an unlicensed driver and/or unauthorized driver.
- (vii) Otherwise using the said motor vehicle contrary to and in total breach of the policy of insurance.

In his defence dated 14th December, 2002, the Defendant pleaded, inter alia, that:-

- He admits that he is the owner of the motor vehicle registration number KAD 365A.
- The said motor vehicles was involved in an accident on the 2nd February, 2002 along Kipkabus – Eldoret Road.
- He took out an insurance policy with the Plaintiff Company being policy number KO 167 MOO9 for the period 9/07/2002 to 8/07/2002 and that the policy was to indemnify the Defendant against any loss that he may suffer as a result of passengers being injured either while traveling as lawful passengers in the motor vehicle or third parties knocked by his motor vehicle.
- The insurance policy was effective at the time of the accident and therefore the Plaintiff is liable to satisfy any claims that arose from the accident.
- That on the 2nd February, 2002 his motor vehicle was in the control of his driver who was and is a qualified driver, some authorized passengers namely Zacharia Wairori and Charles Mwangi who and were not fare paying passengers as alleged by the Plaintiff and he will invite proof to show otherwise.
- The motor vehicle was not at the material time or any other time for that matter being used as a taxi.
- His driver was and is a qualified driver with a valid driving licence.
- The Defendant denies being in breach of the terms of the insurance contract.
- The Plaintiff is liable to satisfy all the claims that have arisen and that may arise following the accident on 2nd February, 2002 as these are the conditions under the insurance policy.
- The Defendant has not been served with a repudiation notice as alleged.
- The suit before the Court is bad in law and not sustainable under the law.

There are interested parties in this suit. As a result of the aforesaid accident two passengers in the motor vehicle, Zacharia Wairori and Charles Mwangi instituted suits in the Chief Magistrate’s Court, Eldoret CMCC Nos. 804 of 2002 and 805 of 2002 in which they sued the Defendant for damages for alleged loss and damage suffered as a result of the accident.

The said suits were stayed by orders of this Court pending the hearing and determination of this suit. Since the outcome of this case would affect the claims of the Plaintiffs in the said suits, they were enjoined as interested parties in this suit so that they could participate in the proceedings and protect any rights they may have. In the event this suit was successful, then the Plaintiff herein as insurer of the vehicle would not be obliged or compelled to indemnify the Interested Parties under Section 10 of the Insurance Motor Vehicle (Third Party Risks) Act, Chapter 405, Laws of Kenya, if they were successful in their suits in the Chief Magistrate's Court.

The Counsels for the Parties filed a list of agreed issues dated 3rd May, 2004 duly signed and lodged in Court on 10th May, 2004.

As a result the issues or questions for the determination of this Court are:-

- (a) Whether or not the policy of insurance between the Plaintiff and the Defendant was in connection of a private vehicle.
- (b) Whether or not the Plaintiff was to indemnify the Defendant for use only in connection for the Defendant's business, domestic and pleasure purposes.
- (c) Whether the policy covered fare paying passengers.
 - (d) Whether the insured motor vehicle was being used as a taxi.
 - (e) Whether the subject motor vehicle was driven by an unqualified and /or unauthorized driver on 2.2.2002.
 - (f) Whether or not the Plaintiff is bound to indemnify the Defendant against claims arising out of the accident on 2.2.2002.
 - (g) Whether the Plaintiff is entitled to reliefs sought.
 - (h) Who is to bear costs.

The Plaintiff called two witnesses who testified on oath.

PW 1 was the Branch Manager of AON Minet Insurance Brokers which offered insurance brokerage services to the Defendant leading to the Proposal Form dated 9th July, 2001 for the Insurance of Motor Vehicle Registration Number KAD 365 A Toyota Corolla for the period commencing 9th July, 2001 to 8th July, 2002.

PW 2 was the Eldoret Branch Manager of the Plaintiff who gave an account of the alleged breach by the Defendant of the Policy conditions on user of the motor vehicle and the authority of the driver.

The Defendant and the Interested Parties did not call any witnesses and therefore did not lead any evidence whatsoever. The Defendant's and the Interested Parties evidentiary cases relied on documents produced by the Plaintiff and/or agreed upon and the cross-examination of PW 1 and PW 2.

I have carefully analysed the pleadings, the evidence of PW 1 and PW 2, the cross-examinations thereof, the documents produced and the able submissions by the three Counsel for the Parties.

I intend to deal with the agreed issues in seriatim. I would like to point out that in their submissions the Counsel for the

Defendant and the Counsel for the Interested Parties raised and submitted on questions relating to:-

- Notices of Institution of the Declaratory suit i.e. that the Interested Parties were never served with notice of institution of the declaratory suit as required by Section 10 (4) of the Insurance (Motor Vehicles Third Party Risks) Act, Chapter 405.
- Whether the suit was brought before the Institution of the claims by the Interested Parties or within three (3) months of institution of such suits.
- Waiver of the right to repudiate the policy by the Defendant. That by hiring an Advocate to represent the Defendant in the Third Party claims or suits and paying their legal fees/costs, the Plaintiff had not shown or exercise an unequivocal conduct of its intention not to treat the contract as subsisting upon the occurrence of a fundamental breach.
- Issues of confidentiality between Advocate-Client. That the insurers cannot use information and statement made in confidentiality by the Defendant to the Advocates by the Insurer to institute a suit against him.

The said issues or questions were not part of the agreed issues to be determined by this Court. The list of agreed issues is dated 24th May, 2004 and filed in Court on 20th August, 2004. This is provided by the Civil Procedure Rules. It is my view that once parties agree on issues to be determined by the Court then the same is binding on them since it is contractual in nature. The agreed on issues consists of a contract that the only issues to be presented and determined were those on the list. They must be based on the pleadings and one cannot agree to include a question not underpinned on the pleadings. However, the parties may agree to exclude or leave out a question or issue which was pleaded by either or both parties.

It is my view that it would be improper for the Court to allow the hearing of and of more importance the determination of a question which was not in an agreed list of issues duly executed by the parties. To do so would render the purpose for which this process is allowed to be meaningless or useless. The object of having issues for determination by the Court to be mutually agreed upon is noble and is intended to bring certainty in proceedings and to save previous judicial time.

Where the issues are not expressly agreed upon, the situation is more fluid provided always one does not step outside his own pleadings. In such a situation, the Court will ultimately be the one to guide the parties as to the issues to be focused on during the trial. At the end one can make submissions on any issue set out in the pleadings.

As a result, I hereby hold that the Parties were bound by the Agreed Issues dated 24th May, 2004 and this Court will not allow the aforesaid issue raised by the Defence and the Interested Party. To allow those “new” issues would amount to an ambush on the Plaintiffs and in breach of the principles of natural justice as it is deemed that the trial was carried out within the parameters of the agreed issues and nothing else.

(a) Whether or not the Policy of Insurance is between the Plaintiff and Defendant was in connection of a Private Vehicle?

The Policy of the Insurance is the contract between the Plaintiff and the Defendant. This is common ground. It is Policy No. KO

107 MOOO9 dated 19th October, 2001. The Policy is headed – “Private Car Policy”. Under the General Exceptions Clause, the Plaintiff as the Insurer would not be liable for certain specified claims, loss or damages. The Clause in respect of the use of the motor vehicle provides:-

“ **GENERAL EXCEPTIONS**

The Company shall not be liable in respect of

1. any accidental loss, damage or liability caused sustained or incurred

(a)

(b) **Whilst the motor vehicle in respect of which indemnity is provided by this Policy is**

(i) being used otherwise than in accordance with the limitation ad to use.

.....”

The limitation as to use states:-

“**MOO2 P.C. (b)**

Use only for social domestic and pleasure purposes and by the Insured in person in connection with his business or profession.

The Policy does not cover use for racing competitions, rallies or trails (or use for practice for any of them) or use of 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.”

(emphasis mine)

From a careful reading of the aforesaid limitation as to the Use of the Vehicle, I do hold and find that the policy of insurance between the Plaintiff and Defendant was in connection with a private car or vehicle. The vehicle was for private use of the insured person and in connection with his:-

- social purpose
- domestic purpose
- pleasure purpose and by the insured in connection with his
- business
- profession

The aforesaid clearly and by sound construction exclude the vehicle to be used for hire or reward e.g. as a taxi or ‘matatu’ or other public service vehicle or for any commercial purpose. So the answer to the first question (a) is yes the Policy of insurance was in connection of a private vehicle.

(b) **Whether or not the Plaintiff was to indemnify the Defendant for use only in connection for the Defendants business, domestic or pleasure purpose?**

The answer to this question is found in the answer given by the Court in question issue (a) above.

On the basis of the limitation as to the use of the motor and the express provisions in the General Exceptions Clause, the answer is, Yes, the Plaintiff was to indemnify the Defendant for use only in connection for the Defendants business, profession, social, domestic and pleasure purposes. Nothing else. The Plaintiff is not in law obliged to indemnify the Defendant for accident, loss, damage or liability caused or sustained whilst the vehicle is used for purposes outside the aforesaid specified purpose.

(c) Whether the Policy covered fare paying passengers?

The answer is certainly NOT! Use of hire or reward is expressly excluded in Clause 1 (b) (i) of the General Exceptions Clause. If the Defendant used the vehicle as a taxi that would be use of “reward” – the fare being the reward. This is excepted, and excluded. The Policy did not cover fare paying passengers.

(d) Whether the Insured Motor Vehicle was being used as a taxi?

I have carefully perused the evidence of PW 1, the Manager of the brokerage firm which obtained the proposal form for the Insurance Policy. He testified how the Defendant had filled a private car proposal form. He outlined the distinction between a private car policy and public service vehicle policy. He also highlighted the various policy terms and conditions that the Defendant had undertaken to observe, notably those on the user of the motor vehicle and on the competence/authority of the driver.

PW 1 did not give any evidence showing or indicating that the vehicle was being used as a taxi.

PW 2 was the Plaintiff’s Manager at Eldoret. He testified how during the existence of the Insurance Policy, the Defendant made a claim on 5th February, 2002 in respect of the accident that took place on 2-02-2002. The Claim Form was marked Ex. No. 4. When he received the Claim Form he looked at it.

PW 2 said that he called the Defendant who went to his office. He said that he asked the Defendant several questions. That the insured was trembling and shaking. This was on 1st March, 2002. PW 1 said that the Defendant told him that he had left the vehicle with his regular driver and the driver operated the vehicle as a taxi. PW 1 did not remember the name of the driver.

PW 1 said that the Defendant wrote a statement on the accident. The Counsel for the Defendant and the Interested Party raised objections. I heard arguments from both sides and delivered a considered ruling on 10.12.07. The Court allowed the PW 1 on behalf of the Plaintiff to produce it under Section 33 (c) of the Evidence Act and call witnesses to prove that it was made by the Defendant on his own free will.

The letter was produced as P. Ex. No. 7. The Statement reads, inter alia, as follows:-

“ **Kenya Ordinance Factories Limited**
P.O. Box 6634,
Tel: 32712/3
ELDORET
1-3-2002

STATEMENT ON HOW THE INVOLVED IN ACCIDENT ON 2/2/2002 (sic)

.....

On 8th October, 2001 I employed Mr. John Kuria Maina as a driver. His driving licence No. J 269889/No. A 366897.

The main objective of employing him was to coach me so as to efficiently drive the vehicle on my own the vehicle had a lot of mechanical problems which I decided to sort out first but I ran out of finance before finishing. I therefore told Mr. Kuria to use the vehicle as a taxi so as to enable us raise some money to be used in repairing minor problems that were remaining.

.....

I placed the vehicle on hands of John Kuria but not Mr. Wanjohi who caused the accident.

..... I am sorry to learn that it was a mistake to use the vehicle as a taxi.”

Nothing in the said statement referred to whether the vehicle was in fact being used as a taxi when the accident occurred. It is quite true that there was a statement in the said letter that the Defendant had allowed his regular driver to operate the vehicle as a taxi to raise money. However, the statement did not say whether on the material day and time it was in fact being used as a taxi. In the Exceptions Clause the words used are:-

**“..... whilst the motor vehicle in respect of which indemnity is provided by the policy in use is
(i) being used otherwise than in accordance with the limitation as to the use.”**

The use of the word “whilst” clearly shows that liability under the Policy can only be avoided if the liability is incurred at a time the insured is in breach that is to say as submitted by Counsel for the Defendant “the breach must be contemporaneous with the incurring of liability.”

In simple words, the accident must have taken place when in fact the vehicle was in use for a purpose not allowed or permitted by the policy in this case as taxi. The fact that the vehicle could possibly have been used previously as taxi or that the Defendant had authorized his regular driver to raise money by using the vehicle as taxi is not by themselves proof that the accident indeed took place “whilst” the vehicle was in such use.

I also do find that there was no evidence that the persons injured in the motor vehicle were being carried for reward i.e. that they were fare paying passengers.

In the light of the foregoing, the answer here is that there is no evidence which proved on a balance of probability that the vehicle was being used as a taxi. It follows that the Plaintiff was not entitled to repudiate the policy on this ground. There was no breach of the condition or to user which was proven.

(e) Whether the subject motor vehicle was driven by an unqualified and/or unauthorized driver on 2-2-2002?

In P. Ex. No. 7 which was produced by PW 2 as stated above, the Defendant inter alia stated:-

“
.....

On 17th January, 2001 we traveled home to Migori with no negative incidence and on 20th January, 2002 I placed the vehicle on the hands of John Kuria, but not Mr. Wanjohi who caused the accident. Mr. Kuria traveled by it back to Eldoret as I still remained on leave.

.....

On reaching Eldoret I found that the person who was driving the vehicle was a stranger to me and had no authority from me. I know Mr. Wanjohi as a person who makes “sanamu” Jesus in the Lord and others but not as a driver.

Kuria explained to me that he had been sick hence he decided to give Wanjohi the vehicle to use

In the said statement the Defendant did not state that the driver Wanjohi was not a qualified driver i.e. that he did not possess a valid driving licence. PW 1 and PW 2 did not give any direct evidence in this regard. As a result I do hold that there is no evidence from Plaintiff before this Court to establish that the said driver was unqualified.

Be that as it may whereas as a general proposition the legal burden of proof lies upon the party who invoke to aid of the law and substantially assess the affirmative of the issue, there is however the evidential burden that is cast upon a party regardless of whether he/she is the Plaintiff/Defendant of proving any particular fact he/she desire. The Court to believe in its existence. This is more so where the fact in issue is especially within the knowledge of such a party (see Sections 109 and 112 of the Evidence Act).

I was referred to the case in the Court of Appeal – NATIONAL INDUSTRIAL CREDIT BANK LIMITED –V- AQUINAS FRANCIS WASIKE C.A. NAIROBI CIVIL APPLICATION NO. 238 OF 2005 where it was observed:-

“This Court has said before and it would bear repeating that while the legal duty is on an Applicant to prove the allegation that an appeal would be rendered nugatory because the respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an Applicant to know in detail the resources owned by a Respondent or the lack of them. Once an Applicant expresses a reasonable fear that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”

In this case the Plaintiff pleaded that the driver was unlicensed. The Plaintiff produced P.Ex. No. 7 at the trial in which the Defendant said that he knew Wanjohi as a sculptor of figurines (“Sanamu”) and not a driver.

In the light of this the Plaintiff was entitled to question whether Wanjohi was a licensed driver. Since the driver of a motor vehicle is required under the law to have a valid driving licence when driving, then once the allegation is made about this, it was the duty or onus for the Defendant to call Wanjohi or produce his driving licence.

The Defendant did not testify neither did he call Wanjohi as a witness. I hold that the burden of proof had shifted and the evidentiary burden required the Defendant to prove that the driver held a valid driving licence.

I do hold that on a balance of probability the driver of the motor vehicle did not have or possess a valid driving licence at the time of the accident.

The Defendant in his statement expressly stated that the driver of the vehicle at the time of the accident did not have authority from him. This is an admission in his own statement. He did not testify to quantify the said statement or retract it.

I do hold that the driver of the vehicle on 2.2.02 was an unauthorized driver. He did not have the authority of the Defendant to drive the vehicle. This was in clear breach and violation of Policy. An authorized driver in the schedule is defined as:-

- (a) The insured
- (b) Any person driving on the insured's order or
with permission.

Also an authorized driver must be one permitted to drive a motor vehicle in accordance with the licensing or other laws or regulations to drive the motor vehicle.

In the premises I do hold that the vehicle at the time of the accident was driven by an unauthorized driver.

(f) Whether or not the Plaintiff is bound to indemnify the Defendant against claims arising out of the accident on 2.2.02?

From the foregoing the answer is that the Plaintiff has proved on a balance of probability that the Defendant breached the terms and conditions of the Insurance and in particular that at the material time when the accident occurred the vehicle was being driven by an unlicensed driver and also an unauthorized driver. As a result the Plaintiff is not bound to indemnify the Defendant against the third party claims arising from the accident.

(g) Whether the Plaintiff is entitled to the reliefs sought?

Yes, the Plaintiff is entitled to the relief sought. I do enter Judgment for the Plaintiff as against the Defendant in terms of Prayer (a) of the Plaint.

(h) Who is to bear costs?

The Defendant shall bear the costs of the Plaintiff in this suit. The Interested Parties shall bear their own costs in this suit.

DATED AND DELIVERED AT ELDORET ON THIS 4TH DAY OF MARCH, 2009.

**M. K. IBRAHIM
JUDGE**

In the presence of:

Mr. Manani for the Defendant

Mr. Karira for the Interested Parties

No appearance for the Plaintiff

