REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 389 of 2007

THOMAS MUOKA MUTHOKA & ANOTHER..... PLAINTIFF

VERSUS

INSURANCE COMPANY OF EAST AFRICA LIMITED…..DEFENDANT

R U L I N G

The defendant is the insurer of motor vehicle registration No. KAR 598J belonging to the Plaintiffs' under a comprehensive motor policy No. 02/970/10/18101/2003. On 16th May, 2004 the said motor vehicle was involved in a road accident in which the deceased died from fatal injuries sustained in the accident. On 8th December 2004 the plaintiffs issued to the defendant a Statutory Notice pursuant to the provision of the Third Party Insurance (Risks) Act, Cap 405 of the Laws of Kenya.

A year later on 6th December 2005, the plaintiffs filed HCCC No. 1454 of 2005 against the defendant's insured, one Ernest Jacob Kisaka, claiming compensation in general and also claiming special damages.

On 20th June 2006 a judgment was entered in favour of the plaintiffs against the defendant insurance company's insured, Ernest Jacob Kisaka, in the above-mentioned suit (hereinafter called the primary suit).

On 20th June 2006 judgment were entered against the defendant's insured in favour of the various plaintiffs in the several cases filed as a result of the aforementioned accident. They include HCCC No. 1453 and 1132 all of 2005, and CMCC No's 13003 and 13004 both of 2005. The Defendant who had instructed its lawyers to represent their insured, was advised by the lawyers to settle the claims as awarded in the said cases.

The defendant, however while fully settling the cases in which the awards were less than the sum insured, declined to do so in respect to the awards which were higher than Kshs.2,000,000/-. However, the defendant forwarded cheques for Kshs.2,000,000/- only in respect of the two cases in which the court awards were over Kshs.6,000,000/- each. The plaintiffs promptly rejected the cheques and thereafter filed this and another declaratory suit to compel the Defendant to pay the entire sums awarded in the cases, i.e. HCCC No. 1453 and 1454 of 2005. Such settlement would contradict the limitation clause in the insurance policy earlier highlighted, limiting liability to Kshs.2,000,000/-.

Meanwhile the defendant also filed suit HCCC No. 717 of 2007 against the plaintiffs seeking a declaration that it had discharged its contractual obligations to the insured and the plaintiffs by offering to

and paying Kshs.2,000,000/- per claim. This was after defendant filed defences to the two plaintiffs' declaratory suits.

On 18th January 2007 the plaintiffs filed an application dated the same date, seeking to have the said Defences filed by the Defendant to the declaratory suits, struck out and judgments entered in the favour, each as prayed. The Defendant responded by filing a replying affidavit dated 9th February 2007 opposing the said application. It is then that both parties narrowed the issues to be determined by this court and by consent tabled one issue which is as follows: -

"**Whether the clause in the insurance Contract at Section IV (A) limiting the Defendant's liability to third Parties at Kshs. 2 million is valid and enforceable at law?"**

The parties who were represented by Njeri Kariuki for the Defendant and E K Mutua for the plaintiffs, filed their written submissions and legal authorities and confirmed that they each had nothing more to add to the said submissions. There was no dispute that the deceased were passengers in the insured's motor vehicle when the accident which resulted into their death, occurred.

To properly appreciate the issue before the court, it is necessary to quote the relevant provisions of the law sought by parties to be interpreted.

Section 4(1) of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405 of the Laws of Kenya provides: -

"**Subject to this Act, no person shall use, or cause to use, or cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirement of this Act."**

There is apparently no issue or dispute that there was in existence the required policy of insurance or such a security in respect of third party risks as complies with the Act aforementioned. However, such a policy must also comply with the provisions of Section 5 of the said Act which states:-

"**In order to comply with the requirements of section 4, the policy of insurance must be a policy which –**

(a) is issued by a company which is required under the Insurance Act …. to carry on motor vehicle insurance business

(b) Insures such person, persons or classes of persons specified in the policy in respect of 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 road:…."

The Proviso to the above immediate provision excludes persons who die or sustain injury while in their course of employment or if their liability is contractual. It however includes and preserves liability in respect of persons being carried as passengers for hire or reward in or upon or entering or getting on to or alighting from the insured's vehicle at the time of the accident. The proviso also now excludes liability of the relevant person abovementioned if the sum is beyond 3 million although this limitation did not apparently exist when the accident before this court occurred.

It is with the above information and knowledge that we can now highlight the clauses in the insurance policy that raise the dispute.

The section of the Insurance Policy signed between the Defendant and the insured under which this dispute arises, is in Section IV. It's heading is "**List of the amount of the company's liability".** It states under Section 1-11…

"**A. In respect of any person (other than a passenger being carried by reason of or in pursuance of a contract of employment) being carried in or upon or entering or getting into or alighting from the motor vehicle:-**

i) in respect of death of or bodily injury to any one person Kshs.2,000,000/-

ii) in respect of a series ……..

B. In respect of any other person …….. unlimited."

It will be observed that the wording of the policy of insurance issued to the Defendant's insured follows and tallies closely with the actual wording of sections 4 and 5 of the Act. However, while the Act presently provides that the limit of liability arising from the death of or injury to a person so covered will not be more than Kshs.3,000,000/- per person, the Defendants policy limits the sum to Kshs.2,000,000/- per person. It will also be borne in mind that at the time the relevant policy was issued, the clause in the law now limiting the liability to Kshs.3,000,000/- did not exist. It came into being by an amendment of the Act made by Parliament in January 2006, but more about the amendment, later.

In my view, no striking complications would appear to immediately arise in complying with the provisions of sections 4 and 5 of the Act which effectively impose a statutory duty upon the owner of a motor vehicle to maintain an insurance cover that protects third parties therein specifically named while the motor vehicle is in use on the road. Also at this stage, the insurer would seem to be an independent player whose part is merely a business position which would only be dictated by the terms of the contract contained in the insurance policy document. Put differently, the position of the insurer would as far as the insurer is concerned, appear to be governed purely by the agreed terms of the insurance between it and the insured and nothing more.

However sections 8, 16 and 10(1) of the Act appear to spell out the involvement of and the extent thereof of the insurer.

Section 8 states: -

"**Any condition in a policy of insurance providing that no liability shall arise under the policy, or that any liability so arising shall cease in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to claim under the policy, shall as respects such liabilities as are required to be covered by a policy under section 5 of this Act, be of no effect.**

Provided that nothing in this section shall be taken to render void any provision in a policy requiring the persons insured to repay to the insurer any sums which the latter may have become liable to pay under the policy and which have been applied to the satisfaction of the claims of third parties."

It is in my view important, to read the wording of the above section with those of section 16 of the same Act for comparison purposes and for maximum effect of their meanings. Section 16 provides: -

"**Where a certificate of insurance has been issued…. to the person by whom a policy has been effected so much of the policy as purports to restrict the insurance of the person insured thereby by reference to any of the following matters- (here a number of matters are named) shall, as respects such liabilities as are required to be covered by a policy under para (b) of section 5 of this Act, be of no effect:**

Provided that nothing in this section shall require an insurer to pay any sum in respect of the liability of any person otherwise than in or towards the discharge of that liability and any sum paid by an insurer in or towards the discharge of any policy by virtue only of this section shall be recoverable by the insurer from that person."

What then are the meanings of the two sections? Interpretation of both became a subject in the case of **New Great Insurance Company of India Ltd v Lilian Evelyn Cross and Another** (1966) E. A, 90. At page 97, **NEWBOLD, V.P**, in reference to Section 8 of the Act, stated: -

"**The effect, therefore, of this section is that a condition in a policy of insurance providing that no liability shall arise under the policy is ineffective in so far as it relates to such liabilities as are required to be covered by a policy under Section 5(b) of the Act and in so far as any such condition is prayed in aid to avoid liability to a third party who has been injured. In so far, however, as the relationship of the insurer and the insured is concerned, then, by virtue of the proviso to the section, if the policy contains – provision requiring the insured to repay to the insurer any amount which the insurer has had to pay to a third party in circumstances in which the condition applies, such a provision is perfectly valid."**

In the above case the insure was trying to avoid paying compensation to an injured third party on the basis that the driver who was driving the insured motor vehicle was not an authorized driver within the definition of such driver as per the terms of the insurance policy entered between the insurer and the insured. The court, however, established that the policy on the face of it, purported to be one which covered the liabilities required to be covered by the Act. The court further found that the insurer was trying to avoid compliance of the conditions as well as liability imposed on it by the proviso to section 5(b) by use of the mere definition of the "**authorized driver".** The court then pronounced that the result of such avoidance, if permitted, would be that a policy which purported to be covering the liabilities required by the Act to be covered, was not and would never be such a policy. The result would be that such a policy would be a misleading document that did not only expose the owner of the motor vehicle to a commission of an offence as provided under the section but also denying the third parties the protection granted to them under the Act.

In relation to section 16 of the Act, the same **New Great Insurance Company of India Ltd** case found that there was no great difference in meaning between that section and section 8 already examined above, except that while section 8 dealt with a condition in a policy which sought to either prevent liability from arising or to avoid a liability which had arisen, section 16 dealt with an attempt to restrict or limit the insurance to certain specified matters.

In conclusion on this point the Appellate court in the above cited case, as I understand it, stressed more on the intention and purpose of the Act which it declared was, "**to provide protection to third parties who receive injury"** and who seek recovery of compensation from the insurer under a contract of insurance to which they are not party. The Appeal Court then proceeded to consider and analyse section 10 of the Act which created the above arrangement that enables third parties who are not party to the insurance contract, to claim compensation under the said insurance contract. Section 10 provides:-

"**10(1) If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under para (b) of section 5 of this Act (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid… or may have avoided…….the policy, the insurer shall…pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability….**

(4) No sum shall be payable by an insure under… this section if, in an action….he has obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of material fact, or by a representation of fact which was false in some material particular….

(6) … **liability covered by the terms of the policy means a liability which is covered by the policy or which would be so covered but for the fact the insurer is entitled to avoid…..or has avoided…… the policy"**

What I understand Section 10(1) to be saying is this – that where the owner of a motor vehicle has

taken out a policy of insurance which purports to indemnify him and other authorized persons in respect of liability to third parties intended to be protected under Section 5(b) of the Act from injury or death to them in the use of the motor vehicle on the road and

(a) a judgment in respect of liability as is required to be covered is obtained against such owner of motor vehicle (the insured).

(b) then notwithstanding that the insurer may in accordance with the terms of the insurance contract be entitled to avoid or may even have avoided the policy or liability (section 8) or would have restricted or limited the liability as per the terms of the policy, (section 16)

(c) nevertheless, the insurer is under mandatory statutory liability to first [pay the full judgment sum to the person entitled to the benefit of the judgment (the injured or the estate of the deceased) and

(d) thereafter, the insurer may recover the due sum so paid to the third party under a clause in the terms of the insurance contract, if any under the Act (section 8 proviso) or a statutory obligation or liability created against the insured under the Act(proviso to section 10).

Before turning to and applying the facts of the case before me, I find it important to highlight what the defendant submits as conflicting contract law and other legal provisions.

First, the Defendant submitted that a party should only be bound by the terms of a contract that he voluntarily chooses to enter into. The Defendant's case is that the insured in this case entered into an insurance contract in which the Defendant's liability was limited to the amount of premium paid by the insured. That the liability accordingly covered by the Defendant as the insurer, was Kshs.2,000,000/- which became the voluntary contractual choice of the insured. That since the insurance contract issued to the insured to cover the latter's liability under section 4 and 5 of the relevant Act, is merely under the principle of subrogation, then, the insured subrogated to the insurer only that specific liability that he chose to subrogate and not anything more.

Njeri Kariuki, Advocate, also referred to the case of **Madison Insurance Company Ltd v Kinara** (t/a Kisii Physiotherapy clinic (2004) I KLR 709 at 713 in which the court stated: -

"…**.. the party whose property is being insured pays premium not with intention of making any profit out of the transaction, but rather with the intention that, were the items assured to be destroyed, stolen or damaged, the other party offering the policy would replace the stolen or destroyed item or pay reasonable charges for its repair."**

The Defendant accordingly further argued that the judgment holders in the present case as third parties, would only be entitled to and be limited to what had been agreed between the contracting parties herein which would be the compensation to third parties limited to Kshs.2,000,000/-

Thirdly, the Defendant also argued that a contract of insurance such as the one under discussion, must in accordance with section 78 of the Insurance Act, Cap 487 mandatorily contain express terms of the sum insured. The section states: -

"**A contract of insurance entered into after the appointed date, shall be void if it is a contract under which the insurer undertakes a liability the amount or maximum amount of which is uncertain at the time when the contract is entered into."**

So by binding itself to pay a maximum sum of shillings two million per person, argued Njeri Kariuki, the Defendant as the insurer was not intending to defeat the provisions of the Act, but rather to enforce section 78 of the Insurance Act aforecited as well as the provisions of sections 4, 5, 8, 10 and 16 of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405 of the Laws of Kenya.

Responding to the points raised by Njeri Kariuki, Advocate, I have no reason not to agree with her,

that a party to a contract should only be bound by the terms of the contract which the party voluntarily entered into. However, I have no doubt in my mind also and do so find, that the contract so voluntarily entered to by the parties, should be a lawful contract under all the laws applicable in the jurisdiction where such a contract was intended to be enforceable. I did not understand the Defendant to be arguing differently.

Secondly, I am of the view and accordingly make a finding that any rule or principle of law, whether in common law or under statute can be reversed or be modified by a fresh statute of Parliament. This happens usually to cover an existing vacuum or remedy an existing mischief or unsatisfactory state of affairs. Again I did not understand the Defendant to deny this position.

Having arrived at the conclusion above, I find it relevant to also establish what the legislature's purpose to enact the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405 of the Laws of Kenya was. As I understand it, the mischief that existed at the passing of the Act was that a third party who was injured by a motor vehicle got no compensation for his suffering or inconvenience if either the owner or the driver of the vehicle happened to be impecunious.

That is why it became the clear object of the legislature to pass the Act to provide a remedy so that people who walk along the road would be protected against the hazards of motor-accidents. The object of the Act accordingly was to make provisions against third party risks arising out of the use of motor vehicles on the roads. As put by Sir Clement De Lestang, J.A. in the cited **New Great Insurance Company of India Company Ltd** case at page 104: -

"**Generally speaking the Act seeks to achieve that object not by placing the whole burden of compensating third parties injured in motor accidents on the insurers but by combination of two means, namely (1) by making it obligatory, on pain of punishment, for any person who uses or causes or permits any other person to use a motor vehicle on the road, to have in relation to the user of the vehicle a policy of insurance which satisfies the requirements of the Act, and (2) by restricting the right of insurers to avoid liability to third parties."**

In my view, the Legislature, to achieve the above purpose laid the relevant legal duty upon both the owner of the motor vehicle who authorized its use on the road on the one hand, and the insurer who issued an insurance cover on the other hand. This means that both persons or sides have to strictly obey each's calling for the legislature's intention or the Act to succeed. Otherwise the Act will have been legislated in vain, a situation this court should not allow to happen.

As stated by Lord Denning (as he then was) in **Escoigne Properties Limited** V. **I.R. Comrs (15)** [1958] A.C. at 565:

"A statute is not passed in a vacuum, but in a framework of circumstances, so as to give a remedy for a known state of affairs. To arrive at its true meaning, you should know the circumstances with reference to which the words were used: and what was the object, appearing from those circumstances, which Parliament had in view."

It will therefore be the duty of this court as well to do its reasonable best to carry out the intention and purpose of the Legislature where the words of the Act are not expressly clear with a view to achieve the original purpose of suppressing the mischief intended to be addressed. As stated in **Heydon's Case** (1584) 3 Co. Rep. 70 also found in [1957] 1 All E.R. 291

"…….the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief….and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico."

My understanding of the various expressions in the various cases cited is that the clear words of a statute will be given a reasonable and express meaning the words carry. The courts will strive to effect

the object of the Legislature without in anyway twisting the clear words of the law. Where there is no clarity the courts will be guided by examining the original intention of the Legislature with a view to arrive at the remedy to the mischief intended to be addressed.

In the present case, as earlier stated, there is no dispute on the facts. The Plaintiff who was the insured, Ernest Jacob Lisaka, took an insurance policy No. 020/970/10/18101/2003 from the Defendant, the Insurance Company of East Africa. The insurance policy was in compliance with Sections 4, 5, 10 and 16 of the Insurance (Motor Vehicle Third Party Risks) Act, Cap. 405. The insurance policy's purpose was to protect third parties by availing a ready source of compensation for injuries or death sustained, arising from the use of the Plaintiff's motor vehicle on the road. It is not disputed that a third party, who is not the Judgment holder, was injured or/and died out of such accident. The third party or parties filed court claim(s) and obtained a Judgment(s) for sum of Kshs.6,138,373/- and 6,338,139/- respectively.

Should the Plaintiff who was covered by the insurance policy above-cited, for the kind of liability intended to be covered under Section 4, 5, 8, 10 and 16 of the Act, be liable to pay the above sums?

The Defendant, if I understand it, says yes, but qualifies this by saying that it should only pay to the extent of not more than KShs.2,000,000/- in respect of each single claim. It gives the reason for this stand as insurance contract hereinabove cited which had limited the liability to Kshs.2,000,000/-.

In my view and taking into account the clear provisions of the above sections, the Defendant's stand is erroneous. Section 10 in my finding clearly states that notwithstanding that the insurer may be entitled to avoid or may have avoided the policy, it/he nevertheless, **shall pay** to the persons, holding the judgment, who in this case are the third parties. This requirement to pay is mandatory as it is qualified by the word "**shall".** This, in my view, is the legal duty imposed upon the insurer by the Legislature. It is admitted that the duty may appear onerous, even unfair. It appears to breach the principle of privity in contract law, only to benefit a third party who has contributed nothing. Yet considered more deeply, it is an imposition of a duty to protect members of society who may not have capability even to go to hospital after an accident has occurred. Furthermore, insurers are virtually all the time big public companies often endowed with adequate funds and capable of absorbing such liabilities. In the last resort the insurers have freedom to choose to give an insurance cover or not.

In my further considered view, therefore, the restriction on the extent of liability which the Defendant purports to include in the insurance policy aforementioned cannot be supported. As stated in Sections 4, 5, 8, 10 and 16 of the Act, such avoidance clauses or restriction are void. The rights to recover which are accorded the third parties under the Act, are, in my opinion, independent and their origin is the statute. They override the insurer's and the insured's contractual rights under the above cited policy of insurance.

Furthermore, it is my view that the Defendant's restriction on the extent of liability to third parties, may be arising from a disability of the insured to pay adequate premium. It should not be allowed to debar the third parties from being recouped by the insurer, over and above the contractual sum. That is why, I believe, the Act independently authorizes the insurer to recover back under Section 16, what the insurer may have paid to third parties but was not lawfully or contractually due to the insured under the insurance contract.

Also in my further opinion, were the insurers allowed by the Court to place restrictions, limitations or avoidances against the clear words of the Act, the astonishing and disappointing consequence would be to render the Act and its objectives nugatory? This is without prejudice to any possible curtailment, if any, allowed to the insurers under Sub sections 2, 3, and 4 of Section 10 of the Act.

To conclude this ruling, I hold that the clause in the insurance contract No. 020/970/10/18101/2003 at Section IV (A) limiting the Defendant's liability to Third Parties to Kshs.2 million, is invalid, void and unenforceable. It is so declared despite the fact that there may be in existence a suit seeking a declaration that the Defendant is entitled to avoid the insurance policy under discussion. That is because the sought declaration does not presently exist and its existence in the future will not help the Defendant to avoid it's

liability to Third parties.

Costs of this application will be to the plaintiffs in the declaratory suits.

Dated and delivered at Nairobi this 5th day of March, 2008.

……..

D.A. ONYANCHA

JUDGE