



REPUBLIC KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

Civil Case 81 of 1997

FRANCIS WAINAINA PLAINTIFF

V E R S U S

BLUE SHIELD INSURANCE CO. LTD. DEFENDANT

J U D G M E N T S

The suit herein seeks judgment against the defendant, **BLUESHIELD INSURANCE COMPANY LIMITED**, for the following orders;

- “(a) A declaration that an indemnity contract does exist as between the Plaintiff and the defendants in respect of the period material to this suit.*
- (b) General damages for inconvenience and apprehension suffered by the Plaintiff at the behest of the Defendants in connection to the attempted breach of contract.*
- (c) Costs of this suit.*
- (d) Interest on (a), (b), and (c) above.*
- (e) Any other relief that this Honourable Court may deem fit to grant.”*

During the trial, the plaintiff had two witnesses whilst the defendant did not lead any evidence.

PW1, FRANCIS NDUNG’U WAINAINA, testified that he was at the material time the registered owner of the motor vehicle registration **KAA 432 Q** (hereinafter cited as “the vehicle”). The material time in this instance is the period immediately preceding, the time of and the period immediately after accident involving the vehicle, which accident is said to have occurred on 7th December, 1991.

According to PW1, the vehicle had a matatu body, and he used the vehicle for commercial purposes and for ferrying fare-paying passengers,

PW1 testified that he had taken out an insurance policy for the vehicle, with the defendant company. The policy which was in force at the time of the accident was valid, as far as PW1 was concerned, between 19th April, 1991 and 18th April, 1992.

In order to prove the fact that the vehicle was covered by a policy of insurance which was issued by the defendant, the witness produced the original policy document **No.854/080/043767**, which was marked as "Exhibit 1."

On the face of the policy document, the insured were **FRANCIS NDUNG'U WAIANAINA** and **REGAL HIRE PURCHASE**. PW1 explained that he bought the vehicle through hire purchase, and that he finished paying the hirer in 1992.

It was PW1's testimony that on 7/12/1991 the vehicle was involved in an accident at a place called Kholera. At the time of the accident, the vehicle was being driven by **PW2, DAVID KIHKA KARIUKI**.

PW1 later visited the scene of the accident, where he found the vehicle still at the scene. He also found the other vehicle, Registration No. **KZQ 833**, at the scene. Later still, PW1 obtained a police abstract of the accident from Mumias Police Station.

PW1 said that he personally reported the accident to the defendant. But the defendant wrote two letters to six law firms, notifying them that the defendant was not going to entertain any claims from any of the passengers who had allegedly been injured during the accident. The two letters, which were copied to PW1, indicated that the defendant had only insured the vehicle for commercial use, with no passenger liability.

PW1 testified that at the time of the accident the vehicle was indeed ferrying passengers for hire. PW1 also testified that he did learn that one of the passengers died, and that other passengers sustained injuries.

Following the accident in contention, the plaintiff had been sued by a number of claimants, in three suits being;

(a) KAKAMEGA HCCC. NO.139 OF 1993;

(b) BUNGOMA PMCC NO. 245 OF 1994;

(c) KAKAMEGA PMCC. NO. 725 OF 1994

In support of his case, the plaintiff sought to produce in evidence the copies of the complaints in the three above cited cases. However, as the copies were not certified, the defendant successfully objected to their production in evidence.

PW1 testified that none of the three cases had been heard and determined, as at 16/10/2002 when PW1 testified. Nonetheless, PW1 asked the court to declare that under the contract of insurance, the defendant was obliged to indemnify the plaintiff in respect of all the claims that have arisen and the claims which may arise out of the accident which occurred on 7/12/1991, involving the vehicle.

During cross-examination PW1 conceded that the policy document produced in evidence had not been signed by either himself or by Regal Hire Purchase. PW1 could not even recall having signed a proposal form. Whilst reiterating that he was the owner of the vehicle as at 7/12/1991, PW1 conceded that he did not have any document to prove ownership as he had apparently sold the vehicle thereafter.

PW2, DAVID KIHKA KARIUKI, was a driver. He said that he had been employed as a driver by PW1, and that he used to drive the vehicle registration KAA 432 Q.

On 7.12.1991 PW1 is said to have instructed PW2 to collect people from a church at Matungu, and to take them to a wedding at Chwele. Later, on the way back from Chwele, when the vehicle had reached Kholera, it was involved in an accident. According to PW2, the vehicle was hit from the rear, by another vehicle which was speeding.

As a result of the accident some people in both vehicles were injured. PW2 left the scene of the accident and went to make a report at the Mumias Police Station.

It was the testimony of PW2 that the vehicle was insured by the defendant. He also said that he had never been charged with any offence arising from the accident.

PW2 had also not been a witness in any case for compensation, save for this one.

After PW2 testified, the plaintiff closed his case. Thereafter Mrs. Shinyada, the learned advocate for the plaintiff submitted that there was a contract of insurance between the plaintiff and the defendant, and that the said contract did not exclude the carrying of passengers in the vehicle. She also submitted that as the defendant called no witness, the plaintiff had proved his case on a balance of probabilities. The court was therefore invited to grant the reliefs sought in the plaint.

In answer to the plaintiff's case, Mr. Nyikuli, learned advocate for the defendant, submitted that the plaintiff had failed to prove that he owned the vehicle Registration No. KAA 432 Q. The reason for that submission was that the plaintiff did not produce documents to prove ownership of the vehicle.

In the opinion of the defendant, the plaintiff ought to have produced either the log-book for the vehicle or records from the registrar of motor vehicles, in order to prove ownership.

The defendant also pointed out that the plaintiff did not even prove that an accident had occurred because the dates given by PW1 and PW2 differed from the date indicated on the police abstract. The dates given by PW1 and PW2 were 7/12/1991, whilst on the police abstract there was the date 7/12/1994.

Meanwhile, as regards the policy of insurance the defendant submitted that the plaintiff had failed to spell out the background to the document, as he did not show how he obtained it or how he paid for it.

But even if there had been a policy of insurance in place, the defendant submitted that the risk complained of would only have been an accident resulting in injuries to passengers under the Insurance (Motor Vehicles) Third Party Risks Act, Cap 405.

Under that Act, the defendant believes that it would only be enjoined to settle judgments arising from a policy of insurance effected pursuant to section 5 (b) of that Act. In other words, as far as the defendant is concerned, it would only have been expected to settle judgments for liability covered in the policy.

But in this case, as there were yet no judgments passed against the plaintiff in the cases filed by those who were injured or killed in the accident, no liability had arisen against the defendant; that is the defendant's contention.

In reply, the plaintiff said that as there was a contract between him and the defendant that meant that the vehicle belonged to the plaintiff. His submission is that the plaintiff could not have been paying premiums for a vehicle which did not belong to him.

Pausing at that point for a moment, I wish to make it clear that the fact that a person pays premiums for a policy of insurance in respect of property, does by itself make the said person the owner of the said property in issue. There is no legal presumption that if you pay premiums for the insurance of a property, you were the owner of that property.

Secondly, the plaintiff submitted that he was not asking for indemnity for judgements against him. He clarified that he was only seeking a declaratory judgment that there existed a contract of indemnity between the plaintiff and the defendant at the time material to this suit. In so far as the suit was of a declaratory nature, the plaintiff believes that the suit was not premature, as asserted by the defendant. His explanation was that once the court gives a declaration that there was a contract between the parties herein, the defendant would thereafter indemnify the plaintiff. The plaintiff made it clear that he would not seek any indemnity until and unless there was judgment passed against him.

In determining this suit, the first issue that must be addressed is whether or not there was a contract of insurance between the plaintiff and the defendant, at the material time, and in respect to the vehicle Registration No. KAA 432 Q.

If there was such a contract, was the policy inclusive or exclusive of passengers who were being ferried in the vehicle, at a fee. Or to put the question in a slightly different format; Did the contract of insurance, if it was in place, cover fare-paying passengers?

The third issue is as to whether or not there was an accident involving the vehicle, at the material time.

In the event that the answer to the three issues above were in the affirmative, is the plaintiff entitled to the reliefs sought, as set out at the very outset of this judgment?

As regards ownership of the vehicle, the plaintiff had asserted that he was the registered owner of the vehicle. That assertion was set out in the plaint. In response to that assertion, the defendant stated, at paragraph 4 of its defence, that it did not admit that the plaintiff was the owner of the vehicle as alleged. The defendant went further to put the plaintiff on notice that he would be put to strict proof on the issue of ownership.

In those circumstances, the plaintiff ought to have adduced evidence to prove ownership of the vehicle. The plaintiff had, however, sold off the vehicle to a third party, by the time he gave evidence in court. Therefore, the plaintiff did not have the log book for the vehicle.

To my mind, the mere fact that the vehicle was sold to a third party did not exonerate the plaintiff from proving ownership. And he could have done so by producing a document from the Registrar of Motor Vehicles, who maintains the records of ownership and of transfer of vehicles.

But even though the plaintiff failed to produce actual documentary proof of ownership, it is equally true that the defendant did not seriously challenge the plaintiff's oral testimony in that regard.

The bottom-line is that the plaintiff asserted but did not offer proof of ownership of the vehicle. By arriving at that holding I am guided by the legal requirement that he who asserts ought to lead evidence to prove his assertion, unless the same is conceded.

Next, I move on to the issue of the contract. It is clear that "Exhibit P1" is a document embodying a policy of insurance. The document cites the insured persons as being **FRANCIS NDUNGU WAINAINA** and **REGAL HIRE PURCHASE**. In effect, the plaintiff is one of the three parties to the policy.

According to PW1, Regal Hire Purchase provided him with finances which he used to buy the vehicle. He also testified that he finished making payments to the hirer in 1992. That would imply that by 15/7/1997, when the suit herein was filed, Regal Hire Purchase no longer had any insurable interest in the vehicle.

But without either the log book or a certificate from the Registrar of Motor Vehicles, this court is unable to make a finding as to whether or not the plaintiff was the sole registered proprietor of the vehicle, as was pleaded in the plaint. The onus was on the plaintiff to prove that assertion but he did not

discharge the said onus.

On the other hand, there is no doubt that the defendant considered the plaintiff as its insured. They did so by endorsing the policy document with both their official stamp, as well as a signature. They also did so through the two letters dated 25th April, 1995 and 23rd July, 1996, respectively. Those letters identified the plaintiff as the insured, and the vehicle Registration KAA 432 Q as the vehicle which was insured by the defendant.

In the light of those facts, the defendant must be deemed to have acknowledged that there was a contract of insurance between it and the plaintiff. Therefore, the defendant cannot be permitted to deny the existence of the contract of insurance. I so hold notwithstanding the failure by the plaintiff to produce the proposal form or other documents which constituted the background to the contract itself. I so say because once a contract was executed the parties thereto can prove the said contract with or without producing the documents exchanged before the contract was finally executed.

The other issue is as regards the alleged accident. PW1 and PW2 testified that the accident occurred on 7/12/1991. There is no doubt that neither of those witnesses was challenged on that aspect of their testimonies.

The police abstract which was produced in evidence by the plaintiff is dated 30/11/1994. On the first portion of the abstract it is indicated that the accident occurred on 7/12/1994. But at paragraph 8 of the abstract it is indicated that the accident was recorded in the Occurrence Book (O.B) on 7/12/1991.

In my considered view, given the fact that the abstract itself was dated 30/11/1994, it is evident that the reference to 7/12/1994 as being the date of the accident was no more than a typographical error. The accident cannot have happened after the date when the abstract was issued. And the accident could not have been reported to the police, who then recorded it in the O. B. on 7/12/1991 unless the accident was on or before that date.

In the result, I find that the vehicle was involved in an accident on 7/12/1991.

From the document embodying the contract of insurance it is evident on the face thereof that it was a **“Commercial Vehicle Policy.”** That being the starting point, it was then necessary for the plaintiff to have proved that the policy also did cover passengers who were being carried for hire.

The vehicle is described in the policy document as a **“Toyota Hilux P/Up”**. PW1 confirmed that it was a pick-up.

Nothing in the policy as much as suggests that the pick-up, which was intended for commercial usage was also to be used in carrying fare-paying passengers. PW1 appears to have appreciated that there was a distinction between commercial usage and passenger transport as he testified as follows;

“I used it for commercial and passenger transport for pay.”

Having taken out a policy for commercial usage, the plaintiff failed to satisfy me that when he decided to also use the vehicle for ferrying fare-paying passengers, he got the concurrence of the defendant to extend the insurance cover to the passengers too. Just because the plaintiff decided to add a matatu body to the pick-up would not, by itself, extend the insurance policy to cover the passengers.

As regards the reliefs sought by the plaintiff, it is clear that he was asking for a declaration that a contract of indemnity exists as between him and the defendant. Having given due consideration to all submissions, I hold that there was in force a contract of insurance between the plaintiff and the defendant, as at 7/12/1991. The said contract was for the vehicle in issue.

But there is an endorsement in the policy document which is in the following terms;

“JURISDICTION CLAUSE-

The Indemnity provided by the Policy shall apply only in respect of Judgments which are in the first instance delivered by or obtained from a court of Competent Jurisdiction within the Republic of Kenya.”

In so far as the plaintiff has readily conceded that there is no judgment yet granted against him, I find that it would be premature for this court to order that he should be indemnified.

The defendant believes that the plaintiff’s driver was not at all liable for the accident. PW2, who was the driver, and also PW1 both testified that the person who was liable for causing the accident was the driver of the other vehicle, Registration No. KZG 833.

If the plaintiff is right, it would imply that the issue of his being indemnified is no more than an academic exercise for now. In the circumstances, I find no legal basis for adjudicating on something which may or may never arise. The plaintiff may or may not be found liable. And it is only if he were to be found liable and if the defendant then breached the contract that the defendant may possibly be held liable.

But even if the defendant were to be held liable, it is trite law that general damages are not awardable for breach of contract. That also implies that general damages cannot be awarded ***“in connection to the attempted breach of contract.”***

To award any relief to the plaintiff for an anticipated attempt to breach a contract would be not only anticipatory but also speculative. That, the court cannot do.

In the result, I hold that there is a contract of insurance between the plaintiff and the defendant. However, as to whether or not the plaintiff ought to be indemnified that must await judgments, if any, against the plaintiff, which would then form the basis for any claims for such indemnity.

Save to the extent that I have found there to have been a contract of insurance between the parties herein, the plaintiff’s claim fails. The plaintiff will pay to the defendant one half of the costs of the suit.

Finally, I deem it necessary to make it clear that in my considered opinion this judgment will not be a bar to the plaintiff if he should be inclined to bring separate actions for indemnity, if such action is based on specific judgments against the plaintiff. But, of course, I cannot and do not purport to prejudge any such action, if any.

Dated, signed and Delivered at Kakamega, this 15th day of May, 2008

FRED A. OCHIENG

J U D G E