



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Case 3 of 2008

GATEWAY INSURANCE CO. LIMITED PLAINTIFF

VERSUS

MOSES JAIKA LUVAI DEFENDANT

AND

SIMON MAKOTSI MAKHUYI 1ST INTERESTED PARTY

SARAH LIHAVI SIMON 2ND INTERESTED PARTY

RAEL MASITSA 3RD INTERESTED PARTY

RUTH RUTO 4TH INTERESTED PARTY

MARY AWINJA 5TH INTERESTED PARTY

RULING

The Plaintiff is an Insurance Company which issues the Defendant with a commercial car policy insurance cover (motor vehicle Third Party Risks) for his motor vehicle Registration No. KAM 291 L Toyota Pick Up. The Policy Certificate was No. 100/080/115026/07/02 and was issued after the payment of the requisite premium.

On or about the 19th March, 2007, the Defendant's motor vehicle was involved in an accident along Eldoret-Webuye road near Mwamba at Edmos area wherein the passengers who were being transported in the said motor vehicle allegedly sustained injuries. As a result of the said accident the passengers in the Defendant's motor vehicle who were allegedly injured filed suits against the Defendant in the Chief Magistrate's Court at Eldoret in:-

- (a) Eldoret CMCC No. 465 of 2007
- (b) Eldoret CMCC No. 469 of 2007
- (c) Eldoret CMCC No. 470 of 2007

(d) Eldoret CMCC No. 468 of 2007

(e) Eldoret CMCC No. 466 of 2007

The Plaintiff instituted this suit seeking a declaration

that it is not liable to indemnify the Defendant in respect of all third party claims arising out of the aforesaid five (5) suits or any other suits that were to arise in future or connected to the accident involving motor vehicle Reg. No. KAM 291 L Toyota Pick-Up on or about 19/3/03.

The Plaintiff gave notice of the institution of this suit to the Advocates for the Plaintiffs in the said suits. As a result the said five (5) Plaintiffs applied to be enjoined in this suit as parties.

The Court added the five Plaintiffs as Interested Parties pending directions as to their participation in the suit. The application was to be heard on its merits.

The Applicants contend that they have a right to be heard in this suit and that they ought to be added as Defendants and be granted leave to defend the Plaintiff's declaratory suit.

The Plaintiff opposed the application arguing, inter alia, that the Applicants have no privity of contract as the insurance policy was only between the Plaintiff and the Defendant.

I have considered the application and the submissions by Counsel. By the time the application was heard the Defendant had filed its Defence and counterclaim. In the counterclaim he seeks a declaration that the Plaintiff is bound by the Judgement passed against the Defendant in Eldoret – Chief Magistrate's Court Civil Suits No. 465/07, 469/07, 470/07, 468/07 and 466/07 and is liable and obligated to meet the Defendant's costs in defending himself in the aforementioned suits.

One thing is certain to me in this suit - any decision by this Court will in one way or the other affect the rights and interests of the Applicants in their respective suits in which they appear to have obtained favourable judgements against the Defendant. The issue for determination by the Court is whether under the law they have a right to participate in the present suit, if so, to what extent and in what exact capacity or role.

The answer lies in Sections 10 (1), (4) and (5) of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405 Laws of Kenya.

Section 10 (1) provides as follows:-

“10 (1) If after a policy of insurance has been effected, judgement in respect of any such liability as is required to be covered by a policy under paragraph (b) of Section 5 (being a liability covered by the terms of the policy) is obtained against any person insured may be entitled to avoid or cancel, or my have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgement any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest.”

This enactment provides for and emphasizes the statutory duty of the insurer to satisfy the judgment, against persons it has insured against claims by third parties in respect of death, or bodily injury arising from motor vehicle accidents involving motor vehicles insured under the provisions of Section 4 of the Act which is mandatory.

The Insurer can only avoid payment and settlement of such judgements if it has obtained a declaratory judgement under the provisions of Section 10 (4) of the Act which provides that:-

“4. No sum shall be payable by an Insurer under the foregoing provisions of this Section if, in an

action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, 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 a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it”

It must be in the light of this provision that the Plaintiff must have filed the present suit.

The proviso to the said Section is extremely relevant to the issue before this Court. It stipulates that:-

“..... Provided that an Insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this sub-section as respects any judgement obtained in any proceedings commenced before the commencement of that action, unless before or within fourteen days thereof after the commencement of that action he has given notice thereof to the person who is the Plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is so given shall be entitled if he thinks fit, to be made a party thereto.”

(emphasis mine)

The aforesaid provision is clear and speaks for itself. The Plaintiffs in the suits which the Insurer seeks to avoid liability under Section 10 (1) by way of declaratory suit must be notified of the institution of the declaration suit and after which the said Plaintiffs are entitled to be made parties to the Insurer’s suit if they think fit.

The provision is mandatory and the Court has no discretion on the matter. The discretion and election lies with the Plaintiffs who have sued the insured for damages and losses arising from motor accidents. It is a right which none of the parties or the Court can take away.

As a result since the Plaintiffs have applied to be enjoined in this suit as Defendants, I do hereby grant prayer 2 and order that they be added as Defendants in the suit, to wit Defendants Nos. 2 – 6.

Since the said parties already have copies of the Plaint, I do hereby grant them leave to file their respective defences as prayed in prayer 3. They shall file and serve the said Defence respectively within the next fifteen (15) days. The Plaintiff shall have leave to file and serve Reply to Defences within fifteen (15) days of service of the Defences respectively.

The Plaintiff shall pay the costs of the application to the said five (5) Applicants

DATED AND DELIVERED AT ELDORET ON THIS 10TH DAY OF SEPTEMBER, 2008.

M. K. IBRAHIM

JUDGE

In the presence of:

Mr. Muleka for the Interested Party

Mr. Kiboi for the Plaintiff

No appearance for the Defendant