



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 74 of 2003

GATEWAY INSURANCE COMPANY LIMITEDPLAINTIFF

V E R S U S

BERNARD KAMANDE KAMUYU DEFENDANT

J U D G M E N T

There has been considerable delay in preparation and delivery of this short and simple judgment. The reason for such delay is that the file was somehow misplaced during my illness and recuperation in the years 2005 and 2006. The delay is regretted.

The Plaintiff seeks in this suit the following reliefs against the Defendant:-

- (a) A declaration that it is and was at all material times entitled to avoid policy of insurance No. 07/070/33543/97/9 between the parties on the ground that the said policy of insurance was obtained by:-
- i. non-disclosure of a material fact or facts; or
 - ii. representations of facts which were false in material particulars; or
 - iii. both (i) and (ii) above.
- (b) A declaration that the Plaintiff is not liable to make any payment under the aforesaid policy of insurance in respect of any claim against the Defendant arising out of injuries sustained in the accident on 18th December, 1997 involving motor vehicle registration number KZB 385.
- (c) Costs of this suit.

The Plaintiff's case as set out in the plaint is that upon the Defendant's proposal and information provided by him and declaration made, the Plaintiff insured him against third-party risk in respect of motor vehicle registration No. **KZB 385, make Toyota Corolla**. The Defendant paid the requisite premium and the Plaintiff therefore issued to him a private car policy of insurance for a period of twelve (12) months from **11th October, 1997 to 10th September, 1998**.

On 18th December, 1997 the Defendant was driving the said motor vehicle along Thika – Muranga road with passengers aboard contrary to the insurance policy. There was an accident involving the motor-vehicle as a result of which a passenger called **GEORGE KINYUA** was injured and subsequently sued

the Defendant for damages arising therefrom. The Plaintiff therefore pleads that it is, and was, at all material times entitled under section 10(4) of the **Insurance (Motor Vehicle Third Party Risks) Act, Cap. 405**, to avoid the said policy on the ground that the policy was obtained by the Defendant by non-disclosure and/or misrepresentation of material facts.

The Defendant was duly served with summons to enter appearance. He neither entered appearance nor filed defence. Interlocutory judgment was entered against him on 15th March, 2004. The said interlocutory judgment was irregular in that it was not available under any of rules 3, 4, 5 or 6 or Order 9A of the Civil Procedure Rules in view of the reliefs sought in the plaint. The said interlocutory judgment was thus null and void, and is hereby set aside.

The Plaintiff then set down the suit for *ex parte* hearing, as it was entitled to do. One witness testified. He is WASHINGTON MAKAU KATHEKI (PW1). In the course of his testimony he produced in evidence various documents, including the following:-

Exhibit P1: Proposal for insurance form duly filled and signed by the Defendant.

Exhibit P2: Certificate of insurance No. CK 291862.

Exhibit P4: Private Car Policy.

Exhibit P5: Motor Accident Report Form.

Exhibit P7: Summons and plaint in Nyeri HCCC NO. 95 of 1998.

I have considered the testimony of PW1 and the documents produced in evidence. I have also considered the written submissions of the learned counsel for the Plaintiff. In the proposal form, to the question whether the car would be used exclusively for social, domestic and pleasure purposes, the Defendant answered, "Yes". He also declared that all the particulars stated therein were correct and that the proposal and declaration would be the basis of the proposed contract between the parties. He did not at any time advise the Plaintiff of any intention to use the motor vehicle for purposes other than the ones declared in the proposal form. The Plaintiff therefore relied upon the truthfulness of the representations contained in the proposal form and thereby issued to the Defendant the insurance cover in question.

By that insurance policy the Plaintiff agreed to indemnify the Defendant as provided in the policy against, *inter alia*, sums which the Defendant would become legally liable to pay in the event of an accident caused by or arising out of the use of the vehicle in respect of the death of or bodily injury to any person, being a liability as is required to be covered by a policy of insurance under section 5(b) of Cap. 405 aforesaid.

As it turned out, the accident giving rise to this suit occurred while the Defendant was using the motor vehicle for purposes other than those declared in the proposal. I am therefore satisfied on balance of probabilities that the insurance policy was obtained by the Defendant by non-disclosure of material facts and/or by representations of fact which were false in material particulars, that is, that the vehicle would be used only for social, domestic and pleasure purposes, whereas the Defendant intended to, and did, use the same for carriage of passengers. Accordingly, the injury of a passenger in the motor vehicle was not compulsorily required to be covered under section 5 of Cap. 405 aforesaid. From the evidence such a risk was not actually covered under the policy of insurance between the parties herein. The Plaintiff is therefore not obliged to indemnify the Defendant against any claim by the passenger called George Kinyua.

Under section 10 of Cap. 405 the Plaintiff is under a duty to satisfy only such judgments as have been obtained against persons who are insured against such liabilities as are required to be covered by a policy under section 5(b) of the Act and which are actually covered by the terms of the insurance policy. The Plaintiff may escape liability in the instant case for such a judgment where it has obtained a declaratory order that it is entitled to avoid the policy on the basis that the same was obtained by the non-disclosure or

misrepresentation of a material fact. He has sought such a declaration.

I am satisfied that the Plaintiff has proved its case on the balance of probability. I will therefore grant to it the two declarations sought in prayers (a) and (b) of the plaint. The Plaintiff will also have the costs of this suit. Orders accordingly.

DATED AT NAIROBI THIS 1ST DAY OF AUGUST, 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 3rd DAY OF AUGUST, 2007