



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

Civil Case 9 of 2004

GATEWAY INSURANCE CO. LTD.....PLAINTIFF

VERSUS

ALBERT J. N. NJAGI.....DEFENDANT

JUDGMENT

This is a declaratory suit. Through this action the plaintiff seeks the following two declarations:

“(a) A declaration that the plaintiff is and has at all material times been entitled to avoid the aforesaid policy of insurance No. 011/080/047022/2000/12 apart from any provisions contained therein on the ground that the said policy of insurance was obtained by the defendant 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 No. 011/080/047022/2000/12 in respect of any claim against the defendant herein arising out of any injuries sustained in the accident on 29th October 2001 involving motor vehicle registration number KSW 814.”

Apart from those declarations, the plaintiff sought the costs of the suit.

After the defendant had been served with the Plaint and summons to enter appearance, he did file a Defence to the action. In the said Defence, the defendant admitted paragraphs 3, 4, 5, 6, 7, 8, 9 and 10 of the Plaint. To my mind, the said admission was significant especially as it relates to paragraphs 5 upto 10 of the Plaint.

Thus the defendant admitted that the proposal form dated 7th December 2000, constituted his request to the plaintiff to issue him with a “**commercial vehicle policy of insurance**” against third party risks for the defendant’s vehicle, which was a 1980 Toyota Hilux pick-up, registration KSW 814.

One of the questions which the defendant had to answer on the proposal form requested the defendant to state fully the purpose for which the vehicle would be used.

In response to that inquiry, the defendant admitted, in his defence, that he told the plaintiff that the vehicle would be used for “**carriage of own goods**”.

Furthermore, the defence admits that the defendant did agree to abide with the terms and conditions of the policy of insurance. The defendant also admitted that at no time did he intimate to the plaintiff, any intention to use the vehicle for purposes other than that which he had specified in the proposal form.

However, in the defence, there is an express denial to the allegation that the defendant had used his vehicle, whose particulars have been set out hereinabove, for purposes of ferrying fare-paying passengers. In particular, the defendant denies that on 29th October 2001, his driver was driving the said vehicle along Manyatta Embu Road, near the District Officer’s office, with passengers on board.

As far as the defendant was concerned, the allegations about the ferrying of a passenger by the name of Stephen Njagi, who allegedly suffered serious injuries when the vehicle was involved in an accident, is all the creation of the plaintiff’s fertile imagination. The defendant, therefore, put the plaintiff on notice, that it would have to strictly prove the said allegations.

When the case came up for trial, on 27th February 2006, the defendant was absent from court. His advocate was also absent. However, after I satisfied myself that the defendant’s advocates had been duly served with a Hearing Notice, I allowed the plaintiff to prosecute the case. In that regard, the plaintiff called only one witness, Mr. WASHINGTON MAKAU KAVEKE.

The said witness testified that he was the plaintiff’s Assistant Claims Manager. He then told the court that the defendant had applied to the plaintiff for an insurance cover. The said application was in the form of a proposal form dated 7th December 2000 (Exhibit 1).

The witness said that the cover sought by the defendant was only for third party cover. And, the defendant is said to have stated that the vehicle would only be used to carry his own goods. All that testimony merely corroborated the defendant’s admissions, as contained in the Defence.

After the plaintiff had accepted the proposal from the defendant, the latter paid the premium sum of Kshs. 2,833/=, whereupon he was issued with a receipt. The said receipt No. 15940, dated 6th November 2001, was adduced in evidence, at the trial, and was marked as Exhibit 2.

The witness then said that the plaintiff did issue to the defendant, a Certificate of Insurance No. B1531139, (Exhibit 3). The cover provided by the said certificate was for the period between 7th December 2000 and 6th December 2001.

It was the testimony of the witness that on 29th October 2001, the insured vehicle was involved in an accident, along the Manyatta Road, in Embu. He said that the accident was reported to the plaintiff, by the defendant’s insurance broker, M/s Family Insurance Brokers.

The witness also testified that on 28th August 2003, the defendant submitted a motor vehicle accident report form (Exhibit 4). Other than that, the defendant is said to also have presented a Police Abstract No. A 547444 dated 4th September 2003. (Exhibit 5).

According to the Police Abstract, there were two people who were injured in the accident. The said persons were named as follows:

(i) Stephen Thiga – Passenger.

His address is Box 120

Manyatta.

(ii) Peter Muriithi – Passenger

His address is Box 77

Manyatta.

Following the accident, the plaintiff was served with summons in **EMBU SRMCC NO. 118/2003, Stephen Nthiga Ireri V Albert J.N. Njagi.**

The witness said that the defendant in that suit was their insured.

In paragraph 4 of the plaint in the case before the magistrate's court, the plaintiff described himself as a fare-paying passenger in the vehicle belonging to the defendant herein, and which had been insured by the plaintiff.

The witness informed the court that the plaintiff returned both the plaint and the Summons to Enter Appearance, to the advocates of the plaintiff in the case before the magistrate's court. Copies of the Plaint, summons and the covering letter were adduced in evidence, before me.

In the light of the above-cited evidence, the plaintiff now asks this court for judgement in accordance with the declarations set out at the start of this judgement.

Having given due consideration to the evidence before me, coupled with the express admissions made in the Defence, I have absolutely no hesitation in holding, as I hereby do that the defendant led the plaintiff to believe that the insured vehicle would be used solely for the defendant's "**carriage of own goods.**" The manner in which the defendant led the plaintiff so to believe is through the particulars which he provided, in his own handwriting, in the proposal form dated 7th December 2000.

Notwithstanding the fact that the defendant had expressly stated that the vehicle would be used only for carriage of his own goods, on 29th October 2001, the vehicle was involved in an accident, whilst ferrying two passengers. One of the said two passengers even sued the defendant for compensation.

Although the defendant put the plaintiff to strict proof in relation to the occurrence of the accident as well as in relation to the issue of there being passengers on the vehicle, the defendant did not tender any evidence to dispute the particulars in the Police Abstract. I therefore accept the contents of the said Police Abstract as accurate. My reason for so accepting the contents of the Police Abstract is not simply because it was a Police Abstract.

The document was delivered to the plaintiff by none other than the defendant. If the defendant had any issues regarding the contents of the said abstract, I would have expected him to have raised the said concerns then, or at the trial. He did neither of the two.

Secondly, the defendant filled in a Motor Vehicle Accident Report Form, and delivered it to the Plaintiff, on 28th August 2003. In that report form, the defendant herein indicated the details of the accident. The only information which he sought to clarify is that Mr. Stephen Nthiga Ireri was a passenger, but was not paying any fare.

For purposes of this case, it matters not that the passenger was not required to pay any fare. That would not alter the fact that the vehicle was not, at the time of the accident, being used solely for carrying the defendant's own goods. Instead, it was ferrying two passengers, and I do not think that the said passengers could ever qualify to be termed as being the defendant's own goods.

Insofar as the vehicle had been put to use other than that for which it was insured, I hold that the defendant did obtain the policy of insurance through non-disclosure of a material fact. And, to the extent that the vehicle was used to carry passengers whilst it was only supposed to carry the defendant's own goods, the defendant is deemed to have made representations of fact which were false in material

particulars.

Accordingly, the plaintiff cannot be under an obligation to honour its part of a contract of insurance which had been founded on material non-disclosure. I therefore grant the declaration that the plaintiff is not liable to make payment under the policy of insurance, in respect to any claim by any passenger in the motor KSW 814, arising from an accident on 29th October 2001.

In the final analysis there shall be judgement in favour of the plaintiff, as prayed in the Plaint dated 8th January 2004, inclusive of the costs of the suit.

Dated and Delivered at Nairobi this 5th day of March 2006.

FRED A. OCHIENG

JUDGE