



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 89 of 2003

GATEWAY INSURANCE CO. LTD.....PLAINTIFF

VERSUS

MARTIN SAMBUDEFENDANT

J U D G E M E N T

The plaintiff was the insurer of the defendant in respect of the defendant's motor vehicle KAJ 376Q.

The plaintiff's claim is that the defendant requested the plaintiff to issue him with a private vehicle policy of insurance, against third party risk for the aforesaid motor vehicle. That the defendant, in the proposal form, indicated that the vehicle would be used exclusively for social, domestic and pleasure purpose. That the defendant failed to state that he required an insurance cover for passengers. The defendant's vehicle reportedly was involved in an accident on or about 18th August 2000 and in the said accident one person by the name of Susan Waithera was injured. That in view of the defendant's non disclosure that he would carry passengers in the vehicle the plaintiff seeks a declaration that the plaintiff is entitled to avoid the policy insurance between itself and the defendant.

P W 1 was **Washington Makau Kaveki**. He described himself as the plaintiff's assistant claim manager. He confirmed that the defendant is the plaintiff's insured.

That the defendant proposed for private car insurance for motor vehicle KAJ 376Q Toyota saloon for a period of 3rd January 1998 to 2nd January 1999. The insurance was for third party cover only. In the proposal form the defendant responded positively to the question.

“Will the car be used exclusively for social, domestic and pleasure purpose.”

For the other questions, which included whether the defendant wished to use the vehicle for professional purposes; in connection with employer's business; by employee or for the carriage of samples the defendant responded negatively. Finally on that proposal form the defendant signed the declaration.

“I/We declare that to the best of my/our knowledge and belief:

(b) All material particulars affecting the assessment of the risk have been disclosed.....”

The plaintiff after receiving the aforesaid proposal form issued a policy of Insurance certificate No: CK 400878 for the period 3rd January 1998 to 2nd January 1999. The defendant renewed the cover by certificate No. C 1601380 for the period 7th August 2000 to 13th April 2001.

The plaintiff thereafter prepared the policy document No. 03/070/034789/98/1. This policy cover was for third party on indemnity basis. P W 1 said that this meant that the plaintiff would indemnify the insured with any legal liability arising out of the use of motor vehicle where he would be liable to pay including costs, during the currency of the policy.

P W 1 stated that the defendant did not report to the plaintiff the aforesaid accident and that the plaintiff came to learn of an accident involving the subject motor vehicle later when demands under section 10 (2) (9) of The Insurance (Motor Vehicle Third party Risk) Act was made by two firms of the advocates. P W 1 said that under the policy, issued by the plaintiff to the defendant, there was no cover for passengers in the subject motor vehicle. That the plaintiff only extends cover to passengers if requested by the insured and that in this case the defendant had not requested for such cover and accordingly the defendant should assume that liability. That accordingly the plaintiff was not bound to indemnify the defendant.

P W1 then concluded in chief that the plaintiff sought a declaration from the court that there was no cover for passengers of the subject motor vehicle.

On being cross examined P W 1 said that words social domestic and pleasure meant that the defendant could use the vehicle for social function, that is he could go where he wished to go; pleasure meant that he could go at his pleasure and that domestic meant he could carry his own household members. He accepted that there was no mention in the proposal that restricted the defendant from carrying passengers. That that proposal form did also indicate the sitting capacity of the vehicle. P W 1 accepted that passengers are categorised as third party but added that the passenger cover was not in the policy. P W 1 accepted that the schedule to the policy covered death or injury to any other party.

On re-examination P W 1 said that the plaintiff provided third party cover as required under the Act.

The defendant **Martin Kiplemoi Sambu** confirmed that he is the registered owner of the motor vehicle KAJ 376Q which had insurance cover of the plaintiff.

That on 18th August 2000 he authorised his brother to drive the said vehicle when the same was involved in an accident. That after the accident he reported the same at Pangani Police Station and also to the plaintiff. He finally asserted that passengers are covered under the police.

On being cross-examined defendant confirmed reporting the accident to the plaintiff and confirmed having filled a form, which was left in the custody of the plaintiff. He denied that the passengers were fare paying.

The parties relationship started by the defendant's filling in the proposal form requesting for Insurance Cover. The defendant indeed stated that the purpose for the use of the car was for social domestic and pleasure purpose. He further indicated that he required "Full Third Party" cover.

The Insurance (Motor Vehicle Third Party Risk) Act Section 4 (1) provides:

1. Subject to this Act, no person shall 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 requirements of this Act.”

The insurance cover sought by the defendant did obviously meet the requirements of this section. But having obtained that third party risk cover the defendant found it hard to accept, and indeed the defendant

did state that **“I thought third party covered my passengers since they asked for sitting capacity.”** The plaintiff’s case is that since the defendant did not request for passenger cover it was regarded that he would assume their risk.

Section 4 as aforestated is further qualified by section 5, which provides:

“Provided that a policy in terms of this section shall not be required as cover: -

(i)

(ii) except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting onto or alighting from the vehicle at the time of occurrence of the event out of which the claims arose:”

The court of appeal in the case: M’MAIRANYI & OTHERS V BLUE SHIELD INSURANCE C. LTD [2005] 1 EA, stated as follows in respect of section 5.

“It is a section that it perhaps unhappily worded and which has over time generated differing judicial interpretation. On our part, we think the meaning conveyed is fairly plain. The later part of the provision (ii) of the section makes it clear that compulsory insurance is not required in respect of risk to passengers.”

In the case JAHAVA – PROVINCIAL INSURANCE CO. LTD HCCC 24699 of 1990 (UR) Justice Githinji, as he then was, stated in regard to section 5.

“As I have said section 5 of the Act does not require the compulsory insurance of all passengers travelling in a motor vehicle except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment.”

The judges of appeal further stated in the case of M’MAIRANYI & OTHERS – V – BLUE SHIELD INSURANCE CO. LTD (Supra);

“To comply with section 4(1) of the Act the owner of the motor vehicle will obviously take a policy of insurance relevant to the intended uses of the motor vehicle. As section 5 (b) of the Act provides, the policy does not have to cover every risk to everybody in respect of death or injury.”

Now that it is clear that the Act does not lay a responsibility on the insured to cover the risk of passengers of his vehicle the question in this matter in whether the parties hereof agreed to include cover to passengers.

The Insurance policy under the title of Indemnity to other persons provides:

“The company will subject to the Limits of Liability and jurisdiction cause indemnify any Authorised Driver or at the request of the insured any person (other than the person driving) in or getting into or out of the motor vehicle against all sums including claimant’s costs and expense which such Authorised Driver or person shall become legally liable to pay in respect of:

- a) death of or bodily injury to any person**
- b) damage of property.....”**

Defence argued that the plaintiff undertook to indemnify the defendant against claim made against him for death or injury to any person and accordingly that that covered the claim of passengers made against the defendant. But as stated herein before and indeed it is the finding of this court, section 5 by implication seems to defined third party risk as excluding cover for passengers. For parties therefore to

agree to cover third party risk for passengers it is necessary for the policy to so specifically state. The policy between the plaintiff and defendant did not provide the cover for third party passengers or the driver. P W 1 did indeed state that that liability was not covered by the plaintiff. Having made that finding the conclusion of the court is that the plaintiff is not obliged to indemnify the defendant against any claim of passengers in the accident that occurred on 18th August 2000 with motor vehicle KAJ 376Q. It is instructive to note the schedule provides amounts payable if there was liability.

The issues that present themselves from the pleadings hereof are as follow:

1. Was the carriage of passengers in the defendant's motor vehicle covered under the policy of insurance?

The court's response in the negative.

2. Did the defendant hereof obtain the policy of insurance by misrepresentation of acts and/or non-disclosure of material facts?

The plaintiff did not prove misrepresentation or non-disclosure of material fact. It was not the plaintiff's case that there was any question in the proposal form, which is authored by the plaintiff, which the defendant misrepresented information or failed to make disclosure.

3. Did the defendant report to the plaintiff the accident?

The clause in the policy requiring notification of accident does not state what form that notification ought to take. Plaintiff denied that it was notified but did not bring to court a record where reported accidents are noted to disprove the defendant's contention that notification was made and that a form was filled by the defendant and left at the plaintiffs premises. In the absence of the plaintiffs rebuttal of the defence evidence I find that a report was made.

4. Is the plaintiff liable under the policy of Insurance herein to any claim by any passenger travelling as such in the defendant's motor vehicle on the date of the subject accident?

Insurance of passengers, as stated herein before, is not compulsory under section 5. For a party to therefore, obtain cover, for third party risk, it is necessary that such risk be recognised in the insurance policy.

The plaintiff is not liable to any claim by any passenger under the insurance policy. The plaintiff is therefore entitled to the declaration sought that it is not liable to make any payment under the insurance policy, for a claim by passengers.

5. Who is to bear the costs of suit?

In the court's view, the plaintiff ought to have inserted a clause in the proposal form, authored by it, requiring the insured state whether he required the third party risk to passengers covered. As consequence of not having such a specific question and because the proposal form required the sitting capacity to be indicated that understandably may well have led the defendant to believe that passengers were covered. I am of the view that having failed to clearly indicate that there was no cover for passengers the plaintiff will not be awarded costs hereof. The plaintiff in any case failed to prove that the defendant misrepresented facts or failed to disclose facts in the proposal form.

Let this case be a warning to the public, that not all third party covers will cover passengers in their car. It is essential as always for parties to comprehensively read proposal forms before signing.

The judgment of this court is: -

(i) That a declaration is hereby made that the plaintiff is not liable to make any payment under

insurance policy 030/070/034 789/98/1 in respect of motor vehicle KAJ 376Q arising out of injuries suffered by passengers of that vehicle in the accident of 18th August 2000.

(ii). That there shall be no orders as to costs

MARY KASANGO

JUDGE

Dated and delivered this 19th June 2006.

MARY KASANGO

JUDGE