



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 666 of 2004

GATEWAY INSURANCE COMPANY.....PLAINTIFF

VERSUS

MUSYOKA MUTHENGI.....DEFENDANT

JUDGEMENT

The plaintiff is an insurance company, which is duly authorised under the provisions of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405 of the Laws of Kenya.

At the trial the plaintiff called one witness, whilst the defendant failed to attend court. However, after satisfying myself that the defendant's advocates, messrs J. M. Mutinda & Company Advocates, had been duly served with the requisite notice, I allowed the plaintiff to prosecute the suit.

The plaintiff's witness, Mr. Washington Makau Kaveke, is their Assistant Claims Manager. He testified that the defendant Musyoka Muthengi was their insured.

The witness testified that the defendant had filled a proposal form for a motor vehicle registration number KYS 357, a Toyota pick-up.

In the said form, which was adduced in evidence, the defendant had indicated that the vehicle would be used for "**carrying own goods.**"

He had also indicated that he did not require any cover for passengers. They only cover which the defendant indicated that he was in need of, was "**Full Third Party.**"

Significantly, the proposal form contained a declaration in the following words:

**"I, the undersigned do hereby, warrant the truth and correctness of all the above statements and particulars and I declare that I have not withheld any material information. I undertake that the vehicle be insured shall not be driven by any person who to my knowledge has been refused any Motor Vehicle Insurance or continuation thereof. And I agree that the above proposal and this warranty and declaration shall be the basis of the contract between me and the Company, and I agree to abide by the terms and conditions of the Policy issued in answer to this proposal. The liability of the company does not begin until the acceptance of the proposal has been formally notified by the Company and a cover note issued."**

The plaintiff did accept the defendant's proposal, and issued a Certificate of Insurance as well as a

Policy document.

According to the uncontroverted evidence of the plaintiff, the period of cover was as from 20<sup>th</sup> March 2003 to 19<sup>th</sup> March 2004.

The cover provided by the plaintiff was only for Third Party. In other words, it only covered the defendant against claims by third parties.

During the period of cover, the insured vehicle was involved in an accident, on 1<sup>st</sup> November 2003, along Matuu/Ekalakala Road, in Machakos District.

The plaintiff learnt about the accident through a Plaint dated 20<sup>th</sup> May 2004, together with summons attached thereto. The plaint and summons were in **MATUU RMCC No. 105 of 2004, ONESMUS KYALO MUTISO V MUSYOKA MUTHENGI & ANOTHER**, (“the Matuu case”).

Paragraph 5 of the Plaint in that suit stated that the insured vehicle was, at the time of the accident, being used as a matatu; and that the plaintiff was a fare-paying passenger.

As the policy issued by the plaintiff did not cover passenger liability, the plaintiff herein duly notified the plaintiff in “**the Matuu case**” that they were not liable to make payments for claims arising from the accident.

I have given careful consideration to the plaintiff’s evidence. I am satisfied that the defendant had asked for, and been given an insurance cover for only third party claims. As the claimant in “**the Matuu case**” was a fare-paying passenger, he does not qualify to be termed as a third party.

Secondly, as the vehicle was being used as a “**matatu**” at the time of the accident, I hold that the defendant had violated the express terms and conditions of the contract of insurance, which had stipulated that the vehicle would only be used by the defendant for carrying his goods.

The policy did not cover passengers. By using the vehicle to carry passengers, the defendant was in breach of the said policy. Therefore, I hold that the plaintiff is entitled to avoid the policy of insurance No. 030/080/067117/03/2. Accordingly, the plaintiff is not liable to make any payment under the said policy, in respect of any claim against the defendant arising out of the accident on 1<sup>st</sup> November 2003, involving the insured motor vehicle, registration KYS 357.

The costs of this suit are awarded to the plaintiff.

Dated and Delivered at NAIROBI, this 16<sup>th</sup> day of November 2006.

**FRED A. OCHIENG**

**JUDGE**