



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 366 of 2004

LION OF KENYA INSURANCE CO. LTD. PLAINTIFF

VERSUS

SAMUEL MASAKA MLIWADEFENDANT

JUDGMENT

1. BACKGROUND

1. On the fateful day of 28th February 2003, Joseph Mtambo Mtambo Mwanyika (driver) and Stanley Mliwa Kirama (Transport Manager) had travelled in a motor vehicle registration number KAL 049E a pick up in make to transport prospective Mango traders to Mbumbuimi. The said two traders were not ready to travel that day back to Machakos town because they had not gotten enough mangoes. The two were advised to spend the night. They instead were approached by two other traders who were ready to travel that night. The two changed their minds about spending the night and proceeded with their new two customers back. Whilst travelling at night along the Tawa-Makueni road there was a sharp corner before one approaches a bridge that really consisted of a concrete road without railing. The weather was not good and it required the skill of a good driver to control the vehicle. At the bridge known as Uaani, the vehicle lost control and hit the edge of the slabled road plunging into the river which had over flowed its banks and also over flowed the bridge. The vehicle had a self accident.

3. The driver and the transport Manage sustained injuries and survived the accident. The two customers who had hired the vehicle sustained fatal injuries.

4. Samuel, Masaku Mliwa the alleged owner of the motor vehicle was notified of the accident at 1.00 a.m. He proceeded to the scene after completing with formalities he filled a motor vehicle report form with the insurance company M/s AON Minet insurance brokers on behalf of Lion of Kenya Insurance Co. Ltd (the plaintiff herein).

5. M/s Safety Surveyors Ltd the investigators so engaged by the plaintiffs filed a report Ext.P5 prepared by PW3 in which they came to the conclusion that the terms of the policy had been breached as the defendant had used the vehicle for commercial purposes instead of for social and pleasure purposes.

6. The plaintiff filed suit on 1 April 204 seeking orders from this court repudiate the insurance policy for the said motor vehicle. The declaration sort from the court was:-

“ The use of the motor vehicle reg. KAL 049E on 28th February 2003 was for hire and reward which use was excluded by the policy of insurance and for an order that the plaintiff is entitled to avoid and is hereby granted an order to a void any and all claims arising from the said accident.”

7. The defence entered appearance and filed defence whereby, in a very brief 9 paragraph the denied the following:-

7.1. That he was the legal owner of the motor vehicle.

7.2. That he was insured with the policy number Com/113/20000494 for Motor vehicle KAL 049E of 3.2.03 to 30.6.03.

7.3. That he hired 3rd parties for hire and reward

7.4. That he denied there to be any third parties.”

8. The defendant nonetheless stated in his defence that he would “rely on the policy of insurance for its full purpose and meaning and “that the subject motor vehicle at the time of the accident was being used as provided for by the policy of insurances existing between the plaintiff and defendant and therefore the plaintiff is not entitled to avoid the policy and all claims arising from the virtue of the provisions of section 10 of the act.”

II: Trial:

9. The plaintiff called their authorized officer PW1 an assistant manager in the claims department of the company. She held an associate of the Insurance of Kenya and was conversant with the claim before court. According to her evidence there was a policy No. Comp 113/20000494 in the name of M/s Sara Lee Household and body Care (K) Ltd. The said company are not party to this suit. The type of policy that they held was for the benefit of their staff. She described the said policy as a group policy whereby the said company would take out the said policy for and or on behalf of their staff. Indeed the defendant admitted in his evidence that he and other staff would be given a loan to buy a motor vehicle. Together with the loan their employer would also take out an insurance policy which policy would be in the employers name. A schedule of the vehicle would appear on the schedule of the policy and or a debit note would be drawn by the Insurance brokers. The defendant admitted that M/s Sara Lee Household and Body Care (K) Ltd were in fact his employer where he was engaged as an accountant.

10. From the evidence before court the plaintiff has established that the defendant was an employee of the Policy Holders M/s Sara Lee Household and Body Care (K) Ltd once a debit note is issued by the insurance brokers the defendant would be issued with an insurance certificate in his personal name and NOT the name of his employer. It is therefore understandable where the advocate for the defendant filed a defence denying all the allegations as set out in the defence. The evidence on the other hand clearly showed that the vehicle once purchased and insured on behalf of the defendant was released to him. All that was required of him was to service the loan.

11. The defendant in evidence agreed and admitted all this. His defence that he never pleaded was that he had never signed any insurance policy, that he had never been given any insurance policy to read and was therefore not aware that he was not permitted to use the vehicle for commercial purposes.

12. The defence was therefore poorly drafted. If what the defendant states is true he would have stated so in his defence and further joined his employer as a 1st third party to this suit for failure to give him the insurance policy to read and the AON Minet insurance brokers as the 2nd third party to the suit for the same reasons of failing to show him the policy document.

13. PW1 stated that there was no duty upon the insurance company to point out the policy to the defendant. This ought to have been done by agents.

14. As this line of defence was never pleaded and a party is bound by their pleading the line of evidence is rejected.

III: The law

15. Under section 10(1) of the Insurance (Motor vehicles Third Party risks) Cap.405 Laws of Kenya. It is the duty of the insurer to satisfy judgments against persons insured. Under sub rule 4 it permits the insurance company to repudiate or avoid the insurance policy which reads:-

“(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 proceeding in which the judgment was given, he 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 non-disclosure of a material fact, or legal representation 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 proviso”

13 The policy terms was clearly stated that the policy did not cover:-

13.1. Use for racing competitions rallies or trials (or use of practice for any of them) or use for hire or reward.

13.2. Use while drawing a trailer except towing (other than for reward) of any one disabled mechanically propelled vehicle.”

14. The agreed issues can therefore be determined as follows:-

14.1. The plaintiff insured the defendants motor vehicle registration number KAL 049E as of the date of the accident 28 February 2003, through the defendants’ employer M/s Sara Lee Household and body care (K) Ltd through policy number Comp/113/20000494 that also covered other vehicles as a group.

14.2. That the said policy was valid at the time of the accident.

14.3. That the defendant was at all times in control of the said vehicle in question but that at the time of accident the defendant unlawfully used the motor vehicle in question for hire and commercial purpose contrary to the terms of the policy

14.4. The plaintiff is therefore entitled to avoid and or repudiate the said policy.”

15. I therefore enter judgment for the plaintiff and hereby grant them orders of declaration that the plaintiff be and is hereby entitled to avoid and is hereby granted an order to avoid any and all claims arising from the accident of 28 February 2003 involving motor vehicle registration KAL 049E and in connection with policy number Comp/113/20000494.

16. I hereby award the costs of this suit to the plaintiff

. Dated this 6th day of December 2006 at Nairobi.

M.A. ANG’AWA

JUDGE

Kinyanjui M.M. for Kantai & Co. Advocates for the plaintiff

Amati E.N. for C.O. Ongoto & Co. Advocates for the defendant