



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

Civil Case 22 of 2003

GATEWAY INSURANCE CO. LTD.....PLAINTIFF

VERSUS

NGANGA NJUGUNA.....DEFENDANT

J U D G E M E N T

The Plaintiff, **GATEWAY INSURANCE COMPANY LIMITED**, seeks against the Defendant, **NGANGA NJUGUNA**, the following reliefs in the plaint dated 17th January, 2003:-

“(a) A declaration that the Plaintiff is and has at all material times been entitled to avoid the ----- policy of insurance No. 030/080/054575, third-party only, apart from any provisions contained therein, 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 herein arising out of injuries sustained in the accident of 24th February, 2002 involving motor vehicle KAC 277N.

(c) In the alternative ----- a declaration that the Plaintiff is not liable to pay any claim arising out of the accident of 24th February, 2002 involving motor vehicle KAC 277N for the reason that the same was being used for an uninsured purpose, to wit, carriage of passengers for hire and reward which was contrary to the terms of the policy.

(d) **Costs of this suit.”**

The Plaintiff’s case as set out in the plaint and as testified by **PW1, WASHINGTON MAKAU KAVEKE**, an assistant manager of the Plaintiff in charge of claims, is that in October, 2001 the Defendant took out with the Plaintiff a commercial motor insurance policy in respect of motor vehicle KAC 277N, make Nissan minibus. The policy was effective from 25th October, 2001 to 24th October, 2002. The Defendant had first completed a proposal form (Exhibit P1) in which he declared that the motor vehicle would be used for carriage of own goods only and would not be used to carry passengers for hire. The Plaintiff accepted the Defendant’s proposal and agreed to issue an insurance cover. The

proposal would form the basis for the insurance policy to be issued.

The Defendant paid the necessary cost of the insurance cover, or premium, vide receipt Exhibit P2. The Plaintiff then issued the necessary insurance cover for third-party risks only vide certificate of insurance No.B1725515 (Exhibit P3). Subsequently, a policy document (Exhibit P4) was issued by the Plaintiff. It comprised the contract between the Plaintiff and the Defendant.

On 6th March, 2002, during the currency of the policy the Defendant reported to the Plaintiff by Exhibit P5 that the motor vehicle had been involved in a self-accident on 24.2.2002 at 5.00p.m. along the Meru-Nairobi road at Thika. The Defendant declared in Exhibit P5 that at the time of the accident he was traveling to Nairobi to ferry own goods. He provided a police abstract of the accident (Exhibit P6). Subsequently the Plaintiff received a statutory notice dated 17.7.2002 (Exhibit P7) and a copy of the plaint in Milimani PMCC No. 5304 of 2002. In that suit the plaintiff was named as one **TABITHA MUNYIVA**, and she described herself in the suit as a fare-paying passenger. The Plaintiff did not involve itself in that suit.

On 30.4.2004 the Plaintiff received a letter (Exhibit P8) advising that judgment had been entered in Milimani PMCC No. 5304 of 2002 against the Defendant for Kshs.178,931/00. The letter required the Plaintiff to satisfy the decree under the provisions of the Insurance (Motor Vehicles Third Party Risks) Act, Cap. 405 (the Act). The Plaintiff refused to settle the decree because the motor vehicle in question was not insured by it for carriage of passengers for hire. The Plaintiff therefore brought this suit.

The Defendant, duly served with summons to enter appearance and copy of the plaint, never entered appearance. Nor did he file defence. The Plaintiff therefore proceeded *ex parte* to prove its case. Upon the uncontroverted testimony of PW1 and the documents produced in evidence I am satisfied on balance that the motor insurance in question did not cover the carriage of passengers for hire; and therefore the risk of injury or death to a passenger in the motor vehicle was not a liability compulsorily required to be covered under section 5(b) of the Act. The Plaintiff is thus not obliged to satisfy the decree obtained in Milimani PMCC No. 5304 of 2002 or any other decree arising out of the same accident. It is clear that the Defendant herein obtained the insurance cover in question by the non-disclosure or misrepresentation of a material fact, that material fact being that the Defendant infact intended to, and did use, the motor vehicle in question for carriage of passengers for hire.

The Plaintiff is therefore entitled to the declaration sought in prayer (b) of the plaint, and I hereby grant that. However, the Plaintiff is not entitled to a declaration as sought in prayer (a) of the plaint in that the risk of death or injury to a passenger in the motor vehicle was not a liability required to be covered by the policy of insurance under section 5(b) of the Act. I shall therefore refuse that prayer. The Plaintiff shall have the costs of this suit. Orders accordingly.

DATED SIGNED AND PRONOUNCED IN OPEN COURT THIS 29TH DAY OF JULY, 2005.

H.P.G. WAWERU

JUDGE