REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suit 201 of 1997

MOHAMED ATHMAN MJAHID ..... PLAINTIFF

VERSUS

GATEWAY INSURANCE COMPANY LIMITED ..... DEFENDANT

Coram: Before Hon. Justice Mwera

Okongo for the plaintiff

Nyaoga for defendant

Court clerk – Kazungu

JUDGEMENT

Pleadings in this 1997 case can be condensed thus: The plaintiff owner of a bus Reg. No. KSK 807, insured it for 3rd party risks with the defendant. It was involved in an accident when a valid insurance policy was in force. The injured people sued the plaintiff in MBA SRMCC NO. 2034/95 and got a judgement for Kshs. 810,000/-.

In January 1996, the defendant was notified of this judgement and it paid Kshs. 420,000/- under the policy which both sides called a policy of indemnity. The balance of Kshs. 390,000/- was not paid and the 3rd parties entitled to it moved against the plaintiff to execute by causing his other bus NO. KAC 813P to be attached. The defendant had declined to pay that balance and so the auctioneers detained the plaintiff's bus for some 147 days before he negotiated, paid the auctioneers charges in order to have the bus released. So the plaintiff's claim is to the effect that the 147 loss of user of his public service bus caused him loss at Kshs. 61,000/- per day. He added to this the auctioneers charges and legal fees to make a total of Kshs. 9,044,135/- as directly flowing from the defendant's refusal to pay the balance of the judgement sum above (Kshs. 390,000/-) when it was obliged to do so under the policy of insurance he had taken from the defendant over the accident bus.

After considerable legal skirmishes some of which went to the Court of Appeal and back a defence was filed on 21st March 2000. It was pleaded inter alia that the plaintiff breached the insurance contract by not paying premiums on time or in full or that that contract excluded consequential loss eg loss of income. It was however boldly averred that the defendant's obligation under the said insurance contract was to indemnify the plaintiff of such losses as it may incur under the risk covered but that it had no obligation to pay any sums to the plaintiffs in SRMCC 2034/95. It was denied that the plaintiff suffered any loss envisaged by the insurance policy and that indeed if he suffered any loss at all, it was due to his failure to mitigate his loss. Again there were more applications, rulings, orders etc until the hearing

started before Etyang J, on 3rd June 2003 with the plaintiff taking the witness stand (PW1).

To the best of what can be garnered from the record two other witness (Bakari PW3) were heard and the proceedings stopped until the undersigned judge took up from where Etyang J left – on 17th November 2004. Athmani Lali Adi (PW4), the plaintiff's transport office manager between 1996 to 1998 testified from the office records kept by a clerk in the plaintiff's Lamu office one Harun who has since died (Exh P8). That Harun kept and maintained the bus manifest for passengers (Reg. No. s. KAC 813P, KSK 807) on routes from Lamu via Mombasa to Lunga Lunga (Kwale) and back (Exh P19).

Abdu Athman (PW5) once worked on the plaintiff's bus No. KAC 813P as a conductor. His duties were on the Mombasa – Kwale trips. Passengers paid Kshs. 100/- one way and the bus also carried luggage. PW5 would collect between Kshs. 20,000/- and 26,000/- per day. He produced copies of receipt books he wrote (Exh P 22 to 23); he was cross-examined. That closed the plaintiff's case.

Robert Kiboro (DWI), a manager with the defendant company then testified. He brought along the records touching on this cause containing a policy his employer issued to the plaintiff regarding the bus in question (Exh P1). That his was a 3rd party insurance cover limited to injuries to passengers only. That it was an indemnity cover whereupon the insured (the plaintiff) was to compensate his injured passengers and inturn the defendant would indemnify him. That in the present case similarly the plaintiff was to pay sums adjudged against him on account of his bus, then in turn approach the defendant for reimbursement. DW1 read the exception clause to the effect that the defendant company could not be liable to the plaintiff under the policy for any loss, damage or expense arising from any accident or consequential loss.

That with that clause the plaintiff could not successfully sue as he does now for consequential loss at all. DW1 then went to the Indemnity Clause and again reiterated that the plaintiff was to pay for any injuries to 3rd parties then ask the defendant for reimbursement. Here, he had to satisfy the judgment against him and then seek refund from the defendant. That had the plaintiff done that, the consequential losses he claims could not have arisen at all. That although the defendant did pay part of the judgement sum in SRMCC 2034/95 the contract terms did not change at all. The plaintiff had the capacity to pay and also an obligation to mitigate his losses.

In the cross examination that followed, the court heard that paying part of the judgement sum was just in good faith on the part of the defendant, and not an obligation at all. That in cases such as this the defendant lets the insured pay what is adjudged against him first then a refund is made. Or where an insured is not capable the defendant may pay on its behalf. Reference was made to a certain letter of 8th May 1996 (seemingly not exhibited) where the defendant allegedly said that it had paid Kshs. 420,000/- as full and final settlement of the sum claimed. DW1 nonetheless maintained that such did not alter the contract at all. If anything that letter being between lawyers could only be what was agreed between them.

To DW1's understanding, the provisions of Cap 405 (Motor Vehicle (Third Party Risk) Insurance Act, herein after the Act, obliges an insurer to compensate not to pay. The court was given to understand that eventually the defendant paid the claim sum anyway (Kshs. 390,000/-) – after the plaintiff suffered the losses being litigated here. But DW1 maintained that they did not directly flow from the insurance contract at all. That was the only defence witness. Both sides then submitted and at length, going by the various authorities each side put forth.

In this court's view and because the parties do not appear to have presented the issues to be determined, broadly these two (2) give the parameters of the determination to follow:

(1) Did the contract of insurance oblige the defendant to pay any sums adjudged from / after the injuries / loss suffered by a 3rd party?

(2) Are the consequential losses claimed here covered under the contract of insurance?

It is at the outset appreciated that the parties were not invoking any practice or trade usage if any exists in 3rd party insurance covers. The dispute arises directly from the insurance policy the defendant

issued to the plaintiff to cover the subject bus. It is not said that one was not in force at the time the subject bus was involved in the accident at all. And it is not in dispute that initially the defendant paid part of the judgment sum in SRMCCC 2030/98 and eventually as per DW1 the balance was also paid. The defendant does not deny that in the meantime the plaintiff's bus was attached and released to him – after a period over which and by which incident of attachment, the plaintiff lays his claim here. So back to the issues.

Regarding the position of the plaintiff vis avis the obligation of the defendant insurer under the Act, we need not be detained here much by Section 4 of the Act which requires every motor car to have an insurance cover in order to be used on the road. And Section 5 which requires specifying which persons and liability the policy covers in case of injury or death suffered while using the insured motor vehicle on the road. We move straight to Section 10 which in its pertinent parts reads:

> ***"10.(1) If after a policy of insurance has been effected, judgement in respect of any such liability as is required to be covered by a policy under paragraph (b) of Section 5 (being liability covered by the terms of the policy) is obtained against any person insured by the policy then notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall subject to the provisions of this section pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of interest on that sum by virtue of any enactment relating to interest of judgements."***

Mr. Okongo held a strong view that payment of any judgment sums is an obligation placed by law on the insurer and he should pay up as soon as he is informed of the judgement. That even though by the policy of insurance, the subject here, the defendant undertook to indemnify the plaintiff, but all the time the law imposed on it the duty to pay the judgement sums that were awarded in SRMCC 2034/95. But that he did only pay part in the beginning then became reluctant to pay the balance occasioning the plaintiff's other vehicle to be attached with resultant loss and damage, the defendant must make good those losses.

Further, that in fact the defendant only paid up the balance of Kshs. 390,000/- to the plaintiffs in SRMCC 2034/95 when they sued it in a declaratory suit and it paid directly to them. And that the plaintiff took all reasonable steps first by informing the defendant that his bus had been attached in execution to get the decretal sum balance (in SRMCC 2034/05) paid. That when the defendant failed to pay so that the motor vehicle could be released, the plaintiff paid auctioneers charges (Exh P10), contacted the financiers of that motor vehicle, who had to have it released via objection proceedings.

Mr. Nyaoga on the defendant's side submitted that since theirs was a contract of indemnity, the plaintiff was obliged to be damnified first by paying off the judgement sums and then going to the insurer to refund / reimburse him. Referring to the Act, the court was told that there being no privity of contract between the decree holders (in SRMCC 2034/95) and the insurer the question of the latter paying the former directly did not arise. It could only be via the insurance policy (Exh P1) which was an indemnity contract – the defendant reimbursing the plaintiff after he paid the judgement creditors first. And that the contract did not stipulate the time within which to pay by way of that indemnity.

As to recovery of consequential losses the defendant cited the case of Madison Insurance Co. Ltd Vs Solomon Kinara C. A. 263/2003 to the effect that only with a specific clause stipulating recovery of such loss would a claimant succeed. That no such clause exhibited in the insurance contract between the two litigants here and so the plaintiff would not recover. That indeed recovery of such losses was excluded in the subject insurance policy (**Clause 5(a) GENERAL EXCEPTIONS**).

It was submitted further that the policy limited liability to Kshs. 810,000/- only in this case – an no more. That accordingly it was untenable to bring up figures beyond and outside that covered as the plaintiff is doing here. The claim of loss of profits due to the detention of the attached bus was also put in focus. That the court was only left to assume and guess that that bus earned Kshs. 61,000/- per day, while all was left to be proved by projected bus manifests, receipts etc without concrete evidence eg. accounting records including profit and loss statements, tax returns.

The last point that the defendant put forth was that the plaintiff did not attempt in his own interest to reduce any loss that was bound to befall him after one of his buses had been attached. That the plaintiff should not have waited for 147 before regaining his bus. He had other operating buses and if he had acted, say in first 21 days (covering notice of judgement and proclamation before attachment), he would have reduced his loss greatly. Or that he could as well have paid Khss. 390,000/- as per the warrants because he was capable, then pursue a refund.

In impeaching the plaintiff's plea that Section 10 of the Act was breached, the defendant submitted that that was not in the pleadings. Without going far before disposing of this point, this court observes that as at the time of these proceedings the issue of 14 days notice commencement of proceedings did not arise. When SRMCC 2034/95 was instituted and the defendant instructed a lawyer to appear for the insured (the plaintiff) that was it. And even more, the defendant paid part of the judgment sum initially and the balance later. It is also not in doubt that the contract between these two litigants flowed from the provisions of the Act. Would more come from the present submission? None at all.

The plaintiff did reply to the defendants submissions and now the court proceeds in its decision.

ISSUE I:

The obligation of the defendant insurer under the Act:

This court's interpretation of Section 10(1) is that the insurer has a duty under the law to pay the judgment sums on being informed. Section 10 mandates that:

> ***"..... the insurer shall subject to the provisions of this section pay to the persons entitled to the benefit of the judgment any sum payable ....."***

The insured is the motor vehicle owner (here the plaintiff). The risk insured is injury or death following an accident by the insured motor vehicle. The persons insured are the 3rd parties (passengers, pedestrians etc). When the 3rd parties are injured following an accident by the insured motor vehicle and they successfully sue the insured (the plaintiff here), they are the people entitled to the benefit of the judgement. So when the insured informs the insurer of the judgment and what it contains to be paid, the insurer has a statutory duty to pay the judgement holders. By operation of the law the judgement holders (in SRMCC 2034/95) need not be privy to the insurance contract between the insured (the plaintiff) and the insurer (the defendant). They are beneficiaries who should get payment and the defendant should not wait to be sued for this. But if the insurer fails, ignores or delays in paying those beneficiaries, by a declaratory suit can compel him to pay. The defendant's stand here is in total agreement with the above because it was submitted on its behalf that:-

> ***"In any event Section 10(1) does not confer any right on the insured plaintiff. It only confers a right to the persons entitled to the benefit of the judgment to be paid any sums payable thereunder ie decree holder(s) in SRMSS 2034/95. But even those beneficiaries of Section 10 of Cap 405 have to file a suit to obtain a declaratory decree to (the) effect that the insurer is bound to pay them."***

In this court's view the defendant agrees that payment is direct to the judgment holders by the insurer. Accordingly its argument that the plaintiff had to pay up first and then go for indemnity from the defendant is fallacious. In any case the plaintiff is not suing for the judgment sum in SRMCC 2034/95. He is suing to recover the loss he incurred when the decree holders in SRMCC 2034/95 caused his bus to be attached and detained pursuant to the failure of the defendant to meet its statutory obligation of paying the whole decretal sum. It had, on realization and recognition of this obligation, paid part of the sum anyway. And it had to be compelled to pay the balance (for which the plaintiffs bus was attached) Kshs. 390,000/- through a declaratory suit. So with Section 10 in place, it could not be affected in anyway by the defendant's incorporating in its policy what it termed as indemnity cause by which it meant that the plaintiff had to pay up first and then approach the defendant for reimbursement. That clause does not alter the statutory obligation at all. Of course if the plaintiff paid Kshs. 390,000/-, he could simply avail the

receipts to the defendant and a refund would be forthcoming. But it can be said that if the insurer failed to refund, then the insured should sue for it. But then that could be their local arrangements.

ISSUE 2:

Are the consequential losses claimed here recoverable? In the view of this court, the answer is in the negative. They are not of such nature as are covered under the insurance contract which was entered into pursuant to law. The policy was an insurance to cover claims limited to injury and death of 3rd parties. The judgement should state what loss has been suffered in the event of any or both these (injury and death) and the costs, interest as determined. If one has to benefit under Section 10 one must confine himself to what that provision says and the beneficiaries under Section 10 are the decree holders in SRMCC 2034/95. They only could sue under that provision of law. It is thus untenable for the plaintiff to seek to benefit from the default of the defendant under Section 10 of the Act, because he incurred losses when the defendant delayed to pay the balance of a judgment sum. Section 10 of the Act was not specifically pleaded but that is garnered from the pleadings generally and the submissions in particular.

In any event the insurance policy did not cover consequential loss. It excluded the same as per the **GENERAL EXCEPTIONS:**

> ***" 5(a) The Company shall not be liable in respect ofany accident loss or damage to any property whatsoever or any loss or expense whatsoever resulting or arising therefrom or any consequential loss:"***

When both litigants appended their respective signatures to this contract, this court can only interprete and apply it as they desired. They desired that in their dealings pursuant to their insurance contract, there will be no liability by way of consequential loss. The plaintiff is claiming that he lost income and paid other expenses because the defendant did not pay the balance it was obliged to under the contract. He cannot get anything on that account because he bound himself to say that their contract did not cover liability arising from consequential loss while effecting the contract.

This court may add that even if say, the parties had not agreed not to concern themselves with consequential loss, and yet they did not insert a clause in the contract imposing liability for consequential loss, it would be an uphill task for the court to be convinced to assume that such clause should be read in the contract. A contract says what parties want. What is excluded from it cannot be assumed save, perhaps for practice and trade usage. But be that as it may.

In the same vein, it is added that had consequential loss been insured under the contract herein, the sought sum would have been considered and probably awarded on a random basis or nothing at all. The claim is specific that for 147 days the attached bus did not make Kshs. 61,000/- per day for the plaintiff. Yet there was no credible or any evidence at all to back up this special damage.

The passenger manifests, receipts etc placed before this court fell far short of proof required to back up a claim for special damages. Such would include the operating account of the subject bus; the profit and loss statement over a period; taxes paid etc. None of these were exhibited. Anyway from all the foregoing this suit is dismissed with costs.

Judgement accordingly.

Delivered on 27th July, 2005.

J.W. MWERA

JUDGE