REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL APPEAL 666 OF 2001

UNITED INSURANCE CO. LTD …….…….. APPELLANT

VERSUS

STEPHEN MIRINGU KIMUNGE …….. RESPONDENT

(An Appealfrom the Ruling of Hon. P. Wekesa, RM

in Milimani CommercialCourts Civil Suit No. 3083 of 2001
delivered on 19th September, 2001).

JUDGMENT

On 14th December, 1994, the Respondent suffered personal injuries in a motor vehicle accident involving motor vehicle registration no. KAC 572 D in which he was a passenger at the material time. He sued its owner and driver, and a consent judgment was entered in his favour in the sum of Kshs.62,650/= plus costs and interest. He then sued the insurer of the aforesaid motor vehicle, the Appellant in this appeal, for a declaration that the Appellant insurer was bound to honour the Judgment, and for Judgment against it for Kshs.62,650/=. The Appellant filed a defence denying its liability to pay on the grounds, inter alia, that the policy of insurance did not cover, nor was it required to cover, passengers.The Appellant also denied having been served with the statutory notice required to be served on it with regard to the action against its insured. Soon thereafter, the Respondent made an application to the lower court to strike out the Defence, on the grounds that it was an abuse of the process of the court, and for Judgment to be entered against the Appellant.

In a brief, and completely unreasoned seven-line Ruling, the lower court (Ms. P. Wekesa) struck out the Defence.

It is against that Ruling that the Appellant has appealed on 10 grounds of appeal. I do not feel the need to repeat here all the grounds of appeal. The main issue is whether this was a clear cut case that could be struck out without a hearing. In other words, was there an enforceable policy of insurance covering the risk that gave rise to the claim in the lower court?

In his submission before the Court, Mr Wamalwa, Counsel for the Appellant, argued that the Appellant insurer was never served with the required statutory notice; that even if served, that did not automatically constitute a cause of action; and that the policy of insurance issued to the insured did not cover "passengers"; that it was not a risk required by law to be covered. He relied on the case of ***Maria Ciabaitaru M'Mairanyi & Others vs Blue Shield Insurance Co. Ltd*** **(*C. A. 101 of 2000*).**

Mr Masika, for the Respondent, argued that there was evidence of service of the statutory notice upon the

Appellant; that the Appellant had not denied the issue of the policy of insurance to the insured; and relying on the case of The ***New Great Insurance Co. of India vs Lilian Cross (1966) EALR 90*** he submitted that under Section 8 of the Insurance (Motor Vehicles Third Party Risks Act, Cap 405 (hereinafter "the Act") the insurer could not avoid liability by limiting its risks under the insurance policy; that any such condition in the policy was rendered void by virtue of Section 8 of the Act; and, therefore, there was no valid defence presented by the Appellant.

I would humbly disagree with the position taken by Mr Masika. This is certainly not a clear cut case of the insurer's liability in respect of a policy it said it never issued, and certainly not a policy that covered "passengers". By his own admission, the Respondent, in his Plaint filed before the lower court said that he was a "passenger" in the motor vehicle insured by the Appellant. The Respondent's argument that the insurer cannot limit its liability by virtue of Section 8 is not tenable in law.The case of ***The New Great Insurance Company (supra)*** relied on by the Respondent is not helpful to him. In that case the insurance company attempted to avoid liability for injuries suffered by a third party on the grounds that the insured's driver had been disqualified from holding a driver's license at the material time. The Court of Appeal held that the insurer could not do so under Section 8 of the Act because it was a liability that was required to be covered under Section 5 (b) of the Act, and in fact was so covered.

However, that case can be distinguished from the facts before this Court. Here, the Respondent was a *"passenger".* The liability in respect of a certain class of passengers is not "required" to be covered by the Act. Section 5 (b) (ii) of the Act makes it clear that compulsory insurance is not required in respect of risk to passengers who are not carried for hire or reward. (See ***Maria Ciabaitaru*** case – supra).

It is not clear from the facts of the case before this Court whether the Respondent was a gratuitous "passenger" in the insured motor vehicle, or a passenger for hire or reward, or a passenger under a contract of employment. What is clear is that he was a "passenger". That in itself created a "triable issue" which was sufficient to let this case go to full hearing. It was, therefore, not a clear cut case which could be disposed of in a summary manner.

Accordingly, and for reasons outlined, this appeal is allowed with costs. The Ruling of the lower court is set aside; and the Respondent's Chamber Summons application dated 15th June, 2001 is dismissed with costs.

Dated and delivered at Nairobi this 21st day of September, 2005.

ALNASHIR VISRAM

JUDGE