



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**MILIMANI COMMERCIAL COURTS NAIROBI**

**CIVIL SUIT NO.1078 OF 2000**

**GATEWAY INSURANCE COMPANY LIMITED.....PLAINTIFF**

**VERSUS**

**SUDAN MATHEWS.....DEFENDANT**

**JUDGEMENT**

By a proposal form dated 15th August 1991, the defendant requested the plaintiff to issue him a private car policy against third party risks in respect of a 1987 Mitsubishi Pajero Station wagon Registration Number KYG 728. To the question whether the car would be used exclusively for social domestic and pleasure purposes, the defendant answered "yes". The proposal contained a declaration that all the particulars stated therein were correct and that the proposal and declaration would be the basis of the proposed contract between the parties. The defendant did not at any time advise the plaintiff of any intention to use the vehicle for purposes other than the ones declared in the proposal form. In pursuance of the said proposal form and the said declaration and in reliance upon the same and upon the truth of the representations contained therein the plaintiff in consideration of the payment of a premium of Kshs.1,500/= issued to the defendant a private vehicle policy and agreed thereby for a period of 12 months from 15th August 1991 to 14th August, 1992 to indemnify the defendant as provided in the policy against inter alia sums which the defendant would become legally liable to pay in the event of an accident caused by or arising out of the use of the vehicle in respect of the death or bodily injury to any person being a liability as is required to be covered by a policy of insurance under Section 5 (b) of the Insurance (Motor Vehicles Third Party Risks) Act, Cap. 405.

The plaintiff claims that the policy was obtained by non disclosure of a material fact or facts and/or by representations of facts which were false in material particular, namely that the vehicle would be used only for social domestic and pleasure purposes whereas the defendant intended to or did use the same for carriage of passengers and/or for hire and reward.

On 18.4.92 the defendant was driving the said vehicle along Nairobi-Mombasa Road with a passenger(s) on board when the vehicle was involved in an accident as a result of which a passenger by the name of Nduku Kanyasie was injured.

The plaintiff's case is that by reason of such material disclosure or misrepresentation of material facts, it is and was entitled under the provisions of Section 10(4) of the Act to avoid the said policy. It seeks a declaration to that effect and also a further declaration that it is not liable to make any payment under the aforesaid policy in respect of any claim against it arising out of injuries sustained in the accident on 8.4.1992 involving the said motor vehicle registration number KYG 728.

I have considered the evidence and the submissions. I think it is pertinent to set out the provisions of Sections 5 and 10 (1) and (4) of the Insurance (Motor Vehicles Third Party risks) Act both of which are pertinent to the reliefs sought by the plaintiff. Section 5 provides-

**"5. In order to comply with the requirements of section 4, the policy of insurance must be a policy which -**

**(a) is issued by a company which is required under the Insurance 'Act, 1984 to carry on motor vehicle insurance business; and**

**(b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road: provided that a policy in terms of this section shall not be required to cover-**

**(i) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or**

**(ii) except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried In or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arose; or**

**(iii) any contractual liability.**

And Section 10 provides -

"(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 a 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 judgement any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

**(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 proceedings in which the judgement was given, he has 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 the non-disclosure of a material fact, or by a representation of 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:**

**Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgement obtained in proceedings commenced before the commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto."**

My interpretation of Section 5 is that the statutory third party cover is not required to extend to the risks of death or bodily injury to the employees of the insured arising out of or in the course of their employment; or to the death or injury to passengers except in the case of motor vehicles in which such

persons are carried for reward or hire or by reason or in pursuance of a contract of employment; or to any contractual liability. In the circumstances of this case, motor vehicle KYG 728 was by the terms of the policy to be used for social, domestic and pleasure purposes and not for hire or reward or the carriage of employees. Accordingly the risk of injury or death to a passenger therein was not compulsorily required to be covered under Cap. 405. And indeed from the evidence, such a risk was not actually covered. That being the case, the plaintiff is not obliged to indemnify the defendant against any claim by the passenger Nduku Kanyasia.

As regards the ambit and scope of Section 10, it is clear to me that the insurer is under a duty to satisfy only such judgements as have been obtained against persons who are insured against such liabilities as are required to be covered by a policy under paragraph (b) of Section 5 and which are actually covered by the terms of the policy. And one of the circumstances in which the insurer may escape liability for such a judgement is where it has obtained a declaratory order that it is entitled to avoid the policy on the basis that the same was obtained by the non-disclosure or misrepresentation of a material fact. That being so, it is not open to the plaintiff to seek such declaratory relief in the circumstances of this case as the risk of injury to a passenger in the defendant's vehicle was not a liability required to be covered by the policy under paragraph (b) of Section 5. In short the prayer for a declaration that the plaintiff is entitled to avoid the policy is misconceived.

In the result, the plaintiff is refused the declaration that it is entitled to avoid the policy as prayed in prayer (a) of the reliefs sought in the plaint but it is granted the declaration that it is not liable to make payment under the policy in respect of any claim by any passenger in the motor vehicle on 8.4.92 as prayed in prayer (b). The plaintiff is also awarded the costs of the suit.

Those, then, are the orders of this court.

**DATED** at **NAIROBI** this 7th April 2003.

**A.G RINGERA**

**JUDGE**

### **INSURANCE**

- Insurance (motor vehicle Third Party Risks) Act.
- Interpretation of Sections 5 and 10(4) of Cap.405.
- What liabilities need not be covered under the Act.
  
- Whether insured can seek a declaration that he is not bound to indemnify insured if risk was not required to be covered by the Act.