

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 120 OF 2000

GEMINIA INSURANCE COMPANY LTD..... PLAINTIFF

VERSUS

JOHN KIPROP CHEMEITOI DEFENDANT

JUDGEMENT

On 19. 6. 1996, John Kiprop Chemeitoi (the Insured) of Nairobi approached M/S GEMINIA INSURANCE CO. LTD (the Insurer) also of Nairobi and completed a proposed form for the Insurance of a Commercial Vehicle. It was a Toyota Hilux Pick-up Registration No. KAE 181N (the vehicle) with a carrying capacity of 3 passengers and one Tun of goods. The purpose for which the vehicle was Insured was for carriage of own goods.

On the basis of that purposed the Insurer issued a Insurance cover Certif9icate for 12 months from 21. 6. 1996 to 20. 6. 1997. A policy of Insurance also issued subject to the endorsement thereon. There were yearly rewards of the Insurance for the year 1997-1998, 1998 – 1999. On 02. 11. 1998 however the vehicle was involved in an accident along the Eldoret – Iten road when it hit a pedestrian. A police Abstract issued on 28. 1. 99 described the vehicle a Toyota “Matatu” owned by one JULIUS RONO and driven by one DANIEL KIPTUM KIMITO. The driver was charged with various offences of careless driving before Iten Resident Magistrate’s Court and was convicted and sentenced for the offence.

On 15. 02. 99 a copy of demand Notice was served on the Insurer by the Advocates for the injured pedestrian citing the policy of insurance but referring to the owners of the vehicle as JULIUS RONO. The statutory Notice was also served. The Insurer then wrote to the insured to provide details of the accident to enable them respond to the demand made. The insured did not respond and so the Insurer considered an investigator who revealed that the Insured had sold the vehicle to one JULIUS RONO who was using the vehicle as a “MATATU” and was carrying fare-paying passengers when the accident occurred. The insured then chose to avoid the policy on the basis of non-disclosure of material facts in the proposal form and for transfer of a policy which was personal tro the insured to another person. The insurer seeks a declaration that he was at all times entitled to avoid the policy stated above.

A statement of defence was filed on 20. 4. 20000 denying that any proposal form was completed before the insurance of the policy and further denying that the vehicle was used as a Matatu at any time.

He further demand that the vehicle was involved in an accident on 2. 11. 98 or any other time, injured any person. In the same breath the insured states that if any body was injured then the Insurer should settle the claim. When the matter was set down for hearing however, neither the insured not his advocates attended court although the they were served. The hearing proceeded ex-parte. I heard the testimony of two witnesses of the insurer. PW1 fared Muga Omwonga the claims supervisor who produced 10 exhibits conforming the execution of the proposal form, the insurance of the insurance policy and insurance certificates, correspondence relating to the demand Notice from the third party and proceedings from the Traffic Court. By 24. 5. 2000 when they received the last consultation from the third party Advocates, new suit had been filed.

The said witnesses Asaph Nyogona Karogi was the Investigator commissioned to look for and obtain information on the alleged accident from the Insured,. He produced letters addressed to the Insured which were never responded to. The confirmed from Iten Police Station that the vehicle ownership had changed and that its actual user was for transporter of fare paying passengers (Matatu). The witnesses who testified

the Traffic Case said that the vehicle was a “Matatu”

I have perused those documents and I am satisfied that the two witnesses were truthful. The denial that the vehicle had not been involved in any accident or injured any person was as shallow as the assertion that the insured never completed any proposed form before the policy of insurance was issued. If that be the case, as correctly submitted by Learned Counsel for the Insurer, Mr. Muigai then it would follow that the contract if insurance was not based on any proposal and therefore it never existed. I am satisfied that he insured made the proposal for the insurance of his other vehicle and that the declared user was for carriage of own goods. I am also satisfied that he vehicle was involved in a Road Traffic Accident while it was engaged in the business of a Matatu, or fare-paying passengers business which was not the Insured user. The ownership had, also changed through it would appear, informally as registered transfer was in evidence. It is no wonder that the insured was reluctant to assist the Insurer to obtain full information on the Accident.

Section 10(2) states:

“.....”

I am satisfied that this suit was brought long before any suit was filed and the Insurer has every right to avoid the policy in all the circumstances of this case.

I grant the declaration sought together with the costs of the suit.

Dated this 30th day of April, 2002.

P. N. WAKI

JUDGE