



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 283 OF 2001**

INVESCO ASSURANCE COMPANY.....PLAINTIFF

VERSUS

CYRUS NGANGA NJIRU.....DEFENDANT

**RULING**

This is the plaintiffs application for an order that the Defence filed herein be struck out on the ground that the defence is likely to delay, embarrass or prejudice the speedy trial of the action. The application is brought under Order VI rule 12(1) CP Rules and S. 3A of CP Act.

The relief sought in the suit is a declaration that the policy of insurance entered into on 6.8.99 does not bind the plaintiff in respect of injuries to passengers and that defendant be compelled to deal with all claims respect of injuries to passengers without involving plaintiff.

In summary plaintiff avers that it issued a commercial vehicle policy to cover defendant motor vehicle reg KAH 913 V Nissan pick up but defendant converted the motor vehicle in a matatu – a passenger vehicle where passengers were carried for hire or reward. Plaintiff further avers that the defendants motor vehicle was involved in accident on 9.8.99 and passengers were injured last plaintiff avers that the defendants driver Daniel Kiraithe Kirimi was charged in Nanyuki Resident Magistrate Court Traffic case No. 155/99 with the offence of ferrying uninsured passengers, pleaded guilty and was duly convicted..

Defendant filed a Defence on 20.4.2001 denying all the material facts relating to the policy pleaded in the plaint. Defendants counsel was served with the present application but he did not file grounds of opposition or (replying affidavit. He did not also attend the hearing of the application. The application is nor therefore opposed.

Documents annexed to the application show that defendant obtained a Third Party Insurance Cover for the motor vehicle in clause 5 of the proposal form he indicated that passengers would not be carried for hire or reward and that the seating capacity of the vehicle including the driver is three persons. The investigations report show that defendant was carrying passengers for hire or reward when the accident occurred.

As defendant did not file a replying affidavit the contents of the supporting affidavit and annexed documents are not controverted. In Corporate Insurance Co., Ltd versus Elias Okinyo Opire CA No. 12 of 1998, the Court of Appeal held in part;

“If an insured after obtaining an insurance cover for a Commercial vehicle for use in connection with his business changes the nature of the vehicle to that of a “matatu” the nature of the policy remains that of a commercial vehicle policy and such change does not and cannot make the insurer liable to the passengers who are thereafter carried in the vehicle for reward (fare)”

The defendants motor vehicle was not insured as a public service vehicle. For Public service vehicle the owner is required by law to obtain an insurance cover for the passengers. The third party policy obtained by defendant only covered third parties as defined in the policy and as known in law and not passengers carried for hire or reward. The fact that the third party policy did not cover passengers injured in the accident is exemplified by the fact that the defendants driver was charged in Nanyuki Resident Magistrate’s Court Traffic Case No. 155 of 1999 with offence of carrying uninsured passengers. Records show that the defendant driver was convicted and sentenced to a fine of shs 500/=.

The claim of the injured passengers is obvious not a claim covered by the third Party Insurance Police which was in effect at the time of the accident.

Consequently I allow the application with costs I strike out the defence and enter judgment for plaintiff against defendant in terms of the Amended plaint with costs.

E. M. Githinji

Judge

28.5.2002

Mr. Makori present