REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 6859 OF 1991

MWAMBA TRANSPORT CO. LTD……..PLAINTIFF

-VERSUS-

KENINDIA ASSURANCE CO. LTD…….……..DEFENDANT

JUDGEMENT

The Plaintiff sued the defendant for a declaration that the defendant is bound to indemnify the plaintiff to the full value of the plaintiff's vehicle which was damaged in an accident. The Plaintiff's case is that the vehicle was covered by an insurance cover from the Defendant. The policy so taken was valid from the 13th February 1985 to 12th February, 1986. It was a Commercial Private Policy.

On 1st January, 1986 the vehicle was involved in an accident along Kericho- Nakuru road. The damage to the vehicle was extensive and the Assessor found it was uneconomical to repair it and recommended it to be written off. By a letter dated the 15.8.1986 the defendant repudiated liability on the ground that the plaintiff refused to cooperate and assist in the investigations carried out by the Defendant.

It was after the repudiation that the plaintiff filed this suit.

The Defendant's defence to the claim is that at the time of the accident the vehicle was being used for purposes which were not covered by the Insurance Policy. The defendant contends further that the value given to the vehicle by the Plaintiff i.e. the pre-accident value was not correct and that the year of manufacture given by the plaintiff was incorrect. The defendant also took up the defence that the policy contained an agreement clause requiring any dispute to be referred to arbitration.

It is not in dispute that the plaintiff had taken insurance cover for the motor vehicle KTK 122 just as it is not in dispute that the vehicle was involved in an accident. What is in dispute is whether the plaintiff was using the vehicle at the time of the accident for purposes which were outside the terms of the policy. It was plaintiff's evidence that the vehicle had gone to collect building stones for the plaintiff. The relevant terms in the policy was "To use the vehicle in connection with Insured's business – use for the carriage of passengers in connection with the Insured's business and use for domestic and pleasure use". There was no evidence from the defendant to show that what plaintiff has said was not true. The defendant indicated that there was a mere suspicion that the vehicle was being used for hire without giving any basis for this suspicion.

From the evidence, I find that the vehicle was being used for purposes which were within the terms of the policy as it was not being hired out as the defendant was insinuating.

That because the policy contained an arbitration clause and that the plaintiff did not refer the matter to arbitration can not be a ground for repudiating liability. Under the Arbitration Act Section 6 (1) the Defendant was at liberty to apply for the court proceedings in favour of arbitration to be stayed. The defendant did not do so. It cannot now seek to use this as a ground for repudiating liability. The Plaintiff was at liberty to use litigation in court or to go for arbitration. He chose litigation and the defendant accepted this jurisdiction when he filed defence without applying for the stay of the court proceedings.

The Defendant called evidence through DW1 who had been instructed to carry out investigation and who told the court that the Plaintiff was uncooperative in that he refused him to interview the driver of the vehicle. But from the evidence by this witness and from the manner he went about interviewing PW1 at his place of work it was quite evident that he was handling the matter in a very high handed manner treating the Plaintiff and the driver as criminal suspects. The witness said as much and it was clear from

his evidence and demenour that he was throwing his weight around. It was not surprising that the Plaintiff felt insulted by this witness's behaviour. I found no evidence that the Plaintiff refused to cooperate. It is clear that it was the witness who was rude to the plaintiff. I attach no weight to what this witness said about the plaintiff being uncooperative that could not in any event be considered as a ground for repudiating liability. Accordingly, I find that the defendant was bound to indemnify the plaintiff for the damages incurred as a result of the accident. The Defendant took issue with the year of manufacture of the vehicle saying that the two assessors did not agree on the year of manufacture. What is relevant to the claim is that the vehicle was insured for the sum of Shs.280,000/- and the plaintiff was entitled to indemnity for this sum insured. That he insured for sum lower than what he paid for it is immaterial and cannot be used as a ground to deny the plaintiff indemnity.

The Plaintiff said that it was not until August, 1986 when the Defendant repudiated liability. For this period, he was not making use of the vehicle and as a result he suffered loss of revenue from the use of the vehicle. By using the vehicle for his own use he saved money, he would have used in hiring a vehicle to do the work this vehicle was doing for him. For the loss of use the plaintiff is asking for the sum of Shs.3,000 per day for the period 1st January, to 30th August, 1986.

I would however consider 6 months as the correct period for which he can claim compensation for the loss of use at the rate of Shs.3,000/- per day. There will therefore be judgment for the plaintiff as prayed for in the plaint and the plaintiff will be paid:

(1) Value of the motor vehicle as insured Kshs.280,000/-

(2) Loss of use for 6 months Kshs.540,000/-

Total Kshs. 820,000/-

The Plaintiff shall also be paid costs of the suit and interest.

Dated and delivered this 2nd day of October, 2000.

KASANGA MULWA

JUDGE