



**APA Insurance Limited v Kituku (Civil Suit 260 of 2019)
[2023] KEHC 1722 (KLR) (Civ) (3 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1722 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT 260 OF 2019

AN ONGERI, J

MARCH 3, 2023

BETWEEN

APA INSURANCE LIMITED PLAINTIFF

AND

PAUL MUSYOKA KITUKU DEFENDANT

JUDGMENT

1. The plaintiff in this case, APA Insurance Limited (hereafter referred to as the plaintiff only) is an insurance company and at all material times was the insurer of the defendant's vehicle registration No KBT 429E *vide* policy No AL700/001388 commencing on October 11, 2013 to October 10, 2014 both days inclusive.
2. On May 24, 2014 when the said cover was in force, the said motor vehicle registration No KBT 429E was involved in a road traffic accident whereby several passengers on board suffered injuries.
3. The passengers sued the defendant Paul Musyoka Kituku (hereafter referred to as the defendant only) *vide* Mavoko CMCC No 683 of 2014 and PMCC No 872 of 2014 as owner of the vehicle for compensation for the injuries sustained.
4. The plaintiff filed the plaint herein dated October 7, 2019 against the defendant seeking the following declarations:
 - i. That the plaintiff has at all times been entitled to avoid the policy insurance No AL700/0013988 on the ground of material breach of fundamental terms of the policy instrument, breach of licensing conditions, traffic laws and as such the plaintiff is at liberty to repudiate or avoid the insurance policy therein.



- ii. That the plaintiff is not liable to compensate the defendant or to settle the claims arising out of the accident and/or indemnify the defendant in respect of any damages and/or claims stemming from the loss therein due to material breach of fundamental terms of the policy instrument, breach of licencing conditions, traffic laws and as such the plaintiff is at liberty to repudiate or avoid the insurance policy herein.
5. The plaintiff is also seeking costs of the suit and any other relief this court may deem fit to grant.
6. The defendant was served with the plaint and summons to enter appearance on July 9, 2020.
7. The process server in his affidavit of service dated October 23, 2020 stated that he called the defendant on his cellphone No 0720228853 and they met in a restaurant at Mlolongo where the defendant was based as a businessman and he served him with the summons.
8. The defendant did not enter appearance or file a defence and the plaintiff made a request for interlocutory judgment under order 10 rule 4, 5, 6 and 9 of the [Civil Procedure Rules](#).
9. The matter was set down for formal proof on March 1, 2023.
10. The plaintiff called one witness (PW 1) who adopted her witness statement dated October 7, 2019 as her evidence in chief.
11. PW 1 said she is currently employed by the plaintiff as a legal counsel and she has access to all documents on record relating to all claims and legal proceedings lodged against the plaintiff including this suit.
12. She further said in the witness statement that a comprehensive motor insurance proposal form and declaration duly executed by the defendant, the defendant unequivocally requested the plaintiff to issue it with a comprehensive motor insurance policy cover in respect of the risks arising out of their use of motor vehicle registration No KBT 429E.
13. That the defendant specifically stated the said motor vehicle shall be a private car not to be used for hire and/or reward and that failure to abide by the license requirements and use of the vehicle in contravention of the license terms and declarations would constitute express breach of fundamental terms of policy documents which would entitle the plaintiff to repudiate and/or avoid the insurance cover issue to the defendant.
14. Further, that pursuant to the said proposal form as well as the declaration, the plaintiff in the belief that the defendant would at all times abide by the traffic laws of Kenya and the licencing terms and specification as to capacity and use of the subject vehicle agreed to issue the defendant with policy number AL700/0013988 commencing on October 11, 2013 to October 10, 2014 both days inclusive.
15. PW 1 further stated in the witness statement that the defendant deliberately breached the fundamental condition as regards the use of the said motor vehicle and used the vehicle to conduct public service vehicle business as a result of which the plaintiff's rights to repudiate and/or avoid the insurance policy accrued.
16. Further, that on 24/05/2014 the said motor vehicle Registration no KBT 429E was involved in a road traffic accident whereby several passengers on board suffered injuries.
17. That the passengers filed a civil suit *vide* Mavoko CMCC No 683 of 2014 and PMCC No 872 of 2014 and served the plaintiff with statutory notices seeking compensation.
18. PW 1 in the statement stated the particulars of material breach and violation of law as follows;



- i. Using the subject vehicle as public service while the same was not licensed to do so.
 - ii. Using the vehicle for hire and reward contrary to policy conditions.
 - iii. Engaging a driver who was not licensed to operate public service business.
 - iv. Carrying excess passengers contrary to manufacturer specifications.
19. The plaintiff is now seeking the declarations stated in the plaint since the defendant was in breach of fundamental terms and conditionality of the policy instrument and licensing terms and traffic laws prohibiting carrying of excess passengers.
20. The plaintiff is also seeking for orders that it is not liable to compensate and/or indemnify the injured persons and deceased passengers or the defendant.
21. Further, the plaintiff is also seeking a declaration that the defendant is personally liable to settle the claims arising from the accident that occurred on May 24, 2014 and also to bear his own loss.
22. I have considered the averments in the plaint dated October 7, 2019 together with the evidence of PW 1.
23. I find that the said evidence has not been challenged by the defendant since the defendant failed to enter appearance or file a defence despite having been served with the summons to enter appearance and file a defence.
24. I find that the plaintiff has proved it's case to the required standards in civil cases which is on a balance of probabilities.
25. I accordingly enter judgment in favor of the plaintiff against the defendant in the following terms:
- i. That a declaration be and is hereby issued that the plaintiff has at all material times been entitled to avoid policy No AL700/001388 on the grounds of material breach of fundamental terms of policy instrument.
 - ii. That a declaration be and is hereby issued that the plaintiff is not liable to compensate the defendant as to settle the claims arising out of the accident and/or to indemnify the defendant in respect of any damages and/or claims stemming from the loss therein due to material breach of fundamental terms of the policy instrument.
 - iii. The defendant to pay the plaintiff the costs of this suit.
 - iv. The deputy registrar of this court to serve the defendant with the ten (10) days' notice of delivery of the *ex parte* judgment.

Orders to issue accordingly.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 3RD DAY OF MARCH, 2023.

.....

A. ONGERI

JUDGE

In the presence of:

..... for the Plaintiff



..... for the Defendant

