



REPUBLIC OF KENYA



KENYA LAW
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**Pacis Insurance Company Limited v Kimtai & another (Civil Case
11 of 2014) [2024] KEHC 16015 (KLR) (8 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 16015 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL CASE 11 OF 2014
REA OUGO, J
NOVEMBER 8, 2024**

BETWEEN

PACIS INSURANCE COMPANY LIMITED PLAINTIFF

AND

ANASTACIA KIMTAI 1ST DEFENDANT

HARRY KIMTAI 2ND DEFENDANT

JUDGMENT

1. The plaintiff in his plaint dated 12th February 2014 seeks the following orders:
 - a. A declaration that at the time of the accident on 15/01/2013, the defendant's motor vehicle registration number KBE 245L was being driven by an unqualified person which was in breach of the warranties of the insurance policy.
 - b. A declaration that the defendant has breached fundamental warranties of the insurance policy number 050/071/1/009057/2012 thereby discharging the plaintiff from liability in respect of any claim arising from the accident involving motor vehicle registration number KBE 345L on 15/01/2013.
 - c. A declaration that the plaintiff shall not be liable in respect of any accident loss damage or liability caused sustained or incurred whilst the defendant's order or with his permission or to his knowledge motor vehicle registration number KBE 345L was being driven by or was otherwise under the control of a person who did not hold a licence to drive the motor vehicle.
 - d. Costs of this suit
 - e. Any other relief that this honourable court shall deem fit and just to grant.



2. By background, the plaintiff at the request of the 1st defendant agreed to provide the 1st defendant with a policy of insurance regarding the motor vehicle registration number KBE 345L. The 1st defendant filled and submitted a motor class proposal form observing utmost good faith. On 03/12/2012 the plaintiff issued the 1st defendant with third-party insurance policy number 050/071/1/009057/2012 to cover liability for third-party risks. The policy was issued subject to the terms, conditions and/or warranties stipulated in the policy document. The policy was valid between 03/12/2012 and 02/12/2013. The policy was taken for the benefit of the 1st and 2nd defendants.
3. On 15/01/2013, the 1st defendant in blatant breach of the policy engaged, employed, caused or otherwise allowed the vehicle to be driven by an unqualified and unlicensed person. The plaintiff avers that it ought to have been reasonably foreseeable to the defendants that allowing the motor vehicle to be driven negligently would result in the vehicle causing an accident out of which claims for damages and compensation would arise. The accident subject of this suit was completely avoidable had the defendants complied with the law and express terms of the insurance policy.
4. The plaintiff also averred that at the time of the accident, the defendant's motor vehicle was used for a purpose other than that for which it was insured, which was in breach of the insurance policy. The plaintiff enumerated the defendant's breach of warranties of the insurance policy as follows:
 - a. Allowing a person without a driving licence to man their vehicle.
 - b. Acting in contravention of the *Traffic Act*, the traffic rules and terms of the insurance policy.
 - c. Failing to disclose material facts to the plaintiff.
 - d. Violating the principle of utmost good faith upon which the policy of insurance finds validity.
 - e. Exposing the plaintiff to foreseeable risks of liabilities and damages by allowing the insured motor vehicle to be driven by an unqualified driver thus making the likelihood of an accident reasonably foreseeable and eminent.
 - f. Ignoring, refusing or otherwise failing to comply with express and/or implied warranties of the insurance policy as stipulated or inferred in the insurance policy document.
5. Any attempts to obtain further information about the circumstances surrounding the accident and the vehicle's driver's qualifications at the time of the accident, were frustrated by the defendants in contravention of their duty of disclosure provided for under the insurance policy.
6. The defendants did not enter appearance or file any defence
7. At the hearing, Dennis Muraga (Pw1), the legal officer at Pacis Insurance Co. Limited, adopted his witness statement dated 14.3. 2024. He testified that following the accident involving the defendant's car, a civil suit, Bungoma HCC No 31 of 2013, had been instituted against three parties including the plaintiff. In the event the insured, who is one of the defendants in this suit, is found liable for the accident, the plaintiff will be required to indemnify him. The plaintiff should not be made to indemnify him since he breached the terms and conditions of the insurance policy by engaging the services of an unqualified and unlicensed driver and allowing it to be driven even though it was in poor mechanical condition. The defendants also breached the terms of the policy by refusing to disclose material facts concerning the accident to the plaintiff, thereby breaching their duty of disclosure provided under the insurance policy.



8. The plaintiff in his submissions argued that it issued the defendant with a third-party policy of insurance with respect to motor vehicle KBE 345L and that from the police abstract, on 15/1/2013, an accident occurred involving the vehicle,
9. It was also submitted that the vehicle was driven by an unqualified and unlicensed person and referred the court to Clause 1 of the policy. The defendant engaged the services of Elias Barasa who was unqualified and unlicensed at the time of the accident and that he drove at high speed. The said driver was charged in Kimilili law courts with the traffic offence of causing death by dangerous driving. The plaintiff also accused the defendant of failing to disclose material facts of the accident. They also argue that the defendant misrepresented to the plaintiff in the proposal form that the motor vehicle would be in good mechanical condition and be driven by a qualified person with a valid licence, therefore breaching the duty of utmost faith. They cited the case of Co-operative Company Limited v David Wachira Wambugu [2010] eKLR.
10. It was submitted that section 10(4) of the Insurance (Motor Vehicle Third Party Risks) Act CAP 405 provides that a declaration can be issued in a suit filed by the insurance to avoid liability within 3 months before or after the institution of the suit against its insured. The plaintiff knew of the existence of the primary suit dated 20/11/2013 on 21/1/2014 and filed their suit on 12/2/2014. The suit was therefore filed within the confines of the law.

Analysis And Determination

11. I have considered the plaint, evidence, and submissions, and the only issue for the court's determination is whether the plaintiff established its case on the balance of probabilities. (See sections 107 and 109 of the *Evidence Act*).
12. It is not in dispute that the plaintiff issued the 1st defendant a third-party insurance policy, policy number 050/071/1/009057/2012, valid between 03/12/2012 and 02/12/2013. According to the police abstract, the accident occurred on 15/1/2013 and the driver of the insured's vehicle was Elias Barasa.
13. Although the plaintiff has accused the insured of engaging an unqualified and unlicensed driver, there was no evidence to show that the said Elias Barasa did not have a valid driving licence. Similarly, the plaintiff did not provide evidence from an expert showing that the insured's motor vehicle was in poor mechanical damage at the time of the accident.
14. The plaintiff accused the insured of failing to disclose information surrounding the accident. Condition No. 5 of the policy provides as follows:

“In the event of any occurrence which may give claim under this policy the Insured shall as soon as possible give notice thereof to the Company with full particulars...”
15. The insured had a duty to report any accident to the insurer as per the policy document. However, in the letter by Uptown Loss Assessors (K) Limited, the insured's husband Henry Kimtai, was contacted so that he could give out information relating to the accident but failed to turn up. However, the insurance contract was between the plaintiff and the insured (1st defendant) and with the insured's husband. There is no evidence that the 1st defendant failed to disclose any information to the plaintiff.
16. The upshot is that the plaintiff has failed to prove its case. The suit is hereby dismissed. No order as to costs.

DATED, SIGNED, AND DELIVERED AT BUNGOMA ON THIS 8TH DAY OF NOVEMBER 2024.



R.E. OUGO

JUDGE

In the presence of:

Mr. Wangoda -For the Plaintiff

Defendants - Absent

Wilkister -C/A

