



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL CASE NO.2 OF 2018

HERITAGE INSURANCE CO. LTD.....PLAINTIFF

VERSUS

MOHAMED ALI NOOREINDEFENDANT

JUDGMENT

1. In the plaint dated 28th March 2018, it is pleaded that the plaintiff, **Heritage Insurance Co. Ltd.**, issued a third party policy of insurance for a motor vehicle Reg. No. KCE 761 L Toyota Probox belonging to and registered in the name of the defendant, **Mohamed Ali Noorein** and which was on the 1st September 2016, involved in a road accident at Seka along the Homa Bay-Katito road whereupon it rammed into a motor vehicle registration No. KCB 686 B Toyota Matatu thereby occasioning fatal injuries to several people.

2. As a result, several claims were filed by the affected persons against the defendant. The plaintiff contends that at the time of the accident, the defendant's motor vehicle was being used in contravention of the express terms of the insurance policy contract in that the vehicle carried six (6) passengers contrary to the capacity of five (5) in terms of the policy and that the defendant breached the terms of the policy by using the motor vehicle for hire whereas the policy was for private use. That, the defendant misrepresented material facts to the plaintiff by his failure to disclose true and material particulars of the accident and failing to co-operate with the plaintiff in arriving at the truthful facts of the accident.

3. The plaintiff also contends that the defendant gave false accounts of the circumstances and chronology of the accident and is therefore liable to any claimant in respect thereof. The plaintiff therefore wishes to repudiate the said third party insurance policy as the defendant did not act with utmost good faith as demanded by the law of insurance policy contracts.

4. In the circumstances, the plaintiff avers that it is not liable to indemnify the defendants in respect of any third party claim arising out of **Oyugis PMCC Nos.9, 83, 81 and 82 of 2017 and Nos.192, 193, 194, 195 and 212 of 2016** between various claimants and the defendant.

The plaintiff therefore prays for:-

i. A declaration that the plaintiff is not liable to indemnify the defendants in respect of any third party claim arising out of Oyugis PMCC No.9, 83, 81 and 82 of 2017 and Nos.192, 193, 194, 195 and 212 of 2016 between various plaintiffs and the defendant.

ii. A declaration that the plaintiff is not liable to indemnify the defendant and/or pay or contribute to any claim in respect of any third party claim arising out of motor vehicle Reg. NO. KCE 761 L and KCB 686 B and/or any suit that is to arise in future that is related and/or connected to the accident involving the two motor vehicles which occurred on 1st September 2016.

iii. Costs of the suit.

5. Pursuant to an order of this court made on the 17th September 2018, the defendant was served with the necessary summons and plaint by way of substituted service in daily newspapers of national circulation i.e. the standard Newspaper and the Daily Nation of 17th January 2019 and 19th January 2019, respectively. However, this court must note that the publications were not readily conspicuous and appear to have been hidden in the classified sections of the newspaper.

6. Be that as it may, the plaintiff cannot be blamed for the defendant's lack of diligence in spotting the publications. He consistently failed to appear for the hearing of all the interlocutory applications filed herein by the plaintiff. He actually failed to enter appearance and/or file a statement of defence thereby prompting the entry of ex-parte judgment against him. Ultimately, the matter was fixed for formal proof on 23rd October 2019, on which date, the defendant, as expected, failed to appear.

7. In his evidence, the plaintiff's branch manager at its Kisumu branch, **James Timbwa (PW1)**, reiterated and adopted his statement dated 13th September 2019. The gravamen of his evidence is that the defendant breached the terms of the material insurance policy (**P. Exhibit 1**) and indeed, the insurance contract by using the insured motor vehicle for purposes of hire and carrying passengers beyond the agreed capacity of five (5). It was also contended that the defendant did not display utmost good faith as was required of him under the policy and as such, the plaintiff was entitled to repudiate the claim and/or liability.

8. As per the letter dated 1st March 2017 (**P. Exhibit 3**), the repudiation was communicated to the insured through the plaintiff's agents i.e. Rafiki Microfinance Insurance Agencies.

An insurance investigator, **Robert Wabwile Murunga (PW2)** produced the necessary accident report dated 6th February 2017 to confirm the occurrence of the accident and the circumstances leading to the same. He concluded that the ensuing material damage claim was void as the vehicle was on hire and was carrying excess passengers beyond the capacity of five (5) on the material time of the accident.

9. In essence, the factual evidence adduced herein on behalf of the plaintiff is tenacious and credible. It remains undisputed and sufficient enough to establish the plaintiff's claim against the defendant. In the circumstances, the plaintiff is not under any obligation to indemnify the defendant against any claim by the direct or indirect victims of the material accidents and having complied with the requirements of **section 10 (4)** of the **Insurance (motor vehicles third party risks) Act**, it is justly and fairly entitled to judgment against the defendant in terms of prayer (a) of the plaint only.

Unless, we purport to be the French astrologer, physician and reputed seer called **Nostradamus**, who was born on 14th December 1503 and died on 2nd July 1566, we cannot predict the future or say what it holds. Therefore, prayer (b) of the plaint is merely wishful thinking on the part of the plaintiff and cannot be granted. Otherwise, the plaintiff is entitled to the costs of the suit. Ordered accordingly.

J.R. KARANJAH

JUDGE

06.02.2020

[Delivered and signed this 6th day of February, 2020]

Court – Leave to appeal granted to the plaintiff.

J.R. KARANJAH

JUDGE

06.02.2020