



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**CIVIL SUIT NO.651 OF 2010**

**CORPORATE INSURANCE COMPANY LIMITED.....APPLICANT**

**VERSUS**

**FRANCIS WANJOHI KIRAGU.....DEFENDANT**

**JUDGMENT**

(1) By way of a Plaint dated 3<sup>0th</sup> September 2010, **CORPORATE INSURANCE COMPANY LIMITED** (the Plaintiff herein) sought judgment against the Defendant for the following:-

**“(1) A Declaration that it is and has at all material times been entitled to avoid the Private Vehicle policy of insurance No.C01/ 070/1/903571/ 2007 issued on 2<sup>nd</sup> November 2007 apart from any provision contained therein on the ground that the said policy of insurance was obtained by the non-disclosure of material facts and/or by the representations of facts which were false in some material particular or particulars.**

**2. A Declaration that the Plaintiff is not liable to indemnify the Defendant for claims by the passengers injured as a result of the said accident under the said policy or under the Insurance (Motor Vehicles Third Party Risks) Act, Cap 405.**

**3. Costs of and incidental to this suit and interest thereon at Court rates.**

(2) The Defendant **FRANCIS WANJOHI KIRAGU** filed his Defence to the suit on 15<sup>th</sup> February 2011. The hearing of the suit commenced before this Court on 18<sup>th</sup> February 2019 at which hearing the Plaintiff called two (2) witnesses in support of its case while the Defendant called one (1) witness.

**BACKGROUND**

(3) The Plaintiff is an authorized insurer within the meaning of **The Insurance Act, Cap 487, laws of Kenya** as read with **The Insurance (Motor Vehicles Third Party Risks) Act, Cap 405 Laws of Kenya**. On 2<sup>nd</sup> November 2007 the Plaintiff issued to the Defendant a private motor vehicle insurance cover, by which the Plaintiff undertook to cover third party risks in respect of the Defendants motor vehicle Registration Number **KAC 053C** vide Policy Number **CO1/070/1/903571/ 2007**. The Plaintiff contends that the said insurance cover was limited to **“Social, Domestic and Pleasure purposes and for the Defendant’s business or profession”** as set out in the limitation clause of the insurance document.

(4) On 22<sup>nd</sup> December 2007 at 3.00A.m, the Defendant’s motor vehicle was involved in an accident along Outer Ring Road in Nairobi in which accident passengers travelling on board the Defendant’s motor vehicle were injured. Subsequently some of the injured passengers lodged claims seeking damages for the injuries sustained during the accident. It was claimed that the accident was caused by the negligent manner of driving of the Defendant, his driver or servant.

(5) The Plaintiff avers that it is entitled to avoid or repudiate the claims of said passengers on the grounds that the insurance cover in place did not extend to **“fare paying passengers”** by virtue of the limitation clause therein.

(6) **PW1 TIBERIOUS NYANGAU** was a legal officer working with the Plaintiff. He confirmed that the Plaintiff had indeed insured the Defendant’s Motor Vehicle Registration Number **KAC 053C** under Third Party Cover for personal, domestic and pleasure purposes only. That after the accident of 22<sup>nd</sup> December 2007, the Defendant submitted an Accident Report Form to the Plaintiff. The Plaintiff also received demand notices from the passengers who were in the vehicle at the time of the accident.

(7) **PW1** stated that the Plaintiff hired investigators to establish the circumstances of the accident and based on the report of said investigator, the Plaintiff established that the vehicle was not being utilized in compliance with the terms of the insurance cover as it was being utilized as a taxi or matatu with fare paying passengers at the time of the accident. On this basis **PW1** contends that the Plaintiff is entitled to void the policy as the Defendant failed to disclose that the vehicle would be used for the carriage of fare paying passengers and secondly on the ground that the Insurance Policy expressly excluded any cover for such fare paying passengers.

(8) **PW2 JONATHAN MWALILI** told the Court that he works as an investigator with **Turgbull Insurance Loss Assessors**. He testified that his investigations revealed that at the time of the accident the vehicle was ferrying four (4) fare paying passengers. That the Defendant was not able to avail the said driver, because the driver fled the scene after the accident and has not been traced to date. **DW2** further stated that upon following up the matter he learnt that the accident had been reported at Buru Buru Police Station. That the Defendant had been charged and convicted at the **Makadara Law Courts** for failing to keep record of his driver for which the Defendant was fined **Kshs.2,000/=**.

(9) **DW1 FRANCIS WANJOHI KIRAGU** is the Defendant and confirms that he is the owner of the Motor vehicle **KAC 053C**. He confirms that he did take out an insurance cover with the Plaintiff to cover 3<sup>rd</sup> Party Risks.

(10) The Defendant stated that he had in the month preceding the accident handed over the vehicle to a friend of his called **Fred Onkoba** who was supposed to use the vehicle to ferry supplies and deliveries to and from the Defendant's shop. The said **Onkoba** later informed the Defendant that his vehicle had been involved in an accident. The Defendant returned to Nairobi from his rural home in Nyeri and found the vehicle at BuruBuru Police Station. Of his friend **Onkoba** there was no trace as he had absconded after the accident and Defendant despite all his efforts was unable to trace his whereabouts. The Defendant confirms that he was unable to trace and avail the driver's documents to the police and confirms that he was charged with the relevant offence at Makadara Law Court where he pleaded "**Guilty**" and paid a fine of **Kshs.2,000/=**. However the Defendant states that he later traced copies of the drivers Identity Card and Driving Licence which he has annexed to the list of exhibits filed in court on **14<sup>th</sup> March 2014**. The Defendant denies that his vehicle was being used as a taxi or matatu and asks that the Plaintiff be directed to fulfil its obligations under the Insurance Cover issued to him.

(11) After the Defendant had closed their case the parties were invited to file their written submissions. The Plaintiff filed its written submissions on **28<sup>th</sup> May 2019**, whilst the Defendant despite being granted adequate time and opportunity failed to file any submissions in the matter.

#### **ANALYSIS AND DETERMINATION**

(12) I have carefully considered the evidence on record in this suit, as well as the submissions filed in court. The following issues arise for determination:-

(i) Whether the Motor vehicle Registration Number **KAC 053C** was being used within the terms of the Insurance Policy issued by the Plaintiff at the time of the Accident.

(ii) Whether the Plaintiff is liable to meet the claims arising from the said accident.

#### **(13) (i) Terms of the Insurance Policy**

Both parties concede that at the time when the accident occurred on **22<sup>nd</sup> December 2007** the Defendant's vehicle was validly covered for Third Party Risks vide **Policy Number CO1/070/1/903571/ 2007** issued by the Plaintiff. The said Policy is annexed to the Plaintiff's list of Documents filed on **18<sup>th</sup> August 2012**. It is agreed by both parties that the scope of the cover provided under this policy was that the vehicle was only to be used for "**social, domestic and pleasure purposes by the insured in person in connection with his business or profession.**"

(14) The Plaintiff's case is that on the night of the accident the vehicle was being driven outside this scope as it was being used as a taxi or matatu ferrying paying passengers. In coming to this conclusion the Plaintiffs have relied upon the Investigation Report prepared by **Targbull Insurance Loss Assessors**. **PW2** confirms that it was he who prepared that report. The Report which was produced by **PW2** at Page 6 concludes as follows:-

**"Considering the above observations and findings, we blamed the insured driver for the accident. We are however of the opinion that the insured's vehicle was being used as a public taxi at the time of the accident thus the insured breached the policy conditions with regard to the use."** [own emphasis].

(15) It is trite law that he who alleges must prove. This principle in law is buttressed by **Section 107 of the Evidence Act Cap 81 Laws of Kenya** which provides:-

**"(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."**

(16) **Section 109** of the same Act provides:-

**“109 Proof of particular fact**

**The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”**

(17) The Plaintiff having alleged that the Defendant’s vehicle was being used to ferry fare paying passengers is obliged to prove that this was in fact the case. In **ANN WAMBUI NDIRITU –VS- JOSEPH KIPRONO ROPKOI & Another [2005]** the Court of Appeal E.A held as follows:-

**“As a general proposition under Section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in Sections 109 and 112 of the Act.”**

(18) The Plaintiffs were not able to avail any of the passengers who were in the vehicle at the material time to testify that they were passengers who had paid a fare. Indeed **PW2** told the court that he did not interview any of the said passengers. Similarly **PW2** was not able to interview the driver of the said vehicle because at the time he was investigating the accident the driver could not be traced. Indeed the Defendant confirmed that his driver absconded after the accident and could not be traced leading to the Defendant paying a fine for failing to avail to the police the particulars of his driver.

(19) As it stands there is no evidence to prove that this vehicle was being used as a taxi or a matatu at the time of the accident nor is there any evidence that the passengers in the said vehicle were fare paying. Accordingly I find that the Plaintiff has failed to prove on a balance of probability that the vehicle was being used outside the scope of the Insurance Policy.

**(20) (ii) Is the Plaintiff liable to pay the claims?**

Notwithstanding the Court’s findings in (i) above, it cannot be concluded that the Plaintiff is liable to pay the claims arising from this accident. For starters a crucial witness being the driver of the vehicle was not called to testify. The fact that this driver absconded after the accident is very telling.

(21) The Defendant told the Court that this driver whom he names as **“Fred Onkoba”** was a friend to whom he had entrusted his vehicle. Yet at the crucial time the Defendant is unable to trace this **“friend”** and is unable to avail his particulars to the police. The Defendant claims that he only recovered the driver’s documents **after** he had been charged and fined at the **Makadara Law Courts**. This seems all too convenient. The Defendant took no steps to surrender those documents to the police to enable them trace and find this driver despite the Defendant being fully aware of both this civil suit as well the claims by the passengers who were injured in the accident. The possibility that the Defendant was acting merely to protect this driver who was his friend cannot be ruled out. I was able to observe the demeanour of the Defendant as he testified before me. He did not strike me as an honest witness. I do not believe that the Defendant was not able to trace his driver after the accident. Rather I am convinced that the Defendant all along had the details and contact of this driver. He deliberately failed to provide those details to the police so as to shield the driver from being charged as a result of the accident. Now during the hearing of the Civil suit where the Defendant wishes to be paid under the Insurance Cover he suddenly **“finds”** the driver’s details. I do not buy this story at all.

(22) I have carefully perused the Insurance Policy document. Under Section IV of the Motor Insurance Proposal Form an **“Authorised Driver”** is defined as follows:-

**“(a) The Insured**

**(b) Any person driving on the Insured’s Order or with his permission.”**

(23) At the time of the accident the Defendant (the Insured) was not driving the vehicle. He told the Court that he was at the material time away at his rural home, in Nyeri County. The Defendant stated he had given his vehicle to one **“Fred Onkoba”** to use for purposes of ferrying purchases and deliveries to the Defendant’s business (shop). The Defendant was categorical that he had **not** authorized the said **“Onkoba”** to drive his vehicle with passengers at 3.00A.m. **“Under cross –examination”** by counsel for the Plaintiff **DW1** stated:

**“He [Onkoba] was to drive the vehicle during the day purchasing items/stock for my shop. “He was not to drive the vehicle at night.””**[own emphasis]

**DW1** goes on to reiterate that:-

**“I had not permitted Onkoba to ferry people in my vehicle at night. He was acting contrary to my instructions...My vehicle was not supposed to ferry passengers unless I was the one driving. I did not give Onkoba permission to ferry passengers at 3.00A.m. Onkoba acted without my consent or knowledge in ferrying passengers.”**[own emphasis]

(24) From this evidence of the Defendant it is manifestly clear that on **22<sup>nd</sup> December** 3.00A.m the vehicle was being driven **without** the Defendant’s authority and **contrary** to his express instructions. At that point this **“Fred Onkoba”** cannot be said to have been an **“authorized driver”** within the terms of **Section IV** of the Policy.

(25) Further a look at the Motor Vehicle Proposal form which is annexed to the investigators report is also revealing Question 2(a) on that Form asks.

**“2(a) Is/Are the vehicle(s) garaged within your premises overnight?”**

To that question the Defendant answered **“Yes”** indicating that the vehicle was normally parked overnight in the Kilimani area of Nairobi. However under cross-examination the Defendant admitted that the vehicle was ordinarily garaged in the compound of his **“friend”** Onkoba. **DW1** states:-

**“I asked him [Onkoba] to keep the vehicle in his compound as I had no parking space at my place...”**

(26) Therefore the statement made by the Defendant in answer to question 2(a) on the Motor Vehicle Proposal form to the effect that the vehicle was ordinarily garaged in his (Defendant’s) compound was blatantly false. The proposal form contains a clear warning in the following terms:-

**“WARNING: IN THE EVENT OF INCORRECT ANSWERS THIS INSURANCE WILL BE NULL AND VOID”**

(27) The Defendant (proposer) appended his signature to that form on **1<sup>st</sup> November 2007**, and as such he is bound by the terms of that proposal form. By providing a false (incorrect answer) to the question 2(a) on the Form the Defendant rendered his insurance cover null and void.

(28) Based on the foregoing due to the anomalies and the insincerity on the part of the Defendant I find that the policy was voided by the Defendant’s own actions and the Plaintiff has no obligation to pay out the claims thereunder. The accident victims are at liberty to sue the Defendant or his driver directly.

(29) Finally I dismiss this suit in its entirety and I direct that each party bear its own costs.

**Dated in Nairobi this 15<sup>th</sup> day of April 2020.**

.....

**Justice Maureen A. Odera**