



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NUMBER 5 OF 2018

MADISON INSURANCE COMPANY LIMITED.....PLAINTIFF

-VERSUS-

MAGHARIBI INVESTMENT MACHINERIES LIMITED.....DEFENDANT

J U D G M E N T

1. On 30th September, 2015 John Nyongesa Mayende was travelling in motor vehicle registration number KBH 030L/ZC 2339 along Eldoret/Nakuru road when a road traffic accident occurred whereby motor vehicle registration number KAY 613L/ZD 1085 collided into the motor vehicle he was travelling in. As a result, he sustained injuries, filed Molo Chief Magistrate’s Civil Case (CMCC) Number 243 of 2016 on 7th September, 2016 for compensation.

2. On 8th February, 2018, this suit was filed by the Insurance Company of the motor vehicle KBH 030L seeking orders;

a) A Declaration that it is not bound to pay/or satisfy judgment in Molo CMCC No. 243 of 2016 and/or indemnify the Defendant against any claim in respect of death, bodily injury to any person, damage to property of any person travelling at the time as an employee of the Defendant whatsoever arising out of the accident which allegedly occurred on 30th September, 2015 along Eldoret Nakuru road at Salgaa area involving the Defendant’s Motor Vehicle Registration Number KBH 030L Mercedes Benz.

b) Costs of this suit.

c) Interest on (b) above at Court rates.

d) Any other or further relief that this Honourable Court may deem just, expedient and fit to grant.

3. The basis for the claim was that the defendant had breached the terms of the insurance policy by carrying an uninsured passenger and failing to disclose that the plaintiff in Molo CMCC 243 of 2016 was its employee.

4. The plaintiff cited clause MOT 49 of the Insurance Policy which states;

“MOT049 THIRD PARTY PASSENGER LIABILITY

Limit amount of the company’s liability:-

A. In respect of any person (other than a passenger being carried by reason of or in pursuance of a contract of employment) being carried in or upon entering or getting onto or alighting from Motor Vehicle.

(i) In respect of death or bodily injury to any one person ... Kshs. 3,000,000/=

(ii) In respect of a series of claims arising out of any one event ... Kshs. 15,000,000/=

B. In respect of any other person..... Kshs. Unlimited

5. There was no appearance on the part of the defendant. The matter proceeded for hearing and the plaintiff called one witness, Charles

Gathu, the plaintiff's legal officer who testified and also produced the policy documents and the investigators report.

6. The issue for determination is whether the plaintiff has established that the plaintiff in CMCC 243 of 2016 was the insured's employee.

7. It is noteworthy that the basis for this suit is that the plaintiff therein was an employee of the insured. No evidence has been led to establish that claim, except the report of the investigator who was appointed by the plaintiff herein. It is also noteworthy that the plaintiff in Molo CMCC 243 of 2016 lays no such claim, it is not pleaded that the plaintiff was an employee of the insured. It is pleaded that the plaintiff was a passenger in the insured's motor vehicle.

8. Secondly, the police abstract provided by the plaintiff states that the said Nyongesa was a passenger in the said lorry.

9. The investigation report indicates that statements were recorded from the insured, this driver and the subject of the suit, all of whom stated that the said John Nyongesa Mayende was a turn boy. That means that the fact of whether or not this John was a passenger or a turn boy is a fact that is in dispute.

10. The plaintiff herein is seeking a declaratory order based on a fact that ought to be determined in the CMCC 243 of 2016, whose judgment the plaintiff herein seeks to be distanced from. The danger of having this suit before me, to determine an issue of fact before the lower court is that, I have no idea how that issue will be determined.

11. My view is that it is only upon the determination of that issue will the plaintiff's claim herein would become viable. Hence the issue as to whether the said person was a passenger or employee of the insured ought to be raised in the suit where he is making his claim.

12. In the event that court finds that indeed he was a turn boy, then, the plaintiff herein would be justified to raise this claim.

13. The enforcement of the MOT 049 depends on the determination of fact, as to whether the plaintiff in CMCC 243 of 2016 was a passenger or turn boy. In order to have matter determined, the plaintiff herein ought to present the evidence of that fact before the court hearing CMCC 243 of 2016, or produce the judgment of that court before this court, confirming that position.

14. As matter stands now, that issue has not been determined, this is not the forum for its determination, and until then, this suit is premature, the same is dismissed with no orders as to costs.

Dated, delivered and signed at Nakuru this 3rd day of July 2020.

Mumbua Matheka

Judge

In the presence of

Edna Court Assistant

Murimi, Ndumia, Mbago & Muchela Company Advocates for plaintiff

Ms Chelule hb for Mr. Murimi for plaintiff