



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL COMMERCIAL ADMIRALTY DIVISION

CIVIL SUIT NO. 99 OF 2016

MAYFAIR INSURANCE COMPANY LIMITED.....PLAINTIFF

VERSUS

HABECK AXEL LEZISHIN ALIAS HANS

AXEL HABECK.....1ST DEFENDANT

SUMMARY SHARDRACK MGUNYA.....2ND DEFENDANT

JUDGMENT

1. In the suit the Plaintiff, by the Plaint dated 13th September 2016 and filed in court on the 20th September 2016, sued the three Defendants and sought declarations in the nature that it, as an insurer; is entitled to avoid and not be bound to pay for and or indemnify the Defendant in respect of any Judgment and from being bound to take up proceedings to defend any claim whatsoever arising out of **Policy No. I/TP/01/0700/14579/2005** and in particular any judgment out of **Kwale SRMCC No. 361 of 2016** on account of the fact that the said policy was obtained by reason of non-disclosure of relevant facts, was procured by misrepresentation of facts material to the contract of insurance and that the insured was in breach of the express terms and conditions of the same contract of insurance.

2. Together with the Plaint the Defendant filed a witness statement by one **GURBUR SINGH** together with a bundle of some 6 documents in support of its claim.

3. Records of the file reveal that the 2nd Defendant was duly served did attend court on the 24th June 2017 when he requested for time to file his papers. He was granted the time but never filed any papers. For the 2nd Defendant, leave was granted on the 19th October 2016 to be served by substituted service by advertisement in the Daily Nation Newspapers. That was done on the 27th October 2016 and an affidavit to that effect filed on the 10th November 2016. Even that Defendant filed no pleadings to challenge the claim.

4. Consequently, the matter proceeded by way of a formal proof by the Plaintiff tendering evidence by one witness without any rebuttal from the two Defendants.

5. In the evidence tendered before court, the Plaintiff's witness, **GURBUX SINGH**, adopted his witness statement as evidence in chief and produced the bundle of documents filed as exhibit P1. The effect to that evidence is that the policy issued was to run for the period between 8th October 2015 to 7th October 2016 and was in respect of motor vehicle registration No.**KBN 979G** at an annual premium of Ksh 7,574/-. It was a condition of the policy that on failure to pay the premium by the Defendant the Plaintiff would cancel the policy by issuance of a notice to that effect.

6. The witness then contended that there was failure to pay the agreed premium and that on the 23rd November 2015 the Plaintiff issued a notice which then had the effect of cancelling the policy with effect from the 8th October 2015. He then asserted that the defendant having been served with a **Statutory Notice** pursuant to **Section 10 of Cap 405**, it the plaintiff decided to file the present suit in order to avoid being bound by any decisions that would result from **Kwale SRMCC No. 361 of 2016**.

7. That is the evidence the court is bound to analyse and apply to determine the suit it being noted that part of the exhibit produced included the policy of insurance document, the summons to enter appearance issued at Kwale magistrate's court and the notice of cancellation.

8. With the Plaint on record and the evidence led, the only issue for determination is whether or not the Plaintiff is bound to take up the

obligation of defending and settling any resultant decree issued as a consequence of the accident to motor vehicle during the period **8th October 2015 to 7th October 2016** or if it is entitled to avoid such claims.

9. It is critical to record that the Plaintiff's claim has not been opposed or challenged by either pleadings in denial or evidence in rebuttal. Over and above that, there is evidence on record that the policy was indeed issued before payment of premiums and on the understanding that premium would be paid. It has been asserted without rebuttal, and I find it proved in a balance of probabilities, that the insured did not pay the premium for the policy and thus the Plaintiff as insurer was entitled to cancel its policy provided it issued a notice pursuant to clause 13 of the contract of insurance (the policy document). That provision states;

“Notwithstanding anything contained herein to the contrary it is hereby understood and agreed that the indemnity provided by this policy will only apply on payment of full premium to the company in accordance with the provisions of section 156 of the insurance act cap 487 failure to which cover lapses”

10. That term and condition of the contract is clearly founded on the provision of The Insurance Act which provides:-

S.156. Advance payment of premiums

(1) “No insurer shall assume a risk in Kenya in respect of insurance business unless and until the premium payable thereon is received by him or is guaranteed to be paid by such person in such manner and within such time as may be prescribed, or unless and until a deposit, of a prescribed amount, is made in advance in the prescribed manner”.

11. It being on record that the premium for the policy was never paid in full and at all, it followed that the policy lapsed upon the notice dated 23rd November 2015 taking effect and therefore by the date the motor vehicle was involved in the accident on the 25th April 2016, there was no policy upon which the Plaintiff would, in law, be obligated to indemnify the 1st Defendant.

12. Accordingly I do find that the Plaintiff's suit is well founded and clearly merited. I therefore do enter judgment for the Plaintiff against the 1st Defendant for declarations in terms of prayers **a, b, and c** together with costs of the suit.

Dated this 20th day of September 2019

PATRICK J. O. OTIENO

JUDGE