REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 71 OF 2014

PACIS INSURANCE COMPANY LIMITED……..PLAINTIFF

VERSUS

MALAKI ODHIAMBO DULLO a.k.a.

MALACHI ODHIAMBO DULLO……DEFENDANT

AND

1. **ELIAS MWAILONG KISEU**
2. **JAMES MWATHA GITHOGO……INTERESTED PARTIES**

J U D G M E N T

1. By a plaint dated the 4/11/2014 the plaintiff sued the defendant and sought three declarations essentially to protect it from being bound to honour obligations under the policy it issued to the defendant to cover the period between 25/10/2012 to 24/10/2013. The plaintiff also sought general damages for breach of contract, breach of trust and for fraudulent misrepresentation as well as costs of the suit and interest.

2. The basis and foundation of the suit was pleaded to be that there was a condition of the policy to the effect that the motor vehicle insured would be solely used for private use and not otherwise and that liability would only attach upon the insured's strict compliance with that term of the policy. It was then pleaded that contrary to the condition, and in breach thereof, the defendant on the 18/11/2012 engaged the motor vehicle in the business of carrying three fare-paying passengers when an accident occurred and the said passengers were injured. The defendant was charged with the offense of careless driving, was convicted and fined Kshs.20,000/= on own plea of guilty.

3. The revelation of the use the vehicle had been put to was made upon investigations after the defendant had reported to the plaintiff that the passengers were actually his friends pursuant to which representation the plaintiff had engaged advocates to defend the claims lodged by such injured persons. In making such misrepresentation, the plaintiff pleaded, the defendant led it to incur costs and expenses in breach of contract and trust for which the defendant is held liable. The particulars of the breach were all set out to include violating the policy and the law and the insurance principle of utmost good faith by misrepresenting fundamental and material facts. However there was not given the particulars of the costs and expenses incurred which to this court takes the nature of special damages.

4. With the plaint, was filed a witness statement by JOSEPH MWAI, which was later substituted with one by JANET KARIMI KABUCHURU, and a list of documents which included the police abstract, the charge sheet, Motor accident report, motor claim proposal form completed by the defendant and a notice pursuant to Cap 405 sent to the defendant. Later a copy of the policy document was also filed in a supplementary list of documents.

5. Personal service upon the defendant appear to have been difficult hence the plaintiff applied for leave to affect substituted service on which leave was granted on the 15/5/2015 with an additional order that the plaintiff in Mombasa, CMCC No.3526 of 2013 be also served. However even with such service, no appearance nor defence was filed by the defendant and the matter therefore proceeded without his pleadings till the 26/5/2016 when the suit was to be heard when Mr. Magiya attended court to say he had just been instructed. Thereafter the defendant's filed a statement of defence but without any witness statement nor documents with his counsel announcing that he would not call any witness at trial.

6. In the cause of the proceedings, but before the plaintiffs gave evidence, with the leave of the court, 1st and 2nd interested parties were joined as such having been passengers in the defendant's motor vehicle on the date of the accident and therefore parties who had sought to recover damages from the defendant and thus interested in the outcome of the suit between the defendant and his insurer in this suit. They

were given the liberty to file any papers they would wish to file. Pursuant to that order the two interested parties filed not only defences but also documents. The witness statements and document filed are largely to support the claims by the interested parties against the defendant and to resist the plaintiff claim against the defendant.

7. In his defence filed the defendant insists that he did not breach any policy conditions by the plaintiff, he asserts he did not carry fare paying passengers adding that the accident was inevitable having been caused by a front tyre-burst.

8. In their statements of defence however, the 3rd parties admit being in the subject motor vehicle but assert being there as lawful passengers with the 1st interested party in particular asserting having been a lawful passenger for reward as a fare paying passenger. Depth was gone into by the said party asserting having been injured, filed a suit, which suit had been heard in full with only a judgment pending delivery and therefore to him this suit was a frivolity and vexation which deserves dismissal with costs.

9. The 1st interested party then pleaded that the suit is bad for having been filed without regard to Section 10 of the Act, Cap 405, and was infact filed out of the statutory prescribed time. He was to that extent taking the active position more than expected of an interested party.

10. For the 2nd interested party the defence put forth is that it did infact issue statutory notice preceding the filing of the suit and therefore under Cap 405 the plaintiff is duty bound to meet any judgment that may result provided it did issue the policy, whether it was entitled to avoid or cancel the policy or even if it had indeed avoided or cancelled the policy. That the breaches alleged did not waive the plaintiff's duty and obligations under the statute. It was then pleaded that the plaintiff failed, before and not later than 14 days after commencement of this action, to notify the 2nd interested party on the non-disclosure accusations against the defendant. On the basis of those pleadings, it was urged that the suit needs to be dismissed.

11. At trial, only the plaintiff, and the interested parties gave evidence because the defendant did not file any witness statement, had announced intention not to call evidence even though at the hearing his counsel curiously sought an adjournment on the basis that the defendant had been bereaved. That adjournment was of course not allowed.

Evidence by the plaintiff

12. PW 1 JANET KARIMI KABUCHURU, the legal officer of the plaintiff gave evidence in chief by relying on the witness statement filed. She then, produced the documents listed in the list and supplementary list of documents as exhibits. The gist of that evidence was that when the defendant proposed for the policy, the declared use for the motor vehicle was agreed to be private use and the policy sought and given was "third party only" and that by putting the vehicle to carriage of passengers for reward there was a fundamental breach of the policy conditions.

13. On cross-examination by the plaintiff's counsel, the witness repeated that carriage of fare paying passengers was a breach specifically prohibited by conditions at page 5 of the policy document produced as exhibit P2 and therefore the plaintiff was not liable to meet any consequent claims.

14. When cross examined by the 1st interested party, the witness said that the misrepresentation was at the point of making the proposal and on reporting the incident and that the 1st interested party was identified and disclosed by the police abstract as a passenger. She then admitted that the 1st interested party issued a notice and posted same on 24/1/2014 and that the lower court plaint was filed on 17/12/2013 while this suit was filed on 6/6/2014 more than 3 months later. She admitted that in filing the suit the 1st interested party was never served with a notice of repudiation. She then admitted that it was an offence to obtain a policy by misrepresentation and that the law allows the insurer to recover any sums paid on the insured's behalf.

15. Upon cross-examination by the 2nd interested party, the witness admitted that the letter by that interested party dated 2/5/2014 was served upon the plaintiff on 8/5/2014. He also confirmed that the 2nd interested party's suit dated 7/5/2014 was filed on 15/5/2014 and upon service the plaintiff appointed an advocate to take the conduct of the defence. She confirmed that the 2nd interested party was never served with notice of intention to repudiate the policy. In re-examination, the witness said that there was never misrepresentation at the time of issuing the policy to create an offense under Section 11, Cap 405.

Evidence by 1st interested party

16. As plaintiff in Mombasa CMCC 3526/2013 and having been joined to these proceedings the 1st interested party filed a witness statement and list of documents which statement he adopted as evidence in chief and the documents produced as exhibits. The effect of the evidence is that he was a lawful fare paying passenger in the defendant's motor vehicle and filed a suit having served the due notices but the plaintiff did not comply with the law so as to be entitled it to avoid the obligations under its policy to third parties. He asserted being a stranger to the wrongs alleged against the defendant by the plaintiff while pointing out that the plaintiff has the remedy of meeting his decree and seeking a refund or indemnity from the defendant. The legal point on timelines to file a declaratory suit was also highlighted it being asserted that this suit was filed outside time limited by the statute. Some of the documents produced as exhibits include the statutory notice issued under Section 405 of the Act and a Certificate of posting showing it was posted on the 29/01/2014. When cross examined by the plaintiff and the defendant's counsel the witness said that he did not identify the defendant's motor vehicle as a taxi or matatu, it being at night, and that he was to pay fare of Kshs.50/= but did not pay the same.

Evidence by 2nd Interested Party

17. Even this interested party, being interested by virtue of being a plaintiff against the defendant in Mbsa CMCC No. 931/2014, filed a witness statement and documents. The effect and gist of that evidence was that he was a lawful passenger in the defendants motor vehicle

when a collision occurred and he blamed the collision and his injuries on the negligence of both driver. He them added that being such a passenger and the motor vehicle having been insured by the plaintiff, the plaintiff was obligated to meet his claim notwithstanding any breach between the defendant and its insured. He said that he knew the defendant as long-time friend whom he had visited on the fateful day and the defendant opted to drop him home. He denied having paid any money as fare to the defendant and that at a place called "**motor inspection"** another person asked for a lift and was so given.

18. Upon cross examination, the 2nd Interested party said that he had known the defendant before the date of the accident and that on that day he was an invitee and not a fare paying passenger in the motor vehicle. He added that even the other person who requested for a life did not discuss any fare with the defendant.

Analysis, issues and determination

19. The production of evidence thus ended with evidence of the plaintiff and the two interested parties. Thereafter parties took time and did file written submission. I have had a chance and benefit of reading the said submissions and I have come to the view that the following issues do isolate themselves from determination of the court:

i. Whether the plaintiff has established a case to be entitled to the remedies sought?

ii. Whether the interested parties are third parties as known to Cap. 405.

iii. What orders should be made as to costs?

Is plaintiff entitled to the remedies sought?

20. The primary purpose of Cap 405 as envisioned in the title to the Act and the provisions imposing a compulsary insurance scheme is to protect third parties from risks of being injured by motor vehicles. The Act prohibits both use and permission to use a motor vehicle on a road unless insured and criminal sanctions are provided by creation of offences[1] .

21. For a policy to suffice the purposes of the Act, it must be issued by a licensed insure, it covers persons or class of persons specified in the policy document and covers all risks incurred by the insured respecting death or bodily injury to any person out of use a motor vehicle on a public road[2].

22. By that statutory architecture, and the purpose and spirit of the law, protection of victim of injury from use of motor vehicles on roads as defined, it behooves every underwriter of such risk to meet the purposes of the act in every event save for the limited instances the law provide under Section 10 of the same Act. The obligation upon an insurer is that once a policy under the Act is issued, the insurer has to compensate the injured third party except and unless it obtains a declaration that he is not bound to so compensate.

23. The pre-requisite for an insurer to be able to seek and obtain a declaration of entitlement to repudiate the policy are that:-

i. That Notice of the institution of the suit was never served upon it either before or within 30 days.

ii. The policy was cancelled before the event giving rise to liability and the certificate surrendered before or within 21 days of the event giving rise to liability and the Registrar of motor vehicles was notified of the cancellation.

iii. The insurer has before the action giving rise to liability or within three months thereafter, commenced an action which has led to a declaration that the insurer is not liable to be bound on account of non-disclosure of material facts false misrepresentation of fact material to the policy or that he was entitled to avoid the policy on its terms.

24. In this case therefore it cannot be debatable that both interested parties did serve upon the plaintiff notice of intention to sue the insured. The 1st interested party's notice is dated 24/01/2014 and the certificate of registration shows it to have been dispatched on 29/01/2014 for service. When registered for service the 30 days had in fact lapsed and the plaintiff here is thus entitled to assert that it is not bound to settle any decree by the plaintiff.

25. One may ask whether the plaintiff itself complied with the requirement of filing the current suit within the time prescribed by Section 10(4) of the Act. Here the 1st interested party's suit was filed way back on 17/12/2013 and the current suit was only filed on 6/6/2014. It was indeed filed out of time. However for the liability to attach, the claimants claim ought to have been itself property founded. This was not founded to warrant the plaintiff to act within the time set. It must be noted that both suits have time line within which to undertake certain action. Here I do find that the 1st interested party had the duty to properly ground its suit. It did not and the plaintiff is entitled to a declaration that it is not obligated to meet that claim. I an addition that party unequivocally assert to have been a fair paying passenger. That is a confession that entitle the plaintiff to repudiate the policy and not be liable to meet the claim.

How about the 2nd Interested Party?

26. This party's suit was filed in May 2014 and the notice thereof served the same month. By the time the current suit was filed the three months prescribed had not lapsed hence this suit cannot be defeated on account of late filing. As against the 2nd interested party the question of the plaintiff liability to that party was timeously brought.

27. The question one had to pursue and answer is whether the 2nd interested party was a third party covered by the policy issued by the plaintiff to the defendant. In terms of Section 5(b) ii, the policy required to be issued is the kind which covers all else except the insured, his workers and those carried in the motor vehicle for hire and or and reward. The evidence led by the 2nd interested party point to having been a guest of the defendant and not a fare paying passenger.

28. But in this suit the plaintiffs' claims not to be bound to meet any decrees arising from the accident on account of the allegations that the defendant did breach the policy condition by mis-representing the use to which the motor vehicle was engaged on the date and time of the accident.

29. As said before the insurance cover intended under the law is purposed to protect members of the public, otherwise called third parties, from injury by motor vehicle while on public roads. That purpose must be achieved and can only be escaped by an insurer if the breach goes to the very heart of contract of insurance. I am of the view that any breach that occurs post the event is by virtue of section 8 of the Act, not a ground to repudiate liability provided that the risk was covered by the policy. That provision reads:

> **"Certain conditions in policies of insurance of no effect**
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> **Any condition in a policy of insurance providing that no liability shall arise under the policy, or that any liability so arising shall cease, in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy, shall, as respects such liabilities as are required to be covered by a policy under section 5, be of no effect:**
>
> **Provided that nothing in this section shall be taken to render void any provision in a policy requiring the persons insured to repay to the insurer any sums which the latter may have become liable to pay under the policy and which have been applied to the satisfaction of the claims of third parties"**.

30. In this matter while the prayer are general, there are two parties who have filed two different suits and whose claims are based on wholly different circumstances. I am thus constrained to deal with the two parties distinctively.

31. That I have done hereto before and now find that the alleged breach by misrepresentation of facts does not entitle the plaintiff to avoid its obligations under the policy. However on the pleadings and evidence by the 1st interested party, the motor vehicle was being used to carry fare paying passengers. To that extent, and as far as the claimant be a person claiming to have been a fare- paying passenger, the plaintiff cannot be bound to settle any claims or to meet the costs of defending such suit. It cannot because he did not issue a policy to cover such a risk. Accordingly I do find that as regards the 1st interested party, the plaintiffs claim succeeds and I grant to the plaintiff prayers **a, b & c** of the plaint. The basis of this finding is that the policy issued did not cover fare- paying passengers and in so far as the 1st interested party pleaded and gave evidence of being a fare paying passengers, the plaintiff did not effect a policy to cover such risks.

32. For the 2nd interested party, I do find that he was a third party covered by the policy effected by the plaintiff and that the fact of alleged misrepresentation by the defendant on making a report to the police did not affect the liability of the plaintiff but confirmed that he was indeed a friend or invitee of the insured and not there by virtue of paying fare as reward.

33. Relating and applying the foregoing findings to the defendant, I do find that the defendant shall be responsible for all the liability that may be adjudged in favour of the 1st interested party without any recourse to the plaintiff. However as the 2nd interested party has been demonstrated to have been a third party and having complied with the requirements and obligations under Section 10 of the Act, the plaintiff shall be bound to not only defend the suit but also meet any decree that may result therefrom.

34. There was a prayer for general damages against the defendant for *breach of contract, fraudulent misrepresentation and breach of trust*. This claim I find not to have been sufficiently proved. To start with fraudulent representation connote criminal culpability and attract higher standard of proof even if it remains below beyond reasonable doubt but must be above balance of probabilities. The evidence offered here so far does not meet the threshold. Even breach of trust was not proved and I repeat as other courts have said before that it is not enough for a litigant to merely throw pleading at court and expect to be awarded damages.

35. For breach of contract, while it is a foregone conclusion that by taking in the 1st Interested Party as a fare paying passenger, the defendant breached the terms of the policy between it at the plaintiff no damage was proved to have resulted therefrom. The law in this area is that the general damages for breach of contract must be what naturally flows from the particular breach and anticipated at the conception of the contract. The question, therefore is what damages is it that which has been visited upon the plaintiff?

36. The law shall remain that he who alleges bears the burden to prove but in this instance no proof has been availed. I find that the plaintiff is not entitled to any general damages as none was proved to the requisite standards.

37. On costs, the plaintiff having succeeded partly against the defendants, I award to it half costs of the suit.

38. As against the interested parties, even if they remain such interested parties, their position was in opposition to the plaintiff claim, they were more like defendants to the plaintiffs claim. Based on the orders I have made I do find that the plaintiff has succeeded against the 1st interested party but failed against the 2nd interested party. Going by the law that cost follow the event, I do order that the 1st interested party shall meet the plaintiffs cost while the plaintiff shall pay the costs of the 2nd interested party.

Dated and delivered at Mombasa this 18th day of October 2019.

P.J.O. OTIENO

JUDGE

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[1] Section 4 Cap 405

[2] Section 6 Cap 405