



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO. 98 OF 2018

UAP INSURANCE COMPANY LIMITED.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF KWALE.....DEFENDANT

JUDGMENT

1. The Plaintiff sought the following relief in its plaint dated 29th October 2018.

a) A declaration that it is and has at all material times been entitled to avoid the said policy Insurance No.050/081/1/007034/2017 AND any provision contained therein on the ground that the terms of the policy have been breached by the defendant.

b) A declaration that the plaintiff is not liable to make any payment under policy insurance No. 050/081/1/007034/2017 in respect to any claim against the defendant herein arising out of an accident which occurred on 12.03.2018 involving Motor vehicle Registration Number KCA 911F Massey Ferguson Tractor.

c) Costs and interest of this suit.

2. The Defendant was served with the summons, Plaintiff and the supporting list of documents on the 9th January, 2019 as per the affidavit of service filed on the 7th February, 2019. The defendant neither filed summons to enter appearance and or a defence as required. The court proceeded to enter an interlocutory judgment on the 18th February, 2019 by the deputy registrar and the Plaintiff was allowed to proceed for hearing on formal proof on the 1st April, 2019..

3. During the hearing, the Plaintiff called one witness, Mr. Martin Mbugua (hereinafter referred to as PW1). PW1 is the Customer Service Officer of the plaintiff company. He told this court that the company received a proposal from the defendant for an insurance of 10 tractors which were to be used to plough land for farmers in Kwale County. He produced a proposal form as plaintiff exhibit 1 and the policy document as Plaintiff exhibit "2" wherein, the defendant had indicated that the 10 tractors would be used exclusively for "carriage of own good" and carriage of passengers was specifically excluded.

4. He produced an investigations Analysis Report dated 8th May 2018 which indicated that the defendant's drivers admitted to carrying a passenger on the tractors in order to be shown the ploughed farm.

5. The Plaintiff submitted that in taking the said policy, the Defendant is in blatant disregard of the policy by allowing its driver to carry an unauthorized passenger who sat on the mud guard of the tractor, lost her balance and fell off thereby sustaining fatal injuries on the 12th March, 2018.

6. At all material times the motor vehicle was to be used for ploughing and "carriage of own good" and it was only the driver who is authorized to sit in and drive the tractor as it does not have a passenger seat.

7. The plaintiff further submitted that there was breach of policy conditions on the part of the defendant and as such, the plaintiff is not entitled to make any payment under the policy insurance number the policy 050/081/1/007034/2017 in respect to any claim against the defendant herein arising out of an accident which occurred on the 12th March, 2018 involving Motor Vehicle Registration number KCA 911F Massey Ferguson Tractor.

8. The plaintiff relied on the case of **Corporate Insurance Company Limited v Stephen Kamau Wamutwe [2014]**

DETERMINATION

9. I have considered all the pleadings, the evidence and documents produced in court. I have also considered the submissions filed by the plaintiff in support of its case. I see the issues emerging out of the pleadings and evidence before me being whether the Plaintiff is entitled to avoid the policy of insurance herein?

10. The answers to this questions lie in the law and the policy of insurance. The Policy herein is a Commercial Vehicle Policy covering all accidental damage claims on comprehensive and thirdparty, fire and theft. My reading of the policy on the limit of liability shows that the policy does not cover carriage of passengers for hire or reward and it's only an authorized driver driving on the insured order or permission and holding a valid licence that is permitted to be on the tractor.

11. I will, therefore, in accordance with sub-clause (2) of the limit of liability section under the "USE CLAUSE AGRICULTURAL SPECIAL TYPES" of the policy document and from the investigation Analysis Report dated 8th May 2018 which at page 15 from the driver of the said Tractor it is evident that the lady fell from the tractor and at the time she had hired the tractor and was riding on it so as to show the farm to the driver grant prayer (b) and (c).

12. Prayer (a) is a general declaration to avoid the entire policy against all the 10 motor vehicles. However, it is my view that the plaintiff has only proved that it is not liable to make payments under the policy number 050/081/1/007034/2017 in respect of any claim involving Motor Vehicle Registration Number KCA 911F Massey Ferguson Tractor but has not proved that the defendants have violated any other clauses of the policy document to warrant a declaration of avoidance of the said policy and any provisions contained therein on the grounds that the terms of the policy have been breached by the defendant.

13. In the upshot, I make the following findings:

a) A declaration that it is and has at all material times been entitled to avoid the said policy Insurance No. 050/081/1/007034/2017 and any provision contained therein on the ground that the terms of the policy have been breached by the defendant is hereby denied.

b) A declaration that the plaintiff is not liable to make any payment under policy insurance No. 050/081/1/007034/2017 in respect to any claim against the defendant herein arising out of an accident which occurred on 12.03.2018 involving Motor vehicle Registration Number KCA 911F Massey Ferguson Tractor is hereby allowed .

c) Costs shall be borne by the Defendant.

Dated, signed and delivered in court this 8th day of October, 2019.

D. O. CHEPKWONY

JUDGE