



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI CIVIL COURTS

CIVIL SUIT NO. 159 OF 2014

CORPORATE INSURANCE COMPANY LIMITED PLAINTIFF

VERSUS

CHARLES JOHN MUSEE DEFENDANT

JUDGMENT

1. Corporate Insurance Company Limited, the Plaintiff herein, filed an action against Charles John Musee the Defendant herein, vide the plaint dated 29th July 2013, in which it sought for judgment as follows:

(a) A declaration that the Plaintiff is and has at all material times been entitled to avoid the aforesaid policy of insurance No. C01/090/1/903084/2012 apart from any provisions contained therein on the ground that the said policy of insurance was obtained by:

i) Non-disclosure of a material fact or facts or

ii) Representation of facts which were false in material particulars or

iii) Both (i) and (ii) above.

(b) A declaration that the Plaintiff is not liable to make any payment under the aforesaid policy of insurance no. C01/080/1/903084/2012 in respect of any claim against the Defendant herein arising out of injuries or loss sustained by any or all of the passengers travelling in motor vehicle registration number KAV 623J on 1st June, 2012 when the same was involved in an accident.

(c) A declaration that motor vehicle registration number KAV 623J was being used for uninsured purposes on 1st June, 2012 and therefore the Plaintiff is not liable to pay any claim arising out of the accident of even date.

(d) Cost of this suit.

2. The Defendant filed a defence to deny the Plaintiff's claim. When this suit came up for hearing the Plaintiff called two witnesses while the Defendant tendered the evidence of a single witness in support of their positions.

3. Before delving deeper into the substance of this suit, let me set out in brief the background of this dispute. The dispute is said to have arisen out of an insurance contract entered between the Plaintiff and the Defendant over motor vehicle registration number KAV 623J for the period between 24th February, 2012 to 23rd February, 2013.

4. It is stated that at all material times the parties had a good relationship until 1st June 2012 when the Defendant's motor vehicle registration number KAV 623J was involved in a road traffic accident along Lang'ata Road.

5. As a result of the accident, one Fred Ramon Ngugi Njoroge sustained serious body injuries and the Defendant's motor vehicle was substantively damaged. The Defendant is said to have informed the Plaintiff about the accident as required under the Insurance Policy.

6. Fred Ramon Ngugi Njoroge, filed an action for damage through his father and guardian ad litem, ***Philip Ngugi vide Nairobi H.C.C.C No. 112 of 2013.*** The Plaintiff went ahead to instruct an advocate to defend the Defendant in the aforesaid suit.

7. The Plaintiff in this instant suit is seeking to inter alia avoid liability under the contract of insurance between it and the Defendant (insured). The Plaintiff accused the Defendant of material non-disclosure and for misrepresentation of material facts at the time of entering into the insurance contract.

8. At the hearing, the Plaintiff summoned two witnesses namely: Jonathan Mwalili (PW1) and Tiberius Nyang'au (PW2). PW1 told this court that he was instructed to carry out an investigation into the circumstances giving rise to the accident. He stated that at the time of the accident the motor insured vehicle was used for private purposes and yet the motor vehicle was insured to carry commercial own goods.

9. PW1 further stated that some passengers who were on board the insured motor vehicle were transported with the permission of the Defendant (the owner). This witness stated that he is aware that the Plaintiff wants to avoid the policy because the motor vehicle was used outside what was insured.

10. Tiberius Nyang'au (PW2) told this court that motor vehicle registration number KAV 623J was insured to be used for own goods. PW2 stated at the time of the accident the aforesaid motor vehicle was used for purposes not insured hence the Plaintiff has a right to repudiate the policy.

11. PW2 pointed out that the passengers who were injured while travelling on the insured motor vehicle were not covered by the Insurance Policy.

12. The Defendant (DW1) on the other hand testified without summoning independent witnesses in support of his defence. DW1 told this court that the insured motor vehicle was a pick – up while had a Comprehensive Insurance Cover. He stated that the pick – up was involved in a road traffic accident which it was being driven by his son.

13. DW1 further stated that the insurance policy covered all third parties including Fred Ramon Ngugi Njoroge who was a passenger in the insured pick-up.

14. At the close of evidence, learned counsels were invited to file and exchange written submissions. The learned advocates appearing in this matter identified four main issues for the determination of this court: -

(i) Whether this court has jurisdiction to hear and determine this suit in light of clause 9 of the Insurance Policy.

(ii) Whether there was non-disclosure of material facts by the defendant on the use of the insured motor vehicle.

(iii) Whether the plaintiff is bound to compensate the occupants of the insured motor vehicle.

(iv) Who should bear the costs of the suit?

15. On the first issue as to whether this court has jurisdiction to entertain the dispute, the Defendant is of the submission that under Clause 9 of the Policy of Insurance, this court is barred from entertaining the matter because the Clause expressly states that a dispute between the insured and the insurer should be referred to either a mediator or an arbitrator. The Plaintiff on the other hand has not submitted on this issue in its written submissions.

16. A careful perusal of the pleadings filed by both sides will provide answers to the question posed herein. In paragraph 15 of the Plaintiff dated 29th July, 2013, the Plaintiff expressly stated that this court has jurisdiction to hear and determine this suit.

17. In answer to the aforesaid pleading, the Defendant expressly stated in Paragraph 7 of his defence that the court's jurisdiction was not denied. The Defendant also filed a list of issues dated 2nd December, 2015 and the issue touching on jurisdiction was never raised. The issue came up at the submission stage and that could be the reason why the Plaintiff did not submit over the issue.

18. In my humble view, I find that the Defendant has approbated and reprobated at the same time. It was not an issue which arose during the hearing nor raised in the pleadings. Consequently, I decline to determine the issue because to do so would prejudice the Plaintiff's case. In essence the Defendant sprung a surprise on the Plaintiff. This court declines to condone the practice.

19. The second issue is whether the Defendant is guilty of material non-disclosure on the use of the insured motor vehicle. It is the Plaintiff's submission that the Defendant is guilty for material non-disclosure and misrepresentation. It is argued that the Defendant did not fully disclose to the Plaintiff what he intended to use the motor vehicle for.

20. At the hearing of this suit, the Plaintiff's legal officer (PW 2) told this court that the plaintiff filed the proposal form on whose basis the Plaintiff issued the Defendant a commercial vehicle Insurance Police No. CO1/080/1/903084/2012. It is pointed out that in the Proposal Form the Defendant stated the purpose which the vehicle will be used as his own goods (farm produce). It is also clear from the Proposal Form which was produced in evidence as an exhibit that the Defendant crossed out the provisions for private which comprise use for domestic, social and pleasure purposes.

21. I am convinced that the Insurance Police issued to the Defendant is based on the aforesaid Proposal Form. It is the evidence of the Defendant (DW 1) that he filled the Proposal Form together with his agent. According to the investigation report prepared by Targbull Loss Assessors & Investigation Consultants and produced by PW 1, the said motor vehicle was used for social, domestic and pleasure purposes.

22. PW 1 stated that the Defendant informed him that he had given his son the insured motor vehicle to go swimming with his friends at

Maasai Lodge in Rongai. I am satisfied that there is cogent evidence showing that Motor vehicle registration No. KAV 623J was at the time of the accident used for domestic, social and pleasure purposes. The Defendant failed to disclose this information while he together with his agent were filling the Proposal Form. There was material non-disclosure over the intended use of the aforesaid motor vehicle. As a result, therefore, the Defendant is in breach of the Terms of the Policy of Insurance and for using the motor vehicle contrary to the insured risk.

23. The third issue is whether the Plaintiff is bound to compensate the passengers who were on board the aforesaid motor vehicle at the time of the accident and whether it is entitled to repudiate the contract of insurance. Having come to the conclusion that the motor vehicle was used for purposes outside those the Defendant stated in the Proposal Form, it is inconceivable for the Plaintiff to be bound to compensate the occupants of the motor vehicle.

24. Having also come to the conclusion that the Defendant is guilty of material none disclosure, I am convinced that the Plaintiff is entitled to avoid the Insurance Contract.

25. The last issue is who should pay costs of this suit. It is apparent that the Plaintiff is the successful party in this suit. Costs follows the event. Consequently, the Defendant should meet the Plaintiff's costs.

26. In the end judgment is entered in favour of the Plaintiff and against the Defendant as follows: -

i) A declaration is hereby made that the Plaintiff is entitled to avoid the Policy of Insurance No. C01/080/1/903084/2012 in respect of any claim as against the Defendant herein arising out of the injuries or loss sustained by any or all of the passengers travelling in Motor Vehicle Registration No. KAV 623J on 1st June, 2012 when the same was involved in an accident.

ii) The Plaintiff is awarded costs of the suit.

Dated, Signed and Delivered in Nairobi this 13th day of July, 2018.

.....

J.K. SERGON

JUDGE

In the presence of:

..... ***For the Plaintiff***

..... ***For the Defendant***