



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAROK**

**CIVIL CASE NO. 7 OF 2016**

**MONARCH INSURANCE CO. LTD.....PLAINTIFF**

**VERSUS**

**MARY WANGARI .....DEFENDANT**

**JUDGEMENT**

1. The plaintiff filed its claim against the defendant, who was its insured person. The plaintiff sought a declaration that it was not liable or bound to make payments or to indemnify the defendant under the insurance policy issued to her in respect of any debt or bodily injury to any person arising of the road accident that occurred on 23<sup>rd</sup> November, 2015 along Maai Mahiu – Narok road, which involved the defendant’s motor vehicle registration No. KBQ 536B.
2. After being served with summons to enter appearance, the defendant failed to do so. As a result, the plaintiff set down the suit for formal proof.
3. The plaintiff called two witnesses namely Obed Ileri (PW1), who is its claims manager and Stephen Kiringu (PW2), the latter was its investigator in respect of the motor vehicular accident.
4. The evidence of PW1 is that they insured the defendant’s motor vehicle registration No. KBQ 536B a Toyota Corolla. It was his evidence that the said motor vehicle was involved in a road accident on 23<sup>rd</sup> November, 2015. As a result, they instructed PW2 to investigate the accident. At the conclusion of the investigation, PW2 found that the said motor vehicle was on hire by a third party, which was in breach of the insurance cover.
5. According to the insurance cover, which was put in evidence as exhibit 3, the said vehicle was to be used for domestic, social pleasure and personal business. The insured defendant was not permitted by the terms of the policy to use it for racing, competitions, rallies or carriage of passengers for hire or reward.
6. PW1 adopted as his evidence his witness statement dated 18<sup>th</sup> April, 2016, which was put in evidence as exhibit 4.
7. The evidence of the investigator (PW2), was that he investigated the accident which is the subject of these proceedings, following instructions from PW1. As a result, he contacted the defendant’s driver who led him to the scene of accident and thereafter proceeded to Maai Mahiu police station. At that police station, they got the abstract report in which the accident was recorded under OB No. 39 of 23/11/2015, which was put in evidence as exhibit 1.
8. Finally, it was his evidence that he recorded a statement from the insured defendant, who admitted that the vehicle had been leased for purposes that were in contravention of the policy of the insurance.
9. Counsel for the plaintiff, Mr. Mosioma then closed the plaintiff’s case.
10. Thereafter, he filed written submissions urging the court to grant the order of declaration. He cited the English case of *Alisa Craig Fishing Co. Ltd v. Malvern Fishing Co. Ltd (1983) All ER 191*, in which it was stated that exemption clauses in the insurance policy must be clear and unambiguous. In the instant case, the exemption clauses forbade the insured defendant from using the motor vehicle for hire or reward. He therefore urged the court to absolve the plaintiff from any liability arising out of the said accident.
11. The proceedings were conducted in the absence of the insured defendant. They were therefore *ex parte* proceedings.
12. In the light of the foregoing evidence, I find the following to be the issues for determination.

1. Whether or not the plaintiff is exempted from liability arising out of the accident of 23<sup>rd</sup> November, 2015.

2. Who bears the costs of this suit?

#### **ISSUE 1**

13. I find from the credible and uncontroverted evidence of the claims manager (PW1) and the accident investigator (PW2) that the insured defendant was in breach of the terms of the insurance policy cover. She used the insured motor vehicle for reward or hire contrary to the terms of the insurance policy cover. In the circumstances, I find that the plaintiff is not liable to compensate or indemnify any person for the injuries sustained in respect of the accident of 23<sup>rd</sup> November, 2015.

#### **ISSUE 2**

14. It is trite law that costs follow the event in terms of section 27 of the Civil Procedure Act [Cap 21] Laws of Kenya. It is clear from these proceedings, that the insured defendant did not participate in these proceedings. In the circumstances, I find that each party has to bear its own costs.

15. The upshot of the foregoing is that the plaintiff's claim in respect of the declaration sought is hereby granted with no order as to costs.

**Judgement delivered** in open court at **Narok** this **20<sup>th</sup>** day of **September, 2018** in the presence of Mr. Meingati holding brief for Mr. Karanja for the plaintiff and in the absence of the defendant.

**J. M. BWONWONGA**

**JUDGE**

**20/9/2018**