



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 291 OF 2010

LIKI RIVER FARM LIMITED.....PLAINTIFF

VS.

TAUSI ASSURANCE CO. LTD.....DEFENDANT

JUDGEMENT

1. This matter concerns the enforceability of a Commercial Vehicle Insurance Policy No. POL/101/39/087/1/2007.
2. Liki River Farm Limited (Liki or the Plaintiff) was at all material time the registered proprietor and owner of a Bus Registration KAP 509A. The Motor vehicle was involved in an accident on 30th June 2007. Liki's case is that at the time of the accident, it held a valid cover under Policy NO. POL/101/39/087/1/2007 with Tausi Assurance Company Ltd (Tausi or the Defendant) and is aggrieved that Tausi has declined to make compensation for the claim arising out of the accident. The Claim by Liki is for the sum of Khs.1,425,000/=being the value of the Motor vehicle and Khs.6,939,300/= being loss incurred for hiring transport for the operations that would otherwise be done by Motor Vehicle KAP 509A.
3. Tausi denies the claim and mainly hinges its Defence on non-payment of premium. It contends that although it issued the Policy on 23rd April 2007, the same did not come into effect until 3rd July 2007 when it received premium in respect thereof.
4. In addition, Tausi alleges the following additional breaches of terms and conditions of the said Policy:-
 - (i) Overloading the vehicle at the time of the accident.
 - (ii) Breach of the warranty on carrying capacity and seating capacity Clause attached to the Policy.
 - (iii) Refusal by the Passengers in the vehicle at the material time to co-operate with the Defendants investigators.
 - (iv) Breach of the provisions of the Traffic Act and the Transport Licensing Act regarding the passenger carrying capacity of the vehicle.
 - (v) Failure to pay excess.
5. Two issues arise for determination;-
 - (i) Was the Plaintiff on cover at the time of the Accident?
 - (ii) Is the Defendant obliged to settle the Plaintiff's claim?
6. The Insurance Policy was taken through a Firm of Brokers known as Crownscope Insurance Brokers Limited. The evidence of Nancy Mukiri (PW2) of the said firm was that Tausi paid its premium and was issued with a receipt NO.0018475 of 30th June 2007 (P Exhibit page 9)
7. There is however evidence that the premium cheque was only made out on 3rd July 2007 (D. Exhibit page 11) by NIC Bank Ltd. NIC

Bank and Crownscope had entered into an Insurance Premium Broker Finance Agreement dated 29th June 2017 in which the Bank financed Crownscope for the payment of Khs.12,000,000/= to Tausi (P Exhibit page 10). Consequently on 2nd July 2007, Tausi issued a Guarantee and indemnity (P Exhibit pages 11 and 12) to NIC Bank in which, as the Primary obligor, it undertook to pay to the Bank, on first demand (and in any event not later than seven days), the prorated refund of the amount due to the Bank by the Insurer under the policies financed by the Bank.

8. Although the witness for Tausi (Mary Akumu) told Court that no one in Tausi appeared to know about the receipt dated 30th June 2007, there was no evidence to successfully challenge its authenticity. This is what the witness said in cross-examination,

“I saw this Receipt in the Plaintiff’s Bundle of Documents before today. No one at Tausi seems to know about it”.

I have to find that the receipt is genuine as there was no attempt to seriously debunk it.

9. There is convergence by the parties on the effect of non-payment of Premium on the validity of an Insurance Contract. In Nizar Virani t/a Kisumu Beach Resort vs. Phoenix of East African Assurance Company Ltd [2009] eKLR, the Court of Appeal endorsed the following passage from MacGillivray & Parkington on Insurance Law;

“As stated in MacGillivray & Parkington on Insurance Law, 7th Edition at paragraph 851:

“Where the risk is not described as running from any specified date, the presumption is that it runs from the date of the policy. The risk may begin to run either before or after the policy is issued. It may run from the date of acceptance of the offer or from the payment of the first premium or from the execution or delivery of the policy. The date when a risk attaches is in each case a matter of construction of the terms of the preliminary agreement or of the policy when executed. There is no principle of law which compels a company to assume a risk as from the date of acceptance or from any other particular date.”

and on payment of premium at paragraph 861:

“There is no rule of law to the effect that there cannot be a complete contract of insurance concluded until the premium is paid, and it has been held in several jurisdictions that the courts will not imply a condition that the insurance is not to attach until payment. It would seem to follow that, if credit has been given for the premium, the insurer is liable to pay in the event of a loss before payment, although, as has been held in a South African decision, the insurer would be entitled to deduct the amount of the premium from the loss payable, at least where the period of credit had expired by that time, since the assured could not insist on payment when in breach of any obligation assumed on his part under the contract.”

10. The effect of the proposition was clarified by Majanja J. in Insurance Company of East Africa vs. Marwa Distributors Limited [2015] eKLR in which he stated,

“In my understanding, the case does not set out a hard and fast rule that failure to pay premium does not invalidate the policy but underpins the general contract principle that parties are bound by their obligations recorded in the agreement. It means that if the parties do not make provision for the effect of non-payment of the premium, the court will not necessarily imply that the policy is invalid. The effect of non-payment of premium on the policy depends on the intention of the parties expressed in the contract”.

I agree with the observation made by the learned Judge. The true effect of non-payment of premium will therefore have to turn on the terms of the Insurance Contract and the language used.

11. The Policy commences with this recital,

“whereas the Insured by a proposal and declaration which shall be the basis of this Contract and is deemed to be incorporated herein has applied to the Tausi Assurance Company Ltd (hereinafter called the Company) for the Insurance hereinafter contained and has paid or agreed to pay the premium as consideration for such Insurance”. My emphasis.

The important words would be, has paid or agreed to pay the premium. Yet this must be read with the premium payment warranty which reads:-

“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”. My emphasis

The words in the recital are thereby qualified by the premium payment warranty.

12. The premium payment warranty invokes the provisions of Section 156 of the Insurance Act which reads:-

“An insurer is barred from assuming a rule unless and until;

a) premium is paid to the insurer or;

b) a guarantee for payment is made or;

c) unless and until a deposit, of a prescribed amount is made in advance”.

13. Reading the policy as a whole, and in the context of the statutory provision, this Court holds that its validity was dependent upon full payment of the premium or receipt by Tausi of an acceptable guarantee for its payment. Indeed the issue of an acceptable guarantee is alluded to by the witness of Tausi when she stated:-

“Insurance can be issued on Credit but only where an Insured is financed and the Insurer receives an acceptable undertaking from the Financier. I do not know if Tausi received such an undertaking”.

I take a view that whether or not Tausi is liable turns on whether, either, full payment of premium was made or an acceptable guarantee/undertaking given prior to the accident which happened at 5.35 am on 30th June 2007.

14. The undisputed evidence is that NIC Bank made out a cheque for payment of the premium on 3rd July 2007 and the money credited into the account of Tausi three (3) days later on 6th July 2007. The payment was made by NIC Bank as the premium financier. However, and of considerable significance, is that on 30th June 2007 Tausi issued a receipt for payment of premium which reads,

“NIC Bank Ltd premium financing for Crownscope Insurance Brokers Ltd premium on AIC”.

15. One must wonder whether, in fact, in issuing that receipt Tausi had assurance for payment of the premium which indeed came in about 4 days later. It seems that Tausi could only issue the receipt upon getting an acceptable undertaking from the financier of the premium (ie. NIC Bank) that premium would be paid.

16. It is common ground that the accident occurred on 30th June 2007 at 5.35am. The Advocates for Tausi submit that the receipt of 30th June 2007 could only have been issued after 8.00am when the offices of their clients opened and this was therefore after the occurrence of the subject accident. Of course there was no evidence led as to when in fact Tausi opened its doors for business on 30th June 2007.

17. Liki’s case rests on the argument that policy was valid because the payment of the premium or guarantee for it was made before the accident. Tausi takes a contrary position. In these circumstances, the onus was on Liki to prove what it asserts.

18. What was the evidence of Liki? PW1 says as follows:-

“Premium was paid on 29th June, 2007 and receipted by Tausi on 30th June 2007”.

She later states,

“The evidence of payment is the Finance Agreement (P. Exhibit page 10). The Agreement does not confirm when payment was effected. It would not be difficult to get evidence of when payment was made from NIC.

The Finance Agreement referred to by the witness is an Insurance Premium Broker Finance Agreement dated 29th June 2007. It was intended to be a tripartite agreement involving NIC Bank, Crownscope and Tausi. Although dated 29th June 2007, the Agreement appears to have been signed by only the representatives of Crownscope and Tausi. A Copy of that Agreement produced in Court shows that the Bank (The financier) did not execute the Agreement. It must follow that the document cannot be a proper undertaking/guarantee for payment of the premium because the financier (who is a Primary party to such an arrangement) had not executed the agreement.

19. Now from further evidence adduced, actual payment of premium was by a cheque dated 3rd July 2007 which was credited to Tausi’s account on 6th July 2007. In respect to the guarantee there is no evidence of when it was furnished to Tausi although it was receipted on 30th June 2007. The net effect is that Liki has not proved that it tendered payment or issued a Guarantee for payment before 5.22.am on 30th June 2007 when the accident occurred. Because of this I have to reach a conclusion that the Plaintiff has not proved that the Policy was valid at the time of the Accident.

20. But in the event I am wrong, I would have to assess the Damages. For the loss of the vehicle, the vehicle was insured from Khs.1,500,000/=. Excess payable would be 5% thereof which would be Khs.75,000/=. The agreed salvage value is Khs.700,000/= so then amount payable is as follows:-

Insured value Ksh. 1,500,000/=

Less Salvage value Khs.700,000/=

Less Excess Ksh. 55,000/-

740,000/=.

This would be the amount payable for loss of the vehicle.

21. In respect to consequential loss, all that has been produced by the Plaintiff is invoices. Invoices without more will not be enough to prove special damages. There must be evidence that they have been paid for (see for example the Court of Appeal decision in Total Kenya Ltd formally called Oil (Kenya) Limited –vs- Janevams Limited [2015] ECLR AND Great Lakes Transport Co. (K) Ltd –vs- Kenya Revenue Authority [2009] eCLR 720). Otherwise they must be evidence, independent of the invoices, that the services or goods for which they were raised were actually performed or supplied and that a legitimate claim to the service provider and supplier of goods is outstanding.

22. The outcome is that, not having found the Defendant liable, I dismiss this claim with costs to the Defendant.

Dated, delivered and signed in open Court at Nairobi this 9th day of November, 2018.

F. TUIYOTT

JUDGE

Present:-

Mwendwa h/b Wanjohi for the Plaintiff

Juma h/b Mege for the Defendant

Nixon - Court Assistant