



**REPUBLIC OF KENYA**

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

**HIGH COURT COMMERCIAL SUIT NO. 5 OF 2006**

**CHEMELIL SUGAR CO. LTD. .... PLAINTIFF**

**VERSUS**

**PHOENIX OF EAST AFRICA ASSURANCE ..... DEFENDANT**

**JUDGMENT**

On or about 14th August 1997, for a consideration of Kshs.454,554/=, the Plaintiff and the Defendant entered into a contract wherein the Defendant undertook to insure the Plaintiff's employees against risks and injuries arising out of and in the course of their employment for the period of one year commencing 7th August 1997 to 30th June 1998. The Policy No.07WC4456 was to cover employees of the Plaintiff earning a wage of less than Kshs.4,000/= per month. This included casual employees and cane cutters 1363 employees in total.

On 28th January 1998 some employees who included casual workers and cane cutters were involved in an accident whilst being transported to work in a tractor Registration Number KAG 831F belonging to the Plaintiff. Those employees sued the Plaintiff in various courts and a number of them obtained were awarded damages running into Kshs.8,831,616/32 which the Plaintiff paid to the employees. The Defendant repudiated the claim and completely refused and/or neglected to indemnify the Plaintiff on grounds that that loss was not covered by the policy hence necessitating this suit. The Plaintiff therefore seeks the following orders:-

- “(a) A declaration that the said policy of insurance extended to the casual labourers and/or cane cutters by virtue of provisions of the policy and the plaintiff is entitled to be indemnified by the defendant in respect to its liability under the policy;***
- (b) Special damages of Kenya Shillings Eight Million, Eight Hundred and Thirty One Thousand Six Hundred and Sixteen and Thirty Two cents (8,831,616.32/=) being sums of monies paid by the plaintiff in settlement of various claims arising out of policy No.07WC4456;***
- (c) General damages;***
- (d) Interest on the amount awarded and due to the Plaintiff at such rate and for such period that this honourable court shall deem fit in the circumstances;***
- (e) Costs of the suit;***
- (f) Any other relief this court may deem fit and just to grant.”***

In its written statement of Defence the defendant maintained that it is not liable to indemnify the Plaintiff

for any loss arising from the accident. The Defendant accuses the Plaintiff of misrepresenting the injured employees as its own employees knowing full well they were employed by independent contractors; of wilfully maliciously and deliberately through its agents, suppressing material documents, facts and details from the Defendant and further of fraudulently attempting to claim under the Employers Liability (Common Law) Policy instead of the policy in force in respect of motor vehicle KAG 831F/ZA 1777. The Defendant also avers that the Plaintiff fraudulently suppressed the employment lists and records of the company and further of deliberately failing to co-operate with the Defendant's investigators so as to hide the truth concerning the persons involved in the accident. The Defendants urged that the suit be dismissed with costs.

At the hearing the Plaintiff called one witness while the Defendant called two.

Relying on the policy of insurance David Biwott (PW1), the Plaintiff's Legal Assistant stated that the policy was clear in its terms; that it covered casual employees and cane cutters being 1,363 in number, that the risk insured was accidents whilst in the course of employment, that it did not cover employees of independent contractors and that the Defendant was to indemnify the Plaintiff against legal liability. He stated that the persons injured in the accident were employees of the Plaintiff who were being transported to their respective work stations in a Motor Vehicle Registration Number KAG 831F belonging to the Plaintiff. He contended that they were injured in the course of their employment and were therefore covered by the policy. He stated that the accident was duly reported to the Defendant but the Defendant refused to take up the matter on grounds that their investigation had revealed that the persons involved in the accident were employees of the Plaintiff's independent contractors but not of the Plaintiff. All the while the policy was in force. Consequently the Plaintiff took over defence of the matters filed in Court by the employees and in the end incurred Kshs.8,818,313/87 in awards to the claimants as well as legal fees. He disputed that they were employees of independent contractors and stated that they were employees of the Plaintiff sourced by its Human Resources Department. He contended that they were supplied with protective gear and would be treated in the company clinic whenever they fell ill. He disputed that the Plaintiff breached the contract and contended that those employees were insured. He denied that the Plaintiff has sub-contractors. He blamed the Defendant for the loss incurred by the Plaintiff and urged this court to enter judgment for the Plaintiff as prayed. In cross-examination he conceded that the policy did have conditions and exclusions. He however disputed that the accident giving rise to this suit fell under exception (k) of the policy. He reiterated that the persons who were involved in the accident were employees of the Plaintiff and stated that they sustained injuries in the course of their employment. He also denied that the Plaintiff impeded the investigations conducted by the Defendant. He denied that the driver of the motor vehicle was drunk at the time the accident occurred and stated there was no medical report to that effect. He stated that by repudiating liability the defendant defrauded the Plaintiff. He conceded that out of 57 claims filed only 24 were awarded by the courts. He could not however tell the court exactly how much the sum total of the awards was.

John Olome Mugondi (DW1) of Clarity Loss Assessors testified that when he carried out investigations he established that the accident had occurred but that the twenty three persons involved were not direct employees of the Plaintiff but rather employees the Plaintiff had contracted to cut cane. They were therefore not covered by the policy. He accused the Plaintiff's managers and particularly the harvesting manager of being very economical with information. He stated that he was never supplied with the Muster Roll as evidence that the claimants were employees of the Plaintiff.

George Kibura Kiratu (DW2), the Defendant's Legal Claims Officer testified that the policy covered cane cutters and casuals in the immediate employment of the insured; That investigations revealed that those injured were not in the direct employment of the Plaintiff and hence the reason the Defendant repudiated and withdrew instructions to defend the suits against the Plaintiff. He also stated that the Plaintiff was in breach of the contract as it did not provide protective gear to the workers as they ought not to have ferried them in an open trailer and did not give them helmets.

The Advocates for the parties summed up their clients' cases by way of written submissions.

It is not disputed that on 14th August 1997 the parties herein entered into an Employers Liability

(Common Law) Policy which covered the period from 7th August 1997 to 30th June 1998. It is not disputed that the said policy covered the Plaintiff's employees including casuals and cane cutters whose remuneration did not exceed 4,000/= a month and that they were 1363 employees in total. There is also no dispute that under the policy the Defendant was to indemnify the Plaintiff against legal liability under common law for damages and claimant's costs and legal fees. It is also not disputed that an accident occurred on 28th January 1998 which gave rise to claims/suits against the Plaintiff leading to the Plaintiff incurring loss in terms of the awards, costs and legal fees. The dispute between the parties turns on whether the persons involved in the accident were covered by the policy. In other words whether they were employees of the Plaintiff. Secondly whether the accident giving rise to the loss the subject matter of this case was covered under the policy.

After a careful evaluation of the evidence tendered by both sides I find that on the issue of whether the persons were involved in the accident were covered by the policy admittedly no list of employees was supplied to the Defendant at the inception of the policy. The agreement was merely that the policy would cover 1363 employees of the Plaintiff including casuals and cane cutters provided their wages were less than Kshs.4,000/= per month. Since the actual names of the employees covered did not feature at the inception of the policy their lack thereof after the accident could not form the basis to say that the persons involved in the accident were not employees of the insured. The Defendant who asserts that those persons were employees of independent contractors which the Plaintiff vehemently denies did not tender proof to that effect. It was not enough for the Defendant to assert that its investigations revealed they were employees of independent contractors. It should have brought that evidence to court. Accordingly I find that there is no basis upon which this court can find that the persons

involved in the accident were not direct employees of the Plaintiff and find that they were covered by the policy.

On the issue of whether the employees were covered in respect of the injuries sustained in the accident in issue my finding is that they were not. To find whether or not they were we can look no further than the policy itself. That policy was produced in evidence. It states:-

**“EMPLOYERS' LIABILITY (COMMON LAW) POLICY**

***NOW THIS POLICY WITNESSETH that if any employee in the Insured's immediate service shall sustain bodily injury by accident or disease caused during the Period of Insurance and arising out of and in the course of his employment by the Insured in the Business and directly related to negligence or breach of common law or statutory duty duty by the Employer.***

***THE COMPANY WILL subject to the Jurisdiction Clause and the other terms exceptions and conditions contained herein or endorsed hereon (all of which are hereinafter collectively referred to as the Terms of this Policy) Indemnify the Insured against legal liability under common law for damages and claimant's costs and expenses of litigation and will in addition pay all costs and expenses incurred by the Insured with the Company's written consent.”***

However that policy had exclusions. Among those exceptions is (b), which I have already dealt with, was that the insured's liability did not extend to employees of contractors to the insured. The exception that is most relevant to us is (k) which states:-

***“The company shall not be liable in respect of***

***“(k) liability in respect of injury loss or damage caused by or through or in connection with the ownership or possession or use by or on behalf of the insured of any vehicle (or machine) which is insured for the benefit of the Insured under any form of Motor Vehicle Insurance Policy.”***

The accident giving rise to this claim occurred whilst the Plaintiffs were being transported to work in its tractor hence in connection with the use of a motor vehicle belonging to the Plaintiff. The tractor was insured for her benefit under a Motor Vehicle Insurance Policy as admitted by PW1. Exclusion (k) is so

clear in its ordinary and natural meaning that it clearly and unambiguously excluded liability in the circumstances of this case. It is my finding therefore that whereas the Defendants insured the Plaintiff's employees for injuries sustained in the course of their employment exception (k) shielded the Defendant against claims arising from accidents due to use of their motor vehicles. In my considered view the Defendant was not liable to indemnify the Plaintiff against legal liability arising from the motor accident. Accordingly I find no merit in the case and dismiss it with costs to the Defendant.

**Signed, dated and delivered at Kisumu this 24th day of January, 2017**

**E.N. MAINA**

**JUDGE**

**In the presence of:-**

Mr. Onsongo for the Plaintiff (H/B for Sentan Adv)

N/A for the Defendant

C/A: Serah Sidera