



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL SUIT NO. 193 OF 2007

KIPKEMEI ARAP SONGOK.....PLAINTIFF

VERSUS

KENINDIA ASSURANCE COMPANY LIMITED.....1ST DEFENDANT

ERIC JUMBA KITI (*as the administrator of*

***the estate of* PRISCA C. KITI (*Deceased*).....2ND DEFENDANT**

JUDGMENT

1. The plaintiff craves three reliefs: first, for a *declaration* that *Kenindia Assurance Company* (the 1st defendant) should satisfy the decree in *Eldoret HCCC 118 of 1996 Prisca Cherono Kiti Cheruiyot v Kiara, Kipkemei Songok & another*; secondly, for a *perpetual injunction* against the 2nd defendant restraining him from executing the decree against the plaintiff; and, thirdly, for *costs* of the suit.

2. The original suit was filed on 6th December 2007. By *consent* of the parties, an *amended plaint* was filed on 28th April 2016. The facts of the case are fairly straightforward. The plaintiff is the owner of a lorry registration number KZE 334. On 1st September 1994, the plaintiff insured the vehicle through an indemnity policy number 109/080/11/04611/1988/08 issued by the 1st defendant. The *terms* of the policy are however in dispute. The plaintiff asserts that it covered *all claims* by *third parties* in connection with the use of the lorry. The 1st defendant contends that the policy *only* covered the conveyance of *goods* belonging to the *plaintiff*.

3. On 30th September 1994, the lorry collided with another vehicle, registration number KZS 086, along Nakuru – Eldoret Road. *Prisca Cherono Kiti* (hereafter *the deceased*) was a passenger in the plaintiff's lorry. She sustained severe injuries which led to her death.

4. The 2nd defendant is the *legal representative* of the estate of the deceased. He sued the plaintiff in *Eldoret HCCC 118 of 1996* claiming general and special damages. On 27th May 2004, judgment was issued in favour of the estate for Kshs 3,761,600 together with costs and interest. The costs were subsequently taxed at Kshs 490,644 as per plaintiff's exhibit number 10. The 1st defendant has declined to meet the decree. That precipitated this suit.

5. By an amended statement of defence dated 20th May 2010, the 1st defendant *denies* the policy. In the alternative, it pleads that if the policy existed, it did *not* cover *unauthorized* passengers. The 1st defendant asserts that it is not bound to indemnify the plaintiff for the resultant decree.

6. On 17th October 2012, the court directed the plaintiff to proceed by way of affidavit evidence. The relevant deposition was sworn on 20th November 2012 and served upon the parties. At paragraph 9 of the affidavit he deposes as follows-

“That on the said date [of the accident] the motor vehicle was in the business of transportation of wheat and had been hired by the said Prisca Cherono Cheruiyot Kiti. The said vehicle was therefore being used for commercial purposes as per the policy.”

7. The plaintiff averred that when he was sued by the estate of the deceased, he served the *summons* upon his insurer. The insurer instructed *Aggarwal & Company Advocates* to defend the suit. Upon demise of counsel, the insurance company appointed *Nyairo & Company Advocates* to take over the conduct of the suit [plaintiff’s exhibits 7(a) and (b)] who conducted the defence until conclusion of the case.

8. The 1st defendant was aggrieved by the decree and lodged an appeal to the Court of Appeal. It sought stay of execution in *Civil Application 284 of 2004*. On 23rd February 2007, the Court of Appeal granted a conditional stay: the appellant was to deposit the sum of Kshs 1,500,000 in an interest bearing account in a reputable bank within 30 days. The plaintiff avers that at that point, the 1st defendant suddenly sought to repudiate the policy. He averred further that the decree has since ballooned to Kshs 10,044,447.

9. The position of the plaintiff is that the 1st defendant did not follow the right procedure in repudiating the policy; that it has acted unlawfully and in bad faith; and, that it is estopped by its conduct from avoiding the policy. The plaintiff relied on a bundle of documents annexed to his deposition and marked exhibits 1 to 15.

10. On 29th June 2016, the learned counsel for the 1st and 2nd defendants confirmed that they did *not* wish to cross examine the plaintiff on his deposition. That then marked the close of the plaintiff’s case.

11. The 1st defendant’s sole witness was Salmon Oluoch Budi. He relied largely on a witness statement dated 14th December 2016. He testified that he is the manager Kenindia Assurance Company, Eldoret branch. He produced the policy (the same copy as plaintiff’s exhibit 3). He referred to an exemption clause in *Section II (iii)* which reads-

“The company shall not be liable in respect of: death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon or entering or getting on to or alighting from the Motor Vehicle at the time of the occurrence of the event out of which the claim arises”

12. Upon cross examination, the witness conceded that the 1st defendant did not seek to repudiate the policy until well after the decree. He said he did not understand the procedures the company required to follow to terminate or repudiate the cover. He also confirmed that the lorry was insured as a commercial vehicle.

13. He said the insured hired out the vehicle to the deceased to carry some goods. The deceased was a passenger in the lorry. The witness was not privy to the terms of the contract between the insured and the deceased. He conceded that the 1st defendant instructed lawyers to defend *Eldoret HCCC 118 of 1996*; and, the ensuing appeal. He said he did not know why Kenindia Assurance defended the suit; or, appealed before it repudiated the policy.

14. Upon further cross examination by counsel for the 2nd defendant, the witness confirmed that the insurer received a notice issued under the relevant Insurance (Motor Vehicles Third Party Risks) Act. He said the policy was valid at time of accident. He however stated that the vehicle did not have a P.S.V. licence. He could not tell if the deceased was authorized or not to board the suit vehicle.

15. That marked the close of the 1st defendant’s case. The 2nd defendant closed his case without calling

any evidence.

16. All the parties have filed written submissions. Those by the plaintiff are dated 6th February 2017; those by the 1st defendant were filed on 23rd February 2017; and, those by the 2nd defendant on 14th February 2017. I have paid heed to the pleadings; the plaintiff's deposition and exhibits; the evidence of the 1st defendant; and, the rival submissions.

17. From the pleadings and the evidence, the issues for determination are three-pronged-

i. *Whether the 1st defendant had issued a policy of indemnity to the plaintiff;*

ii. *Whether the 1st defendant is entitled to avoid the policy. Paraphrased, whether the 1st defendant is liable to meet the decree in Eldoret HCCC 118 of 1996; and,*

iii. *Who will meet the costs of this suit?*

18. I will begin by making *three* general propositions on the law of *contract*: Parties are bound by commercial agreements; and, they must keep their part of the bargain. Secondly, it is *not* the true province of the courts to rewrite contracts for parties. See Morris & Company Vs Kenya Commercial Bank [2003] 2 E.A 605 and National Bank of Kenya Limited Vs Pipeplastic Samkolit and another [2001] KLR 112.

19. Thirdly, the contract in the present case is one of *indemnity*. It is between an *insurance company* and a *policy holder*. It thus a contract *uberrimae fidei*. It is one of *utmost good faith*. See Margaret Nduta Kamithi & another v Kenindia Assurance Co. Ltd, High Court, Milimani, Nairobi Commercial case 37 of 2000 [2001] eKLR, Co-operative Insurance v David Wachira Wambugu, Court of Appeal, Nyeri, Civ. Appl. 66 of 2008 [2010] eKLR, Joel v Law Union & Crown Insurance (No. 2) [1908] 2 KB 883. The interpretation of the rights of the parties in this dispute must be underpinned by those *three* general legal principles.

20. I have closely studied policy number 109/080/11/04611/1988/08 (plaintiff's exhibit 3). The 1st defendant's witness admitted that it was *underwritten* by Kenindia Assurance. It was thus misleading to plead in paragraph 3 of the amended statement of defence that "*the 1st defendant avers that in the event there existed a policy of insurance between the 1st defendant and the plaintiff (but which is denied)...*". As a general rule of pleadings, a party is not allowed to plead to two conflicting and inconsistent facts.

21. I find that the policy is clearly titled *Commercial Vehicle Insurance Policy*; that it was in the name of the plaintiff; and, that it covered the lorry registration number KZE 334. In section II clauses 1 (a) and (b), the insured undertook to *indemnify* the plaintiff in the event of an accident in respect of *claims* of bodily injury or damage to property. The answer to issue number i) framed at paragraph 17 of this judgment is answered in the *affirmative*.

22. It is not contested that at the time of the accident, the cover was *valid*. The only live issue is whether the deceased was an *unauthorized* passenger; or, whether the insurer should *indemnify* the plaintiff for the claim brought by the deceased's estate. For starters, the lorry was engaged in a *commercial* venture. The deceased was a passenger at the *invitation* of the plaintiff; and, the goods being transported belonged to her. The plaintiff deposed as follows-

"That on the said date [of the accident] the motor vehicle was in the business of transportation of wheat and had been hired by the said Prisca Cheronu Cheruiyot Kiti. The said vehicle was therefore being used for commercial purposes as per the policy."

23. I find it self-serving to claim that she was then an *unauthorized* passenger; or, that the plaintiff could only transport *his* own goods in the lorry. If the latter were the case, the policy would not have been a *Commercial Vehicle Insurance Policy*. I am accordingly *not* satisfied that the exemption clause in section

II (iii) of the policy was applicable.

24. But if I be wrong on that score, the 1st defendant *failed* to follow the right procedure in law to repudiate the contract. For starters, the insurer never served *notice* to its insured. The 1st defendant conceded that it received notice of the claim as was required by section 10 (2) of the Insurance (Motor Vehicles Third Party Risks) Act. If the 1st defendant desired to repudiate the policy, it could, for example, have complied with section 10 (4) of the Act. By dint of that provision, the insurer was required to seek a *declaration* within *three months* that it was entitled to *avoid* the policy on certain grounds such as misrepresentation; or, material non-disclosure; and, quite apart from any other conditions in the policy. It did *not* do so.

25. I stated that this contract is *uberrimae fidei*. It is one of *utmost good faith*. The 1st defendant *faithfully* defended the suit brought by the estate of the deceased in *Eldoret HCCC 118 of 1996*. The 1st defendant instructed *Aggarwal & Company Advocates* to defend the suit. Upon demise of counsel, the insurance company appointed *Nyairo & Company Advocates* to take over the matter [plaintiff's exhibits 7(a) and (b)] who conducted the defence until conclusion of the case. Being aggrieved by the decree, the 1st defendant lodged an appeal to the Court of Appeal. It sought stay of execution in *Civil Application 284 of 2004*. On 23rd February 2007, the Court of Appeal granted a conditional stay: the appellant was to deposit the sum of Kshs 1,500,000 in an interest bearing account in a reputable bank within 30 days.

26. It is only at that late hour, *years* later, that the 1st defendant suddenly sought to repudiate the policy. And even then, it did not *notify* its *insured*: it instead authored a letter on 18th June 2007 to its lawyer, *Nyairo & Company*, instructing the firm to abandon the matter. The plaintiff was simply left unsheltered in the rain.

27. I thus readily find that the 1st defendant acted in bad faith. More importantly, the 1st defendant is *estopped* by its conduct from avoiding the claim by the estate of the deceased. See generally, *Margaret Nduta Kamithi & another v Kenindia Assurance Co. Ltd*, High Court, Milimani, Nairobi Commercial case 37 of 2000 [2001] eKLR, *Francis Kimani Kariuki v intra Africa Assurance Company Limited*, Nakuru High court, Civil case 224 of 2007 [2008] eKLR. The 1st defendant *led* the plaintiff to *believe* for all those years that he was entitled to indemnity against the decree.

28. My answer to issue number ii) framed at paragraph 17 of this judgment is thus as follows: the 1st defendant is *not* entitled to *avoid* the policy. Paraphrased, the 1st defendant is enjoined to *meet* the full decree in *Eldoret HCCC 118 of 1996*.

29. In the end, the defence proffered by the 1st defendant is a red herring. I find that the plaintiff has proved his case on a balance of probabilities. I declare that the 1st defendant is *not* entitled to *avoid* the policy; and, shall satisfy the final decree in *Eldoret HCCC 118 of 1996* *Prisca Cherono Kiti Cheruiyot v Kiara, Kipkemei Songok & another*. I also grant a *perpetual injunction* restraining the 2nd defendant from executing that decree against the *plaintiff*.

30. Costs follow the event and are at the discretion of the court. I grant the *plaintiff* costs of this suit to be met by the 1st defendant. There is no *privity of contract* between the 1st and 2nd defendants; and, the 2nd defendant did *not* call evidence in this case. I thus *decline* to award costs to the 2nd defendant.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 16th day of March 2017.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Mr. Chepkwony for the plaintiff instructed by Chepkwony & Company Advocates.

No appearance by counsel for the 1st defendant.

Mr. Yego for the 2nd defendant instructed by Z. K. Yego Advocate.

Mr. J. Kemboi, Court Clerk.