



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO.24 OF 2013**

**ICEA LION GENERAL INSURANCE CO. LTD.....PLAINTIFF**

**VERSUS**

**THE BOARD OF GOVERNERS**

**RIOMA MIXED SECONDARY SCHOOL.....DEFENDANT**

**AND**

**NICHOLAS MUNGE TAI & 22 OTHERS.....INTERESTED PARTIES**

**JUDGEMENT**

1. On 8<sup>th</sup> October 2015 the Plaintiff herein, ICEA Lion General Insurance Co. Limited, filed this case seeking the following reliefs:-
  - a. **A declaration that the Plaintiff is not liable and/or duty bound under the policy and/or bound by contract to compensate and/or settle any claims arising from the aforementioned accident in respect of the Defendant's motor vehicle registration KBT 580N Isuzu bus.**
  - b. **A declaration that the provisions of Section 10(4) of the Insurance motor vehicle third party risk) Act Cap.405 Laws of Kenya absolve the plaintiff from any liability in respect of and in relation to the aforesaid accident.**
  - c. **Costs of the suit.**
  - d. **Any other relief this Honourable Court may deem fit and just to grant.**
2. The cause of action is captured at Paragraph 3 of the said Plaint wherein the plaintiff states that the defendant was at all material times to this suit the registered owner of a motor vehicle registration number **KBT 580N, Isuzu Bus** (*hereinafter also known as the suit motor vehicle*) which was at all material times insured by the Plaintiff under a comprehensive commercial motor vehicle insurance policy.
4. On 10<sup>th</sup> July 2013 an accident occurred at Nyambunde area along Itumbe-Igare Road involving the suit motor vehicle, which accident resulted into deaths and injuries of the passengers therein and that upon receipt of the accident report the plaintiff dispatched investigators to the scene of the said accident to establish the circumstances leading to the accident. The accident in question received a lot of publicity and was widely covered in both the print and electronic media.
5. That the report that was filed by the investigators indicated that the defendant's said motor vehicle was overloaded at the time of the accident having carried excess passengers contrary to the

contract of insurance and traffic laws.

6. Particulars of breach of contract on the part of the defendant's agent or servant were particularized as follows:
  - a. **Allowing motor vehicle registration number KBT 580N Isuzu bus to be overloaded.**
  - b. **Overloading and/or carrying excess passengers on board motor vehicle registration number KBT 580N Isuzu bus.**
  - c. **Failing to observe the weight capacity limit set.**
  - d. **Failing to adhere to the Road Traffic Rules and regulations and safety precautions.**
  - e. **Exposing and/or causing the accident to occur.**
  - f. **Permitting and/or carrying uninsured passengers.**
  - g. **Driving at an excessive speed having overloaded the vehicle.**
  - h. **Failing to disclose the circumstances leading to the accident at the time of the report contrary to the Traffic Act.**
7. That as a result of the aforementioned breach on the part of the defendant the plaintiff is now expected to settle numerous claims as the insurer of the suit motor vehicle and is therefore likely to suffer financial loss resulting from such settlements.
8. The plaintiff thus contends that in line with the terms of their contract of insurance it is not **LIABLE** to settle any claims that may arise from the said accident which it alleges was caused by the defendant's breach of the terms of their contract. The plaintiff case is that as a result of the said breach, the defendant is wholly to blame for the accident and should therefore be held solely responsible to settle them.

### **Defendant's Pleadings**

9. In the defendant's written statement of defence and counterclaim filed on 28<sup>th</sup> November 2013 the defendant denies all the allegations contained therein and particularly denies being in breach of the insurance contract it had with the plaintiff over the suit motor vehicle. The defendant further contends that the number of persons aboard the suit motor vehicle at the time of the accident could not be authenticated, verified, or correctly tested unless and until the affected individuals filed claims in court so as to accord the defendant an opportunity to test the veracity, propriety capacity and authenticity of the claimants. The defendant's case is that adhered to and diligently observed all the terms and conditions of the contract.
10. In the counterclaim the defendant states as follows:
  - i. **That the defendant insured the suit motor vehicle for the period 16<sup>th</sup> January 2013 to 15<sup>th</sup> January 2014 after paying the agreed premiums.**
  - ii. **That the defendant's suit motor vehicle was involved in a road accident on 10<sup>th</sup> July 2013 and as a result some passengers therein sustained bodily injuries while others died. The defendant avers that the passengers aboard the suit motor vehicle were within the limit set or envisaged in the proposal form.**
  - iii. **That after filling the proposal form and paying premium, the defendant's motor vehicle was placed on comprehensive insurance cover and hence the plaintiff committed itself to be responsible for all liabilities to the third parties in the event of death or bodily injury.**
  - iv. **That in breach of the germane contract the plaintiff has unilaterally, arbitrarily and without any legal justification elected or decided to opt out of the contract by failing, refusing and/or neglecting to abide and/or perform its part of the bargain as spelt out in the germane insurance contract that commenced 16<sup>th</sup> January, 2013.**
  - v. **The defendant's claim against the plaintiff is for an order of the court compelling the plaintiff to abide with and/or unconditionally comply with the contract of insurance in respect to the suit motor vehicle for the period between 16<sup>th</sup> January 2013 up to 15<sup>th</sup>**

January 2014.

- vi. **The defendant maintains that the third party aspect of the said insurance cover was compulsory and that it would be against public policy for the plaintiff to avoid its obligations and/or seek to disengage from the pertinent insurance contract.**
- vii. **The defendant therefore prayed for the following orders:**
  - a. **That the plaintiff's suit be dismissed in with costs.**
  - b. **That judgment be entered in for the defendant as prayed for in the counter claim through an order directing the plaintiff to perform all its contractual obligations to the defendant institution and/or genuine third party claimants as per the insurance policy number 980-A1-118482-13 issued in favour of the defendant on the 16<sup>th</sup> January 2013.**
  - c. **A declaration that public policy enjoins the plaintiff to uphold the contract in terms of the compulsory third party insurance dimensions of the contract dated 16<sup>th</sup> January 2013.**
  - d. **Costs of the defence and counterclaim be awarded to the defendant.**

11. On 10<sup>th</sup> June 2015 a consent was recorded before Wakiaga J. in which parties agreed that the proceedings in all the related accident cases pending before the lower court be stayed pending the outcome of this suit and further that the interested parties be enjoined to this suit.

### **PLAINTIFF'S EVIDENCE**

12. The plaintiff called a total of three witnesses as follows:

1. **PW1 Jackson Mbuthia Kiboi**, who was the Plaintiff's Legal Assistant confirmed that the Plaintiff was the insurer of the suit motor vehicle for the period between 16<sup>th</sup> January 2013 to 15<sup>th</sup> January 2014. He also confirmed that an accident occurred on 10<sup>th</sup> July 2013 but his evidence was focused on the insurance proposal form and the policy document in which the defendant had declared the carrying capacity of the vehicle at 51 passengers yet the investigations that followed the accident established that the carrying capacity had been exceeded and that there were 71 passengers in the suit motor vehicle at the time of the accident which was clearly in excess of the agreed terms of their contract.
13. The contract of insurance between the plaintiff and the defendant produced as exhibit No.3 contained general exceptions that the insurance company would not be liable if the motor vehicle is carried more passengers than its capacity. PW1 thus prayed for declaratory order entitling the plaintiff to repudiate liability for any claims arising out of the accident that took place on 10<sup>th</sup> July 2013 involving the suit motor vehicle. He also prayed for the costs for this suit.
14. On being cross-examined by the defendant's counsel PW1 explained that a third party means any person other than the insured or his authorized driver. He stated that third party claimant's had served them with statutory notices and that the plaintiff was disclaiming all third party claims.
15. PW1 further stated that as at the time of his testimony in court, the plaintiff had received 67 statutory notices and 51 complaints filed at both Ogembo & Kisii Law Courts.
16. He also stated that they will only honour the claims filed by pedestrians if their cases succeeded in court and that the declaration they are seeking is against the passengers (*only*) who were inside the suit motor vehicle at the time of the accident. Lastly he conceded that under the law, an insurer cannot repudiate liability on the basis of overloading of the insured's motor vehicle.
17. On re-examination, PW1 contended that this case involves "*first parties*", who were passengers and according to the plaintiff, a third party is anyone outside the vehicle. He reiterated that they did not have a problem with the plaintiff compensating third parties but they were not going to pay "*first parties*".

18. On examination by the court, he confirmed that their policy does not define a "first party".

On further cross-examination he was categorical that the passengers aboard the suit motor vehicle at the time of the accident were not third parties. He referred to the passengers as "first parties" who were not covered under their policy.

19. **PW2 Patrick Kikombo Mukwata** was the investigator with the Zakeche Security Services Limited, which was contracted by the Plaintiff to investigate the circumstances surrounding the accident. He stated that his investigations revealed that there were a total of 75 passengers in the suit motor vehicle at the time of the accident. He produced an investigations report as P. Exhibit No.5.

20. On further cross-examination by Mr. Gichana counsel for the interested parties, he revealed that the sources of their report was the police, the schools involved, scene of accident and the Education Office. He testified that they visited the hospital where the injured persons were admitted but he however did not obtain a certified list of patients who were admitted following the accident. Lastly, PW2 confirmed that the information that they received from different agencies showed that the suit motor vehicle was carrying more passengers than the agreed 51 passengers limit.

21. On re-examination he reiterated that 75 was the number of passengers they got from release letters issued by the District Education Officer.

22. **PW3 No.68955 PC. Elmarid Owuor Magwanga** recalled that an accident occurred on 10<sup>th</sup> July 2013 at 6.30 p.m. along Itumbe-Igare road involving the suit motor vehicle that was ferrying students and teachers from about 6 schools to and from ball games. He stated that according to the District Education Officer (DEO) at Marani, each school had a list of the games participants which was as follows: Tambach School had 20 students, Engolo 16 students, Kenyoro – 16 students, Itibo 8 students, Entunda 7 students and Nyakeyo 7 students. In total he stated that there were about 82 students and 5 teachers on board the suit motor vehicle. He thus concluded that in total, there were about 87 passengers on board the suit motor vehicle at the time of the accident yet the suit motor vehicle's capacity was 51 passengers.

23. He further testified that upon concluding the investigations, they found that the driver of the suit motor vehicle was carrying excess passengers and that this could have contributed to the accident. He also testified that the driver of the suit motor vehicle one Joseph Amuoma was arraigned before Ogembo Law Courts on the 17<sup>th</sup> in Criminal/traffic Case No.121 of 2013 which case is still pending before the said court.

24. He produced extracts of the police file which included P3 forms, abstracts, inquest forms all which were marked a P. Exhibit 6. In concluding his evidence in chief, he contended that the main cause of the accident was overloading.

25. On cross-examination he stated that they went to the various schools to confirm if the number of students released by the schools corresponded with the record of the DEO but he did not confirm the tallies to the court. He revealed that the driver of the suit motor vehicle was charged with the following traffic offences:

- i. Causing death by dangerous driving.
- ii. Carrying uninsured passengers.
- iii. Carrying excess passengers.
- iv. Driving a motor vehicle without endorsement of class A in his driving license.

This marked the close of the plaintiff's case.

### **Defendant's evidence.**

26. The Defendant's evidence was led by DW1 Rawlings Onyango Juma the current principal of Matongo Boys Secondary who was at the time of the accident the principal of Rioma Secondary School, the defendant's herein. He testified that at the time of the accident, he was, by virtue of being the principal of the defendant school also the secretary to the defendant Board of Management and that the school had an insurance contract with the plaintiff in respect to the suit motor vehicle by which the plaintiff agreed to insure the suit motor vehicle comprehensively from 16<sup>th</sup> January 2013 to 15<sup>th</sup> January 2014 under policy No.980A111848213. He confirmed that the carrying capacity of the bus was 51 passengers.

27. DW1 stated that on 1<sup>0th</sup> July 2013, the sub-county director of education, Marani sub county, requested the defendant to hire out the suit motor vehicle to be used in ferrying to the games venue. He was however not able to tell how many students eventually boarded the bus but added that as at the time of his transfer from the defendant school to his current station, 51 claims arising out of the said accident had been filed in court against the defendant. He asked the court to dismiss this case and allow the defendant's counterclaim since the defendant's motor vehicle had a valid comprehensive insurance cover at the time of the accident.

28. On cross-examination by the Plaintiff's advocate Mr. Ayieko, he stated that the suit motor vehicle was covered under commercial use which meant that the defendant could hire it out to other schools.

#### **The interested party's case.**

29. The interested party did not lead any evidence in support of its case and after the close of the defence case, parties agreed to file and exchange written submissions before judgment.

#### **Plaintiff's Submissions.**

30. In its written submission filed on 18th November 2015, the plaintiffs, through its advocates Ms Onyinkwa & Co. Advocates submitted that, clause 2 of the general exceptions in the policy document stated as follows:

***" we will not be liable in respect to any accident, injury, loss or damages on liability if the motor vehicle is carrying more than its authorized capacity".***

According to the plaintiff the defendant breached the terms of the policy by carrying excess passengers thereby entitling the Plaintiff to repudiate liability in respect to its obligations under the policy.

31. The Plaintiff stated that the proposal form filled by the Defendant herein clearly stated that the insured motor vehicle had a carrying capacity of 51 passengers.

32. The Plaintiff relied on the following authorities in support of its submissions:

- i. **Kisii HCC No. 168 of 2005 Co-operative Insurance Co. Ltd - Vs- Bridgestone Construction Ltd**
- ii. **Nairobi HCCA No. 198 of 2008 Kenya Alliance Insurance Co. Ltd- Vs- Parklands Shade Hotel Ltd & Another**
- iii. **Supreme Court Of India National Insurance Co. Ltd- Vs- Anjana Shyam & Others**
- iv. **Chhattisgarh State Consumer Disputes Redressal Commission, Pandri, Raipur (C.G) Appeal No. FA/13/293 M/S Bhagwati Trading Company-Vs- Oriental Insurance Company Ltd.**

### **Defendant's Submissions**

33. Mr. Mose Nyambega counsel for the defendant submitted that since it was not disputed that the Defendant had a valid insurance policy issued by the Plaintiff in respect to the suit motor vehicle, the said policy was not voidable. His argument was that the power of the court to declare the contract void and order a cancellation of the policy only exists where the contract is voidable by reason of some defect existing at the inception of the contract.
34. He contended that since the Plaintiff had not alleged that the instant contract of insurance had a defect at inception, the bid by the Plaintiff to disclaim liability on the grounds advanced in the plaint is a legal fallacy. He further stated that the disclaimer suit was premature, speculative and contrary to the provisions of **Sections 4, 5, 8 and 16 of The Insurance (Motor Vehicle Third Party Risks) Act Cap 405 Laws of Kenya**- (hereinafter in this judgment referred to as "**The Act**").
35. He further contended that the exception clause in the contract of insurance limiting liability to third parties is void and counter to the provisions of **Sections 8 and 16 of The Act**.
36. The Defendant relied on the following authorities:
- i. **Corporate Insurance Co. Ltd -Vs- Stephen Kamau Wamute [2014] eKLR**
  - ii. **Intra Africa Assurance Co. Ltd -Vs- Simon N. Njoroge Avertano Da Costa [1997]eKLR**
  - iii. **Black's Law Dictionary, Ninth Edition**
  - iv. **General Principles of Law of Insurance by E.R HARDY IVAMY**
  - v. **The New Great Insurance Company of India -Vs- Lilian Evelyn Cross & Anor;**
  - vi. **Bird's Modern Insurance Law**

### **Interested Parties Submissions**

37. Mr. Gichana, advocate for the interested parties, directed his submission on the relevant provisions of The Act and stated that while **Section 4 of The Act** makes third party insurance mandatory for all vehicles used on the road, **Section 16** of the act provides for instance when the extent of the insurance cover cannot be limited.
38. According to the interested party, under the said section 16 (c) of the Act the number of person's that a vehicle carries cannot exempt an insurer from liability in respect to third parties.
39. The interested party relied on the case of **Thomas Muoka Muthoka & Anor -Vs- Insurance Company of East Africa Ltd. NRB HCCC 389 of 2007.**

### **Analysis and determination.**

40. After considering the pleadings filed in this case, the evidence tendered during the hearing, the submissions by the counsels and the authorities cited I note that the following are the issues to be determined by this court:
- i. **Was there a valid insurance contract between the plaintiff and the defendant as at 10<sup>th</sup> July 2013 when the suit motor vehicle got involved in an accident?**
41. It is not in dispute that on 10<sup>th</sup> July 2013, an accident occurred along the Itumbe/Igare road involving the defendant's motor vehicle registration number KBT 580H an Isuzu Bus (the suit motor vehicle). It is also not disputed that the suit motor vehicle was at the time of the accident comprehensively insured by the plaintiff under policy number **980-AI-II8482-13**. Indeed the plaintiff in its evidence produced as exhibits, a certificate of change of name of the plaintiff, the proposal form, the policy document between the plaintiff and defendant and a motor accident report form.

ii. **What is the meaning of the term third party in relation to the policy document and the Insurance (Motor Vehicle Third Party Risk) Act Cap.405 Laws of Kenya?**

42. The term "*third party*" is defined at clause 2 of the policy document as follows:

***“Any person other than you or your authorized driver who has been injured or whose property has been damaged.”***

Black's Law Dictionary defines "third Party" as follows:

***"A party who is not a party to a lawsuit, agreement or other transaction but who is somehow implicated in it; someone other than the principle parties."***

43. **Section 5 (b) (ii)** of The Insurance (Motor Vehicle Third Party Risks) Act Cap.405 Laws of Kenya provides as follows:

**"5. In order to comply with the requirements of Section 4, the policy of insurance must be a policy which:-**

**(b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road:**

**Provided that a policy in terms of this section shall not be required to cover**

**(ii) except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims rose;"**

44. To my mind, the students and teachers who were travelling as passengers in the suit motor vehicle at the time of the accident fit into the category and definition of third parties as stated herein above by virtue of the fact that the suit motor vehicle had been hired for their use they were neither parties to the insurance contract nor the drivers of the suit motor vehicle. They were the very reason why the suit motor vehicle was purchased and insured in the first place. The plaintiff's argument that the third parties covered under their policy were pedestrians outside the suit motor vehicle, if taken literally would mean that the plaintiff would still have repudiated liability in respect to all the passengers even if their number was the exact agreed 51 or even less since according to the plaintiff, all persons inside the bus were "first parties" not covered by the policy. I find this argument by the plaintiff to be illogical, mischievous and reveals that the real intention of the plaintiff in this case is to avoid liability in respect to the passengers aboard the bus in totality and as such, the issue of the bus having been overloaded appears to me, to be more of an excuse than a reason to repudiate liability. It is my humble view that it is inconceivable that the defendant could have taken out a comprehensive commercial insurance cover only to cover the risk of pedestrians who may be knocked by the bus and to leave out the students and school fraternity in whose favour the bus was purchased in the first place. The plaintiff's argument goes contrary to the real purpose of the Act, which was to protect the interests of third parties.

45. PW1 introduced the term "first parties" to fortify the plaintiff's argument that the passengers inside the bus were not third parties and were therefore not covered by the policy. I find that this term "first parties" is unknown in insurance parlance and was not defined by the plaintiff in the policy document. It is my finding that all the passengers on the suit motor vehicle are third parties under the law and are covered under the mandatory protection of Section 5(b)(ii) of The Act.

46. **Was the suit motor vehicle overloaded as at the time of the accident?**

PW1, Mr. Jackson Kiboi testified that the maximum carrying capacity of the suit motor vehicle was 51 passengers yet as at the time of going to trial (October 2015) the Plaintiff had received sixty

seven (67) statutory notices from various claimants arising from the said accident.

PW2 from Zakache Security Services Ltd produced the investigation report which showed that the passenger manifest of the suit motor vehicle had 78 passengers on board while it was only authorized to carry 51 passengers.

PW3 the investigation officer, Ogembo Traffic Base testified that the police investigations revealed that at the time of the accident the bus was carrying 87 passengers. His testimony was that the probable cause of the accident was the carrying of excess passengers. He added that the insured's driver was charged with an array of traffic offences including carrying uninsured passengers, causing death by dangerous driving and overloading.

He also produced the police file in support of the plaintiff's case and a perusal of the witnesses statements contained in the said file, which includes the statement of one Amuoma Mariera who was the driver of the ill-fated bus, reveals that the suit motor vehicle was overloaded as some students were either standing on the aisle of the suit motor vehicle or were seated on each other.

The defendant called one witness, the principal of the defendant school at the time of the accident one Rawlings Onyango Juma who confirmed the defendant had a comprehensive insurance cover for the suit motor vehicle running from 16<sup>th</sup> January 2014 to 15<sup>th</sup> January 2015. He was, however not able to tell exactly how many passengers were inside the suit motor vehicle at the time of the accident since he did not witness the accident.

47. An analysis of the evidence adduced by the plaintiff's witnesses, on a balance of probabilities, shows that the number of passengers on the suit vehicle exceeded the 51 passenger limit set by the conditions of the insurance policy. It is my humble view that even though the plaintiff did not prove the exact number of students and teachers aboard the suit motor vehicle at the time of the accident, the plaintiff nevertheless proved, on a balance of probabilities, that the said number exceeded the 51 passengers which was the capacity of the suit motor vehicle. I say so because once the plaintiff adduced the evidence suggesting that the bus had carried more passengers than the 51 agreed upon, the burden of proof shifted to the defence to call evidence so as to prove that the contrary was the position, and that indeed the insured motor vehicle did not exceed its passenger limit.
48. After weighing the above evidence, and considering that this is a civil suit in which strict proof of facts is not mandatory, I find that, on a balance of probability, the suit motor vehicle had carried more than 51 passengers at the time of the accident.
49. Having made a finding that all the passengers on the suit motor vehicle were third parties within the meaning of the The Act, and having found that on a balance of probabilities the passengers in the said vehicle exceeded the 51 passenger limit agreed upon in the insurance policy, I will now shift my focus to the the most critical part of this judgment, which is, whether or not the plaintiff can avoid liability by virtue of the fact that the defendant was in breach of an express condition of their contract in respect to the suit motor vehicle's passenger limit.
50. Clause 2 of the general exceptions contained in the motor vehicle policy document signed between the plaintiff and defendant reads:

***“we will not be liable in respect of any accident, injury, loss, damages on liability if the motor vehicle is carrying more than its authorized capacity.”***

51. Sections 8, 16 and 10(1) of The Act on the other hand provides as follows:-

**Section 8;**

**“Any condition in a policy of insurance providing that no liability shall arise under the policy or that any liability so arising shall cease in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to claim under the policy, shall, as respects such liabilities as are required to be covered by a policy under Section 5, be**

**of no effect.”**

**Section 5** of The Act states:-

**“In order to comply with the requirements of Section 4, the policy of insurance must be a policy which:-**

- a. **Is issued by a company which is required under the Insurance Act, 1984 (Cap. 487) to carry on motor vehicle insurance business; and**
- b. **Insures such person, persons in classes of persons specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on the road:**

52. In **Thomas Muoka Muthoka & Another –vs- Insurance Company of East Africa Limited [2008] eKLR** Onyancha J, observed the following on the above section:

**“The provision to the above immediate provision excludes persons who die or sustain injury while in their course of employment or if their liability is contractual. It however includes and preserves liability in respect of persons being carried as passengers for hire or regard in or upon or entering or getting on to or alighting from the insured’s vehicle at the time of the accident. The proviso also now excludes liability of the relevant person above mentioned if the sum is beyond 3 million as per an amendment made by Act No.10 of 2006, Section 34.”**

53. The provisions of **Section 8** of The Act should be read hand in hand with **Section 16** of the same Act for comparison purposes and to give maximum effect of their meanings.

**Section 16** provides:-

**“Where a certificate of insurance has been issued under section 7 to the person by whom a policy has been effected so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any of the following matters:**

- a. **The age or physical or mental condition of persons driving the vehicles; or**
- b. **The condition of the vehicle**
- c. **The number of persons that the vehicle carries or**
- d. **The weight or physical characteristics of the goods that the vehicle carries; or**
- e. **The times at which or the areas within which the vehicle is used; or**
- f. **The horse-power or value of the vehicle; or**
- g. **The carrying on the vehicle of any particular apparatus; or**
- h. **The carrying on the vehicle of any particular means of identification other than any means of identification required to be carried by or under the Traffic Act (Cap.403),**

**shall, as respects such liabilities as are required to be averred by a policy under paragraph (b) of the Section 5, be of no effect.”**

**Provided that nothing in this section shall require an insurer to pay any sum in respect of the liability of any person otherwise than in or towards the discharge of that liability, and any sum paid by an insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue of only this section shall be recoverable by the insurer from that person.”**

54. The interpretation of both **Section 8** and **16** was dealt with in the case of **The Great Insurance company of India Ltd –vs- Lilian Everlyn Cross and Another [1966] E.A 90** at page 97 Newbold V.P. in reference to **Section 8** of the Act, stated;

**“The effect, therefore, of this Section is that a condition in a policy of insurance providing**

**that no liability shall arise under the policy is ineffective in so far as it relates to such liabilities as are required to be covered by a policy under Section 5(b) of the Act and in, so far as any such condition is prayed in aid to avoid liability to a third party who has been injured. In so far, however, as the relationship of the insurer and the insured is concerned, then, by virtue of the proviso to the section, if the policy contains - provision requiring the insured to repay to the insurer any amount which the insurer has had to pay to a third party in the circumstances in which the condition applies, such a provision is perfectly valid.”**

55. In the New Great Insurance Company of India Ltd case, (supra) the insurer wanted to avoid paying compensation to an injured third party in basis that the driver, who was driving the insured motor vehicle, was not an authorized driver within the definition of a driver under the terms of the insurance policy entered between the insurer and the insured. The court, however, established that the policy on the face of it, purported to be one which covered the liabilities required to be covered by the Act. The court found that the insurer was trying to avoid compliance of the conditions as well as liability imposed on it by the proviso to **Section 5 (b)** by use of the mere definition of the "authorized driver". The court then pronounced that the result of such avoidance, if permitted, would be that a policy which purported to be covering the liabilities required by the Act be covered, was not and would never be such a policy. The result would be that such a policy would be a misleading document that did not only expose the owner of the motor vehicle to a commission of an offence as provided under the Section but also denying the third parties the protection granted to them under the Act.

56. It was further held in the New Great Insurance Company (supra) case that there was no great difference in meaning between **Section 16** and **Section 8** already examined above, except that while **Section 8** dealt with a condition in a policy which sought to either prevent liability from arising or to avoid a liability which had arisen, **Section 16** dealt with an attempt to restrict or limit the insurance to certain specified matters.

57. The appeal court in the New Great Insurance Company (supra) case stressed more on the intention and purpose of the Act which it declared was **"to provide protection to third parties who receive injury"** and who seek recovery of compensation from the insurer under a contract of insurance to which they are not party.

58. **Section 10** provides;-

**"10 (1) If, after policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under para (b) of Section 5 of this Act (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid....or may have avoided....the policy, the insurer shall.....pay to the persons entitled to the benefit of the judgment any sum payable there under in respect of the liability...."**

**(4) No sum shall be payable by an insurer under....this section if, in an action...he has obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of material fact, or by a representation of fact which was false in some material particular...**

**(6)....liability covered by the terms of the policy means a liability which is covered by the policy or which would be so covered but for the fact the insurer is entitled to avoid....or has avoided...the policy"**

In the present case, as I had indicated earlier in this judgment, the parties in this case had by consent agreed stay all third party claims that were pending before the Senior Principle Magistrate's Court at Ogembo pending the determination by this case, therefore the question of whether or not the plaintiff is entitled to avoid liability under **Section 10(4) of the Insurance (Motor Vehicle Third Party Risks) Act Cap.405** for the reason that the suit motor vehicle which

had exceeded its passenger capacity does not arise since no judgment has been made directing the plaintiff to compensate the third parties. The bottom line is that the defendant had a valid insurance cover issued by the defendant at the time the accident.

59. At this juncture I wish to borrow the reasoning in the New Great Insurance Company case (supra) and find that even if the plaintiff, has on a balance of probabilities, proved that the suit motor vehicle may have been overloaded at the time of the accident, that ground would still not entitle them to repudiate liability in respect to third parties.

In the said case it was stated as follows:

**“It is submitted on behalf of the insurer that this section only applies where the liability is covered by the terms of the policy and that in this case no liability arose under the policy for any injury caused by a disqualified driver. I accept that this section only applies where both the liability is required under Section 5(b) to be covered by a policy and the liability is in fact covered by the terms of the policy or would be so covered were it not for the fact that according to the terms of the policy the insurer is entitled to avoid it. A liability may be required under Section 5(b) to be covered by a policy and yet the liability may not in fact be covered by the particular policy. An example of this is where a policy is taken out relating to the use of the vehicle by the insured only but in fact the vehicle is used by another person. Another example would be where the insured obtained the policy by non-disclosure of a material fact. This would enable the insurer to take action in accordance with the appropriate provisions of Section 10 and to obtain a declaration that although the policy apparently covered the liability, never the less in fact it did not do so as there was never in existence a contract of insurance.”**

60. On the facts of this case, however, the liability was both required to be covered by **Section 5(b)** and was in fact, so covered and therefore the condition which excludes liability in the case of overloading is, by dint of the very clear provisions **Section 8** rendered ineffective.

61. In conclusion therefore I find that the defendant who is the owner of the suit motor vehicle had taken out a valid policy of insurance in compliance with the Act and in order to indemnify it in respect of liability to the third parties who may suffer any loss or injury resulting from an accident involving the suit motor vehicle. In my humble view Section 5(b) of the Act covered the defendants, as the owners of the suit motor vehicle, from any liability or claims by third parties arising from the use of the suit motor vehicle on the road. Under Section 8 of the Act, the clause in the policy limiting the number of passengers to 51 is, in my thinking, immaterial.

62. **Section 4(1)** of the Act provides that a person may not use or cause or permit a motor vehicle to be used on the road unless there is a policy in force covering the use of such a motor vehicle.

63. In this case the use of the suit motor vehicle was covered by a valid policy and the fact that the suit motor vehicle may have been overloaded at the time of the accident does not exempt the plaintiff from liability. To my mind, **Section 4** of the Act merely stipulates that a policy in compliance with the requirements of the Act, must be in force. It is the user of the vehicle and not its carrying capacity that is required to be covered by a policy of insurance.

64. Having made a very detailed analysis of this case and taking into account the relevant law and authorities, I hereby make orders as follows:

- a. The plaintiff's suit is dismissed with costs to the defendant.
- b. The order staying all the related civil suits pending before the lower court is hereby lifted.
- c. The defendant's counterclaim is hereby allowed but only in respect to orders that the plaintiff shall perform all its contractual obligations to the defendant in respect to the genuine third party claimants in line with the insurance policy number 980 - A1-118482-13 issued to the defendants

on 16th January 2013.

Dated, Signed and delivered in open court this 7th day of **March** 2016

**HON. W. OKWANYI**

**JUDGE**