



IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 500 OF 2009

CORPORATE INSURANCE

COMPANY LIMITED PLAINTIFF

Vrsus

STEPHEN KAMAU WAMUTWE DEFENDANT

JUDGMENT

Avoiding policy of insurance

[1] The Plaintiff sought the following relief in its amended plaint dated 9/9/2009;

- a) A declaration that it is and has at all material times been entitled to avoid the policy of Insurance No.C01/080/1/900024/2005 issued on 2/11/2005 as subsequently renewed apart from any provision contained therein on the ground that the said policy of insurance was obtained by the non-disclosure of material facts and/or by the representation of facts which were false on come material particular or particulars.
- b) A declaration that the plaintiff is not liable to indemnify the defendant for claims by the passengers injured or killed as a result of the said accident under the said policy or under the Insurance (Motor Vehicle 3rd party Risks) Act Cap 405.
- c) A declaration that the plaintiff is not liable under the Insurance (Motor vehicles 3rd party risks) Act to indemnify the defendant for claims by the owners of motor tractor registration number KBG 165A.
- c) Costs of and incidental to this suit and interest thereon at court rates.

[2] The Defendant was served with hearing Notice and an affidavit of service was filed on 30th June, 2014. The Court was satisfied with the service and allowed the Plaintiff to prosecute its case on 10th March, 2014. During the hearing, the Plaintiff called one witness; Mr. TIBERIUS NYANG'AU MANYURA (hereafter PW1). PW1 is the legal officer of the plaintiff company and had worked there for 2 years. His responsibilities included advising the company on legal claims.

He told this court that the company received a proposal for insurance from the Defendant but through his Agent for, and insured the Defendant's motor vehicle registration number KAE 114Y. The said motor vehicle was a lorry make Mercedes Benz with a carrying capacity of 12 tons. The lorry was to be used for general cartage of goods. The cover was third-party insurance and the policy number was C01/080/1/90024/2005. He further stated that Clause 044 restricted overloading of and or carrying of unauthorized passengers in the vehicle. Later, the company received a notification that the lorry had been involved in an accident on 29th February, 2009, and a demand letter by Wambugu Muriithi & Co Advocates claiming damages on behalf of a deceased passenger in the vehicle. On receipt of the foregoing notifications, the company commissioned an investigation into the accident. A report dated 20th July, 2009 was compiled and found that the insured vehicle was being used for carrying a bulldozer tractor and two unauthorized passengers in its cabin. The load was 20.5 tons. On that basis, the company repudiated the policy of insurance on the vehicle. ICEA Insurance Company also sent a demand to the company for compensation on damages to and loss of the tractor. The lawyers for the company issued statutory notices for the repudiation of policy. The company should, therefore, be absolved from liability. He produced the proposal form, the policy of insurance, demand letters by claimants, investigations report, supplementary report and the statutory notice as exhibits in the case. The plaintiff then withdrew the documents filed earlier on 22.6.2012.

[4] In support of its case, the plaintiff also relied on the statement of DORIS ING'AHIZU. It also filed submissions which I have considered. The essential core of those submissions emphasized that the plaintiff is an authorized insurer within the meaning of the Insurance Act (Cap 487) as read with The Insurance Vehicles Third Party Risks) Act (Cap 405) (hereinafter called "cap 405") of the laws of Kenya. It also renewed commercial motor vehicle insurance cover on the 27th day of October 2005, and undertook to cover third party risks in respect of a motor lorry registration number KAE 114Y belonging to the Defendant and described in policy Number C01/080/1/900024/2005. The liability to 3rd party risks in the said insurance cover specifically excluded passengers who may be injured whilst in the Defendant's motor vehicle as passengers as can clearly be seen in the exceptions to Section II at page 2 of the said document. The plaintiff submits that the said Insurance Policy No. C01/080/1/900024/2005 which was renewed annually was confined to the carriage of goods whose weight did not exceed twelve (12) tons only and by giving the policy the plaintiff agreed that for the period of the existence of the cover it would indemnify the Defendant against liability to third parties in case of accident caused by or arising out of the use of the said motor vehicle for death or bodily injuries suffered. But, third parties excluded passengers in the insured motor vehicle. In pursuance to the said policy and in accordance with the provisions of Section 7 of Cap 405 the Plaintiff delivered to the defendant a Certificate of insurance.

[5] The Plaintiff further submitted that in taking the said policy, the Defendant failed to disclose material facts and/or represented facts that were false as set out hereunder;

- i. At all material times the motor vehicle was used for carriage of and/or transportation of passengers.
- ii. The defendant in diverse dates during the existence of the said policy and particularly on 20/2/2009 allowed and/or permitted the said motor vehicle to be used for carriage and/or for transportation of passengers in contravention of the clear terms and conditions of the said policy.
- iii. The Defendant in diverse dated during the existence to the said policy and particularly on 20/2/2009, the Defendant allowed and/or permitted the said motor vehicle to be used for carriage of goods whose weight exceeded the limit of cargo that the motor vehicle was insured to ferry.

[6] The personal representatives of the deceased passenger have given notice to institute civil proceedings against the Defendant on the grounds that the deceased died as a result of the Defendant's driver negligence in driving the insured motor vehicle. But, according to the plaintiff, it is entitled to avoid the said policy on the grounds that; 1) the policy was obtained by the Defendant on non-disclosure and/or misrepresentations of facts and 2) under the said policy it cannot and is not obligated to indemnify any passengers travelling in the said motor vehicle and/or

the owners of the said motor tractor. The plaintiff relied on the following list of authorities in support of its case;

1. *Civil appeal NO. 12 of 1998 Corporate Insurance Co. Ltd Vs Elias Okinyi Ofire*
2. *HCCC No. 1770 of 2001 Gateway Insurance Co.Ltd Vs Azar Jamil Anwar*
3. *HCCC No. 22 of 2003 Gateway Insurance Co. Ltd Vs Nganga Njuguna*
4. *HCCC No. 1078 of 2000 Gateway Insurance Co. Ltd VS Sudan Mathews*

THE DETERMINATION

[7] I have considered all the evidence and documents produced in court. I have also considered the submissions filed by the plaintiff in support of its case. I see two distinct issues emerging out of the pleadings and evidence before me. The first one is; whether the Plaintiff is entitled to avoid the policy of insurance herein. And the second is; whether the plaintiff is not obligated to pay any claim under the policy of insurance herein. The first issue is of a general nature and may entail the second one. But I will invert the issues and start with the second one. The answers to these questions lie in the law and the policy of insurance. The Policy herein is a Commercial Vehicle Policy covering third party risks. My reading of the policy is that it was not insurance for carriage of passengers for hire or reward. I will, therefore, in accordance with sub-clause (iii) of the exceptions to section II of the policy grant prayer (b) in so far as it relates only to passengers in the insured motor vehicle other than those carried by reason of or in pursuance of a contract of employment. See the case of **NBI HCCC NO 22 OF 2003 GATEWAY INSURANCE COMPANY LIMITED v NGANGA NJUGUNA**. But that will not warrant a general declaration to avoid the entire policy against all and sundry because the component for third party risks under section II entitled *Liability to Third Parties* is subject to the Insurance (Motor Vehicle Third Party Risks) Act (Cap 405) which obligates the insurer to bear such liabilities as are required by the said Act to be insured. However, I am acutely aware that where the insurer is so liable under the Act for such liabilities as are required to be insured by the Act, the insured is entitled to indemnity or repayment of all such sums which it will have paid out under the Act but which it would not have been obliged to pay but for the provision of the Act. Therefore, in my own thinking and sense, it is not tenable to issue a general declaration to avoiding the policy entirely unless requirements in section 10 of the Act are fully satisfied. The policy in question covered carriage of goods and there seems to be claims from the owner of bulldozer which had been carried by the insured motor vehicle. The insurance company seeks to avoid the policy on the ground that the policy was obtained by non-disclosure of a material fact and or representations of facts which were false in material particulars. The insurance company claims that the insured vehicle was to carry 12 tons but at the time of the accident it carried 20.5 tons. The insurance company understood that weight of the load to be overloading off the insured vehicle and therefore contrary to Clause 044 of the policy. However, the said clause 044 talks of *“carrying...a greater load than permitted by any law for the time being in force”*. No concrete evidence was adduced on these matters. The two positions, therefore, can only be reconciled through evidence. And since those are matters of evidence, it will be unjust to try the intended suit by the third party at this forum where he is not a party. Thus, I deny the general declaration which will allow the insurance to avoid the entire policy.

[8] The upshot is that:

- a) I deny a declaration that it is and has at all material times been entitled to avoid the policy of Insurance No.C01/080/1/900024/2005 issued on 2/11/2005 as subsequently renewed.
- b) I allow a declaration that the plaintiff is not liable to indemnify the defendant for claims by the passengers (other than passengers carried on the insured vehicle by reason of or in pursuance of a contract of employment) who were injured or

killed as a result of the accident which occurred on 29th February, 2009, under the said policy or under the Insurance (Motor Vehicle Third Party Risks) Act Cap 405.

c) I deny a declaration that the plaintiff is not liable under the Insurance (Motor Vehicles Third Party Risks) Act to indemnify the defendant for claims by the owners of motor tractor registration number KBG 165A.

c) Costs shall be borne by the Defendant.

Dated, signed and delivered in court this 7th day of October, 2014

F. GIKONYO

JUDGE