



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 680 OF 2006

INSURANCE COMPANY OF EAST AFRICA LIMITED.....PLAINTIFF

-VERSUS-

EVA VIVIAN WANJIRU MBOGORO.....DEFENDANT

JUDGEMENT

1. The current suit was instituted by way of a Plaint dated **11th December 2006** and filed on even date. The Plaint was later amended on **25th July 2012** and filed in Court on **27th July 2012**.
2. The Plaintiff is described as a limited liability Company and licensed as an insurance Company under the Insurance Act (Cap 487) Laws of Kenya. The Defendant is an adult female and working for gain within the Republic of Kenya.
3. The facts of the case are as follows. On or about the **9th of December 2005**, the Defendant was desirous to effect insurance on her then unregistered motor vehicle, Toyota Corolla saloon car, with the plaintiff. The Defendant signed and delivered to the Plaintiff a private motor car insurance proposal and declaration in writing dated **9th December 2005**. According to the Plaintiff, the Defendant agreed that the said proposal would be held to be promissory and to be the basis of the insurance which she desired to effect.
4. It is the Plaintiff's contention that in the said proposal and declaration, the Defendant misrepresented to them that the motor vehicle in question would be used exclusively for social, domestic and pleasure purposes. In this proposal, the Defendant answered in the affirmative the question as to whether the car would be used exclusively for social, domestic and pleasure purposes. As to whether the car would be used to carry passengers for hire or reward, the Defendant's answer was in the negative. It is on the faith and strength of this proposal and the representations contained therein that the Plaintiff insured the Defendant's motor vehicle registered as KAV 132C under a private motor car policy of insurance No. 020/970/023720/2005 issued on **3rd March 2006**.
5. On or about **26th September 2006**, the Plaintiff received notices of institution of suits under Section 10 (2)(a) of the Insurance (Motor Vehicles Third Party Risks) Act notifying them of two suits instituted at the Chief Magistrate's Court in Naivasha. In the said suits, the Plaintiffs were seeking damages for injuries allegedly sustained following an alleged accident on **3rd March 2006** involving the Defendant's vehicle registration No. KAV 132 C. The Plaintiff further received a notice of intention to institute a suit, sometime in April 2008, under Section 10 (2) (a) of the Insurance (Motor Vehicles Third Party Risks) Act. In the said notice, the Plaintiff was notified that the Estate of Anderson Sayo Dzuya intended to

institute a suit seeking damages for injuries allegedly sustained following an accident on 10th April, 2006 involving motor vehicle registration No. KAV 132 C.

6. It is the Plaintiff's contention that at the time of the alleged accidents referred to above, the Defendant's Motor Vehicle was being used for purposes outside the policy. According to the Plaintiff, the said vehicle was being used to carry passengers for hire and reward. It is therefore the Plaintiff's position that the policy of insurance was obtained by misrepresentation and non disclosure of material facts by the Defendant.

7. It is also the Plaintiff's contention that the Defendant breached the terms and conditions of the policy which required that the motor vehicle be driven by a qualified and authorised driver at all times. The Policy also required the Defendant to notify the Plaintiff of any occurrence which would give rise to the claim under the policy. It is averred that the Defendant failed to report the accidents to the Plaintiff.

8. In light of the foregoing, it is the Plaintiff's case that the Defendant is not entitled to indemnity under the said Policy. It is further the Plaintiff's case that they are not liable under the Insurance (Motor Vehicles Third Party Risks) Act to satisfy any Judgment that may be obtained against the Defendant in connection with the use of motor Vehicle KAV 132C. It is therefore the Plaintiff's position that they are entitled to avoid the policy.

9. The Plaintiff prays for Judgment against the Defendant for:-

a. A declaration that the policy of insurance in respect of motor vehicle registration No. KAV 132 C was obtained by non disclosure of material facts by the Defendant which was false and the Plaintiff is entitled to avoid the policy.

b. A declaration that the Plaintiff is not liable to indemnify the Defendant or to satisfy any Judgment that may be obtained in connection with or any other use of motor vehicle registration KAV 132C.

c. The costs of this suit together with interest thereon at Court rates from the date of Judgment until payment in full.

10. The suit was controverted by the Defendant who filed the defence dated 7th February 2007 on even date. The Defendant admits that she signed and delivered a proposal and declaration in writing to the Plaintiff. However, she denies making any false misrepresentations or promise. It is the Defendant's position that at no time did she warrant to the Plaintiff that the said motor vehicle would be used exclusively for social domestic and pleasure purposes.

11. It is further the Defendant's position that in consideration to the premiums paid, the Plaintiff agreed to indemnify the Defendant against all claims which the Defendant would be legally liable to pay. According to the Defendant, the claims included those made by any persons including passengers in connection with the use of the insured vehicle. Therefore, it is the Defendant's case that the Plaintiff covered the claims sustained by the Plaintiffs in the suits instituted at the Chief Magistrate's Court in Naivasha. It is further her case that by virtue of the policy, the Plaintiff is liable to indemnify her in respect of the Judgment(s) arising out of the said suits, if any.

12. The Plaintiff filed a list of documents in support of its case on **20th February 2012**.

13. The hearing commenced on **5th May 2014**. The Defendant was not present despite being served with the hearing notice by the Plaintiff. There is an affidavit of service dated **4th March 2014** and filed on **23rd April 2014** as well as a Certificate of posting as proof that the hearing notice was served upon the Defendant by way of registered post. Being satisfied that the Defendant was duly served, I proceeded to hear the matter. The first witness of the Plaintiff was one Peter Muriuki Kaniaru, an employee of Millenium Global Insurance Investigation. He relied on the report from their investigations dated **17th**

August 2006 to be found at pages 23 to 56 of the Plaintiff's bundle of documents.

14. PW 1 testified that the aforesaid Company was instructed by the Plaintiff to conduct investigations on an accident involving Motor vehicle KAV 132 C. The investigations established that at the time of the accident, the insured, who is the Defendant herein, had given the vehicle to one Anthony Mathenge. The said Antony had in turn given the Motor vehicle to one Johnston Muchai who was apparently involved in the accident of **10th April 2006**. According to the Investigations report, Muchai had called Mathenge informing him that he had been involved in an accident after hitting a dog. However, it turns out he had hit a person according to a report from a Police Officer from Kasarani Police Station.

15. The second witness was Jackson Kiboi, a claims officer with the Plaintiff. He relied on his Witness statement dated **16th June 2014** and filed on **17th June 2014**. He testified that the Plaintiff instructed Millenium Global Insurance Investigators to conduct an investigation on the accident involving the insured motor vehicle on **10th April 2006** along Thika Road.

16. PW 2 testified that the investigations were conducted and the Plaintiff received a report on 24th August 2006. The said report disclosed that the insured vehicle had been hired out to one Johnston Muchai Muthanga for reward.

17. It is his position that the insurance cover was solely meant for private, domestic and pleasure use. Therefore, the Defendant breached the terms of the insurance by giving out her car for hire.

18. The plaintiff filed written submissions in support of its case on **24th June 2014**. The Defendant did not file submissions.

ANALYSIS

19. I have considered the pleadings herein and it is my view that the main issue for determination is whether the Plaintiff is entitled to avoid the policy under the "Limitations as to use" clause under the Policy.

20. It is not in dispute that the Defendant had a policy of insurance with the Plaintiff. There were terms and conditions to be adhered to by both parties in the said policy. The proposal form, being the basis of the insurance policy, had questions to be answered. In this proposal, the Defendant answered in the affirmative the question as to whether the car would be used exclusively for social, domestic and pleasure purposes. As to whether the car would be used to carry passengers for hire or reward, the Defendant's answer was in the negative.

21. It is the Plaintiff's case that at the time of the alleged accidents, the Defendant's motor vehicle was being used for purposes outside the policy. According to the Plaintiff, the said vehicle was being used to carry passengers for hire and reward. The investigations report shows that the vehicle was hired out to one Johnston Muchai Muthanga for reward. The report (*page 32 of Plaintiff's bundle of documents*) indicates that the insured vehicle was plying for hire and reward and that it had been leased to a car hire company. This report relates to the accident that occurred on **10th April 2006**. It is therefore the Plaintiff's position that the policy of insurance was obtained by misrepresentation and non disclosure of material facts by the Defendant.

22. The Plaintiff did not produce substantive evidence, for example a contract or receipt(s) to prove that the insured motor vehicle had indeed been hired out for reward. However, the Defendant did not adduce any evidence to rebut the Plaintiff's allegations that the vehicle had been hired out for reward.

23. There is no report on the alleged accidents that occurred on 3rd March 2006 involving the insured's motor vehicle. At paragraph 7 (a) and (b) of the Amended Plaint, it is stated that the Plaintiffs in Civil suit No. 699 of 2006 and Civil Suit No. 705 of 2006 respectively, were seeking damages for injuries sustained in an alleged accident on 3rd March 2006. Therefore, it is not clear under what circumstances the said

Plaintiffs were seeking damages for injuries, that is, whether they were passengers or pedestrians.

24. That notwithstanding, it seems that the Defendant did not notify the Plaintiff of the said accidents. In the Insurance Policy, one of the conditions was that the Defendant notifies the Insurer, the Plaintiff herein, of any accidents as soon as possible. In this case, the Defendant was in breach of the policy, for failing to notify the Plaintiff of the alleged accidents. In the circumstances the Plaintiff is not liable for any claims or Judgments that may arise from the alleged accident that occurred on 3rd March 2006.

25. It is further the Plaintiff's case that by breaching the terms of the insurance policy, the Defendant is not entitled to indemnity by the Plaintiff. On the other hand, in her Defence, it was the Defendant's position that in consideration to the premiums paid, the Plaintiff agreed to indemnify the Defendant against all claims which she would be legally liable to pay.

26. Therefore, the bone of contention is whether or not the Plaintiff is liable to indemnify the Defendant for the accidents involving the insured motor vehicle.

27. As earlier stated, the Defendant did not appear at the hearing of this suit. Therefore, the Plaintiff's claim is uncontroverted. In the case of **Janet Kaphiphe Ouma & Another Vs Marie Stopes Internationals Kisumu HCCC No. 68 of 2007**, the learned Judge citing the decision in **Edward Muriga vs Nathaniel D. Shulter, Civil Appeal No. 23 of 1997** said:

“In this matter, apart from filing its statement of Defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...sections 107 and 108 of the Evidence act are clear that he who asserts or pleads must assert the same by way of evidence.”

In **AUTAR SINGH BAHRA AND ANOTHER VS RAJU GOVINDJI HCCC NO. 548 of 1998(UR)** Mbaluto J. held:

“Although the Defendant has denied liability in an amended Defence and counter-claim, no witness was called to give evidence on his behalf. That means that not only does the Defence rendered by the 1st Plaintiff in support of the Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”

28. In light of the above cases, and having in mind that the Defendant did not give evidence to substantiate its case or challenge the Plaintiff's claim, I have no option but to consider the Plaintiff's claim as uncontroverted. In the circumstances, it is plain that the Plaintiff has proven its case on a balance of probability as to why it is entitled to avoid the policy herein.

29. In the upshot, I hereby enter Judgment in favour of the Plaintiff as follows:-

- a. A declaration that the policy of insurance in respect of motor vehicle registration No. KAV 132 C was obtained by non disclosure of material facts by the Defendant which was false and the Plaintiff is entitled to avoid the policy.**
- b. A declaration that the Plaintiff is not liable to indemnify the Defendant or to satisfy any Judgment that may be obtained in connection with or any other use of motor vehicle registration KAV 132C.**
- c. The costs of this suit shall be for the Plaintiff.**

THAT is the Judgement of the court.

Dated, Read and Delivered at NAIROBI this 3rd Day of October 2014.

E.K.O OGOLA

JUDGE

Present:-

Absent for the Plaintiff

Absent for Defendant

Teresia – Court clerk