



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CIVIL SUIT NO. 8 OF 2017

THE MONARCH INSURANCE COMPANY LIMITED.....PLAINTIFF

VERSUS

JAPHET MWENDA M'KABWERA.....DEFENDANT

J U D G M E N T

1. The Plaintiff herein seeks a declaration that it is not liable or bound to make payment or indemnify the Defendant under the Insurance Policy of cover arising from the road traffic accident that occurred along **Nuu-Endau Murram Road** involving the Defendant's motor-vehicle Registration No. **KBT 608D**.

2. It was the Plaintiff's case that on the **20th December, 2016**, it issued a comprehensive insurance policy cover number **MRV/0700/000721/2016** for motor-vehicle Registration Number **KBT 608D**, **Toyota Probox** (subject motor-vehicle) owned by the Defendant which was supposed to be used for social, domestic and pleasure purposes. On or about **24th December, 2016**, the subject motor-vehicle was involved in a road traffic accident where three passengers were injured.

3. It was averred that per the express and implied form of policy the insurance cover did not cover liability or risks in respect of death or bodily injury to passengers being covered in or upon entering or getting into or alighting from the subject motor-vehicle and as a consequence the Plaintiff is not bound to indemnify the Defendant in event of loss occasioned to third parties.

4. Further, that in **2015** the Defendant sold the subject motor-vehicle to **Peter Kirunja Murugu** and failed to disclose the facts while taking out the insurance policy cover.

5. The Defendant was served with summons to enter appearance but failed and/or neglected to enter appearance and/or file defence. Therefore, Judgment was entered on the **3rd** day of **November, 2018** and the case proceeded to formal proof.

6. It was the Plaintiff's case that it be absolved from liability arising from the accident because the insured breached the policy by hiring out the motor-vehicle.

7. It was urged by the Plaintiff that parties herein were bound by their contractual terms in the motor-vehicle policy and the policy conclusion schedule. It called upon the Court to rely on the case of **Securicor Courier Kenya Limited vs. Onyango & Another Civil Appeal No. 323 of 2012** where it was stated that an exemption clause must be clear and unambiguous in order for it to be enforced by the Court.

8. The Plaintiff adduced in evidence a policy document addressed to a 'client' with a forwarding letter stating that it was evidence of a contract that was entered into between them. Looking at the policy schedule there is a clause for limitation to use. The motor-vehicle was to be used for social, domestic and pleasure purposes and for the business and profession of the insured.

9. Investigations carried out by **Leon Investigators** established that the Defendant had leased (hired) out the motor-vehicle to **Peter Kirunja Murugu** who had paid him **Kshs. 200,000/=**, **Kshs. 50,000/=** and **Kshs. 50,000/=** respectively and at the time of the accident he had not remitted what was expected of him. An opinion was formed that the Defendant had no insurable interest in the motor-vehicle at the time.

10. In the case of **National Bank of Kenya Ltd vs. Pipeplastic Samkolit (k) LTD & Another, Civil Appeal No. 95 of 1999 (2001) eKLR** the Court of Appeal stated as follows:

"A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are proved. As was stated by Shah JA in the case of Fina Bank Limited vs. Spares & Industries Limited (Civil Appeal No. 51 of 2000) (unreported).

It is clear beyond peradventure that save for those special cases where equity might be purported to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow the party to escape from a bad bargain."

11. I have seen the statements recorded by the investigator from the Defendant and the individual who was in control of the motor-vehicle at the time of the accident which established the fact that the person (**Peter Kirunja Murugu**) was the one using the motor-vehicle for his private errands and in connection with his business since **February, 2015**.

12. Without any explanation having been rendered by the Defendant, I find the Plaintiff having established on a balance of probabilities the fact of the Defendant having deviated from what was stipulated in the agreement. This was in breach of the contract.

13. In the result, I find the Plaintiff having proved the case to the required standard, hence, enter Judgment in favour of the Plaintiff as follows:

i. A declaration be and is hereby issued that the Plaintiff is not liable to indemnify the Defendant under the insurance policy cover in respect of any claim of bodily injury to any person or passenger who was being carried arising out of the road traffic accident which occurred on **24th December, 2016** along **Nuu-Endau Road** involving the Defendant's motor-vehicle Registration No. **KBT 608D** and motor-vehicle **KAN 196S**.

ii. Costs of the suit are awarded to the Plaintiff.

14. It is so ordered.

Dated, Signed and Delivered at Kitui this 9th day of January, 2020.

L. N. MUTENDE

JUDGE