



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL CASE NO. 9 OF 2017

THE UAP INSURANCE COMPANY LIMITED.....PLAINTIFF

VERSUS

NANCY WAKUTHI KAGO.....DEFENDANT

J U D G M E N T

A. Introduction

1. In its plaint dated 19th May 2017, the plaintiff in this suit claims breach of terms and conditions of an insurance policy cover by the defendant as well as misrepresentation of material facts.
2. The defendant did not enter appearance though she was served with the plaint as per the affidavit of service sworn on 26th October 2017.
3. In the plaint, the plaintiff prays for judgement against the defendant for a declaration that the Plaintiff is not liable or bound to make payments or indemnify the defendant under insurance policy cover number 072/080/1/1015145/2015 in respect of any claim in respect to death or bodily injury to any person or passenger arising out of road traffic accident which occurred on 8th January 2017, along Kiritiri-Embu Road near Air Strip Area within Embu County involving the Defendant's Motor Vehicle Registration Number KCE 200T.

B. Plaintiff's Case

4. The plaintiff case is made of two witnesses PW1 and PW2 who had a ready filed witness statements. PW1, a Senior Legal Officer at the plaintiff company testified that he had recorded his evidence on the 19th May 2017 which he wished to adopt. It was PW1 testimony that the defendant entered into a valid insurance contract with the plaintiff for her motor vehicle registration number KCE 200T. He further stated that there was an express/or implied term of the policy that the insurance was a Third Party Risks only and did not cover liability in respect of the death or bodily injury to passengers and or employees. It is this clause that the defendant breached on the 8/1/2017 as she was ferrying employees to a Christmas party when the accident occurred.
5. PW2 testified that he was instructed by the plaintiff to investigate the accident that occurred on 8/1/2017 that involved vehicle registration number KCE 200T. It was his testimony that the aforementioned motor vehicle was ferrying passengers contrary to the policy terms.
6. PW2 further testified that the vehicle's policy was commercial for the owner's businesses whereas on the material day it was being used to do the business of ferrying passengers. PW2 prepared his report and filed his report.

C. Plaintiff's Submissions

7. The plaintiff submitted that there was a valid insurance contract between themselves and the defendant however they further submitted that there was an express/or implied term of the policy that the insurance was a Third Party Risks only and did not cover liability in respect of the death or bodily injury to passengers and or employees, which the defendant breached. Reference was made to page 8 of the policy.
8. The plaintiff relied on Section 5 (b) (i) of the Insurance (Motor Vehicles Third Party Risks) Act as well as the cases of **Gateway Insurance Company Limited v Sudan Mathews[2003] eKLR**, **Day Break Limited v Mnarch Insurance Co. Limited [2013] eKLR**, **Gemina Insurance Company Limited v Gabriel M. Mugambi [2011] eKLR** and **Kenya Orient Insurance Co. Ltd v Benjamin Ochina [2013] eKLR** that enunciate the principal that an insurer is not in law obliged to indemnify an insured for an accident, loss or damage or liability caused or sustained whilst the insured motor vehicle is used for purpose outside the purpose for which the vehicle was insured.
9. The plaintiff further submitted that the defendant admitted to the Investigators appointed by the plaintiff that she carried employees contrary to the stipulations and representations in the Policy Cover.

10. It was the plaintiff's submission that the vehicle registration number KCE 200T exceeded the carrying capacity as it was only supposed to carry two (2) passengers as was evidenced by the log book produced in court as the police abstract produced in court indicated that 8 people were involved in the accident on the material day which was contrary to clause 6 of the General Exception in the policy document and as such the plaintiff was not bound to indemnify the defendant. The plaintiff relied on the case of **Pacis Insurance Company Limited v Outreach Community Centre & Another [2017] eKLR** where the court held that an insurer can repudiate claim for the sole reason that an insured motor vehicle was overloaded at the time of the accident.

11. It was also the plaintiff's submission that the passengers were seated in the cargo section of the subject motor vehicle in an illegal overcrowded position contrary to Section 60 (1) of Cap 403 Traffic Act.

D. Issues for Determination

12. The issues for determination in this matter have been identified as follows: -

a) Whether there was breach of the insurance contract by the defendant; and if so,

b) Whether the plaintiff is liable to indemnify the defendant.

E. Analysis & Determination

13. The short summary of the facts of this case as it emerges from the record are that on the 17th September 2016, the defendant took up an insurance policy cover number 072/080/1/015145/2015, a Third Party Risks only cover. On the 8th January 2017, the defendant's motor vehicle registration number KCE 200T was involved in a road traffic accident while ferrying passengers who were employees of Ripana Contractor and Designer Company Limited and the seven (7) of the employees suffered fatal injuries. This incident was corroborated by the police abstract attached as part of the plaintiff's supporting documents as well as the testimony and report prepared by PW2.

14. On perusal of the policy document, under the title "Exceptions" which is a sub-topic under the larger topic "LEGAL LIABILITY OF PASSENGERS FOR ACTS OF NEGLIGENCE" "I note that it does not cover liability in respect of the death or bodily injury to passengers and or employees of the insured.

15. Clause 6 of the "General Exceptions" of the policy document provides: -

"Any accident loss damage or liability caused sustained or incurred whilst the Motor vehicle is/are being used to carry passenger(s) and or loads in excess of the assessment by the Licensing Authorities. However, it shall not affect the right of any person to recover any indemnifiable amounts under or by virtue of legislation, but the insured shall repay to the Company all sums paid by the COMPANY WHICH THE Company will not have been liable to pay save for the Legislation."

16. In his statement dated 19th May 2017, PW1 states that the plaintiff stands exposed to claims and declaratory suits in respect of liability expressly excluded and not covered by the subject policy cover issued to the defendant. PW2's report and testimony corroborated this.

17. In the case of **National Bank of Kenya Ltd V Pipeplastic Samkolit (K) Ltd & Another, Civil Appeal No. 95 of 1999 [2001] eKLR**, the Court of Appeal sitting at Nairobi held 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 pleaded and 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 prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain."

18. The plaintiff in seeking to avoid the policy is relying on clause 6 of the "General Exceptions" found in page 5 as well as the "Exceptions" clause found on page 8 of the Policy document. It was a clear and unambiguous clause of the insurance policy contract to which the parties committed themselves to and which bind them.

19. In entering into a contract, the basis of any terms between parties who engage is trust that the other party will honour the terms of the bargain and such terms cannot be interfered with unless the contract was made under coercion, fraud or undue influence which must be pleaded and proved. In this case there was no suggestion of employment of coercion, fraud, or undue influence in regard to the terms of the insurance policy. The terms of engagement in my view must be enforced joining to both ends of bargain.

20. Section 5(b)(i) of the Insurance (Motor Vehicles Third Party Risks) Act, provides: -

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

i. liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person issued by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment;"

21. In Gateway Insurance Company Ltd -VS- Sudan Mathews (Milimani Commercial Courts) Civil Case No. 10178 of 2000, a case quoted by the plaintiff, Justice Ringera (as he then was) stated as follows and I am in agreement with him:

“.....the statutory third party cover is not required to extend to the risks of death or bodily injury to employees of the insured arising out of or in the course of their employment; or to the death or injury to passengers except in the case of motor vehicle in which such persons are carried for reward or hire or by reason or in pursuance of a contract of employment; or to any contractual liability.”

22. It is worth noting that the defendant did not enter appearance nor file a defence in the instant case and this means that the evidence of the plaintiff is uncontroverted.

23. I find that the plaintiff has proved on the balance of probabilities that the defendant breached the conditions and terms of the policy as set out in paragraph 8 of the plaint in regard to the use of the insured motor vehicle registration number KCE 200T.

24. I hereby find in favour of the plaintiff and enter judgment in the following terms: -

a) That a declaration do hereby issue that the plaintiff is not liable to make payments or to indemnify the defendant under insurance policy no. 072/080/1015145/2015 in respect of any claim in respect to death or bodily injury to any person or passenger being carried arising out of road traffic accident which occurred on 8th January 2017, along Kiritiri-Embu Road near Air Strip Area within Embu County involving the Defendant's Motor Vehicle Registration Number KCE 200T.

b) That the costs of the suit are hereby awarded to the plaintiff.

25. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 30TH DAY OF MAY, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Jaoko for Ms. Gicheha for plaintiff