



**Geminia Insurance Company Limited v Windle Charitable Trust  
Registered Trustees; Omot & 4 others (Interested Parties) (Civil Suit  
E005 of 2024) [2025] KEHC 9914 (KLR) (10 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 9914 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT LODWAR  
CIVIL SUIT E005 OF 2024  
PJO OTIENO, J  
JULY 10, 2025**

**BETWEEN**

**GEMINIA INSURANCE COMPANY LIMITED ..... PLAINTIFF**

**AND**

**WINDLE CHARITABLE TRUST REGISTERED TRUSTEES ..... DEFENDANT**

**AND**

**KORINI OPIEU OMOT ..... INTERESTED PARTY**

**GATBEL GATKUOTH KANG ..... INTERESTED PARTY**

**MADUTH MATHUCH GENG ..... INTERESTED PARTY**

**ASPOIR MULENDA ..... INTERESTED PARTY**

**MARIAM ABOU ABOU ..... INTERESTED PARTY**

**JUDGMENT**

1. By way of a plaint dated 23.09.2024, the plaintiff, being an in surer, has moved the court, against the defendant, as its insured, seeking to be granted the following orders;
  - a. A declaration that the plaintiff is and has at all material times been entitled to avoid the aforesaid policy of insurance MPC/NBI/2023/256688 and any provision contained therein in respect to claims be the following persons;
    - i. Mariam Abo
    - ii. Madut Mathich
    - iii. Kirini Opiou



- iv. Gat Bell
  - v. Espoir Mulena
  - vi. Samuel Jumik
  - vii. Daniel Hamed Idris
  - viii. Ayum Bor
  - ix. Parek Machar; and
  - x. Benjamin Juma (the driver) on the ground that the terms of the policy had been breached by the defendant.
- b. A declaration that the plaintiff is not liable to make any payment under the aforesaid policy of insurance MPC/NBI/2023/256688 in respect of any claims against the defendant herein arising out of the injuries sustained as a result of the accident on 23<sup>rd</sup> March, 2024 involving motor vehicle registration number KDG 008X and/or from any accident involving the motor vehicle during the pendency of the said insurance policy.
  - c. Any other relief that this honourable court may deem fit to grant.
  - d. Costs of this suit together with interest thereon at court rates.
2. The plaintiff narrates the genesis of the dispute at hand to be that on or about the 29<sup>th</sup> day of March, 2023, it entered into a motor private insurance policy in respect of motor vehicle registration number KDG008X and issued policy number MPC/NBI/2023/256688 on the term that the policy would cover liabilities to third parties only. They aver that the motor vehicle was, subsequently and during the life of the policy, involved in a road traffic accident on 23.03.2024 along the Kakuma-Lokichogio road, while carrying passengers, the interested parties, who were then injured. The interested parties subsequently filed Kakuma MCCC's No. E009 of 2024, E010 of 2024, E011 of 2024, E012 of 2024 and E013 of 2024 seeking special and general damages. It is the prospects of having the possible decrees from the said cases that is targeted by the declarations sought.
  3. The plaintiff asserts that section IV, General Exceptions 2, of the policy provided document exempts it from being liable in respect of an accident, injury, loss, damage or liability if the vehicle is carrying more than its authorized capacity. The plaintiff therefore applies that term of the contract to the facts of this case and claims that the defendant was in breach of this term by carrying 10 passengers in a 9 passengers capacity vehicle. It asserts that the breach entitles it to repudiate the policy and that it is not liable, in law and contract to indemnify the defendant or any other claiming parties.
  4. The plaintiff further relies on section II paragraph 4(a) of the policy to entitle it not to pay for the death of or bodily injury to any person in the employment of the insured arising out of and in the course of such employment and alleges that by its claim form, the defendant had identified that passengers as incentive workers, hence were not covered by the policy issued.
  5. On the basis of the two alleged breaches, the plaintiff prays that the court finds for it and issues the prayers sought.
  6. The plaintiff was resisted by the defendant in a statement of defence dated 24.10.2024 in which the defendant contested the jurisdiction of the court, denied that the motor vehicle in question was carrying more than its authorized capacity and further averred that the plaintiff is disentitled from avoiding cover for any purported breach of the insurance policy. The defendant further avers that



contrary to the assertions of the plaintiff, only two of the interested parties were employees, the rest were not such employees. The defendant essentially denies all the allegations of breach, asserts that the plaintiff was using every excuse to avoid liability and points out that by its notice of repudiation, only one reason was proffered, the fact of employment of the passengers and that the new grounds of over-capacity and use for extraneous purposes were new and imagined grounds.

7. When served with the defence, the plaintiff filed a Reply thereto by which it reiterated its pleadings in the plaint, denied the assertions by the defendant then gave notice that it would exhibit a pay slip to show that the passengers were employees.
8. By its ruling delivered on the 31.01.2025, the court determined the objection on jurisdiction thus paving the way for the suit to be heard on the merits.
9. During the case conference, the parties agreed to proceed by way of case stated, waive the right of cross-examination of witnesses and adopted the witness statements and the documents adduced as evidence and exhibits.
10. For the plaintiffs, there is the witness statement of Carren Manyoge, the Legal Officer. That statement reiterates the averments in the plaint and stresses that it is entitled to avoid the policy based on the provisions of Section II paragraph 4(a) and section IV, general exception 2, of the policy issued by it to the defendant.
11. She emphasized that the defendant while reporting the accident to the plaintiff filled out a claims form where it stated that the subject motor vehicle had carried nine passengers, excluding the driver, and the findings of an investigator for the plaintiff had further established that the defendant despite having taken out a private insurance cover used its motor vehicle to transport persons referred to as incentive teachers from Kakuma Refugee Camp after training.
12. Her position is that the breach of the terms of the policy warrants the insurance company to void the cover. The statement, as said before, was accompanied with a list and copies of documents which included; the policy schedule and private insurance policy, plaints filed by the interested parties, notice of intention to repudiate and the claim form attaching a statement by the defendant's driver.
13. The defendant filed the witness statement of Philemon Misoy who introduces himself as the Defendant's Kakuma Program Coordinator. He confirmed the accident involving motor vehicle registration number KDG 008X and added that the motor vehicle was previously operated by UNHCR who donated it to the defendant. He stated that the defendant made no modifications and the seating capacity for the motor vehicle remained at 10 people including the driver. He avows that the seating capacity was confirmed by CFAO Mobility Kenya Limited (formerly Toyota Kenya) and refuted claims that the motor vehicle was ferrying employees at the time of the accident and asserts that the motor vehicle only had one Gatbel Kang who was a member of staff.
14. The defendant thus denies being in any breach and prays that the plaintiff suit be dismissed with costs.
15. The matter was directed to be canvassed by way of written submissions pursuant to which directions, both sides filed submission the court find to be very valuable. The summary of the submissions is as below.

### **Plaintiff's Submissions**

16. The plaintiff proclaims that the essentials of an ordinary contract apply to a contract of insurance and refers the court to the Court of Appeal decision in Corporate Insurance Company Limited v Rainbow Cabs & Car Hire Limited (2023) KECA 1029 (KLR for that proposition).



17. it further refers the court to the court of appeal decision in Kenya Alliance Insurance Company Ltd v Parklands Shade Hotel Limited & another (2015) KECA 352 (KLR) where it was held that in law, all contracting parties must act toward one another in good faith and that insurance contracts however, require a higher standard than simple good faith. The court stressed that a person who completes an insurance proposal form in applying for insurance cover must not only answer truthfully all questions that are asked, but must of his own accord disclose all facts relevant to the policy. Failure to do so may entitle the insurer to repudiate the policy and refuse to pay a claim. For an insurer to successfully repudiate a policy, there must be proof of breach of an express or implied warranty, deviation or the like.
18. The plaintiff then identifies two issues for determination by this court to be; a) whether the defendant breached the terms of the insurance policy and; b) whether the plaintiff is liable to make any payments under the policy of insurance in respect of claims against the defendant.
19. On whether the defendant breached the terms of the insurance policy, the plaintiff submits that section IV (2) of the insurance policy provides that the insurance will not be liable for any accident, injury, loss, damage or liability if the vehicle is carrying more than the authorized passengers. It is then emphasized that the defendant's driver indicated in the claim form that aboard the motor vehicle were nine people at the time of the accident. It thus submits that this capacity was in excess of the motor vehicles handling capacity which is captured as two in the logbook and that Mirox Insurance Investigators who carried out investigations on the accident interviewed some of the passengers and recorded their statements. The submissions are therefore that, the driver confirmed that he had 9 passengers in the motor vehicle, Mariam Abou stated they were about 11 passengers while Daniel Hamad stated that they were 10 people on board.
20. The respondent further submits that section II paragraph 4(a) of the policy of insurance provides that the insurance will not pay for death of or bodily injury to any person in the policy holder's employment arising out of or in the course of such employment and that the plaintiff filed pay slips from the defendant showing that the passengers in their motor vehicles were their employees. It is stressed that none of the interested parties have denied being employees of the defendant.
21. On whether the plaintiff is liable to make any payments under the policy of insurance in respect of claims against the defendant, the plaintiff submits that the policy of insurance between the plaintiff and the defendant amounts to a contract and that the breach of the terms of the policy has resultant consequences that must be adhered to. The decision in National bank Ltd vs Pipeplastic Samkolit (K) (2202) EA 503 was cited for the law that a court of law cannot rewrite a contract between the parties.
22. The plaintiff further cited the decision in Paul Mutisya vs jubilee insurance Company of Kenya ltd (2018) KEHC 5132 for the holding that an insurer is entitled to meet the claims where it is proved that the insured was in breach of the terms for which the motor vehicle was insured.

### **Defendant's Submissions**

23. On whether the persons claiming liability against the plaintiff were employees of the defendant, the defendant submits that only the motor vehicle's driver by the name of Benjamin Juma and Gatbel Kang were employees of the defendant.
24. On whether the subject motor vehicle was carrying in excess of its authorized capacity, the defendant submits that it was the evidence of Caren Manyonge in her witness statement that the vehicle had the capacity of up to ten including the driver. To the defendant, that evidence that went into record uncontested cannot marry with the contrary contention that the capacity of the vehicle was only two people. It is thus added that the evidence of the defence supported by the document of confirmation



- from the dealers of the motor vehicle that the vehicle has a capacity of nine passengers excluding the driver.
25. The defendant then underscores the incident of the burden of proof to lie upon the plaintiff to prove his allegations so as to be entitled to the orders sought and also on the provisions of the *traffic act* defining a motor car to mean a vehicle with a seating capacity of not more than ten people, excluding the driver, and also what amounts to overload.
  26. The decision in *Imara Steel Mills ltd vs Heritage insurance Co Ltd (2016) HEHC 2555* for the proposition that a contract cannot oust a statutory provision and for the position that the Insurance Regulatory Authority has issued guidelines to the effect that an insurer shall not decline a claim on the basis of breach of warranty or condition where the circumstances of the loss are unconnected to the such a breach. The decision also underscores the public interest for which people insure risks at the consideration of the insurer collecting premiums.
  27. On the investigation report produced by the plaintiff, the defendant asserts that the same is affirmative that there was no relationship between the interested parties and the defendant and further that the possibility of alteration to the motor vehicle was not disclosed on material aspects of when, how and the extent of such alteration.
  28. The defendant thus prays that the claim for entitlement to repudiation be denied the suit be dismissed and the plaintiff asked to bear its duty as an insurer.
  29. After the submissions were filed and after the court had perused same, the court invited the counsel to address it on how section 10(4) may impact on the suit. The court was concerned that the limitation had not come out yet it was a matter of law the court could not ignore.
  30. During the address by counsel, it was agreed that the suits highlighted in this matter were all filed on the 21.05.2024. That confirmation helps establish if the timelines set by the statute were honoured.
  30. Even though the matter was agreed to proceed pursuant to Order 35 Rule 1, and despite the directions by the court that parties settle and file list of agreed issues within set timelines, no issues were so filed and when the two counsel appeared before the court, when invited by the court to address that issue, both agreed that the court isolates the issues from the pleadings and submissions filed and prepares a judgement. This judgment is thus on issues as isolated by the court after the parties asked the court to do so on their behalf.
  31. In performing the duty of the parties in identifying the issues for determination, the court appreciate that both sides have addressed only two issues in commonality, whose determination leads to the rendition in the matter. Accordingly, the court isolates the issues for its determination to be whether: -
    - i. The persons who were injured while aboard the defendants motor vehicle were employees of the defendant?
    - ii. There was a breach of terms of the policy by ferrying an overload of passengers?
    - iii. If either of the two above be answered in the affirmative, whether the plaintiff has established a case for avoiding the policy?

### **Analysis And Determination**

32. Those issues go to the merit of the matter but it is equally important that the court gets satisfied that the suit is properly before it. So, the preliminary point is whether the suit complies with the provisions



of the proviso to Section 10(4), of the Insurance (Motor Vehicle Third Party Risks) Act, cap 405. That law says: -

“No sum shall be payable by an insurer under the foregoing provisions of this section if in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, 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 a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto”.

33. The provision in whole obligates an insurer to; bring its suit to avoid the policy before the suit(s) for compensation or within three months of such suit(s) being filed and to notify the claimants in such suit(s) of the ground upon which it seeks to avoid liability.
34. Based on the material availed, this suit was filed on the 24.09.2024, some four months after the suits for compensation were filed. That was clearly outside the time set. In addition, there was no document exhibited to evidence that a notice was served upon the plaintiff seeking compensation from the defendant. There is therefore nothing to show that the requirements of the proviso to the section was met, yet it was the obligation of the plaintiff to so demonstrate.
35. The court thus finds that the suit affronts the mandatory demands of the law and is thus improperly before the court.
36. That determination would be sufficient to dispose of the matter but because it was raised late after the parties had applied themselves to the merit, the court has opted to equally interrogate the merits of the case.
37. The gist of the plaintiff's case is that the defendant violated and/or breached the private insurance policy in respect of motor vehicle registration number KDG 008X and it is therefore not liable for liabilities arising therefrom.
38. It is pleaded that the breaches regard and entailed; the acts of the defendant in ferrying passengers who were its employees, contrary to section II paragraph 4 of the policy and, in ferrying passenger more than the authorized capacity of the motor car, contrary to section IV of the policy.
39. It is indubitable that the legal burden of proof remains constant through a trial with the plaintiff to establish all the facts and contentions which will support its case. If at the conclusion of the trial he has failed to establish the allegations in the pleadings to the appropriate standard, within a balance of probabilities, he must lose the case. The legal burden of proof rests upon the party desiring the court to grant him a relief, thus a claimant must satisfy the court that the conditions which entitle him to an award have been satisfied in respect of a particular allegation. He who moves the court bears the burden to substantiate the allegations as may be essential for the success of its case.



40. In this case, thus, the burden rests upon the plaintiff to prove that the defendant in deed breached the terms of the policy by ferrying own employees and in a number that exceed the permitted load of the motor car.

**Whether persons who were injured while aboard the defendants motor vehicle were employees of the defendant?**

41. The agreement between the parties on the liability of the plaintiff for employees of the defendant is in no doubt an exclusion. That close in the policy document is not unique to the contract between the parties here. It is in fact derivative of the statute, Insurance, (Motor Vehicle Third Party Risks) Act. While section 4 of the Act creates a mandatory scheme with penal consequences for non-compliance, section 5 defines the category of persons to be covered and specifically excludes employees of the insured.
42. It is thus not a convoluted issue to decide whether an employee is a covered category of the cover issued by the plaintiff. Employees are not covered in the policy.
43. The question then is whether, in this matter, the plaintiff has demonstrated that the passengers in the car on the material day were indeed employees of the defendant. In an attempt to discharge the burden, the plaintiff has in the supplementary list of documents exhibited three copies of pay slips for Gatbel Kang Gatkuoth. That no doubt demonstrates, and same is conceded by the defendant, that that person was indeed an employee of the defendant and thus excluded from the category of the persons covered by the subject policy. That individual and the driver being employees of the defendant are by law and the contract excluded from being the burden of the plaintiff if a compensation was to be ordered against the defendant.
44. To the contrary and regarding the other passengers, the plaintiff has exhibited statements from two of the passengers; Miriam Abou Katauko and Daniel Hamad Idris. Both agree with the position of the driver that the accident occurred as they were going home from a training at the Refugee Camp. The two passengers do specify their places of employment as teacher and do not allude to being employees of the defendant. In fact, the same investigator confirms in his report that the passengers had no relationship with the defendant.
45. Up to this juncture, while it was the duty of the plaintiff to prove employment of the passengers, it has done well in relation to the driver and Gatbel Kang but has led no iota of evidence that the other eight passenger were equally employees. Being the duty bearer for purposes of proof, the failure to discharge the onus invites, inevitably, the concomitant failure of the claim that the passengers were employees. The court finds that the allegation that all the passenger were employees fail with the result that the first issue is answered in the negative.

**Whether there was a breach of terms of the policy by ferrying an overload of passengers?**

46. The policy schedule as adduced in evidence by the plaintiff very well capture the information captured regarding the motor vehicle to be the registration number, the type of body, engine number, chassis number and the year of manufacture. The seating capacity of the motor vehicle is not disclosed.
47. When counsel for both plaintiff and defendant appeared before the court on the 01.07.2025, both confirmed, upon inquiry by the court, that the proposal form was never filed by either side. To court that being the foundational document initiating the negotiation of the contract, it holds the information on what was disclosed or concealed by the insured. It is thus not obvious what the seating capacity of the vehicle was agreed between the parties.



48. The law however left no lacuna for such disputes. A reading of Section 56(1) of the *Traffic Act*, ordains the evidence of the manufacturer of a motor vehicle as the best evidence on the carrying capacity of the motor vehicle. The provision donates to only the manufacturer of the chassis of the vehicle to prescribe its load or an inspector under the Act to determine such load. It is clear to the court that the registrar of motor vehicle is not by law, the authority on the carrying capacity of a motor car.
49. The contract as disclosed in the policy defines itself as the evidence of contract between the parties while the schedule is defined by the policy as the summary of details specific to the contract. To the court, the two documents should be and disclose the exhaustive terms of the contract between the parties. Parties are entitled to negotiate and include or exclude terms deemed necessary to safeguard the interests to be created and secured in the contract. It is that autonomy of the parties and the concomitant ability of both to best protect respective interests, the arms-length doctrine, that yield the binding position of the law that nobody, including the court, can rewrite for the parties their contract.
50. Applying that trite position of the law in this matter, the court finds that parties are bound by their bargain as embodied in the final document exhibited. The position strenuously taken by the plaintiff regarding the seating capacity of the motor vehicle should demonstrate how important the issue ought to have been at the negotiating table. Noting that it is the plaintiff daily business to underwrite risks, it is difficult to fathom how it was never discussed nor included in the contract between the parties. The court finds that had the parties intended to ground the seating capacity as a critical and germane term of the contract, nothing would have stopped them from spelling it so in clear and obvious terms. That it is not a term in the contract invites the inference that it was not intended and the court is precluded from imposing it upon the parties.
51. The other way to look at the issue is equally established. Parties are bound by their pleading which the law mandates to be clear and precise to aid fair hearing and avoid ambush. In this matter, the plaintiff pleads at paragraphs 12 and 13 of the plaint, that the defendant blatantly breached the express terms of the policy document. In law, it was the duty of the plaintiff, under Order 2 Rule 10, to plead the necessary particulars of the alleged breach. That pleading was prejudicial to the defendant in that the specific allegation of overloading the motor car was not disclosed.
52. It is however of note that at paragraph 9 of the same plaint, the plaintiff averred that the vehicle ought to have carried not more than nine passengers yet the driver said he had himself and nine passengers. That is repeated in the witness statement at paragraphs 6 and 7. However, in the submissions, the plaintiff resiles from such pleading and evidence and submits that the vehicle had a seating capacity of not more than two passengers. The court takes the learning that submissions are never pleadings nor evidence but the opinion of the author. The same cannot override the pleadings and evidence. In any event the log book being evidence cannot be adduced to amend or subtract from the pleading. That would offend the dictates of the principle that parties be bound by their pleadings. To the extent that the logbook was adduced to show that the seating capacity of the motor car was not more than two passengers, such evidence was inadmissible but even when so received, it could only be received gratis, and of no benefit to the fair determination of the case.
53. It is thus the finding by the court that that there has not been demonstrated breach of any policy conditions to warrant the plaintiff being entitled to the declaration sought.
54. The foregoing discussions and conclusion thus determine the third and last issue in the negative. This finding however does not in any way override the earlier finding that, the driver and Gatbell Gatkuoth Kang, having been proved and established to have been employees of the defendant are not part of the risk covered and shall never be the burden of the plaintiff even in the even that they were to seek compensation and be awarded damages.



55. The ultimate consequence is that the plaintiff has failed in his duty to prove the case pleaded. The suit is therefore dismissed with costs to the defendant.

**DATED, SIGNED AND DELIVERED AT LODWAR THIS 10<sup>TH</sup> DAY OF JULY, 2025.**

**PATRICK J O OTIENO**

**JUDGE**

