Pax Limited v Heritage Insurance Company (Commercial Appeal E002 of 2024) [2025] KEHC 12853 (KLR) (19 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12853 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

COMMERCIAL APPEAL E002 OF 2024

DK KEMEI, J

SEPTEMBER 19, 2025

BETWEEN

PAX LIMITED ..... APPELLANT

AND

HERITAGE INSURANCE COMPANY ..... RESPONDENT

(Being an appeal from the Judgment of the Hon. E. Tsimonjero (SRM) delivered on 31st July 2024 at Ukwala in PMC Commercial Suit No. E004 of 2021)

JUDGMENT

1. The Appeal arises from the Judgment of the Hon. E. Tsimonjero (SRM) delivered on 31st July 2024 in Ukwala PMCC COMMSU No. E004 of 2021.

2. The brief facts of the dispute were that on or about 15th October 2018, the Appellant's motor vehicle, KCP 856S Isuzu Truck, was involved in a road accident along Kisumu-Busia road at Nzoia River. In the Amended Plaint dated 12th April 2023, the Appellant pleaded that at all material times, the Respondent was the insurer of the motor vehicle under Policy No. 101878070252(Comprehensive). According to the Appellant, its motor vehicle was towed to Sunshine Auto Mobiles garage in Kisumu Town, where it was kept. The Appellant lodged an indemnity claim with the Respondent, which was investigated by the Respondent's agents, but on or about 22nd January 2019, the Respondent denied liability and declined to honour the insurance contract.

3. The Appellant instructed Paramount Assessors Limited to assess the repairs, and upon assessing the repairs, the Appellant paid an assessment fee of Kshs. 10,000.00. The assessor came up with the total estimated repair costs of Kshs. 2,141,940.00. According to the Appellant, its motor vehicle was their tool of trade for transport services at a fee and earned them an average monthly income of Kshs. 90,000.00, thus entitled to claim for loss of user from the date of the accident. The Appellant claimed for daily storage fee of Kshs. 500, which remains unpaid from the date of the accident, as the motor

vehicle is still grounded at Sunshine Auto Mobiles garage. According to the Appellant, the motor vehicle was towed at a cost of Kshs. 34,000.00.

4. The Appellants sought the following reliefs:

   a. Specific performance of the Insurance Policy regarding compensation, and particularly payment of Kshs. 2, 141,940.00 being the estimated cost of repairs of the damaged motor vehicle;

   b. Special damages of Kshs. 44,000.00, being the amount paid as assessment and towing fee.

   c. Damages for loss of user, from the date of the accident up to the date of entry of judgment.

   d. Payment of daily storage fee, from the date of accident up to the date of entry of judgment.

   e. Costs of the suit.

   f. Interest on (a) (b) (c) and (d) above.

5. Vide its Statement of Defence dated 2nd November 2021, the Respondent denied that the motor vehicle belonged to the Appellant or was involved in any accident on 15th October 2018. It was pleaded that the Appellant, after notifying the Respondent of the accident on or about 14th October 2018, failed to disclose the load capacity that the motor vehicle was carrying. According to the Respondent, investigations established that the motor vehicle had a capacity of 7,160 tonnes, instead of the licensed capacity of 2,500 tonnes, which was a breach of the fundamental terms and conditions of the policy, particularly regarding overloading; thus, the cover did not operate and stood cancelled. The Respondent asserted that the policy did not cover any liability arising from damages caused by overloading and strain; thus, the Respondent was not liable to pay any sum claimed by the Appellant.

6. The Respondent pleaded that the suit was brought prematurely without first resorting to arbitration, which is a condition precedent for a court action under the policy of insurance. The Respondent admitted jurisdiction of the Court but denied that the Appellant had any cause of action against the Respondent. According to the Respondent, the Appellant's suit is bad in law, vague, incoherent, and unimaginable, and that the same was filed without regard to the rules of pleading. The Respondent prayed for the suit to be struck out or dismissed with costs.

7. Vide a reply dated 24th January 2022, the Appellant denied all the facts pleaded and prayed for dismissal of the Statement of Defence and judgment be entered as per the Plaint.

8. PW1 James Nairangu, the Appellant's Director, stated that his motor vehicle was involved in an accident and that he reported it. He adopted his witness statement dated 27th September 2021. He adopted his list of documents as exhibits, save for numbers 6 and 7, which were marked as PMF6 and PMF7. He stated that his vehicle carries up to 10 tons and that day he was not overloaded, as he even got clearance from the weighbridge as per Exhibit 4. He claimed that he had taken a comprehensive cover with the insurance.

9. PW1 was stood down to allow the Respondent to file the Policy document for Commercial vehicle insurance.

10. PW2 Simon Waweru Kimani, the driver, adopted his witness statement dated 27th September 2021. He stated that he started the journey on 13th October 2018 and that the accident occurred at midnight on 13th or 14th October 2018. He reported on 14th October 2018. He stated that the motor vehicle had been weighed on 12th October 2018 before the journey at about 8.30 PM, and that they had to collect a certificate for purposes of the suit, which they are not ordinarily given when the motor vehicle

is weighed. On being cross-examined, he stated that he weighed at Gilgil on 12th October 2018. He was on the road from 12th to 14 October 2018. He stated that he knew how much weight he should carry, which is totally unrelated to the logbook, and that overloading cannot cause a motor vehicle to lose control and cause an accident. He stated that the weight was between 3.5 and 10 tons as per the weighbridge report marked as Exhibit 4. In re-examination, PW2 stated that if the vehicle had been overloaded, he would have been stopped at the weighbridge and charged, but was not.

11. PW1 stated that he was using the motor vehicle for business. He stated that it was insured in June 2018 with Heritage. After the accident, he took it to Sunshine for repairs. He stated that he was getting Kshs. 90,000 to Kshs. 120 per month. He stated that he spent money on towing and repairs. He stated that the motor vehicle is still at Sunshine, which is charging Kshs. 500 daily for storage. On being cross-examined, he stated that he approached Heritage and made a proposal form cover on 7th June 2018. He wanted a comprehensive commercial policy for his motor vehicle. He stated that his motor vehicle was inspected, and that the capacity in the proposal he filled was a maximum of 7 tons. The tare weight was 5000 Kg, load capacity 2500 Kg, thus a gross weight of 7,500 Kg. He stated that he was issued a Policy document certificate and cover for the motor vehicle, which was to commence from 7th June 2018 to 6th July 2019. He stated the cover was for his own cargo and the lives of other parties. He stated that under Clause 4(a) of the Proposal Form, he filled in for general carriage. He stated that he filled a Yes for carriage of other persons. He stated that under Clause 4(c), he answered that he had not altered the motor vehicle to carry more than 2500 kg. He stated that his motor vehicle was involved in a self-involving accident on 15th October 2018. He filed the Claim Form, and they reported with his driver the accident. He stated that the load of Irish Potatoes weighed 12,160 Kgs, which was confirmed even after investigations by Heritage investigators. He denied carrying more than 7,500 tons. He denied carrying excess. He stated that he got clearance from KeNHA, who cleared his motor vehicle for 18,000 Kgs. He stated that he was still incurring a loss of user since he could make Kshs. 30,000.00. He stated that he could make about Kshs. 90,000.00 per month. He stated that he filed returns with the Kenya Revenue Authority, though the money did not pass through his accounts. He stated that he received cash and incurred expenses in cash, but he did not have any documentation to show that the money was paid in taxes or for routine expenses for repairs. In re-examination, PW1 stated that he had receipts he used to issue to clients. He stated that they had applied with their cargo load as per the type of vehicle and its normal carriage of 12,160. He stated that the insurance had told them that under the general carriage, they could carry other people's goods. He denied tampering with the motor vehicle as the load capacity was the same.

12. PW3 Eliud Nashali, an assessor with Paramount Assessors, stated he assessed the motor vehicle, KCP 856S Isuzu NER 75 Lorry, which had been extensively damaged. The assessment costs came to Kshs. 2,141,940.00. He stated that the pre-accident value came to Kshs. 1,550,000.00 while the salvage value is at Kshs. 250,000.00. He stated that they charged Kshs. 10,000.00. On being cross-examined, he stated that the motor vehicle was a total write-off. He stated that the salvage value was above the pre-accident value. He stated that the one who compensates for the accident value keeps the salvage, but if the owner needs it, the salvage value may be deducted from the compensated amount. In re-examination, PW3 stated that it would not be economical to repair the motor vehicle as the cost of repair exceeds its value since the motor vehicle was a total loss.

13. PW4 Mukesh Patel, the Director of Sunshine Automobile Kisumu, stated that they received a motor vehicle on 31st October 2018 from Heritage Insurance. He stated that the assessment of the damages was done by Paramount Assessors. He stated that they have not received instructions from the insurer to start the repairs. He stated that they charged a storage fee of Kshs. 500 daily after the grace period of 30 days. He stated that the storage fee from 31st October 2018 to 16th October 2023 (1808 days),

which aggregates to Kshs. 904,000.00 less Kshs. 15,000.00 for the 30-day grace period, giving a total of Kshs. 889,000.00 plus 16% VAT of Kshs. 142,240, which totals to Kshs. 1,031,240.00. He produced an invoice dated 3rd April 2023. On being cross-examined, he stated that they were claiming money on the invoice which had not been paid.

14. The Appellants' case was closed.

15. On 19th March 2024, during the defence hearing, the learned trial Magistrate marked the Respondent's case as closed for non-appearance by either the advocate or witnesses. The Respondent's case was reopened after its application dated 22nd March 2024 was compromised.

16. DW1 Robert Kioko, the Manager of Legal and Compliance, adopted the witness statement and list of documents dated 19th January 2023 and 19th November 2024, respectively. On being cross-examined, he stated that the Appellant had proposed to use the motor vehicle for general carriage. He stated the motor vehicle was insured based on the Appellant's proposal for his personal goods and goods for other people. He stated that the proposal is the basis of the insurance policy. He stated that PW1 visited them when the registration of the motor vehicle was in process. He stated that the motor vehicle was overloaded as the maximum carrying capacity of the motor vehicle was 7 tons, which included the weight of the motor vehicle, though he stated that he was not certain since he was not an expert. He stated that it was KeNHA to identify the overload and provide a report. He stated that the policy was for his own use, but it was changed to general, though there was no change of user.

17. DW2 Bryan Nyaga, a Private Insurance Investigator working with Invesco in insurance investigations, stated that he prepared a report dated 18th January 2018 for motor vehicle KCP 836S, which was involved in an accident on 14th October 2018. He stated that they established it was involved in an accident, and that the damage was consistent with the same. He stated that the motor vehicle had a 4660 Kg overload. He stated that it was carrying 2,500 Kg. The load carried was 7150 Kg as per the indication by the driver. He stated that the weighbridge indicated 12,160. On being cross-examined, DW2 stated that he did not have any certification from any institution. He stated that the report was prepared by Martin, who was no longer with them. He proofread the report. He never visited the scene. He stated that the load was not there at the time of the investigation, but there was a statement from the driver. He stated that the load the motor vehicle was to carry, as per the manufacturer's recommendation, was 2,500 kg. He stated that the load was permitted by KeNHA and not by the manufacturers. He stated that he was not a party to the capacity suggested in the proposal of 7 tonnes. He stated that drivers are not required to carry the logbooks while on transit. He stated that the specification was as per the manufacturer, and that any change was to be indicated. He stated that it was a factual thing that the load was 2,500 Kg as per the log book, which may be or not for a small vehicle. He stated that he did not wish to comment on what the truck should carry.

18. In his judgment, the learned trial Magistrate noted that the motor vehicle had been insured by the Respondent and that it was involved in an accident on or about 14th October 2018 and extensively damaged. On whether the motor vehicle had carried excess beyond its capacity, the learned trial Magistrate held that a reading of Clause NP 8 of the Policy Document titled "Overloading of Vehicles" provided on the exceptions to indemnity on condition of overload, that the same was only applicable where there was a load greater than what is permissible by law in force at the time. According to the learned trial Magistrate, the policy did not refer to excess load as per the manufacturer's recommendations, but specifically the load permissible under the law. The earned trial Magistrate held that the Appellant's proposal for a maximum carrying capacity of 7 tons did not include the weight of the motor vehicle itself, but specifically the load to be carried on the motor vehicle. While finding there was no breach of the policy and/or insurance contract by the Appellant, the learned trial Magistrate

held that the Appellant did not carry excess load as the load of 12,160 Kg forming the complaint by the Respondent was permissible and within the limit of 18,000 Kg permitted by KeNHA.

19. Regarding the reliefs sought by the Appellant, the learned trial Magistrate found the Appellant was not entitled to the repair costs since the Insurance Policy was clear that the Appellant was entitled to the Pre-Accident value of the motor vehicle where there is a total loss, which was not pleaded. Reliance was placed on the case of Permuga Auto Spares & Another vs Margaret Korir Tagi [2015] eKLR. On towing charges and assessment fees, the learned trial Magistrate noted that there was proof of the expenses but held that the claims had no legs on which to stand owing to the fact that the main prayer had failed. Regarding the claim for loss of user under the Policy, the learned trial Magistrate held that it was subject to the Appellant proving that it had paid an additional premium and the alleged income of Kshs. 90,000.00 supported by cogent evidence, but the Appellant's production of some fee receipts of payments received was not sufficient. The learned trial Magistrate noted that PW1 confirmed that their dealings were mostly in cash and without any money going through the account. The claim failed.

20. On the claim for storage fee, the learned trial Magistrate held that it was not economical for the Appellant to store what had been declared to be written off and total loss. According to the learned trial Magistrate, after the 30-day grace period, the Appellant could have mitigated the loss by having the motor vehicle released to them for storage at their yard as they pursued the Respondent for compensation, but the Appellant failed to do so.

21. On costs, the learned trial Magistrate held that due to the corporate nature of the Respondent, each party was to bear its own costs. The learned trial Magistrate dismissed the Appellant's suit in its entirety.

22. Aggrieved, the Appellant has appealed vide the Memorandum of Appeal dated 27th August 2024, contending that:

    1. The learned trial magistrate erred in law and in fact in taking into account irrelevant issues and arriving at a wrong conclusion.

    2. The learned trial magistrate erred in law and fact in dismissing the Appellant's claim on account of a technicality despite having found that there was no breach of the Policy and/or insurance contract by the Appellant.

    3. The learned trial magistrate erred in law and fact in holding that the Appellant had not sought the appropriate reliefs, yet the prayers sought included a relief for specific performance of the insurance policy regarding compensation.

    4. The learned trial magistrate erred in law and fact in failing to make an award on special damages despite having determined that there was proof of the expenses.

    5. The learned trial magistrate erred in law and fact in holding that there was no evidence proving the claim for the loss of user, ignoring the overwhelming evidence adduced and the circumstances of the case.

    6. The learned trial magistrate erred in law and fact in failing to make an award on storage charges, ignoring the overwhelming evidence adduced and the circumstances of the case.

    7. The learned trial magistrate erred in law and fact in failing to judiciously analyze the Appellant's evidence and explanation together with the Appellant's submissions.

    8. The learned trial magistrate's findings were completely unfounded and unsupported in law.

    9. The learned trial magistrate arrived at an unfair decision that led to a miscarriage of justice.

23. The Appellant prays that the judgment and decree against the Appellant be set aside, and the costs of this appeal and the suit be awarded to the Appellant.

24. The appeal was canvassed by way of written submissions.

25. The Appellant submits that the learned trial Magistrate, having found that there was no fault on the part of the Appellant, the Appellant was entitled to the reliefs sought in the Plaint. The Appellant submits that the learned trial Magistrate erred in law and fact in holding that the Appellant had not sought the appropriate reliefs, yet the prayers sought included a relief for specific performance of the insurance policy regarding compensation. According to the Appellant, it pleaded that the Respondent blatantly denied liability by declining to honor the insurance contract entered into between themselves and the Appellant. The Appellant submits having acknowledged that the Appellant had suffered a tort, it would have been fair if the learned trial Magistrate had awarded the Appellant the Pre-Accident value of the motor vehicle so as to reinstate him to the position before the accident in line with the principle of restitution in integrum. The Appellant urges this Court to invoke and apply the inherent power of the court, overriding the objective principle of the court and the non-technicality principle of *the Constitution* by revisiting the record, re-analyzing it on its own and reversing the impugned orders of the trial court. The Appellant urges this Court to consider the first relief sought in the Amended Plaint for specific performance as per the insurance policy, which stipulates that the Pre-Accident value is payable to the insured in case of total loss. Reliance is placed on Silas Mutua Mberia vs Muthoni Njue Veronica [2021]eKLR, where the Court held that it would be unjust for the trial court to be too technical on the rule that parties are bound by their pleadings, thus the Appellant was entitled to be compensated for the loss occasioned to him by the Respondent. Further reliance is placed on Ahmed Abubakar Hassan vs Attorney General [2013] eKLR, where the High Court made an award to the Plaintiff for Pre-Accident value less the salvage value, even though the Plaintiff had claimed for repair costs.

26. On the assessment and towing fee of Kshs. 44,000.00 not granted by the learned trial Magistrate, the Appellant submits that the same were specifically proved through receipts produced as exhibits on a balance of probabilities. On the claim for loss of user, the Appellant submits that the Appellant's Director was not cross-examined on whether they had paid premiums or not, thus safer for the learned trial Magistrate to assume that the same had been paid than assume the same had not been paid. According to the Appellant, a bundle of receipts issued by them to different people for transport services was produced as exhibits without any objection from the Respondent. Reliance is placed on Samuel Kariuki Nyangoti vs Johaan Distelberger on the proposition that the loss of use of a profit-making chattel, such as a lorry or matatu, through an accident is similarly a claim in general damages. Further reliance is placed on Peter Njuguna Joseph & Another vs Anna Moraa (Civil Appeal No.23 of 1991), where the Court assessed the loss of use where no single document was produced. The Appellant urges this Court to use its discretion in coming up with the period that the Appellant should be compensated, given the fact that the Appellant also had a duty to mitigate the losses, and noting that the motor vehicle is still stalled at the Respondent's approved garage. According to the Appellant, the computation should be done against the proved monthly income of Kshs. 90,000.00. The Appellant submits that the motor vehicle was received at PW4's garage under the instructions of the Respondent; thus, the Appellant is entitled to the storage fee claim to settle with the garage. Reference is made to the proforma invoice produced as Exhibit 12 showing the daily storage charges. The Appellant claims a sum of Kshs. 1,300,000.00 being the Pre-Accident value (Kshs. 1,500,000.00 less the salvage value of Kshs. 250,000.00); special damages of Kshs. 44,000.00 being the assessment and towing fee; damages for loss of use and daily storage fee for the period to be determined by the Court after taking into account the duty of mitigation of losses; and costs of the suit and interest.

27. Regarding the Respondent's Cross Appeal, the Appellant submits that its motor vehicle was cleared by the weighbridge to proceed with the journey as it was not overloaded. It is submitted that the Respondent did not tender any material to show the motor vehicle was indeed overloaded. The Appellant submits that the tonnage of the subject motor vehicle on the material date was not anything near the said 7-ton limit indicated in the proposal form. The Appellant submits that since the date of the proposal form is 4th June 2018 and the log book is dated 3rd July 2018, the log book was not part of the documents needed for them to be issued with the insurance cover. According to the Appellant, the weighbridge ticket produced in evidence clearly indicated that the load capacity of the motor vehicle was legal. It is submitted that the Respondent never produced any material which showed that the subject motor vehicle's gross weight on the material day exceeded the prescribed legal limits for the vehicle on any particular part of the public roads. The Appellant urges this Court to uphold the trial Court's finding on liability that there was no breach of the policy and/or insurance contract by the Appellant, thus the Respondent was liable for breach of the insurance contract. The Appellant urges this Court to dismiss the Cross Appeal with costs.

28. Aggrieved by the judgment, the Respondent has filed a Memorandum of Cross Appeal dated 4th October 2024, contending that:

    1. The learned trial Magistrate erred in law and in fact in holding that the Appellant was not in breach of the policy condition against overloading.

    2. The learned trial Magistrate erred in law and in fact in failing to hold that the Appellant was in breach of the fundamental terms and conditions of the policy, being overloading, and thus that the insurance cover did not operate and stood cancelled.

    3. The learned trial Magistrate erred in law and fact in failing to hold that the Appellant's motor vehicle was carrying a load in excess of the manufacturer's specification.

    4. The learned trial Magistrate erred in law and in fact in failing to hold that the Appellant overloaded the vehicle by carrying a load higher than disclosed at the time of the issuance of the policy.

    5. The learned trial Magistrate erred in law and in fact in failing to find that the Appellant was by contract not entitled or permitted to carry a load heavier than indicated in the vehicle's log book upon which the policy was based.

    6. The learned trial Magistrate erred in law and in fact in holding that the tonnage allowed by law to be carried by the vehicle was 18,000 Kgs when there was no such evidence.

    7. The learned trial Magistrate erred in law and in fact in holding that since the Appellant's vehicle had been allowed to pass a weighbridge by KeNHA officials, which was evidence that it was the lorry's authorized capacity.

    8. The learned trial Magistrate erred in law and in fact in failing to find that the Appellant breached the policy of insurance by failing to notify the Respondent of important changes affecting the vehicle or its use.

29. The Respondent prays that:

    a. The trial Court's decision that the Appellant was not in breach of the policy conditions relating to overloading be set aside and replaced with a finding that the Appellant was in breach of the policy thereof.

b. The Court does hold that the Appellant was in breach of the policy by overloading and by failure to notify the Respondent of any important changes affecting the vehicle covered under the policy and/or its use.

c. The costs of the appeal and the Cross Appeal shall be paid by the Appellant to the Respondent.

30. The Respondent submits that at the time of the accident, the motor vehicle had a gross weight of 12,160 Kg, which was more than the weight allowed by the manufacturer of 7,500 Kg. According to the Respondent, the excess weight with reference to the vehicle's log book was 4,160Kg kg at the time of the accident. Reference was made to Condition 1 of the Policy that the Respondent would only make payment under the Policy only "if the information you have provided in the proposal for this insurance is true and complete to the best of your knowledge and belief." The Respondent submits that the log book showed that the vehicle's carrying capacity was 2,500 Kg with a total tonnage (vehicle plus load) of 7,500 Kg, but on the date of the accident, the tonnage was 12.160 Kg, which is 4,660Kg more than the load indicated in the logbook. The Respondent asserts that the fact that the vehicle was allowed to pass a weight bridge carrying a load above its manufacturer's stated load does not make the load legal. According to the Respondent, the Appellant had an obligation under Condition 3 of the Policy to inform the Respondent that the motor vehicle was going to carry a load that was more than stated in his proposal and incorporated in the Policy, or more than was allowed under the vehicle registration certificate. Reference is made to Section 56 of the *Traffic Act* prohibiting the use of a vehicle on a road with a load greater than specified by the manufacturer, or than the load capacity determined by an inspector under the *Traffic Act*. It is submitted that the load specified by the manufacturer was 2,500 Kg and had not been specified by an inspector under the Act. The Respondent submits that Section 57 provides for exemptions where the Highway Authority grants a permit allowing the motor vehicle to carry a load greater than specified in the manufacturer's logbook. It is submitted that the weigh bridge ticket was not a permit under Section 57 of the *Traffic Act*. Reference is made to Kenya Road (Kenya National Highway Authority) Regulations LN 86 of 2013, where overload is defined to mean "that the axle combinations or gross vehicle mass on a vehicle exceeds the prescribed legal limits for any particular part of public roads." The Respondent asserts that the trial Court erred gravely in assuming that the law in force in relation to loading and overloading was a weighbridge ticket that purportedly allowed the vehicle to pass the weighbridge. The Respondent urges this Court to allow the Cross Appeal with costs.

31. Regarding the Appeal, the Respondent submits that the motor vehicle could not be economically repaired, thus the Appellant could not be awarded costs of repairs. The Respondent submits that the Court cannot give judgment based on some unpleaded issues as held by the court in Rose Mule Kimuyu & Another vs Equity Bank & Another [2019]eKLR, Machakos HCCC No. 6 of 2018 where the Court cited Court of Appeal decision in Dakianga Distributors (K) Ltd vs Kenya Seed Company Limited[2015]eKLR, Esso Petroleum Co.Ltd vs Southport Corporation[1956]AC 218 at 238, Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others; Civil Appeal No. 219 of 2013(2014)eKLR, Supreme Court of Malawi in Malawi Railways Ltd vs Nyasulu[1988]MWSC 3, MNM vs DMK & 13 Others[2017]eKLR, Kenya Commercial Bank Ltd vs Sheikh Osman Mohammed, CA No. 179 of 2010; and Raila Amolo Odinga & Another vs IEBC & 2 Others(2017) eKLR. According to the Respondent, since the Appellant did not seek a remedy based on a total loss, the Respondent had no opportunity to bring evidence to either support or counter the Appellant's evidence on the lorry's value, such as a vehicle's assessment report, that would have shown what was, in the Respondent's assessment, the Pre accident value and the salvage value. The Respondent asserts that the trial Court was correct in holding that the Appellant could not be given judgment for a cause of action, namely, total loss of the vehicle, that it did not plead. According to the

Respondent, had that been pleaded, the Respondent would have had an opportunity to bring evidence on the pre-accident value of the vehicle and its salvage. It is submitted that by not claiming the total loss, the Respondent was denied a chance to present evidence of what the market value of the vehicle was.

32. The Respondent asserts that in the event this Court finds the trial Court was wrong, the Appellant is entitled to be compensated for the loss of its vehicle by taking the pre-accident value of the motor vehicle at Kshs. 1,500,000.00 less its salvage value of Kshs. 250,000.00 totaling to Kshs. 1,250,000.00. However, the Respondent submits that the finding would go against the rules of pleadings and would amount to a denial of justice to the Respondent, who had no chance to contest the unpleaded cause of action.

33. Regarding loss of use, towing and storage charges, the Respondent submits that they are consequential losses. The Respondent submits that the Appellant had the onus to establish that such a loss was covered by the policy of insurance. According to the Respondent, under the General exceptions in the policy of insurance, no such losses were covered. Reliance is placed on Concord Insurance Company Limited vs David Otieno Alinyo & Another [2005]eKLR, Civil Appeal No. 163 of 2002. The Respondent submits that the case of Samuel Kariuki Nyangoti vs Johaan Distelberger [2017] eKLR is distinguishable from the instant case since the contract between them is explicit that consequential loss was not covered.

34. The Respondent submits that under Clause 4 of the Policy titled Loss of income is applicable where an insured person has paid an additional premium and the loss of income is strictly for the period the vehicle is undergoing repairs. According to the Respondent, that was neither pleaded nor proved to have been done by the Appellant. It is submitted that the Appellant cannot claim that the motor vehicle was undergoing repairs as it was a total loss, as confirmed by the Appellant's own assessor. The Respondent submits that the Clause for loss of income did not therefore apply to situations where the vehicle was a total loss. Reliance is placed on ICEA Lion General Insurance Company Limited vs Chris Ndolo Mutuku t/a Crystal Charlotte Beach Resort [2021]eKLR Siaya Civil Appeal No. 48 of 2019, where the Insurance Policy provided that the cover did not cover consequential loss. On appeal, the High Court found that such damages were not payable in view of the specific clause. Further reliance is placed on Madison Insurance Co. Ltd vs Solomon Kinara t/a Kisii Physiotherapy Clinic [2004] eKLR CACA No.263 of 2003, where the Court of Appeal stated that ordinary or standard form policies or contracts of insurance do not cover consequential loss unless the parties specifically contract that such loss would be covered. See Corporate Ins. Co. Ltd vs Loise Wanjiru Wachira. According to the Respondent, this was a special damage that required to be pleaded and strictly proved with particularity. Reference is made to Capital Fish Kenya Limited vs The Kenya Power & Lighting Co.Ltd [2016] eKLR, CACA 189 of 2014. The Respondent submits that PW1 stated that he did not have any audited accounts, and had no books of account, no bank statements, no tax returns, nor even M-Pesa statements of the motor vehicle's alleged income. According to the Respondent, the Appellant ought to have not only shown incoming revenue, but also outgoings and profits or losses, thus random receipts were not sufficient proof of loss. Reliance is placed on Virani t/a Kisumu Beach Resort vs Phoenix of East Africa Assurance Company Limited [2004] eKLR CACA No. 88 of 2002. The Respondent submits that the claim for loss of user and towing fee must be dismissed as they are not covered under the Policy.

35. Regarding the storage fee, the Respondent submits that the claim is a consequential loss that is not covered under the policy, thus not payable. According to the Respondent, once it knew on 23rd November 2018 that the motor vehicle was a total loss and that it was not repairable, the Appellant had no business leaving the salvage at the garage. The Respondent submits that had the Appellant not done so, it would not have incurred the storage charges, which are more than the value of the salvage and the

total loss of the vehicle. It is submitted that the Appellant cannot recover avoidable losses for which he had a duty in law to mitigate. Reliance is placed on Concord Insurance Company Ltd vs David Otieno Alinyo & Another[2005]eKLR; African Highland Produce Ltd vs John Kisorio[2001]eKLR CACA No. 264 of 1999; and Timsales Ltd vs Up & Down Saw Mills(Kenya) Ltd[1985]eKLR CACA No. 46 of 1984. The Respondent submits that the Appellant failed to mitigate damage and its losses, thus the claim for storage fee was properly dismissed. The Respondent urges this Court to dismiss the appeal with costs.

DETERMINATION

36. I have considered the appeal in light of the grounds in the Appellant's Memorandum of Appeal and the Respondent's Cross Appeal, the evidence on record, and written submissions filed on behalf of the parties herein.

37. This being a first appeal, the role of this court is to re-evaluate and subject the evidence to a fresh analysis to reach an independent conclusion as to whether or not to uphold the decision of the trial court. The court also takes note of the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore has to make an allowance for the same. See Selle vs. Associated Motor Boat Co. [1968] EA 123).

38. The mandate has been astutely elaborated in Geoffrey Muthinja & Another vs. Samuel Muguna Henry & 1756 others (2015) KECA 304 (KLR);

> " As this is a first appeal, our mandate is a broad one and involves,..., a fresh and exhaustive examination, re-evaluation and re-analysis of the entire record with a view to drawing our own inferences and making our own independent conclusion, on all the material before us. We pay a measure of deference to the findings of the first instance Court but are free to depart from them in appropriate cases, where they are founded on no evidence, constitute a misapprehension of the law, or are plainly wrong. The latitude to depart is wider where, as in this case, there was no trial involving the taking of viva voce evidence, in which case the first instance Judge would have had the added advantage of hearing and seeing the witnesses and so would have been better placed to judge their credibility and make a more informed judgment on the veracity of the opposing cases."

39. Having established the duty of this Court at the appellate stage, I am therefore required to re-evaluate, re-assess, and reanalyze the factual details of this matter and then determine whether or not the conclusions reached by the learned trial Magistrate are to stand.

40. It is not in dispute that the Appellant's motor vehicle registration number KCP 856S Isuzu Truck was insured under Commercial Vehicle Insurance Policy No. 101878070252(Comprehensive) with the Respondent from 7th June 2018 to 6th June 2019. It is not in dispute that the said motor vehicle belonging to the Appellant was involved in a self-involving accident on 15th October 2018, and that the same was reported to the Respondent and the police station at Ugunja. It's not in dispute that the Gilgil Nairobi Bound Weighbridge issued a weighbridge ticket No. KGS180376F1/1 dated 12th October 2018, indicating the motor vehicle Gross Vehicle Weight as 12,160 Kg out of the permissible and tolerance weight of 18,000 Kg, thus legal. It is not disputed that at the time of the accident, the motor vehicle's Registration Certificate, dated 3rd July 2018, indicated a Gross Vehicle Weight of 7,500, a Tare Weight of 5,000, and a Load Capacity of 2,500 Kg. It is not in dispute that the Proposal Form made by the Appellant for purposes of insurance cover indicated the maker's maximum carrying capacity of the motor vehicle to be 7 tons.

41. Vide the letter dated 22nd January 2019, the Respondent contended that the motor vehicle load capacity is 2,500 tons as the manufacturer's recommendation, but the motor vehicle at the time of the accident was carrying 7,160 tons, thus there was an overloading which increased the chance of causing an accident. Based on these findings, the Respondent indicated that the Appellant breached some fundamental terms and conditions of the Policy, in particular, the cover did not operate when there was an overload. In the premises, the Respondent declined to compensate the Appellant for the accident. In the converse, the Appellant contended that the Gilgil weighbridge found the actual weight of 12,160 Kg on the motor vehicle to be legal as it had not passed the permissible and tolerance weight of 18,000 Kg. The Appellant contends that the Respondent did not tender any material to show the motor vehicle was indeed overloaded.

42. The court is of the view that the issues for determination are:

    1. Whether the Appellant was in breach of the policy conditions relating to overloading.

    2. Whether the Appellant proved it was entitled to be compensated for the loss under the Insurance Policy.

    3. Whether the Appellant proved its claim for:

        i. Assessment fee.

        ii. Towing fees.

        iii. Storage fees.

        iv. Loss of User.

    4. Costs of the suit and interest

43. It is not in dispute that the Appellant took an insurance policy with the Respondent for its motor vehicle. According to the learned trial Magistrate, the insurance policy, in particular Clause NP 8, did not refer to excess load as per the manufacturer's recommendations, but specifically to the load permissible under the law. The Respondent contends the load capacity at the time of the accident was not the recommended one by the manufacturer. Further, the Respondent makes reference to Sections 56 and 57 of the *Traffic Act*.

44. Section 56 provides as follows:

    Limitation of loads

    (1) No vehicle shall be used on a road with a load greater than the load specified by the manufacturer of the chassis of the vehicle or than the load capacity determined by an inspector under this Act or as provided for under the East African Community Vehicle Load Control Act, 2013..."

45. Section 57 provides as follows:

    Exemptions

    (1) A highway authority may grant a permit subject to such conditions as may be specified therein —

        (a) for the use on a road of a vehicle the weight or dimensions of which exceeds the maximum weight or dimensions provided for by rules made under this Act; (b) for the carriage by a vehicle on a road of any specified load which it is unlawful to place on the

vehicle under the provisions of any rules made under this Act. (2) Every permit granted under this section shall be in writing, and shall be carried on the vehicle in question whenever the vehicle is being used under the authority of that permit..."

46. Section 56 is to the effect that the weight must be sanctioned by the manufacturer of the chassis of the vehicle or an inspector under the *Traffic Act* or as provided for under the East African Community Vehicle Load Control Act, 2013. This is the basis upon which the Respondent contends that the load capacity carried by the Appellant had not been sanctioned by the manufacturer of the vehicle's chassis. Section 57 provides for the exemptions where the Highway Authority has granted a permit.

47. The *Traffic Act* has defined Highway Authority as:

> " highway authority" means the Cabinet Secretary for the time being responsible for Public Roads or any other Authority or body to whom the Cabinet Secretary delegates powers subject to such terms and conditions as he may deem appropriate;

48. Under Section 2 of the *Kenya Roads Act*, Cap 408 provides as follows:

> " Highways Authority" means the Kenya National Highways Authority established under section 3.

49. Section 4 of the Act provides for the functions of the authority inter alia under Subsection (1) (d) 'ensuring adherence to the rules and guidelines on axle load control prescribed under the *Traffic Act* (Cap. 403) and under any regulations under this Act'. The Appellant produced the weighbridge ticket that indicated the load weight at 12,160 Kg, which was within the permissible and tolerance weight. The learned trial Magistrate held that the Appellant did not carry an excess load, as the load of 12,160 Kg, forming the basis of the complaint by the Respondent, was permissible and within the limit of 18,000 Kg permitted by the Kenya National Highways Authority (KeNHA).

50. Clause NP 8 of the Insurance Policy provides as follows:

Overloading of vehicles

> "It is hereby understood and agreed that the indemnity provided by this Policy shall be inoperative (save in relation to such liabilities as are required by the Insurance (Motor vehicle Third Party Risks) Act, Cap. 405 to be insured in which the Company would not have been obliged to pay but for the provision of the said Act) if the Motor vehicle at the time of any event giving rise to a claim shall be carrying a greater number of passengers or a greater load than permitted by any law for the time being in force."

51. It is not in dispute that the Appellant and Respondent entered into a binding insurance contract. It is trite law that it is not the business of the court to rewrite contracts between the parties unless coercion, fraud, or undue influence are pleaded and proved. See National Bank of Kenya Ltd vs Pipe plastic Samkolit (K) Ltd [2002]2 EA 503. Clause NP 8 prohibits carrying a greater load than permitted by any law for the time being in force. I agree with the learned trial Magistrate that the Policy prohibited overloading unless permitted by any law for the time being in force. The *Kenya Roads Act*, which establishes KeNHA, was, for the time being, in force, whereby one of the Authority's functions is to manage and control the weight of the cargo transported on our roads. It was DW1's testimony in cross-examination that KeNHA was the body to identify the overload.

52. From the foregoing analysis regarding the first issue, it is clear that the Appellant was not in breach of the policy conditions relating to overloading since Clause NP 8 of the policy document was to

be considered based on the load permissible in law at the time and not on what the manufacturer provided . The learned trial Magistrate's finding thereon was therefore quite sound and must be upheld. The Respondent's Cross Appeal on this ground lacks merit.

53. As regards the second issue, I find the learned trial Magistrate was wrong to find that since the pre-accident value had not been pleaded, but the repair costs had been pleaded and hence the same must be allowed was plainly wrong since the motor vehicle was assessed as a total loss and thus the issue of repair costs would not arise at all. According to the learned trial Magistrate, based on the Policy, the costs of the repairs could not be claimed when there was a total loss. The learned trial Magistrate was guided by the principle that parties are bound by their pleading.

54. It is not in dispute that the Appellant pleaded in the Amended Plaint repair costs of Kshs. 2,141,940.00 assessed by Paramount Assessors Limited. In the prayers, the Appellant pleaded 'a) specific performance of the insurance policy regarding compensation, and particularly payment of Kshs. 2,141,940 as the estimated cost of repairs of the damaged motor vehicle.' It is not in dispute that the motor vehicle was declared a total loss since the repair costs were assessed to be higher than the pre-accident value. The learned trial Magistrate found that the court could not grant unpleaded reliefs.

55. In David Sironga Ole Tukai v Francis Arap Muge & 2 Others [2014] KECA 155 (KLR), the Court of Appeal stated that:

> " It is well established in our jurisdiction that the court will not grant a remedy which has not been applied for, and that it will not determine issues which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expediting the litigation through diminution of delay and expense.
>
> The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to a denial of justice."

56. However, the exceptions to the rule that parties are bound by their pleadings are well captured in Odd Jobs vs Mubia [1970] EA 476, Law, JA, where the Court of Appeal stated that:

> " [A] court may allow evidence to be called, and may base its decision, on an unpleaded issue if it appears from the course followed at the trial that the unpleaded issue has in fact been left to the court for decision." (See also Vyas Industries Ltd V Diocess of Meru [1982] KLR 114)

57. It was appreciated in MNM vs. DNMK & 13 Others [2017] eKLR, that:

> " A court may validly determine an unpleaded issue where evidence is led by the parties, and from the course followed at trial, it appears that the unpleaded issue has been left to the court to decide."

58. In Christopher Orina Kenyariri T/A Kenyariri & Associates Advocates vs. Salama Beach Hotel Limited & 3 others [2017] eKLR, the Court held:

> " Those, therefore, were the crisp and only issues before the learned judge. As has been stated time without number, a court will not determine or base its decision on unpleaded issues. However, if it appears from the cause followed at trial that an unpleaded issue has been left to the court to decide, the trial court may validly determine the unpleaded issue..."

59. The Court of Appeal pronounced itself in Rosemary B. Koinange (suing as legal representative of the Late Dr. Wilfred Koinange and also in her own personal capacity) & 5 others vs. Isabella Wanjiku Karanja & 2 Others [2017] eKLR that:

> " The law on unpleaded issues and parties being bound by their pleadings, as relates to this question, is amplified by a long line of authorities as correctly illustrated by the appellants. But there is an equally long line of authorities unequivocally asserting the power of a court to determine issues which the parties have not raised in their pleadings. They may allow the court to do so by consent, as stated, for example, in Chalicha FCS Ltd vs. Odhiambo & 9 Others [1987] KLR 182, that: "Cases must be decided on the issues on the record. The court has no power to make an order, unless by consent, which is outside the pleadings. In this instance, the issues raised by the Judge and the order thereon was a nullity."

60. The legal burden of proof was on the Appellant to prove its claim on a balance of probabilities. It was therefore incumbent upon the Appellant to prove the assertions pleaded in the Amended Plaint.

61. Section 107(1) of the *Evidence Act*, Cap 80, provides that:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

62. The Supreme Court case of Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014] eKLR held that:

> " The person who makes such an allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof, which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one and is a requisite response to an already discharged initial burden. "The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue" [Cross and Tapper on Evidence, (Oxford University Press, 12th ed, 2010, page 124)]."

63. The standard of proof in civil cases is well captured in the case of Palace Investment Ltd v. Geoffrey Kariuki Mwenda & Another (2015) eKLR, where the Court held that:

Denning J. in Miller v Minister of Pensions (1947) 2 ALL ER 372, discussing the burden of proof, had this to say:

> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say, we think it is more probable than not, the burden is discharged, but if the probabilities are equal, it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

64. Kimaru J. (as he then was) in William Kabogo Gitau vs George Thuo & 2 others (2010) 1 KLR 526 stated that:

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposite party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegation that he made has occurred."

65. It is not in dispute that PW3 (Eliud Nashali), an assessor with Paramount Assessors, assessed the motor vehicle, KCP 856S Isuzu NPR 75 Lorry. The assessed costs came to Kshs. 2,141,940.00, while the Pre-accident value came to Kshs. 1,550,000.00 and the salvage value at Kshs. 250,000.00. PW3 produced the assessment report as Exhibit 6. PW3 charged Kshs. 10,000.00 for assessment and produced the receipt as Exhibit 7. He opined that the motor vehicle was a total write-off, thus not economical to repair the same as the cost of repair exceeds its value.

66. The court aligns with the holding of Mulwa J. in Permuga Auto Spares & Another vs Margaret Korir Tagi[2015 that:

> " ...once a vehicle has been written off, the only compensation is the per-accident value, less salvage value as assessed, and other reasonable consequential expenses that are subject to proof...The payment of the pre-accident value is made to bring the owner as near as possible to the state he would have been if not for the accident and loss."

67. However, i find the decision factually distinguishable from the instant matter, in that there was no contention of unpleaded issues. In the decision, the assessor had not indicated the cost price of the damaged items, while in his instant matter, PW3 had given an estimate of repair costs, thus distinguishable from Permuga Auto Spares & Another (supra).

68. Condition 1 of the Policy provides that the maximum the insurance would pay where there is a total loss will be the market value immediately before the loss or damage. The learned trial Magistrate's finding was premised on the basis that the pre-accident value had not been pleaded. The Policy of Insurance and Commercial Vehicle Insurance Policy were produced in court as the Respondent's exhibits. The Policy, which was produced as an exhibit, indicated that where there is a total loss, it was the Pre-Accident value that was payable, less the salvage value. The Policy formed part of the evidence on record for the trial Court to determine on, despite the Pre-Accident value not being pleaded expressly in the Plaint. That being the position, it is clear that the issue of the pre-accident value

was well within the knowledge of the parties and that in the event of a total loss/write off of the vehicle, the same would be resorted to by the parties. It mattered therefore that the same was not pleaded as the prayer for specific performance had been pleaded by the Appellant and backed by the conduct of the parties in having the policy document produced in evidence.

69. From the foregoing, i find that it was unjust for the learned trial Magistrate to place reliance only on the principle that parties must be bound by their pleadings without taking into account the circumstances of the case. The assessment report did provide the Pre-Accident value and the Salvage value. The accident is not denied as it was reported to the Respondent. The Court in Odds vs Job (supra) is clear on the exceptions to the principle, which i find very much applicable to the circumstances of this case. PW3 was able to lead the trial Court in terms of the assessment report, which was produced as an exhibit. Parties agreed to be bound by the exhibits produced in court, as no objection was raised regarding their production.

70. I find that the learned trial Magistrate ought to have calculated the loss by taking into consideration the Pre-Accident value of Ksh. 1,550,000.00 less the Salvage value of Kshs. 250,000.00, leaving a balance of Kshs. 1,300,000.00. The Appellant is entitled to Kshs. 1,300,000.00 as compensation for the loss and damage of its motor vehicle under the Insurance Policy.

71. The Appellant has urged this Court to interfere with the findings of the learned trial Magistrate regarding the damages. The learned trial Magistrate declined to award all the damages and dismissed the suit in its entirety.

72. In Kenya Bus Services Limited vs. Jane Karambu Gituma Civil Appeal Case No. 241 of 2000, where the Court of Appeal stated as follows:

> " ...in this regard, both the East African Court of Appeal (the predecessor of this Court) and this court itself have consistently maintained that an appellate court will not interfere with the quantum of damages awarded by a trial court unless it is satisfied either that the trial court acted on a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account of some relevant one or adopting the wrong approach), or it has misapprehended the facts, or for those or any other reasons the award was so inordinately high or low so as to represent a wholly erroneous estimate of the damages."

73. Special damages, in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177.

74. Regarding the assessment fee of Kshs. 10,000.00, i find the amount of Kshs. 10,000.00 was pleaded and strictly proved vide a receipt dated 23rd September 2021. It is a direct, immediate, and necessary expense incurred as a result of the accident, such as towing costs. It is not in dispute that the motor vehicle was towed to Sunshine Automobiles' garage from Ugunja Police Station. A receipt dated 31st October 2018 indicating Kshs. 34,000.00 was exhibited in support of the claim. I find the two claims having been pleaded and strictly proved by the Appellant, the same are payable.

75. On the storage fee, i find the Appellant is not entitled to the damages even if an invoice was exhibited since there is evidence on record vide the letter dated 22nd January 2019 from the Respondent instructing the Appellant to collect their motor vehicle from Sunshine Automobiles garage to avoid accumulation of the storage fee. The Appellant was aware of the instructions by the Respondent as they responded to the Respondent vide a letter dated 24th January 2019, where they did not mention anything about collecting its motor vehicle. The Appellant failed to mitigate the loss, thus not entitled to the claim. It is instructive that upon the expiry of the grace period of thirty days, the Appellant was

required to collect the salvage and keep it at a place of its choice but not to let it remain at Sunshine Garage and that any charges thereafter ought to be addressed by the Appellant and not the Respondent.

76. In Safe Rentals Limited v Leisure Lodge Limited T/a Leisure Lodge Hotel Club Casino [2012] KECA 105 (KLR), the Court of Appeal held that:

> " 19. The guiding principles of law in mitigation of losses was stated in African Highland Produce Limited vs. John Kisorio, Civil Appeal No. 264 of 1999 (unreported) where this Court applying Halsbury's Laws of England, 3rd edition Vol. 11 page 289 had this to say: "The guiding principle of law in mitigation of losses is as follows: It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues, and he cannot claim as damages any sum which is due to his own neglect. The duty arises immediately a plaintiff realizes that an interest of his has been injured by a breach of contract or a tort, and he is then bound to act, as best he may, not only in his own interests, but also in those of the defendant..... The question, what is reasonable for a plaintiff to do in mitigation of his damages is not a question of law, but one of fact in the circumstances of each particular case, the burden of proof being upon the defendant."

77. Regarding the damages for loss of user, the Appellant has placed reliance on several receipts for transportation services. The receipts show, the Appellant was earning Kshs. 30,000.00 for a trip. According to the Respondent, loss of user was a consequential loss that is excluded under the Policy, thus not payable. I do not doubt that loss of user is a consequential loss. If the policy did not provide for it, then the Appellant cannot make any claim thereon.

78. Black's Law Dictionary, 2nd Ed has defined consequential loss as:

> A loss that happens and is insured. The loss is not predictable. Additional insurance must be bought. Refer to direct loss and indirect loss.

79. In Madison Insurance Company Limited Vs Solomon Kinara t/a Kisii Physiotherapy clinic, [2004] eKLR, the Court of Appeal stated thus;

> " 23. ....ordinary or standard form policies or contracts of insurance do not cover consequential loss unless the parties specifically contract that such loss would be covered...The policy of insurance between the Appellant and Respondent was an ordinary or standard form contract, and as such, there was nothing to import into that policy the element of consequential loss. The Respondent's claim was that the loss was occasioned by the Appellant's wrongful repudiation or refusal to pay for the loss of the items the policy covered, but we do not think this takes the matter any further. The parties could have covered such an eventuality in their policy of insurance, and in the absence of such a provision, the Respondent was not entitled to claim consequential loss of profits. That was what this Court rejected in the case of Corporate Ins. Co Ltd Vs Loise Wanjiru Wachira, to which we have already referred."
>
> 24. From the above-quoted passage, it is clear that the consequential loss can only be awarded by the court if parties to the contract specifically contract that

such loss would be covered. The rationale is simple: insurance contracts are not entered into with the intention of profit-making."

80. Section I Clause 5 of the Policy excludes consequential loss. Under General Exceptions, it is provided that "we will not be liable in respect of: Clause 5(a) any accident, loss or damage to any property or any loss or expense whatsoever resulting or arising therefrom." However, the Policy, under Section V, Clause 4, provides that the cover was extended to cover loss of income while the insured motor vehicle is undergoing repairs, where the insured has paid an additional premium. The learned trial magistrate correctly found that no evidence was tendered to show the motor vehicle was undergoing repairs. In fact, PW1 was claiming storage fee since the motor vehicle had never been repaired as the Respondent declined liability under the Policy.

81. In David Bagine v Martin Bundi [1997] KECA 54 (KLR), the Court of Appeal held that:

> " Damages for loss of use of a chattel can be limited (if proved) to a reasonable period, which period in this instance could only have been the period during which the respondent's lorry could have been repaired, plus some period that may have been required to assess the repair costs. There was no evidence before the learned judge of what period the vehicle would have needed for repairs or for assessment of repair costs..."

82. I find the loss of the user claim is a consequential loss that was excluded from the cover under the insurance policy. The Appellant failed to show whether it had paid additional premiums or whether the motor vehicle was undergoing repairs.

83. It is trite that the claim for loss of user is a special damage claim. See Josephat Waithaka Wangungu v Kenindia Assurance Company Limited [2015] KEHC 2687 (KLR; Sande V KCC (1992) LLR 314 (CAK- Cockar, Omolo and Tunoi). However, it is trite law that it is not the business of the court to rewrite contracts between parties. In the premises, I find it needless to render myself whether the claim, being a special damage claim, was in addition to being pleaded, was strictly proved since the insurance does not cover consequential loss unless the Appellant substantiated with evidence that it satisfied Section V, Clause 4 on loss of income.

84. For the reasons i have set out above, the Cross Appeal must fail and is hereby dismissed.

85. In the result, it is my finding that the Appellant's appeal partially succeeds. The learned trial Magistrate's judgment delivered on 31st July 2024 is hereby set aside and substituted with the following orders:

    a. The Appellant is entitled to be compensated for the loss under the Insurance Policy in the sum of Kshs. 1,300,000.00.to be paid by the Respondent.

    b. Assessment fee of Kshs. 10,000.00 plus Towing fees of Kshs 34,000/= is allowed and to be paid by the Respondent.

    c. Storage fees claim is dismissed.

    d. Loss of User claim is dismissed.

    e. Interest on (a) and (b) above at court rates from the date of filing suit.

    As the appeal has partially succeeded, the Appellant is awarded half costs thereof while the parties shall bear their own costs in the lower court.

Orders accordingly.

DATED AND DELIVERED AT SIAYA THIS 19TH DAY OF SEPTEMBER 2025.

D. K. KEMEI

JUDGE

In the presence of:

Cheruiyot.....for Appellant

M/s Barasa.....for Respondent

Okumu.....Court Assistant