

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MIGORI
CIVIL SUIT NO. E003 OF 2021

MUA INSURANCE COMPANY LTD
(FORMERLY SAHAM ASSURENCE COMPANY LIMITED)PLAINTIFF

VERSUS

WILSON KIBURE NYABOKARA.....DEFENDANT

AND

JOSEPHINE MAROA SESE.....1ST INTERESTED PARTY
ESTINA MOGESI.....2ND INTERESTED PARTY
PETER SINTAKE BURURE.....3RD INTERESTED PARTY

JUDGMENT

Vide an amended plaint dated **30th November 2021**, the Plaintiff moved this court seeking for the following reliefs against the Defendant;

- a) A Declaration that it is not bound to pay and/or satisfy any Judgment arising from Migori CMCC No. 54 of 2021- Estina Mogesi Vs Wilson Kibure Nyabokara, Migori CMCC No. 55 of 2021-Josephine Maroa Sese Vs Wilson Kibure Nyabokara and Rongo PMCC No. 161 of 2021 Peter Sintake Burure Vs Wilson Kibure Nyabokara & Joseph Kamal Kaibei respectively and/or judgment in any suit arising from the said accident and/or indemnify the Defendant against any claim in respect of bodily injury to any person, damage to property satisfy any claim whatsoever arising out of the accident which allegedly occurred on 20/6/2020 along Isibania/Migori Road at Kwa Makara Area; involving the Defendant's Motor Vehicle Registration Number KCQ 885 F.**
- b) Costs of the suit.**
- c) Interest on (b) above at Court rates.**
- d) Any other or further relief that the Honorable Court may deem just, expedient and fit to grant.**

The plaintiff in its plaint avers that the Defendant, vide a proposal, requested the Plaintiff to issue him with an Insurance policy cover for his Motor Vehicle Registration Number KCQ 885 F, which motor vehicle was to be used as a private motor vehicle for the Defendant's personal use. Pursuant to the said proposal request, the Plaintiff issued the Defendant with a Motor Vehicle Insurance Policy Number MGL/07/070/0/041637/2020 upon payment of the requisite premium.

The Plaintiff asserts that it was an express term of the insurance policy that the motor vehicle would be used for the Defendant's personal use and as a private motor vehicle and that it was expressly provided that the motor vehicle would not be used for hire and reward. It was expressly provided that the Plaintiff would not be liable for any liability and/or loss arising from the use of the subject motor vehicle for hire and reward and/or for any purpose or use contrary to the disclosed and/or authorized use.

It was a term of the subject insurance policy cover that the Plaintiff would indemnify the Defendant in the event of loss, damage and claims arising from a road traffic accident caused or arising from the use of the motor vehicle registration number KCQ 885 F within the contractual use of the Motor Vehicle, as a private motor vehicle. Further, if an accident arose, the Defendant would fully cooperate with the Plaintiff, including but not limited to furnishing the Plaintiff and/or their agent with all material information relating to the occurrence of the accident

That on or about 20th June 2020 the Defendant's Motor Vehicle was involved in a road traffic accident along the Isibania Migori Road at Kwa Makara as a consequence of which passengers aboard the motor vehicle were allegedly injured. Upon investigations by the Plaintiff, it became apparent that the Defendant's motor vehicle was being used for hire and reward at the time of the accident. It also became apparent that the Defendant's motor vehicle was being used as a P.S.V Matatu, contrary to the provisions of the insurance policy. The Defendant willfully concealed some material facts in reporting the accident to the Plaintiff, deliberately misrepresented material facts as to the circumstances surrounding the occurrence of the accident and in particular misrepresented material facts as to the use of the subject motor vehicle.

The Plaintiff avers that the Defendant and his driver misrepresented that the passengers were the Defendant's driver relatives whereas investigations conducted by the Plaintiff revealed there was no acquaintance between the Defendant's driver and the passengers. The Plaintiff further avers that, it is neither legally nor contractually liable to indemnify the Defendant or the injured passengers onboard the motor vehicle as that would go beyond the scope of the insurance contract between the parties and beyond the scope of a mandatory insurance cover within the meaning of Sections 4 and 5 of Insurance (Motor Vehicle Third Party Risk) Act, CAP 405 of the Laws of Kenya.

As a result of the said accident, the passengers sustained injuries and have consequently instituted civil suits being Migori CMCC No. 54 of 2021-Estina Mogesi vs Wilson Kibure Nyabokara, Migori CMCC No. 55 of 2021-Josephine Maroa Sese vs Wilson Kibure Nyabokara and Rongo PMCC No.161 of 2021 Peter Sintake Burure vs Wilson Kibure Nyabokara & Joseph Kamau Kaibei respectively and subsequently served the Plaintiff with a Notice of Institution of the said suit.

The Plaintiff therefore avers that the Defendant was in breach of the contract and should bear the consequences of any Judgment arising from Migori CMCC No. 54 of 2021-Estina Mogesi vs Wilson Kibure Nyabokara, Migori CMCC No. 55 of 2021-Josephine Maroa Sese vs Wilson Kibure Nyabokara and Rongo PMCC No.161 of 2021 Peter Sintake Burure vs Wilson Kibure Nyabokara & Joseph Kamau Kaibei respectively and/or any liability arising from any claims by any passenger relating to the use of his motor vehicle as a matatu and/or for hire and reward.

The plaintiff pleaded particulars of breach of insurance policy and conditions as follows;

- a) Hiring out his motor vehicle to passengers for hire and reward.**
- b) Using his motor vehicle for hire and reward.**
- c) Using his private motor vehicle as a matatu for ferrying passengers.**
- d) Failing to fully cooperate with the Plaintiff herein.**
- e) Failing to make full disclosure of material particulars.**

- f) Misrepresenting material facts and/or giving the false information.**
- g) Concealing material facts from the Plaintiff.**
- h) Breaching the implied and/or express term of uberrimae fidei.**
- i) Willfully breaching the terms of the insurance policy.**

The Plaintiff avers that it is neither legally nor contractually liable to compensate the passengers injured as a result of the accident and or shoulder any judgment arising from the aforementioned cases. The Plaintiff therefore seeks a declaration that it is not bound to pay and or satisfy any judgment arising from Migori CMCC No. 54 of 2021-Estina Mogesi vs Wilson Kibure Nyabokara, Migori CMCC No. 55 of 2021-Josephine Maroa Sese vs Wilson Kibure Nyabokara and Rongo PMCC No.161 of 2021 Peter Sintake Burure vs Wilson Kibure Nyabokara & Joseph Kamau Kaibei respectively and or any judgment in any suit arising from the said accident and or indemnify the Defendant against any claim in respect of bodily injuries sustained by any person, damage to property, or to satisfy any claim whatsoever arising out of the accident which allegedly occurred on 20th June 2020 along Isibania/Migori Road at Kwa Makara Area involving the Defendant's Motor Vehicle Registration Number KCQ 885 F.

The Defendants and Interested Parties did not enter appearance or file statement of defense in this matter.

Evidence

This matter proceeded for hearing on 17th October 2024.

PW1Kelvin Kitavi in his testimony stated that he works at MUA Insurance Company Ltd as a Senior Legal Officer. He stated that the insured Defendant took out a private motor cover with the plaintiff. It was a comprehensive cover for KCQ 885F Policy No. MGL/07/070/00/416137/2020 and the scope of the cover was private use only. In the course of the pendency of the cover they received a notice that on 20th June 2020 the vehicle was involved in an accident. The Defendant reported occurrence of the accident and filed a motor vehicle claim form dated 21st June 2020. The insurance instituted investigations to establish circumstances surrounding the accident which revealed that the

Defendant had breached the terms of the policy. It was noted that the subject motor vehicle was being used for hire contrary to the policy.

The Plaintiff informed the Defendant of the outcome of the investigations through vide a letter dated 6th August 2020 declining liability as the Defendant had concealed material facts by failing to give the Investigator the details of persons involved in the accident. That upon the Defendant responding and giving explanations of the gaps noted in the investigation report the Plaintiff responded by a letter dated 21st August 2020 the and re-affirmed their position. Subsequently three suits were filed Migori CMCC No. 54 and 55 of 2021 and Rongo PMCC No. 161 of 2021.

The Plaintiff stated that policy the Defendant took out had limitations as to use in clause “use only for social, domestic and pleasure purposes your own business and professions.” It was contended that the Policy did not cover for carriage of passengers, for hire or reward and therefore the Defendant did not comply with the limitation on the use. The plaintiff prayed for a declaration that it is not bound to pay and or satisfy any judgment arising from Migori CMCC No. 54 and 55 of 2021 and Rongo PMCC No. 161 of 2021.

In cross examination by counsel for the 1st and 2nd Interested parties PW1 stated that the insurance was comprehensive policy and the motor vehicle KCQ 885F was involved in an accident. The Investigator confirmed that there were people who were injured in the accident. Josephine Maroa Sese, Estina Mogesi and Peter Sintake Burure were involved in the accident. He said that the only people who were injured as per investigation report and Police Abstract were Peter Sintake and Rehema. It was confirmed that there were three suits that were filed against the plaintiff as a result of the accident by people who claimed claim to have been passengers in the subject motor vehicle

In cross examination by counsel for the 3rd Interested party PW1 stated that the Investigations confirmed that Peter Sintake Burure was involved in an accident on 20th June 2020. He also confirmed that motor vehicle KCQ 885F was insured by the plaintiff. That Peter Sintake Burure filed a suit in Rongo PMCC No. 161 of 2020 but the plaintiff did not appoint an advocate to represent them in the primary suit. That they filed the declaratory suit after judgment was delivered and also did repudiate the

claim when they informed insured they would not be taking any liability which was communicated to the Insured. PW1 said that they did not inform the trial court in the primary suit that they repudiate the claim.

PW1 further stated that they relied on the report of an Insurance Investigator who was hired by the plaintiff. He said that the investigator was paid fees as per Associations of Kenya Insurers Guidelines and they relied on the report for repudiation.

During re-examination he stated that the Investigators and Professional/Experts are licensed by Association of Kenya Insurers to carry out investigations. He said that Investigators are not employees of the plaintiff and they don't earn a salary from the plaintiff. That when the claim was repudiated, the Insured was informed and the 3rd Interested party is aware of the repudiation. He said that not all claims are supposed to be paid, there are exceptions to payable claims which are guided by the terms of the contract. The policy taken out forms the basis of the contract between the Insurance and Insured. The policy taken out by the Defendant is within the Laws of Kenya.

PW2-John Munyoki testified that he was the Investigator and had an Investigation report dated 17th July 2020 and were instructed by Saham Assurance Co. Ltd (MUA Insurance Co. Ltd). He said he was not an employee of MUA Insurance. He said that Wilson Kibure the Plaintiff herein was not related to him and he has no reason to be biased against him. He stated that the vehicle was being used for hire and reward, and he recorded statements from Wilson Kibure driver and a passenger Peter Sintake. The driver said he was requested by two of his relatives to take them to Masaba and they paid Kshs. 3,000/= out of which he was able to give the insured Kshs. 1,000/=. The driver received the money from passengers who were onboard the motor vehicle. The Insured confirmed that he was paid Kshs. 1,000/=.

That according to PW2, the conclusion was that the vehicle was being used as a matatu for hire and reward. PW2 prepared the investigations Report and forwarded to the plaintiff. He produced it in court as an exhibit. During cross examination by 1st and 2nd Interested party Advocate, he confirmed that an accident occurred on 20th June 2020. He said he went to Isbania Police Station where the report was made and according to the

police, it is Peter and Rehema who were injured. The police abstract has the names of Peter and Rehema. The police indicated that matter referred was referred to insurance. That the driver told him that he was ferrying relatives but didn't have their names. He said that the high mileage is an indication that the insured vehicle was being used as a Matatu.

In cross examination by the 3rd Interested party PW2 stated that he established that motor vehicle was being used for hire and reward and there was a statement of the insured's driver as to exchange of money from the 3rd Interested party and the Insured's driver.

In re-examination, he stated that evidence of money was given by Peter Sintake who admitted that money was paid to the driver. The Insured also admitted about the money.

The Defendant and Interested Parties closed their cases without calling for any evidence and directions were taken for filing of submissions.

The plaintiff's submissions are dated 29th January 2025 whereas the 3rd Interested party's submissions are dated 26th November 2024. There are no submissions on record for the Defendant, 1st and 2nd Interested parties.

Analysis and Determination

Having considered the pleadings and the rival submissions, I find the issues condensing for determination are;

- (a). Whether the Defendant breached the terms of the insurance policy by using the vehicle for hire and reward.**
- (b). Whether the Plaintiff (insurer) is legally and contractually liable to indemnify the Defendant for claims and judgments arising from the accident.**
- (c). Whether the Plaintiff complied with statutory obligations under the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405.**
- (d). Whether the Interested Parties (injured passengers) can enforce judgment against the Plaintiff despite repudiation.**
- (e). Who should bear the costs of the declaratory suit.**

On the first issue, I find it important to define the term contract. The Black's Law Dictionary 11th Edition defines it as an agreement between

two or more parties creating obligations that are enforceable or otherwise recognizable at law.

1. As to what amounts to breach of contract, the Black's Law Dictionary 11th edition has defined breach of contract as a violation of a contractual obligation by failing to perform one's own promise, by repudiating it or by interfering with another party's performance.

There is no dispute that the plaintiff insured the Defendant's motor vehicle registration number KCQ 885F under policy number MGL/07/070/0/041673/2020 and the motor vehicle was involved in an accident on 20th June 20220. The plaintiff argued that it was an express term of the insurance contract that the Defendant's vehicle was expressly excluded from use for carriage of passengers for hire and reward. The policy cover was only for personal use (social, domestic, pleasure, and own business). The plaintiff argued that the subject motor vehicle was used for hire and reward contrary to the terms of the policy cover. Evidence by **PW1 (insurer's legal officer)** and **PW2 (investigator)** showed that passengers paid the Defendant's driver Kshs. 3,000, part of which (Kshs. 1,000) was remitted to the insured. The driver had initially misrepresented that passengers were relatives, but evidence pointed otherwise. The Clause restricting "hire and reward" use is a standard limitation, and breach was clearly proved.

The provisions of **Section 10(4) of Cap 405**, an insurer may avoid liability if policy conditions are breached, provided repudiation is communicated. The Defendant having materially breached the policy terms, the insurer was entitled to void the duty to indemnify. The insurer repudiated liability through letters dated 6th and 21st August 2020. When through investigations it was established and the police abstract submitted in court confirmed that those involved in accident namely Sintake Burure and Rehema were passengers in the subject motor vehicle. The driver of the subject motor vehicle and the 2 passengers admitted having paid a sum of Kshs. 3,000/= and the driver admits having paid Kshs. 1,000/= to the Insured.

Insurance is a contract that is based on utmost good faith and attempt by the Defendant to conceal and/ or misrepresent material facts on use of vehicle and status of passengers undermines the basis of the contract.

In the case of **Kenindia Assurance Co. Ltd v Otiende** [1989] KLR and **Jubilee Insurance Co. Ltd v Elias** [2017] eKLR) it was affirmed that an insurer is not bound where insured breaches material terms.

This court finds that the Plaintiff was entitled to avoid liability in these circumstances

Although Cap 405 makes third-party insurance compulsory for liability to third parties arising from motor accidents it also limits coverage to authorized use. Section 5 excludes liability if the vehicle is used otherwise than in accordance with the limitations as to use specified in the policy.

The court in **Cannon Assurance Co. Ltd v Peter Mulei Kituku & 2 Others** [2018] eKLR, recognized that unauthorized PSV use excluded indemnity. The Plaintiff cannot be compelled under Cap 405 to indemnify for unauthorized "PSV" use.

In consideration that the Defendant used the subject insured motor vehicle as a PSV without authority injured third parties can only find their reprieve by suing the insured directly as the court has found that the Insurer is entitled to repudiated liability. The said 3rd Parties testified in the primary suits confirming that they were passengers and not the Defendant's relatives and that they paid for the ride in the insured motor vehicle. It is not surprising that the Defendant did not enter appearance or file a statement of defense in response to the declaratory suit. He did not testify or even call witnesses and this court has accessed the evidence in the trial courts which confirm breach of the insurance policy.

The Defendant having failed to defend the declaratory suit and the Interested Parties having failed to adduce evidence the declarations sought by the Plaintiff are hereby granted.

The Costs of the suit to be borne by the Defendant; Interested Parties being victims of the accident will bear their own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MIGORI THIS 25th DAY OF
SEPTEMBER, 2025.**

**HON. LADY JUSTICE ANNE ONG'INJO
JUDGE**