



ICEA Lion General Insurance Company Limited v Ongera (Civil Suit E004 of 2023) [2025] KEHC 17664 (KLR) (28 November 2025) (Judgment)

Neutral citation: [2025] KEHC 17664 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL SUIT E004 OF 2023
CM KARIUKI, J
NOVEMBER 28, 2025**

BETWEEN

ICEA LION GENERAL INSURANCE COMPANY LIMITED PLAINTIFF

AND

CYRUS OBURU ONGERA DEFENDANT

JUDGMENT

Introduction

1. This suit was commenced by way of a Plaint dated 22nd June 2023 in which the Plaintiff, ICEA Lion General Insurance Company Limited, a licensed insurer carrying on business under the *Insurance Act*, seeks declaratory orders relating to its alleged non-liability under Motor Vehicle Insurance Policy No. 970-JO-166105-22 issued to the Defendant, Mr. Cyrus Oburu Ongera, in respect of Motor Vehicle Registration Number KCS 925Q.
2. The Plaintiff avers that the Defendant procured a private-use motor vehicle insurance policy on the representation that the insured vehicle would be used solely for private purposes. The Plaintiff pleads that on 11th April 2023, the vehicle was involved in a road traffic accident along the Narok–Mai Mahiu Road at Nmedekia Junction, during which several persons aboard the vehicle sustained injuries. It is the Plaintiff’s case that investigations revealed that the vehicle was, at the time, being used to carry fare-paying passengers for hire and reward, contrary to the terms of the private-use policy. As a result, the Plaintiff contends that it bears no contractual or statutory obligation to indemnify the Defendant or to satisfy any judgment arising from the said accident, including in Narok CMCC Nos. E140, E148, and E149 of 2023, and any others that may arise.
3. The Defendant filed a Statement of Defence dated 20th September 2024. Save for those matters expressly admitted, the Defendant denies the Plaintiff’s averments. He admits paragraphs 1, 3, 4, and 5 of the Plaint but vehemently denies the allegations that his vehicle was being used for hire, reward, or to ferry fare-paying passengers as alleged in paragraphs 6 to 9 of the Plaint, putting the Plaintiff to strict



proof. The Defendant further denies that any breach of policy terms occurred or that the Plaintiff is entitled to the declarations sought.

4. The Defendant additionally pleads that the suit is premature, incompetent, bad in law, and discloses no reasonable cause of action, asserting that no judgment has been entered against him in respect of the alleged accident that would trigger the statutory obligation contemplated under the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405. He contends that the Plaintiff cannot properly invoke the Court's jurisdiction to obtain declarations concerning matters not yet determined in the primary suits. He further avers that he was never served with any demand or notice of intention to sue.
5. The Defendant, however, concedes the jurisdiction of this Court. He prays that the Plaintiff's suit be dismissed with costs.

Plaintiff's Case

6. The Plaintiff called one witness, PW1, Vitalis Juma Masinde, a legal assistant employed by the Plaintiff. PW1 testified on oath and stated that he had authority from the Plaintiff to testify on its behalf. He adopted his witness statement dated 22nd August 2023 as part of his evidence-in-chief.
7. PW1 stated that according to the Plaintiff's records, Motor Vehicle Registration Number KCS 925Q was insured under a private-use policy and was being driven by one Benjamin Kiarie at the time of the accident. PW1 indicated that the accident occurred on 11th April 2023, involving passengers who sustained injuries. He produced a bundle of ten documents, including the insurance policy, proposal form, police abstract, driver's statement, and witness statements, which were collectively marked as Plaintiff's Exhibits.
8. PW1 testified that the Plaintiff's investigations revealed that the vehicle had been used contrary to the terms of the policy, namely, that it was allegedly ferrying passengers for hire and reward. He stated that the declaratory suit was filed to obtain a determination that the Plaintiff is not liable to indemnify the Defendant for claims arising from the accident.
9. On cross-examination, PW1 acknowledged that the driver's statement did not indicate the exact date or time of the accident. He also confirmed that the police abstract reflected the accident date as 11th August 2023 at 0300 hours, and conceded that the journey seemed to have taken more than 24 hours. He admitted that he did not know what transpired between the time the vehicle allegedly left Kisii and the time of the accident.
10. PW1 further testified that although passengers were injured, no receipts or any proof showed that they were fare-paying passengers. He also confirmed that the insured (Defendant) had been sued in several suits, but the Plaintiff itself had not been sued. He stated that although the Plaintiff had been served with notices of institution of the suits, no outcomes had been communicated to them.
11. In re-examination, PW1 stated that the Plaintiff relied on passengers' statements indicating that they paid fare, including one Petronilla, who allegedly paid Kshs. 1,500. He maintained that the accident occurred shortly after midnight on 11th August 2023 and that the Plaintiff filed this declaratory suit to be exonerated from liability in respect of the suits filed against the insured.

Defence Case

12. The Defendant, DW1, Cyrus Oburu Ongera, testified on oath. He stated that he resides in Ongata Rongai and works as a store assistant. He adopted his undated witness statement filed on 22nd April 2025 as his evidence-in-chief. He confirmed that motor vehicle KCS 925Q belonged to him and that



it was involved in an accident in which several passengers sustained injuries. He maintained that the individuals injured were not fare-paying passengers but merely persons who had been offered a lift.

13. On cross-examination, DW1 confirmed that his ID number is XXXXXXXX and that he was the insured under the ICEA Lion policy. He explained that when he bought the vehicle in 2021, it was insured under Trident Insurance before he later obtained a private-use cover with the Plaintiff. He stated that the driver at the time of the accident was Benjamin Kiarie, whose statement dated 12th June 2023, he had seen.
14. He acknowledged that passenger Petronilla Kinyanya had recorded a statement dated 9th July 2023 in which she indicated that she paid Kshs. 1,500 as fare. However, DW1 stated that he did not know whether she indeed paid any fare. He also confirmed that the accident was reported at Narok Police Station, but that he had no documentary proof of the report apart from the police abstract. He confirmed that he was not calling any additional witnesses.
15. On re-examination, DW1 reiterated that he saw the motor vehicle at Narok Police Station after the accident and obtained a police abstract. He maintained that his driver did not say that there were fare-paying passengers in the vehicle.

Directions of the court

16. The Court directed that the suit be disposed of by way of written submissions. Both parties duly filed their respective submissions, which the Court has carefully considered alongside the pleadings, the evidence adduced at trial, and the applicable law.

The plaintiff's submissions.

17. The Plaintiff submits that the dispute arises from an insurance contract issued to the Defendant for motor vehicle registration number KCS 925Q, insured under a private motor vehicle policy pursuant to a duly completed proposal form. The Plaintiff contends that under the policy terms—specifically the General Exceptions and Limitations as to Use clauses—it only undertook to indemnify the Defendant for risks arising from private and domestic use, and not for hire or reward.
18. It is the Plaintiff's case that on 11 April 2023, the insured vehicle was involved in a road traffic accident along the Narok–Mai Mahiu Road, resulting in injuries to multiple passengers who subsequently filed suits in Narok CMCC Nos. E140, E148, and E149 of 2023. The Plaintiff states that subsequent investigations revealed that the vehicle was being used to carry fare-paying passengers contrary to the policy terms. Reliance is placed on the investigation report (PEXH 4), the handwritten statement of the driver indicating that the vehicle operated under Sansam Cabs along the Nairobi–Kisii route, and the statement of a passenger, Bethronilla Kenyanya, who confirmed paying fare for the journey. The Plaintiff, therefore, urges the Court to find that the Defendant breached the policy.
19. The Plaintiff argues that this breach entitles it to disclaim liability for the claims arising from the accident. It cites Section 10(4) of the *Insurance (Motor Vehicles Third Party Risks) Act*, Cap 405, asserting that it is legally entitled to avoid the policy on account of nondisclosure and breach of material terms. The Plaintiff further relies on authorities, including Gateway Insurance Company Limited vs. Sudan Mathews, Nairobi HCCC NO. 1078 of 2000, Britam Insurance Company Limited v Murage; Mose & 4 others (Interested Parties) (Civil Suit 27 of 2019) [2023] KEHC 2588 (KLR) (29 March 2023) (Judgment, and Corporate Insurance Co. Ltd v Elias Okinyi Ofire [1999] eKLR; [1999] 2 EA 61, to submit that an insurer is not bound to indemnify an insured where a private vehicle is used for hire or reward without appropriate cover.



20. The Plaintiff maintains that the Defendant tendered no evidence to demonstrate that the vehicle was being used within the contractual limitations and cites Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya), Kisumu HCCC No. 68 of 2007 to argue that its evidence therefore stands uncontroverted.
21. In the circumstances, the Plaintiff prays for a declaration that it is not bound to satisfy or pay any judgment or claim arising from the accident of 11 April 2023 involving motor vehicle KCS 925Q, including the claims in Narok CMCC Nos. E140, E148, and E149 of 2023, together with the costs of this suit.

The defendant's submissions.

22. The Defendant relies on his Statement of Defence dated 20 September 2024 and urges the Court to dismiss the suit. He submits that the Plaintiff's claim is premised on an alleged breach of the terms of a private motor insurance policy following a road traffic accident involving motor vehicle KCS 925Q on 11 April 2023, in which several persons sustained injuries and subsequently filed suits in Narok CMCC Nos. E140, E148, and E149 of 2023.
23. On the first issue—whether the Defendant breached the policy—the Defendant maintains that at the time of the accident, the vehicle was carrying his friends, not fare-paying passengers. He argues that the Plaintiff failed to call any of the persons whose statements it relied upon, including the driver and the alleged passengers, nor did it produce any independent evidence showing that payment of fare was made. In particular, the Plaintiff produced no receipts, M-Pesa confirmations, or oral testimony from the alleged fare-paying passengers. The Defendant contends that the introduction of the name Betronilla Kenyanya, who does not feature in the suits pleaded in the Plaintiff, further undermines the reliability of the Plaintiff's evidence.
24. The Defendant therefore submits that the Plaintiff has failed to discharge the legal and evidential burden of proof under sections 107, 109, and 112 of the *Evidence Act*, as explained in *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & 4 By 4 Safaris Ltd* [2004] eKLR, which emphasizes that “he who alleges must prove.” He argues that the absence of proof of fare-paying passengers, no breach of the policy terms has been demonstrated.
25. On the second issue—whether the suit is premature—the Defendant submits that no judgment has been entered in the primary suits pending before the subordinate court. He argues that under Section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act*, Cap 405, an insurer only becomes liable after judgment has been entered against the insured. Without such a judgment, the Plaintiff cannot seek a declaration to avoid or limit liability. The Defendant relies on the decisions in *Kenindia Assurance Co. Ltd v James Otiende* [1989] 2 KAR 162, *Joseph Mbuta Nziu v Kenya Orient Insurance Co. Ltd* [2015] eKLR, and the Court of Appeal's reasoning in *Kasereka v Gateway Insurance Co. Ltd* [2003] 2 EA 502, which affirm that a judgment against the insured is an essential precondition to an insurer's statutory liability.
26. The Defendant further draws the Court's attention to the ruling by Hon. Justice Francis Gikonyo dismissing the Plaintiff's earlier application for stay of proceedings in the primary suits, wherein the Court held that the declaratory suit should simply be fast-tracked and that there existed no justification for interrupting proceedings in the lower courts in the absence of any judgment against the insured.
27. In the circumstances, the Defendant submits that the Plaintiff's suit is speculative, anticipatory, and legally premature, having been filed before the accrual of any statutory or contractual liability. He therefore prays that the suit be dismissed with costs.



Analysis And Determination.

28. I have carefully considered the pleadings, oral evidence on record, the exhibits produced, and the parties' written submissions. From the facts and the applicable law, the following issues arise for determination:
- i. Whether the Defendant breached the terms of the insurance policy by using the motor vehicle for hire and reward.
 - ii. Whether the declaratory suit is premature in the absence of judgment in the primary suits.
 - iii. Whether the Plaintiff is entitled to the declaratory orders sought.
29. The Plaintiff's case was presented through PW1, Vitalis Juma Masinde, a legal assistant who testified on behalf of the insurer. He stated that the insured motor vehicle, KCS 925Q, was insured for private use but was allegedly being used to carry fare-paying passengers at the time of the accident on 11 April 2023. He relied on insurance documents, a driver's statement, and several passenger statements, particularly that of one Petronilla Kinyanya, to support the allegation that the occupants had paid the fare. However, under cross-examination, PW1 conceded that he was not an eyewitness and had no direct knowledge of the circumstances of the accident. He also admitted that the Plaintiff had no receipts, M-Pesa confirmations, or any financial documentation showing that the alleged passengers had paid the fare. The driver's statement did not indicate the date or time of the accident, nor did it contain information suggesting that the vehicle was being used for hire and reward. More importantly, none of the passengers, including the said Petronilla, were called as witnesses to verify the alleged payment of fare, and no investigating officer testified to confirm that the police had reached a finding that the vehicle was operating as a PSV.
30. The law is clear that the burden of proving breach of policy rests squarely with the insurer. Sections 107 to 109 of the *Evidence Act* impose the duty of proof on the party alleging a fact. In *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2004] eKLR and *Kirugi & Another v Kabiya* [1987] KLR 347, the courts emphasized that a plaintiff must prove its case and cannot rely on gaps or perceived weaknesses in the defendant's case. In the insurance context, courts such as in *Madison Insurance Co. Ltd v Samuel Mungai Muchiri & Another* [2016] eKLR have underscored that an insurer must present cogent, reliable, and credible evidence to demonstrate that a private-use vehicle was used for hire and reward. In the present case, the Plaintiff relied entirely on untested witness statements, none of which were subjected to cross-examination. The Plaintiff did not call the driver, any passenger, or an investigating officer. The evidence as presented remained speculative and fell far short of establishing, on a balance of probabilities, that the Defendant breached the policy conditions.
31. The Defendant, on his part, denied that the vehicle was being used as a commercial transport vehicle and maintained that the passengers had merely been given a lift. Although he was not present at the scene, his account was not rebutted by any direct or documentary evidence. In the absence of credible proof of fare payment, the allegation of breach remained unsubstantiated.
32. A further issue arises from the Plaintiff's attempt to obtain a declaration absolving it from liability in respect of suits already filed in the Narok Magistrates' Court by persons injured in the accident. It is not disputed that no judgment has been entered in those primary suits. Under Section 10(1) of the *Insurance (Motor Vehicles Third Party Risks) Act*, an insurer's statutory obligation to satisfy a judgment arises only after a judgment is first entered against the insured. The jurisprudence on this point is consistent. In *Kenindia Assurance Co. Ltd v James Otiende* [1989] 2 KAR 162 and *Joseph Mbuta Nziu v Kenya Orient Insurance Co. Ltd* [2015] eKLR, the courts emphasized that liability



must crystallize through a judgment before declaratory proceedings can be used to challenge or avoid indemnity. More recently, the Court of Appeal in Gateway Insurance Co. Ltd v Moses Jaika Luvai [2020] eKLR and APA Insurance Company Ltd v George Masele [2023] KECA reaffirmed that a declaratory suit brought before judgment in the primary suits is premature and incompetent.

33. The Plaintiff therefore seeks a determination in anticipation of liability yet to be established. Courts have repeatedly cautioned against issuing declaratory relief in hypothetical or speculative circumstances. As stated in John Harun Mwau v Attorney General & Others [2012] eKLR, courts do not issue declarations in the abstract or where the factual situation has not crystallized.

34. Given the evidential gaps and the legal framework governing motor vehicle insurance disputes, the Court finds that the Plaintiff has not proved any breach of the policy. The allegation that the vehicle was being used for hire and reward is unsupported by credible or admissible evidence. Additionally, the suit was filed prematurely in the absence of any judgment in the primary suits that would give rise to the insurer's statutory obligations under Section 10 of Cap 405. For these reasons, the reliefs sought cannot be issued.

I. In the result, the Court is satisfied that the Plaintiff has failed to establish its case on a balance of probabilities.

II. The declaratory suit is therefore dismissed, with no costs awarded to the Defendant.

35. It is so ordered.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH THE TEAMS APPLICATION,
THIS 28TH DAY OF NOVEMBER, 2025**

.....

CHARLES KARIUKI

JUDGE

