

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
COMMERCIAL AND TAX DIVISION
CIVIL APPEAL NO. 432 OF 2013

GATEWAY INSURANCE COMPANY LTD

(Now Sanlam General Insurance Ltd)

..... **PLAINTIFF**

VERSUS

GATHOGA JOSEPH

..... **1ST DEFENDANT**

GRACE WANJIRU NGETHE &

GEORGE GATHUA MATHU

(Both suing as the Administrators of the Estate

Of the late Peter Kagwima Kimani)

..... **2ND DEFENDANT**

JUDGEMENT

1. The Plaintiff instituted this suit by way of a Complaint dated 3 October 2013. The suit has undergone various amendments, with the Further Amended Complaint dated 28 March 2024 serving as the operative pleading upon which this trial proceeded. The Plaintiff seeks the following reliefs against the 1st Defendant:
 - (i) A declaration that it is and has at all times been entitled to avoid the aforesaid policy of insurance No. 030/084/1/033565/2012/11 and any provision contained therein on the ground that the terms of the policy had been breached by the 1st Defendant;

- (ii) A declaration that the Plaintiff is not liable to make any payment under the aforesaid policy of insurance No. 030/084/1/033565/2012/11 in respect of any claim against the 1st Defendant herein arising out of the accident which occurred on 8 November 2012 involving the motor vehicle registration number KAN 476A;
 - (iii) Any other or further relief that this Honourable Court may deem fit to grant;
 - (iv) Costs of this suit be borne by the 1st Defendant.
2. The 1st Defendant, despite being served with summons and pleadings, failed to enter an appearance or file a defence. He did not participate in the proceedings, and the matter proceeded against him undefended
 3. The 2nd Defendants filed their Statement of Defence and Counterclaim dated 10 June 2024 wherein they traverse the Plaintiff's allegations and counterclaim for the satisfaction of a judgment decree obtained in the subordinate court.

Brief Background

4. On 2 November 2012, the 1st Defendant approached the Plaintiff seeking insurance coverage for his vehicle, a Toyota Hiace Matatu, Registration No. KAN 476A. He completed a Proposal Form [Exhibit 1] in which he purportedly requested cover for 'Private Hire' purposes.
5. Based on this proposal, the Plaintiff issued Policy Number 030/084/1/033565/2012/11 [Exhibit 2], commencing on 2 November 2012 and expiring on 1 December 2012. Crucially, the Plaintiff also issued a Certificate of Insurance No. A 5677769 [Exhibit 3].
6. On 8 November 2012, six days after the inception of the policy, the Insured Motor Vehicle was involved in a collision along the Nairobi-Naivasha Road at

Ngarariga Market. The accident involved a collision with a government-owned vehicle, a Police Truck Registration Number GK A953F.

7. According to the Investigation Report prepared by Sterling Loss Assessors and Adjusters dated 4 January 2013 [Exhibit 7], the accident occurred when the Police Truck, driven by P.C. Crispo Thurania Mworira, veered into the wrong lane at high speed. The driver of the Insured Motor Vehicle, one Michael Mburu Kamau, swerved to avoid a head-on collision, but the vehicles collided.
8. The accident resulted in fatal injuries to nine persons, including the driver of the Insured Motor Vehicle and eight passengers. One of the deceased passengers was Peter Kagwima Kimani, whose estate is represented by the 2nd Defendants herein.
9. The Plaintiff commissioned an investigation immediately after the accident. The findings of Sterling Loss Assessors [Exhibit 7] became the catalyst for the Plaintiff's decision to repudiate liability. The report highlighted that at the time of the accident, the Insured Motor Vehicle was carrying 13 fare-paying passengers. The investigators concluded that the vehicle was operating as a *matatu* (Public Service Vehicle) plying the Kiambaa-Githunguri-Limuru route, contrary to the private hire limitations the Plaintiff alleges were in the policy. The vehicle was being driven by Mr. Michael Mburu Kamau, described as a Sacco driver, rather than the insured personally. The Plaintiff contends this violated the chauffeur driven by insured clause in the Proposal Form. The investigators opined that the primary blame for the accident lay with the driver of the Police Truck, GK A953F, for leaving his lane.
10. Following the accident, the 2nd Defendants instituted Limuru Senior Principal Magistrate's Court Civil Suit No. 318 of 2015 against the 1st Defendant and the Attorney General. In a judgment delivered on 23 November 2018, the subordinate court found the Attorney General 90% liable and the 1st Defendant 10% liable. Judgment was entered in favor of the 2nd Defendants

for a total sum, with the 1st Defendant's portion calculated at Kshs. 764,768.60.

11. The 2nd Defendants subsequently filed a declaratory suit against the Plaintiff herein, Limuru SPMCC No. 141 of 2019, seeking satisfaction of that decree. In that suit, the Plaintiff's defence was struck out, and judgment was entered against it on 24 July 2020. However, execution of that judgment was stayed pending the determination of this High Court suit.

Plaintiff's Case

12. The Plaintiff is a company engaged in the insurance industry, licensed to offer insurance services, *inter alia*, under section 5 of the Insurance (Motor Vehicle Third Party Risks) Act. On 2 November 2012, the 1st Defendant, the registered owner of motor vehicle registration number KAN 476A, made a request to the Plaintiff for the provision of an insurance policy against statutory liabilities under the Act in respect of his motor vehicle. Pursuant to the information contained in the Proposal Form and the Declaration, and relying on the same to be true representations, and for the consideration of the premium payable, the Plaintiff issued the 1st Defendant with Policy of Insurance No. 030/084/1/033565/2012/11 for the period 2 November 2012 to 1 December 2012.
13. The Plaintiff called one witness, PW1, Raymond Odhiambo, its Senior Legal Officer. PW1 adopted his witness statement dated 12 April 2024.
14. According to the Policy, the Plaintiff would indemnify the 1st Defendant should the 1st Defendant become liable in the event of an accident while the vehicle was being used exclusively for private hire being chauffeur driven by the insured personally. The Policy provided that the motor vehicle should not be used for purposes other than those stated in the Policy.

15. PW1 testified that at the time of the issuance of the Certificate of Insurance, the 1st Defendant did not disclose that he wanted to run a *matatu* business. During the pendency of the policy, the 1st Defendant permitted the motor vehicle to be used for purposes other than those insured, contrary to the terms of the policy.
16. On 8 November 2012, the motor vehicle was involved in a road traffic accident along Nairobi- Naivasha Road, with Police Truck GK A953F, as a result of which 9 persons sustained fatal injuries, which 6 sustained varied degrees of injuries. Following the accident, several court cases were filed against the Plaintiff, including *Limuru SPMCC No. 141 of 2019 – Grace Wanjiru Ngethe & George Gathua Matuu -vs- Sanlam General Insurance Co. Ltd (formerly Gateway Insurance Co. Ltd)*.
17. PW1 produced an Investigation Report dated 4 January 2013, which indicates that when the accident occurred when the third-party Police truck, that was being driven at high speed, veered towards the wrong side of the road, towards the 1st Defendant's motor vehicle. In a bid to avoid a head-on collision, the insured's driver swerved towards the deceleration lane. Unfortunately, due to the prevailing short distance and the time involved, the Police truck collided with the front side of the insured's motor vehicle. The Report concludes that at the time of the accident, the insured's motor vehicle was ferrying fare-paying passengers, which was in contravention of the limitation to use clause.
18. In response to the 2nd Defendants' Counterclaim, the Plaintiff maintains that since the 1st Defendant was in breach of the terms of the insurance policy, then the Plaintiff is not liable to pay any sums to the 2nd Defendants.
19. In its submissions, the Plaintiff argued that the evidence from some of the passengers in the various suits filed at Limuru, indicate that they were fare paying passengers. Citing the case of ***Newsholme Bros vs Road Transport***

and General Insurance Co Ltd [1929] All ER 442 at 444, the Plaintiff submitted that a contract of insurance requires the utmost good faith.

20. The Plaintiff further relied on the cases of **CIC Ltd -vs- David Wachira Wambugu [2010] 1 KLR 254**, **Michael Kinyua Njue vs APA Insurance Company Ltd [2022] eKLR** and **ICI -vs- Elias Okinyi Ofire [1999] eKLR**.
21. Regarding the Counterclaim, the Plaintiff submitted that the principle of subrogation applies where there is a contract for insurance. If the insured risk takes effect and the insurer settled the insured's claim, then the insurer is entitled to diminish the loss suffered by its insured by seeking compensation from the party who caused the loss. Relying on the case of **Kenya Power & Lighting company -vs- Julius Wambale & Another [2019] eKLR**, the Plaintiff argued that the claim for subrogation lay not in the causation and blameworthiness for the accident, but in the proof that the insurance company had compensated the insured. The Plaintiff posited that this doctrine does not apply in the present cases since the insurer did not compensate its insured.

2nd Defendants' Case

22. It is the 2nd Defendants' case that following the road traffic accident, legal proceedings were commenced *vide* Limuru SPMC Civil Suit No. 318 of 2015. On 23 November 2018, judgement was entered therein in favor of the 2nd Defendants herein. Liability was apportioned as 10% to the 1st Defendant and 90% to the National Police Service Commission. The court awarded a total sum of Kshs 7,647,686, plus interest thereon. However, execution of the said judgement was stayed, pending determination of the instant case.
23. DW1, Grace Wanjiru Ngethe, a co-Administrator of the estate of Peter Kagwima Kimani (Deceased) adopted her witness statement dated 10 June 2024. She testified that following the accident, legal proceedings were instituted against the 1st Defendant, the National Police Service Commission,

the Inspector General National Police Service and the Hon. the Attorney General at the Limuru Law Courts. It was DW2's testimony that the Plaintiff herein was all along aware of the proceedings, given that it was served with the Statutory Notice dated 29 July 2015 as required under section 10(2) of the Insurance (Third Party Risk) Act.

24. Following the judgement delivered on 28 February 2019, the 2nd Defendants' Advocates formally demanded the payment of Kshs 764,768.60 by the Plaintiff. Failure by the Plaintiff to honour the judgement compelled the 2nd Defendants to file a declaratory suit under the doctrine of subrogation. It was DW1's testimony that the Plaintiff entered appearance in the said suit and filed defence, which was struck out by the court for being a sham and comprising of mere denials. Judgement was subsequently entered in favor of the 2nd Defendants as against the Plaintiff.
25. The 2nd Defendants argue that the liability of the Plaintiff has already been determined in Limuru SPMCC No. 141 of 2019, where judgment was entered against the Plaintiff. They argue that the Plaintiff participated in those proceedings and failed to appeal, making the judgment valid and enforceable, subject only to the stay order.
26. In their Counterclaim, the 2nd Defendants seek judgement in their favour against the Plaintiff as follows:
 - (i) Kshs 764,768.60 as at 14 February 2019, being 10% of the apportioned liability against its insured the 1st Defendant;
 - (ii) Interest on (i) above at court rates from 14 February 2019 which amount continues to accrue interest at the rate of 12% p.a until payment in full;
 - (iii) Costs of the counterclaim
 - (iv) Any other relief that this Honourable Court may deem fit and appropriate.

Analysis & Determination

27. Having keenly read the pleadings and considered the evidence herein, the following issues lend themselves for determination:

- (i) Whether the Plaintiff's suit is procedurally defective for failure to comply with the mandatory notice requirements under Section 10(4) of the Insurance (Motor Vehicle Third Party Risks) Act.
- (ii) Whether the Plaintiff has proved material non-disclosure or misrepresentation sufficient to avoid the policy under Section 10(4) of the Act.
- (iii) Whether the Plaintiff is liable to satisfy the judgment obtained by the 2nd Defendants against the 1st Defendant in Limuru CMCC No. 318 of 2015.
- (iv) Who should bear the costs of the suit and the counterclaim.

Compliance with Section 10(4) Notice Requirements

28. This Court must first address the threshold issue of statutory compliance. The Plaintiff invokes the jurisdiction of this Court pursuant to Section 10(4) of the Insurance (Motor Vehicle Third Party Risks) Act. This section provides an insurer with a mechanism to avoid satisfying a judgment if they can prove the policy was obtained by non-disclosure or false representation.

29. However, this right is not absolute; it is fettered by strict procedural safeguards designed to protect third parties who may have spent years litigating against an insured driver, only to find the insurer repudiating liability at the eleventh hour.

30. Section 10(4) states:

No sum shall be payable by an insurer under the foregoing provisions of this section if, in an action commenced before, or

within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy, he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact... Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely.

31. The statutory architecture imposes a dual burden on the insurer. The declaratory suit must be filed *before* or within three months after the commencement of the primary claim. The insurer must give notice to the third party (the victim) specifying the grounds of non-disclosure.
32. The chronology of events is critical. The accident occurred on 8 November 2012. The declaratory suit was filed on 3 October 2013. The primary suit (Limuru CMCC NO. 318 of 2015) was filed in 2015. The statutory notice was served by the 2nd Defendants on Plaintiff on 29 July 2015.
33. The Plaintiff filed this suit in 2013, which is technically before the commencement of the Limuru proceedings in 2015. Thus, the three-month limitation for filing the suit is not the primary obstacle. The obstacle is the Notice Requirement.
34. The proviso to Section 10(4) ensures that a third party is made aware of the insurer's challenge to the policy's validity. This allows the third party to apply to be joined in the declaratory suit to protect their interests. In this case, the

2nd Defendants were not original parties to the 2013 suit. They were only joined in 2024 after they had already obtained judgment in Limuru.

35. During cross-examination, PW1 was explicitly asked whether the Plaintiff notified the Defendants regarding the alleged breach or the decision to decline the claim. His response was telling. He confirmed that once a claim has been declined by the insurer, the same is communicated to the insured. In this instance, there was no evidence of such communication.
36. There is absolutely no evidence on record that the Plaintiff served a notice under Section 10(4) upon the 2nd Defendants specifying the non-disclosure within 14 days of the 2nd Defendants commencing the Limuru suit, or indeed at any time prior to the 2nd Defendants forcing their way into this suit via a joinder application.
37. The courts have been consistent in strictly interpreting this provision. In ***Fidelity Shield Insurance Company Limited v Musembi [2024] KEHC 5825***, the Court dismissed a declaratory suit specifically because the plaintiff failed to discharge the burden of proving that the statutory notice was served within 14 days. Similarly, in ***Corporate Insurance Co. Ltd v Violet Nabwire Ouma [2019] eKLR***, the Court of Appeal held that failure to notify the third party rendered the declaration ineffective against them.
38. I find that the Plaintiff failed to comply with the mandatory notice requirements of Section 10(4). The Plaintiff sat on the investigation report from January 2013, filed a suit against the absent 1st Defendant, and failed to notify the 2nd Defendants of the specific grounds of avoidance until years later. This procedural failure is fatal to the Plaintiff's claim for a declaration against the 2nd Defendants.
39. Even if the Plaintiff had surmounted the procedural hurdle, their case collapses on the substantive evidence. The central pillar of the Plaintiff's

argument is that the 1st Defendant breached the policy by using the vehicle for fare-paying passengers when he had proposed private hire. However, this argument is directly contradicted by the Plaintiff's own document, Exhibit 3: The Certificate of Insurance. I have examined Exhibit 3. As noted in the submissions and confirmed by PW1 during the hearing, the Certificate contains the following express terms:

Policy Holder:	Joseph Muiruri Gathoga
Registration No:	KAN 476A
Licensed to Carry:	14 Fare Paying Passengers
Class:	PSV (Public Service Vehicle).

40. This document completely eviscerates the Plaintiff's claim of non-disclosure. How can the Plaintiff allege that the insured failed to disclose his intention to carry fare-paying passengers when the Plaintiff issued a certificate explicitly licensing him to carry 14 fare paying passengers?
41. The Plaintiff relies on the Proposal Form [Exhibit 1] to define the contract. While the proposal form is indeed the basis of the contract, the Certificate of Insurance serves a distinct and superior statutory function vis-à-vis third parties. Section 7 of the Act mandates the issuance of the certificate to evidence that the vehicle is insured in compliance with the Act.
42. In ***Kenya Alliance Insurance Co. Ltd v Thomas Ochieng Apopa [2020] eKLR***, the Court of Appeal reaffirmed that a Certificate of Insurance is *prima facie* evidence of the existence and terms of the insurance cover.
43. Furthermore, the *contra proferentem* rule applies here. The Plaintiff drafted the documents. If there is a contradiction between the Proposal Form and the Certificate of Insurance, the ambiguity must be resolved against the insurer. By issuing a PSV Certificate, the Plaintiff represented to the world that the vehicle was insured to carry fare-paying passengers.

44. The Plaintiff cited ***Corporate Insurance Company Ltd v Elias Okinyi Ofire eKLR*** to argue that carrying passengers in a commercial vehicle breaches the policy. That case is distinguishable. In ***Ofire***, the policy and certificate were for commercial use (goods), and the breach was the actual usage for passengers. In the present case, the Certificate itself authorized the carriage of passengers. The insured was using the vehicle exactly as the Certificate permitted.
45. Therefore, I find that the operative term regarding usage was that contained in the Certificate of Insurance. The vehicle was insured as a PSV for fare-paying passengers. The Plaintiff's assertion of private hire restrictions is contradicted by their own evidence.
46. Based on this finding, the allegation of material non-disclosure falls away. The Plaintiff claims the 1st Defendant did not disclose he wanted to run a *matatu* business. Yet, the Plaintiff issued a certificate for a *matatu* (14-seater PSV).
47. If the Plaintiff genuinely intended to limit the cover to private hire (chauffeur-driven for specific clients), it was negligent in issuing a standard PSV Matatu certificate. Under Section 10(4), the insurer must prove the policy was obtained by non-disclosure. Here, the disclosure, or lack thereof, in the proposal form seems irrelevant because the insurer issued a policy covering the wider risk anyway.
48. Regarding the allegation of an unauthorized driver, Mr. Kamau, Section 8 of the Act renders void any condition in a policy that purports to restrict liability to third parties based on the age or physical/mental condition of the driver. While named driver clauses are enforceable between insurer and insured for own-damage claims, courts are reluctant to allow them to defeat third-party injury claims under the statutory scheme, especially where the

driver held a valid license, as confirmed by the investigation report. In any event, this breach would not amount to non-disclosure at the inception of the policy (which is the ground for Section 10(4) avoidance), but rather a breach of condition during the currency of the policy. Section 10(4) specifically deals with avoidance for obtaining the policy via fraud/non-disclosure, not subsequent breaches.

Res Judicata and Estoppel

49. The 2nd Defendants raised the issue of the judgment in Limuru SPMCC No. 141 of 2019. In that suit, the Magistrate's Court entered judgment against the Plaintiff for the same claim. The Plaintiff admitted through PW1 that they participated in that suit and did not appeal the judgment.
50. While execution was stayed, the existence of a valid, un-appealed judgment on the same liability between the same parties raises the doctrine of *res judicata* under Section 7 of the Civil Procedure Act. The lower court has already determined that the Plaintiff is liable. The Plaintiff's attempt to re-litigate the validity of the policy in this Court, after failing to defend the declaratory suit in Limuru, borders on an abuse of court process.
51. Although this High Court suit was filed earlier in time, in 2013, the Limuru judgment was delivered in 2020. The proper course for the Plaintiff would have been to seek a stay of the Limuru proceedings under section 6 of the Civil Procedure Act at the time. Having failed to do so, and having allowed judgment to be entered, they are now hard-pressed to argue against the findings of a competent court.

The Counterclaim

52. The 2nd Defendants seek Kshs. 764,768.60 pursuant to the judgment in Limuru CMCC No. 318 of 2015.

53. Section 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act creates a statutory duty for insurers to satisfy judgments against their insureds.

If, after a certificate of insurance has been delivered... judgment in respect of any such liability as is required to be covered by a policy... is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel... the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder.

54. The Plaintiff argued that subrogation does not apply because they haven't paid the insured. This reveals a fundamental misunderstanding of the 2nd Defendants' claim. The Counterclaim is not a common law subrogation claim; it is a statutory claim for direct payment under Section 10(1). The statute mandates the insurer to pay the third party directly once a judgment is obtained against the insured.
55. Since I have found that the Plaintiff failed to effectively avoid the policy under Section 10(4), the policy (Certificate) covered the risk of fare-paying passengers, a judgment was obtained against the insured, then the Plaintiff is strictly liable under Section 10(1) to satisfy the decree. The amount claimed is Kshs. 764,768.60, being the 10% apportionment of the total damages awarded in the primary suit. This computation is supported by the Decree [Exhibit 8] and is not disputed in quantum by the Plaintiff. What remains now is execution, and lifting of the interim stay orders issued herein.
56. The Plaintiff has failed to discharge the burden of proof required to avoid the insurance policy. Their case is riddled with contradictions, primarily the issuance of a PSV Certificate of Insurance while arguing the policy was for

private hire. Furthermore, the Plaintiff failed to comply with the mandatory procedural requirements of giving notice under Section 10(4) of the Act.

57. The Plaintiff accepted the premium and issued a certificate authorizing the carriage of fare-paying passengers. They cannot now, after a tragic accident, retreat behind technicalities to deny compensation to the victims. As stated by Ringera J in ***Gateway Insurance Company Limited v Sudan Mathews [2003] eKLR***, the statutory scheme is designed to ensure that victims of road accidents are not left without remedy.
58. The Plaintiff's suit is devoid of merit and is essentially an attempt to evade a clear statutory obligation.
59. Accordingly, the Plaintiff's suit is dismissed in its entirety with costs to the 2nd Defendants. Any interim orders issued herein are hereby vacated. I need not make any orders with regard to the Counterclaim since the same is the subject of two judgements of the lower court.

Dated and Delivered at Nairobi this 30 day of January 2026

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

For Plaintiff:	James Gakuya
For 1st Defendant:	N/A
For the 2nd Defendant:	Mr Oguye h/b Kimani
Court Assistant:	Lucy Mwangi