



**Wambua (Suing as the Personal Representative of the Estate of Charles Makenzi Wambua)  
v Africa Merchant Assurance Company Limited; Mulili & 9 others (Interested Parties)  
(Civil Case 213 of 2014) [2026] KEHC 750 (KLR) (Civ) (29 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 750 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
CIVIL CASE 213 OF 2014  
JN MULWA, J  
JANUARY 29, 2026**

**BETWEEN**

**JOSEPH MUGO WAMBUA (SUING AS THE PERSONAL REPRESENTATIVE  
OF THE ESTATE OF CHARLES MAKENZI WAMBUA) ..... PLAINTIFF**

**AND**

**AFRICA MERCHANT ASSURANCE COMPANY LIMITED ..... DEFENDANT**

**AND**

**STANLEY MBATHA MULILI ..... INTERESTED PARTY  
JANET KASYOKA MAKAU ..... INTERESTED PARTY  
REDEMPTA MUENI KIOKO ..... INTERESTED PARTY  
PIUS KILONZO MAKAU ..... INTERESTED PARTY  
SELESTINA NGINA MUEMA ..... INTERESTED PARTY  
MARGARET MBITHE KIASYA ..... INTERESTED PARTY  
NDUKU MUTIE ..... INTERESTED PARTY  
RICHARD MUNEE MUTINDA ..... INTERESTED PARTY  
RICHARD KYALO ..... INTERESTED PARTY  
ZAINABU MZEE KANUNA ALIAS ..... INTERESTED PARTY**



## JUDGMENT

1. By a plaint dated 16/07/2014 and amended on 26/04/2022, Joseph Mugo Wambua (suing as the administrator of the estate of the late) Charles Makenzi Wambua (hereafter the Plaintiff) filed suit against Africa Merchant Assurance Co. Ltd (hereafter the Defendant) alongside Stanley Mbatha Mulili, Janet Kasyoka Makau, Redempta Mueni Kioko, Pius Kilonzo Makau, Selestina Ngina Muema, Margaret Mbithe Kiasya, Nduku Mutie, Richard Munee Mutinda and Ricahrd Kyalo (hereafter the Interested Parties) seeking judgment as against the Defendant for-;
  - a. A declaration that there are no limits on the insurance cover obtained by Charles Makenzi Wambua from the Defendant over Motor vehicle registration number KBL 383M.
  - b. A declaration that there are no limits on the insurance cover obtained by Charles Makenzi Wambua from the Defendant over motor vehicle registration number KBL 383M that are applicable to the facts of the accident that occurred on 20/08/2011 involving motor vehicle registration number KBL 383M
  - c. A declaration that the Defendant's action in seeking to impose policy limits on the insurance cover obtained by Charles Makenzi Wambua from the Defendant over motor vehicle registration number KBL 383M are illegal null and void.
  - d. A declaration that any policy limits on the insurance policy by Charles Makenzi Wambua from the Defendant over motor vehicle registration number KBL 383M as relates to the accident that occurred on or about 20/08/2011 is illegal null and void.
  - e. A declaration that the Defendant is liable to and should settle all judgments issued against Charles Makenzi Wambua in all and any suit(s) filed against him as a result of the accident that occurred on or about 20/08/2011 involving motor vehicle registration number KBL 383M
  - f. General damages.
  - g. And any other relief that this honorable Court may deem fit to grant.
2. It was averred that the Third Parties are necessary parties to the suit having obtained judgments against Charles Makenzi Wambua in various suits relating to an accident that occurred on 20/08/2011 involving motor vehicle registration number KBL 383M (hereafter the suit motor vehicle). It was averred that the Plaintiff had insured the suit motor vehicle with Defendant under a comprehensive cover. That the Plaintiff paid all amounts required under the insurance policy however the Defendant did not provide him with the insurance policy.
3. It was further averred that on the date in question, the suit motor vehicle was involved in a road traffic accident along Makueni where several third parties were injured, some fatally, and as a result of the accident, suits were filed seeking compensation for the injuries and untimely deaths. That the Plaintiff on 22/08/2011 held a meeting with the Defendant's Managing Director where it was agreed that the Defendant would take up and settle all claims arising out of the accident upon payment of Kshs. 330,000/- being excess, which was paid.
4. That the Defendant took up the matters, entered into negotiations with the various claimants and settled some of the claims out of Court on behalf of the Plaintiff however on 05/05/2014, the Defendant wrote to the Plaintiff informing him that it had paid out a sum of Kshs. 14,071,869/- in



respect of the claims arising from the said accident involving the suit motor vehicle and it would not honor any more claims as the policy cover limit was Kshs. 7,000,000/-.

5. It was averred that the Plaintiff was a stranger to any purported policy limits and at no time was he issued with a policy document or alerted as to any policy limits, to wit, the Defendant's action to impose a policy limit in respect of the accident was malicious, illegal, null and void. That the Defendant on its own and or through its authorized agents' employees or servants acted negligently towards handling of the suit that were filed against the Plaintiff thus occasioning the latter loss, damage and eventually led to his demise.
6. The Defendant filed a statement of Defence and Counter-claim dated 19/12/2014 denying the key averments in the plaint meanwhile averred on without prejudice of the averments in the statement of defence that the policy contract provided that the Defendant would pay a maximum of Kshs. 7,000,000/- out of one event, to wit, the Plaintiff was aware of.
7. In its Counter-claim, the Defendant averred that the Plaintiff was issued with the policy and or alerted as to the limits of the insurance cover, which he accepted, whereas the Defendant settled the claims in respect of the suit motor vehicle in excess of Kshs. 7,071,869/-. Accordingly, the Defendant sought a declaration that it is not liable to settle or pay any claims or further claims and or judgments over above the policy limit of Kshs. 7,000,00/- , to wit, it sought judgment as against the Plaintiff in the following terms-;
  - a. That the Plaintiff be ordered to pay the Defendant Kshs. 7,071,869/- as pleaded at Paragraph 12 above.
  - b. That the Plaintiff's suit against the Defendant be dismissed with costs.
  - c. That the Defendant be awarded the costs of the Counter-claim.
  - d. That declaration does issue that the Defendant is not liable to pay any claims and or judgments over and above the policy limit of Kshs. 7,000,000/-.
8. The Plaintiff filed a reply to defence and defence to the Counter-claim dated 30/09/2022 denying the key averments in the Counter-claim meanwhile averred that the Plaintiff was issued with an insurance cover by the Defendant with no policy limit. It was further averred that if there was any limit, the same was illegal and void inter alia for the reason that it was not brought to the Plaintiff's attention neither was it legal.
9. The 6<sup>th</sup> Interested Party on her part filed a defence dated 05/02/2015 denying the key averments in the plaint meanwhile averred that she regularly obtained a judgment as against the Plaintiff in Machakos CMCC No. 1122 of 2011 that is yet to be challenged or satisfied whereas her fruits of successful litigation ought to be settled either by the Plaintiff or the Defendant.
10. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> & 10<sup>th</sup> Interested Party on their part did not file any pleadings.
11. The suit proceeded to full hearing during which the Plaintiff and Defendant called evidence in support of the averments in their respective pleadings.

### **Plaintiff's Case and Evidence**

12. Joseph Mugo Wambua testified as PW1. He began by stating that the Deceased Plaintiff was his father and proceeded to adopt his witness statement dated 22/04/2022 as his evidence in chief meanwhile adduced into evidence the documents appearing in his list of documents dated 17/05/2023 as PExh.1-39. The gist of his evidence was that his father had insured the suit motor vehicle with the



Defendant which was involved in an accident on 20/08/2011. He stated that the Defendant honored some judgments in respect of the claims emanating from the accident however on 05/05/2014 it wrote to the Plaintiff indicating that it had reached its policy limits and would not honor any more judgements arising from claims in respect of the accident in question.

13. He went on to state that the Defendant never provided the Plaintiff with a copy of the policy document or policy limit document whereas the first time he saw the alleged policy was when the Defendant wrote to the Plaintiff on 05/05/2014 indicating that it would not be settling any more claims in respect of the accident. It was his evidence that there was no policy limit applying to the policy in respect of the suit motor vehicle whereas any policy limit as regards the third-party claimants is illegal and void.
14. On cross examination, it was his evidence that the suit motor vehicle was a Public Service Vehicle (PSV). Upon being referred to the list of documents it was his evidence that persons injured in the accident were from one incident, to wit, the policy document captures the limit as six (6) million. He further stated that at the time of the accident the policy cover was valid.
15. In re-examination, PW1 reiterated that he came to know of the policy in 2014 whereas the policy document shown to him by the Defendant's advocate is dated 10/08/2016. He went on to state that the letter to the Plaintiff dated 25/05/2014 captured the policy limit as seven (7) million whereas given the contradictory figures the same is evidence of the fact that the policy had no limits.

### **Defendant's Case and Evidence**

16. On behalf of the Defendant, Nicklus Okero testified as DW1. He identified himself as a legal officer with the Defendant meanwhile proceeded to adopt his witness statement dated 27/03/2024 as his evidence in chief. He went on to adduce into evidence the documents appearing in his list of documents dated 11/06/2024 as DExh.1 & 2. It was his evidence that the Court ought to appreciate that the Defendant has since settled the claims emanating from the accident in accordance with policy stating that the policy document was shared with the Plaintiff at the time of taking out the insurance contract, with the terms being duly communicated.
17. On cross examination, DW1 stated that he had no document before Court to confirm that the Plaintiff was aware of the terms of the policy. He confirmed that the Plaintiff settled excess in the sum of Kshs. 335,000/- meanwhile confirmed that the Defendant took up claims emanating from the accident in question. He further confirmed that the policy covered passengers in the suit motor vehicle to the tune of three (3) million whereas the policy was extended. That in 2015, when some of the claims had been filed the Defendant had already stopped payments. He stated that the accident was investigated and a report prepared on the same.
18. In re-examination, he maintained that the Defendant settled claims to the tune of fourteen (14) million Kenya shillings whereas the latter's intention was to settle the claims with the excess therefore being settled by the insured.
19. At the close of the trial, both parties filed written submissions.

### **Plaintiff's Submissions**

20. Counsel for the Plaintiff restated the history of the matter, pleadings and evidence by the respective parties meanwhile proceeded to condense his submissions into four (4) cogent issues.
21. On whether the Defendant furnished the Plaintiff with a policy document, counsel cited Section 2(c) of the *Insurance Act* and Article 46(1)(b) of *the Constitution*, he posited that the latter was never issued with policy document when he took up the insurance cover and stating that the same was only



furnished upon the Plaintiff when they notified him that they would cease making payments in respect of the policy.

22. On whether there were any applicable limits to the policy, counsel argued that the policy relied on by the Defendant had different dates and information thus presenting doubt as to the authenticity of the policy limit. It was further argued that the clause relied on by the Defendant was in respect of passengers aboard the suit motor vehicle in pursuance of a contract of employment. Counsel went on to argue that the Defendant having settled claims to the tune of fourteen million translates to that there was no policy limit whereas the argument on payment in excess was an afterthought. While calling to aid Section 80 of the *Insurance Act* and Section 7 of the *Consumer Protection Act*, it was submitted that any ambiguity in the proposal or policy document ought to be resolved in favour of the Plaintiff and a finding made that there was no policy limit.
23. As to whether the Defendant ought to settle all claims arising from the accident, counsel cited the decisions in *UAP Insurance Co Limited v Nyawira & 4 others* [2023] KEHC 24187 (KLR) and *Cannon Assurance Company Limited v Peter Mulei Sammy* [2020] eKLR to argue that the Defendant having confirmed that the suit motor vehicle had a valid insurance policy, it cannot escape liability towards payments to third parties.
24. Penultimately, concerning whether the Defendant is liable to pay damages for negligence, counsel submitted that the latter negligently handled the claims arising from the accident and equally failed to adequately inform the Plaintiff or even properly investigate the claims arising therefore the Plaintiff is entitled to damages. The decision in *S.M Thiga v Phoenix E.A Assurance Co. Ltd* [2016] eKLR was relied on in the foretated regard. In conclusion the Court was urged to allow the suit as prayed.

### **Defendant's Submission**

25. On the part of the Defendant, counsel localized his submission into a singular issue. It was submitted that despite the Plaintiff feigning ignorance, the policy document adduced as evidence before the Court by the Defendant, clearly captured that policy limit was Kshs. 6,000,000/- for any series of claims arising out of one event. That the Defendant had paid Kshs. 7,071,869/- in excess of the policy limit, it was not liable to settle any other claims arising from the material accident.
26. It was further submitted that by the Plaintiff's suit, it seeks to re-write the insurance contract that was willfully executed without fraud, duress, mistake or unconscionability between the parties therefore given the dicta in *National Bank of Kenya v Pipeplastic Samkolit (K) Ltd & Another* [2001] eKLR, this Court ought to decline the Plaintiff's invitation to re-write the policy document. In conclusion, it was submitted that the Defendant has fully satisfied its obligation to the Plaintiff and ought to be discharged from any liability whereas the Court ought to enter judgment in favour of the Defendant in the counter-claim for the sums paid in excess of the policy limit.

### **Analysis and Determination**

27. The Court has carefully considered the respective parties' pleadings, the evidence adduced by respective witnesses, and the parties' written submissions, the Court proposes to contemporaneously address Plaintiff and Counter-claim, to wit, the issues for determination are as follows:-
  - a. Whether there was a limit to the insurance cover obtained by the Plaintiff over motor vehicle registration number KBL 383M in respect of the accident that occurred on 20/08/2011?



- b. Whether the Defendant is liable to and should settle all judgments issued against Charles Makenzi Wambua in all and any suit(s) filed against him as a result of the accident that occurred on or about 20/08/2011 involving motor vehicle registration number KBL 383M?
- c. Whether the Defendant is entitled to a refund of Kshs. 7,071,869/- from the Plaintiff?
- d. Whether the Plaintiff is entitled to any damages and costs of the suit.

**Whether there was a limit to the insurance cover obtained by the Plaintiff over motor vehicle registration number KBL 383M in respect of the accident that occurred on 20/08/2011?**

28. It necessitates mentioning that the applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. The duty of proving the averments contained in the plaint lay squarely upon the Plaintiff whereas the converse duty lay on the Defendant concerning the averments in the statement of defence and counterclaim. That said, in *Karugi & Another v Kabiya & 3 Others* (1987) KLR 347 the Court of Appeal stated that:-

“[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”

29. Pertinent to the determination of issue at fore, are the pleadings, which formed the basis of the parties’ respective cases before the trial Court. Concerning the latter, the Court of Appeal in *Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] 2 KLR 91 observed that-

“We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.”

30. Having set out the above, the gist of the Plaintiff’s suit is that a policy of insurance in respect of the suit motor vehicle was taken out with the Defendant. That the suit motor vehicle was involved in an accident on 20/08/2011, that the Defendant took up the matter and settled claims arising from the accident to the tune of Kshs.14,071,869/-. Therefore, the Defendant ought to settle any other claims arising from the accident whereas any purported policy limits in respect of the accident are malicious, illegal, null and void.

31. On the part of the Defendant, the kernel of its case is that the policy of insurance provided that the Defendant would pay a maximum of Kshs. 6,000,000/- out of one event, to wit, the Plaintiff was aware of, whereas, the Defendant having settled the claims in respect of the suit motor vehicle in excess of Kshs. 7,071,869/-, it is entitled to a refund of the same, given the policy limit.



32. At the heart of the dispute is the policy of insurance and the schedule attached thereto. Both parties do not dispute that the Defendant issued the Plaintiff with a policy of insurance in respect of the suit motor vehicle. It would appear from the reading of PExh.7 and DExh.2, that the suit motor vehicle was insured under Policy No. AM1/085/1/008076/2010/06. It is also not in dispute that the suit motor vehicle was involved in a road traffic accident on 20/08/2011, to wit at the time, the suit motor vehicle had a valid policy of insurance, as confirmed by DW1's testimony before the Court.
33. Further, the Court gathers from DW1's testimony, PExh.7 and DExh.2, there is implied evidence that the policy of insurance having been taken out in 2010, the same was renewed annually given that PExh.7 captures the date the policy as 06/05/2014 and DExh.2 captures the date of the policy as 10/08/2016. Neither party adduced into evidence the policy scheduled for the period running and or encapsulating 20/08/2011, when the accident involving the suit motor vehicle occurred.
35. Having set out the above, it warrants mentioning that this Court has held time without number that a policy of insurance and schedule thereto are the instruments that set out the respective parties' rights and obligations under the contract of insurance. Adjacent to the above, the role of the Court while adjudicating a dispute arising between contracting parties is well settled. In the oft-cited decision of National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR, the Court held that; -

“A court of law cannot re-write a contract between the parties whereas its role is limited to interpretation of the same. This is because contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does not have the right or ability to substitute its judgment for that of the parties.”

36. Given the earlier finding on implied renewal, the policy of insurance adduced by both parties as PExh.8 & DExh.2, captured that suit motor vehicle was insured under the “Commercial Public Service (PSV) Policy” cover. Further, in the said policy of insurance under “Section II – Liability to Third Parties”, provided that;-
1. Indemnity to you or your authorized driver or any person in or getting into or out of the vehicle. We will cover you or any authorized driver or any person in or getting into or out of the vehicle against legal liability for damage (including the related costs and expenses) for;-
    - a) Death or bodily injury to any person.
    - b) Damage to property arising as a result of an accident by or in connection with your vehicle including while loading and unloading the vehicle as long as such costs will not exceed the amounts of cover provided for under this policy.
  2. Indemnity to legal representatives.  
.....
  3. Application of limits of liability  
In the event of an accident involving indemnity under this Section to more than one person the limits of liability will apply to the total amount of indemnity to all persons indemnified and such indemnity will apply in priority to you.
  - 4 .....  
.....



37. Notably, the schedules to the policies dated 06/05/2014 and 10/08/2016 which were respectively adduced as PExh.7 and DExh.2 were similar in particulars. They provided as follows concerning “Limit of the amount of the Company’s Liability under-;

“Section 1-3 (Protections & Removal) .....

Section 1-4 (Authorized repair limit) .....

Section II -1(a) Liability to Third Parties Death or Bodily Injury)

A. In respect of persons being carried in or upon entering or getting onto or alighting from the vehicle and in pursuance of a contract of employment.

(i) Any one person.....3,000,000

(ii) Series of claims arising out of one event.....6,000,000

B. In respect of any other person not being carried in or upon or entering or getting onto or alighting from the vehicle.

(i) Any one person.....3,000,000

(ii) Series of claims arising out of one event.....Unlimited”

38. Here, it necessitates reminder that the suit motor vehicle having been insured by the Defendant was involved in a road traffic accident that resulted in the injury and or death of third-party’s who have been enjoined to the instant proceedings as Interested Parties (PExh.4). That said, compulsory Third-Party Insurance is codified in Section 4 and 5 of the *Insurance (Motor Vehicles Third Party Risks) Act*. The contentious issue of mandatory third-party motor vehicle insurance limits of Kshs. 3,000,000/- was conclusively addressed by the Court of Appeal in *Justus Mutiga & 2 others v Law Society of Kenya & another* [2018] KECA 338 (KLR) and as such requires no restatement

Nevertheless, what had been presented for consideration before this Court concerns whether there was a limit compensatory claims by the Defendant in respect of the policy taken out by the Plaintiff.

39. From the evidence and testimony before this Court, the Defendant offered varied explanations concerning its limit. Vide PExh.10 it appears that in ceasing to settle any outstanding claims arising from the single accident in respect of the suit motor vehicle, the Defendant on 05/05/2014 informed the Plaintiff that “.....the policy limit of the cover per event is Kshs. 7,000,000/- .....” and that the Defendant had surpassed its limit. However, on cross examination, DW1 clarified that the correct limit was Kshs. 6,000,000/-. It is notable that Section II -1(a) of the policy schedule has two limbs. Part A concerns persons being carried in or upon entering or getting onto or alighting from the vehicle and in pursuance of a contract of employment. Part B concerns persons being carried in or upon entering or getting onto or alighting from the vehicle.

40. The former caps compensation for any one person at Kshs. 3,000,000/- and compensation for a series of claims arising out of one event at Kshs. 6,000,000/-. The latter caps compensation for any one person at Kshs. 3,000,000/- and with respect to a series of claims arising out of one event, the compensation was unlimited. See paragraph 39 above.

41. Here, the Defendant did not offer any evidence that the Interested Parties were third-party’s in pursuance of a contract of employment, to wit, Part A of the policy schedule would apply. For all intents and purposes my understanding of Part B of the policy schedule as may be construed alongside the dicta in *Justus Mutiga* (supra), the Defendant was legally liable to compensate for death or injury



of any third-party involved in the accident to the tune of Kshs. 3,000,000/- notwithstanding number of persons involved/series of claims arising from that one event, being the accident that occurred 20/08/2011.

42. To the foregoing end, this Court is not convinced there was a limit to the insurance cover obtained by the Plaintiff over motor vehicle registration number KBL 383M in respect of the accident that occurred on 20/08/2011.

Whether the Defendant is liable to and should settle all judgments issued against Charles Makenzi Wambua in all and any suit(s) filed against him as a result of the accident that occurred on or about 20/08/2011 involving motor vehicle registration number KBL 383M?

43. Here, I need not belabor on the question given this Court's finding on the earlier question as framed. While applying my mind to the dicta in *National Bank of Kenya Ltd (supra)*, it is not in dispute by dint of the policy of insurance and schedule thereto, upon the occurrence of the accident the Defendant was to legally take up liability to compensate for death or injury of any third-party involved in the accident to the tune of Kshs. 3,000,000/- notwithstanding number of persons involved/series of claims arising from that one event, being the accident that occurred on 20/08/2011. That was the basis on the contract between the Plaintiff and Defendant.

44. While the Plaintiff discharged his burden of proof on there being a valid contract on insurance or policy and liability have crystallized on account of the incident or accident that occurred on 20/08/2011, the Defendant failed to discharge its evidential burden on proof that either the Plaintiff was in breach of the contract of insurance or that it was entitled to denying the claims by dint of any of the grounds set out in Section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act* as discussed by the Court of Appeal in *Jiji v Gateway Insurance Co. Ltd [2022] KECA 368 (KLR)* for either reason that -; the Interested Parties were not claimants within the meaning of Section 5(b) of the *Insurance (Motor Vehicle Third party Risks) Act*; there was no valid judgment in favour of the Interested Parties as against the Plaintiff; that statutory notices were never effected upon the Defendant, in respect of the respective Interested Party claims and; there never existed a valid policy of insurance between the Defendant and Plaintiff at the time of the accident.

45. Consequently, it is the Court's reasoned deduction that the Defendant is liable to and should settle all judgments issued against Charles Makenzi Wambua in respect of all claims concerning the accident that occurred on or about 20/08/2011 involving motor vehicle registration number KBL 383M.

Whether the Defendant is entitled to a refund of Kshs. 7,071,869/- from the Plaintiff?

46. Similarly, on this question, in light of this Court earlier finding, that Defendant was to legally take up liability to compensate for death or injury of any third-party involved/series of claims arising from one event, being the accident that occurred on 20/08/2011. It would be otiose to address myself to the question. Indubitably, the Defendant's letter dated 05/05/2014 – (PEXh.10) – was a nullity in itself given the express terms of the policy of insurance., to wit, the Defendant cannot now claim a refund of Kshs. 7,071,869/- from the Plaintiff.



### **As to whether the Plaintiff is entitled to any damages?**

47. On the above, I draw guidance for the Supreme Court decision in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others* [2014] eKLR whereof the apex court stated regarding the question of legal and evidential burden that:-

“The person who makes 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”.

48. By his plaint, the Plaintiff itemized various particulars of negligence as against the Defendant, to wit, it was averred that as a consequence of the particularized negligence, the Plaintiff suffered mental anguish loss and damage which eventually led to his demise for which damages are sought.

49. Save for PW1’s testimony, no other evidence was led in respect of the averments of negligence as against the Defendant. Further, there was no medical evidence or otherwise that as a consequence of the Defendant’s actions (PEXh.10), the same led to the untimely demise of the Plaintiff.

50. In a nutshell, no correlation was made between the Defendant’s actions and the Plaintiff’s untimely demise. Onus was on the Plaintiff to plead, particularize and lead evidence of loss and damage upon which the claim of general damages could be premised. Consequently, the Court is not convinced that the Plaintiff is entitled to any damages for the untimely death. The claim is declined.

### **Final Disposition**

51. Accordingly, the Court finds and enters judgment in favour of the Plaintiff as against the Defendant in the following terms;

- a. A declaration does hereby issue that there are no limits on the insurance cover obtained by Charles Makenzi Wambua from the Defendant over Motor vehicle registration number KBL 383M.
- b. A declaration does hereby issue that there are no limits on the insurance cover obtained by Charles Makenzi Wambua from the Defendant over motor vehicle registration number KBL 383M that are applicable to the facts of the accident that occurred on 20/08/2011 involving motor vehicle registration number KBL 383M.
- c. A declaration does hereby issue that the Defendant’s actions in seeking to impose policy limits on the insurance cover obtained by Charles Makenzi Wambua from the Defendant over motor vehicle registration number KBL 383M are illegal null and void.
- d. A declaration does hereby issue that any policy limits on the insurance policy by Charles Makenzi Wambua from the Defendant over motor vehicle registration number KBL 383M as relates to the accident that occurred on about 20/08/2011 is illegal null and void.
- e. A declaration does hereby issue that the Defendant is liable to and should settle all judgments issued against Charles Makenzi Wambua in all and any suit(s) filed against him as a result of



the accident that occurred on 20/08/2011 involving motor vehicle registration number KBL 383M.

- f. Claim for damages is declined.
- g. The Defendant's Counter-claim is dismissed with costs.
- h. The Plaintiff is awarded both costs of the suit and the counter-claim.
- i. Interest will accrue at Court's rate from the date of this judgment until full settlement.

Orders accordingly.

**DELIVERED DATED AND SIGNED AT NAIROBI THIS 29<sup>TH</sup> DAY OF JANUARY, 2026.**

.....  
**JANET MULWA.**  
**JUDGE**

