Walter v Madison General Insurance Kenya Limited (Civil Appeal E055 of 2025) [2026] KEHC 629 (KLR) (28 January 2026) (Judgment)

Neutral citation: [2026] KEHC 629 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E055 OF 2025

DKN MAGARE, J

JANUARY 28, 2026

BETWEEN

MOSE OTISO WALTER .... APPELLANT

AND

MADISON GENERAL INSURANCE KENYA LIMITED .... RESPONDENT

JUDGMENT

1. This Appeal arises from the Judgement and Decree of Hon. J. Nyariki, Senior Resident Magistrate, delivered on 20.03.2025 in Kisii CMCC No. E149 of 2023. The appellant was the defendant in the lower court.
2. The Appellant was the Plaintiff in a declaratory Suit for repudiation of an insurance policy. The Respondent was an insured under a private motor vehicle insurance policy in respect of motor vehicle registration number KCT 557H.
3. The court entered judgment in favour of the respondent, resulting in this appeal. The memorandum of appeal dated 17.04.2025 is a textbook example of how not to draft one. The grounds of appeal were as follows:
    a. That the Honorable Learned Magistrate erred in law and in fact by misinterpreting sections 107, 108 and 109 of the *Evidence Act* and by holding that the Appellant bore the initial burden to prove the case.
    b. That the Honorable Learned Magistrate erred in law and in fact by misinterpreting Section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act*, Chapter 405 of the Laws of Kenya by holding that it was the basis of Appellant's claim yet the matter before the Court was filed by the Respondent.

c. That the Honorable Learned Magistrate erred in law and in fact by holding that the Respondent has no liability to indemnify the Appellant against loss and personal injury claims.

d. That the Honorable Learned Magistrate erred in law and in fact by holding that the Appellant's vehicle was used for commercial purposes by ferrying fare-paying passengers, yet no evidence was adduced by the passengers and no witness statement was availed in Court.

e. That the Honorable Learned Magistrate erred in law and in fact by relying on hearsay evidence by the Investigator who gave evidence on what the passengers allegedly told him, yet none came to court to testify directly to the Court.

f. That the Honorable Learned Magistrate erred in law and in fact in holding that burden of proof shifted to the Appellant, yet the burden was on the Respondent to prove his case.

g. That the Honorable Learned Magistrate erred in law and in fact in holding that there was a breach of insurance contract between the Appellant and Respondent

h. That the learned trial Magistrate erred in law by failing to recognize that the appellant was entitled to a right to hearing thus denying him his constitutional right to a fair trial.

i. That the learned Magistrate erred in law and fact by failing to consider the counterclaim by the Appellant.

j. That the learned Magistrate erred in law and fact by relying on unproven statement that the Appellant's driver was found touting at Afya Centre, an allegation that was false.

k. That the learned Magistrate erred in law and fact by concluding that the Appellant lied on the issue of his friends, Mr. Dancun and Vincent Momanyi who were allegedly on board the Appellant's motor vehicle, an allegation that was not proven from the Claim form and no written statement was provided. The Respondent relied on hearsay evidence to tilt the burden of proof on the Appellant.

l. That the learned Magistrate erred in law and fact by taking judicial notice that the Appellant's private vehicle was allegedly ferrying fare paying passengers from Afya Centre, Nairobi to Kisii, which is against the *Evidence Act*

4. The respondent filed suit on 08.10.2021, stating that on 3.11.2020, the appellant took out a policy for motor vehicle registration number, KCT 557 H, Toyota Voxy, for use only for personal/social, domestic, and pleasure purposes as a comprehensive private motor vehicle policy. It was averred that on 11.07.2021, the insured motor vehicle, registration number KCT 557 H, Toyota Voxy, was driven along Kisii Keroka Road at Kereri Girls' High School, carrying 5 fare-paying passengers, and was driven carelessly, resulting in an accident.

5. They averred that this was contrary to the comprehensive private policy in force. The respondent averred that by virtue of the appellant's actions. They averred that the Respondent was bound to avoid the policy as far as it relates to the claims already filed or any other claim that arises out of the use of the aforesaid the motor vehicle registration number, KCT 557 H, Toyota Voxy, pursuant to section 10(4) of the insurance (motor vehicle) third party risks cap 405, laws of Kenya. It was their case that liability was therefore repudiated. They also set out general exceptions in the policy for the insured vehicle being used otherwise than in accordance with the limitations on use, among others. They sought a declaration that they are entitled to avoid the aforesaid policy, among other prayers. A notice of intention to sue was given and filed in the suit.

6. The respondent set out particulars of fraud, misstatement, and misrepresentation, in particular that it falsely claimed that it was for use only for social, domestic, and pleasure purposes, when it was used to ferry fare-paying passengers. They sought a declaration that the respondent is entitled to avoid settlement of any likely award in the suits already filed, those yet to be filed, and those concluded in relation to the claims arising out of the aforesaid accidents in relation to motor vehicle registration number KCT 557H Toyota Voxy. The prayer was so wide that the court must, in the end, make a requisite direction in relation to which matters the order will apply and which they will not. The prayers are also prolix and repetitive.

7. The appellant filed a defence and counterclaim, which is undated but filed on 23.07.2023. They denied that the vehicle was used for hire or reward, or to ferry fare-paying passengers; it was said to be used with friends from Nairobi for social activities. They denied breach of the use clause and averred that the respondent should compensate them. They falsely threatened to issue a preliminary objection over a mundane issue, but it never came to pass. The counterclaim was sought to the effect that:

    a. The respondent refused to defend related cases.

    b. Refused to cater for material damage. Set out for the following as special damages:

        i. Towing to the police station Ksh.10,000/=

        ii. Towing to Kisumu and back. Ksh. 50,000 /=

        iii. Cost of repairs Ksh. 140,000/=

        Total Ksh. 200,000/=

8. The matter proceeded by way of submissions. The draft judgment was ready last time, but I had not carried the original file. I deferred it to today, given that this was the last day of the term, with apologies to parties.

Evidence and proceedings

9. The matter was initially filed in the High Court. It proceeded with directions and preliminary proceedings. The court transferred the matter to the lower court on 16.02.2023. The ruling in respect thereof is reported as Madison General Insurance Kenya Ltd v Walter (Civil Case E002 of 2021) [2023] KEHC 1327 (KLR) (16 February 2023) (Ruling).

10. PW1 was Moses Barasa, a legal officer with the respondent. He testified in respect of the road traffic accident on 11.07.2021. He adopted his statement dated 5.10.2021. He restated the averments in the plaint verbatim. He identified 8 documents and produced 7 exhibits, with the investigation report, PMFI 5, marked for identification. He maintained that the report found that the insured motor vehicle was being used for hire and reward, contrary to the policy. He placed reliance on section 8 of the Insurance (Motor Vehicle) Third Party Risks Cap 405, Laws of Kenya.

11. On cross-examination, the witness stated that the policy was in place, it was well funded, and it was only for social, domestic, and pleasure purposes. The witness stated that if the appellant was ferrying friends, it was in order. However, the investigation found evidence that the vehicle was used to ferry fare-paying passengers.

12. PW2 was PC Moses Kasera of Kisii Police Station. He testified that a road traffic accident occurred on 11 July 2021 at about 1850 hours at Kereri Girls, along the Keroka–Kisii Road. The accident involved motor vehicle registration number KCT 557H, a Toyota Voxy, and motor vehicle registration number KBU 695Y, a Demio. He stated that the passengers involved in the accident were Luchendo Jacinta

Wambiwa, Olpha Amati Nyabuto, Rael Rabera Mauti, and Naomi Maundu. He produced the police abstract in respect of the accident as an exhibit. He stated that the investigating officer blamed the Toyota Voxy registration number KCT 557H for the accident. There was a re-examination, which was not germane to the issues before the court.

13. PW3 was Jared Wigina, an investigator by profession. He testified that he was instructed by the respondent to investigate the accident involving motor vehicle registration number KCT 557H, Toyota Voxy. Upon investigating, he found that the vehicle was carrying five fare-paying passengers, each of whom had paid Ksh 1,500/= for transport from Nairobi to Kisii.

14. On cross-examination by Mr. Gekombe, he stated that the vehicle was not licensed by the NTSA to carry passengers. He further stated that he conducted the investigations about one month after the accident. He interviewed the passengers and prepared his report based on their statements. He testified that the vehicle had a tracker, which showed that it was constantly on the road. He stated that it was not illegal to drive the vehicle per se, but that the illegality lay in the purpose for which it was being used. He stated that the driver misrepresented the facts, claiming that he was travelling with two friends, Duncan and Vincent. Upon investigation, he found that Duncan was not in the vehicle, but that Vincent was in charge of it. He further stated that he interviewed the driver at Afya Centre, at a petrol station along Moi Avenue.

15. He stated that the driver indicated he was the appellant's driver. The vehicle was parked and touting for passengers. He did not present any report to the police. He further stated that he travelled to Mogonga and interviewed the owner, and later to Nairobi to interview the driver. Jacinta was on attachment in court at the time.

16. DW1 testified that he was jobless and the owner of motor vehicle registration number KCT 557H, a Toyota Voxy, and that he dealt in the real estate business. He stated that in 2021, he was campaigning for the MCA position in Kisii, Masige Ward, and frequently travelled between Utawala and Kisii. He testified that at times he travelled to Nairobi alone, while on other occasions the driver travelled alone. On the material day, he stated that he was at Mogonga. He further testified that the vehicle was later repossessed and sold by the financiers. He stated that PW3 interviewed him at Mogonga.

17. On cross-examination by Mr. Ojonga, he stated that the vehicle was for personal use. The driver was to drive to Kisii and pick him up at Mogonga. He picked up friends who were on their way home from work. Two in Nairobi, one in Narok, and another in Suswa. He did not know them all as they were coming for his campaigns. The appellant maintained that the driver was coming from Donholm and did not collect passengers from Afya Centre, where his office was. He denied that the passengers were passengers but had come for the campaigns. He stated that he vied for Masige ward on the ODM ticket. Never mind that there were no campaigns and voting in 2021.

18. DW2 was Amos Mauti Osoro, the driver of motor vehicle registration number KCT 557 H, Toyota Voxy. He stated that he picked Rael from Donholm, and they used the southern bypass. In Narok, he picked Jacinta and Olpha. In Keroka, he picked his girlfriend, Naomi. He stated that PW2 did not interview him; the interview was conducted by a young man. He had been instructed by the boss on 11/7.2021. There is no indication whether the witness was cross-examined.

Impugned judgment

19. The court posited that the initial burden lay with the defendant to show there was a contract of insurance. This was said to be common ground. Secondly, they posited that it was agreed that an accident involving the suit motor vehicle occurred during the defendant's legal ownership of the vehicle. The court set out Section 10 of the Insurance (Motor Third Party Risks) Act, Cap 405.

20. The court held that the purpose of insurance is not to give unnecessary advantage to an insured. The court relied on the case of Madison Insurance Company Ltd v Solomon Kinara t/a Kisii Physiotherapy Clinic [2004] KECA 162 (KLR), where the court of appeal [Omolo & Tunoi, Jj.A. & Ringera, Ag. JA] held as doth:

> In their book The Law of Insurance, 2nd Edition, under the heading The Contract of Insurance and sub-heading Indemnity at page 4, Preston and Colinvaux state as follows:
>
> Indemnity, it has been said, is the controlling principle in insurance law, and by reference to that principle a great many difficulties arising on insurance contracts can be settled. Except in insurance on life and against accident the insurer contracts to indemnify the assured for what he may actually lose by the happening of the events upon which the insurer's liability is to arise, and in no circumstances, is the assured in theory entitled to make a profit of his loss. That rule might be inferred as being the intention of the parties, having regard to the aim of a contract of insurance, but there are further powerful reasons for its application. Were it not so, the two parties to the contract would not have a common interest in the preservation of the thing insured and the contract would create a desire for the happening of the event insured against. Where in fact the assured has a prospect of profit, there and there only can arise the temptation to crime, fraud or such carelessness as may bring about the destruction of the thing insured.

21. The court found that the defendant did not displace the evidentiary burden. The court found that PW3 interviewed the passengers and the appellant, and that the passengers were fare-paying. The court wondered why the so-called girlfriend was not called as a witness. The counterclaim was dismissed for lack of merit.

22. The court allowed the prayers in the plaint. It is not one of the most edifying ways of writing a judgment. The court must set out the orders granted. Order 21 Rule 4 of the Civil Procedure Rules provides as follows:

> Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

Submissions

23. The respondent filed submissions dated 5.10.2025. They set out the duty of the court as set out in the case of Mursal & another v Manese (suing as the legal administrator of Dalphine Kanini Manesa) [2022] KEHC 282 (KLR). He submitted that an insurance is a contract between the parties. Parties are bound by the terms of the insurance. They said the contract's validity is not disputed. They sought reliance on the case of Insurance Company of East Africa vpan Africa Syndicate Limited [2015] KEHC 5251 (KLR), where the court, A.Mbogholi Msagha J, as he then was, held that an insurance policy is a contract between the insured and the insurer.

24. They stated that the court cannot rewrite the contracts between parties. reliance was placed on the case of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] KECA 362 (KLR), where the court of appeal [Tunoi, Shah & Keiwua JJ A] stated as follows: -

A Court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.

25. They submitted that the appellant was in breach of non-disclosure or misrepresentation. They relied on Section 10 of the Insurance (Motor Third Party Risks) Act, Cap 405. The said section provides as follows:

    (4) 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 judgement 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, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it:

26. They averred that the motor vehicle was for use in a purpose other than those in the insurance contract. The decision was said to be in line with general exceptions. reliance was placed on the case of Catherine Mbithe Ngina v Silker Agencies Limited [2021] KEHC 7820 (KLR):

> I must point out, however, that the contents of the police abstract as extracted from the records held by the police are merely evidence that a report of an accident was made. It is prima facie evidence of the occurrence of the accident and the particulars of those involved. It can, however, be rebutted. It was therefore held in Peter Kanithi Kimunya vs. Aden Guyo Haro [2014] eKLR:
>
> A police abstract is not proof of the occurrence of an accident but of the fact that, following an accident, the occurrence thereof was 'reported' at a particular police station.

27. They laid out the facts of the case and submitted that the respondent had proved the case beyond a reasonable doubt. Reliance was placed on Kenya Alliance Insurance Co. Ltd v Rose Achieng Abdullah [2021] eKLR, in which the case of Albert v Motor Insurers' Bureau [1972] AC 301 was cited with approval.

28. Further, reliance was placed in the case of Imara Steel Mills Ltd v Heritage Insurance Co. Kenya Ltd & 38 others [2016] KEHC 2555 (KLR), where R. Nyakundi held as follows:

> From the facts and legal principles contained and argued before this court one need to restate that contracts of insurance are contracts of uberrima fidei and every material is required to be disclosed. This phrase was defined in the case of United India Insurance Co. Ltd v M.K.J Corporation [1996] 6SCC India 428:
>
> It is a fundamental principle of insurance law that utmost good faith must be observed by the contracting parties. Good faith forbids either party from concealing (non-disclosure) what he privately knows, to draw the other into a bargain, from his ignorance of the fact and his believing the contrary. Just as the insured has a duty to disclose, similarly, it is the duty of the insurers and their parties to disclose all material facts within their knowledge, since obligations of good faith applies to them equally with the assured.

29. The appellant filed submissions dated 27.08.2025. They submitted the burden of proof in this matter is on the Respondent to prove that the Appellant breached the terms of the Policy. It was their submissions that the Respondent had alleged fraud on the part of the Appellant. Furthermore, fraud is a serious allegation and must be proved and not inferred. It was their submissions that the standard of proof in fraud cases is much higher than the balance of probabilities, because fraud is a serious allegation with dire consequences. Reliance was placed in the case of Kinyanjui Kamau v George

Kamau Njoroge [2015] eKLR cited with approval the case of Ndolo v Ndolo (2008) 1 KLR (G&F) 742 as follows:

It is trite law that any allegations of fraud must be pleaded and strictly proved. In Ndolo vs Ndolo (2008) 1KLR (G & F) 742 the court stated that: '

> ... We start by saying that it was the Defendant who was alleging that the will was a forgery and the burden to prove the allegation lay squarely on him. Since the Defendant was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely, proof upon a balance of probabilities; but the burden of proof on the Defendant was certainly not one beyond a reasonable doubt as in criminal cases.

30. They continued that in Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR cited with approval the case of Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR (Civil Appeal No. 106 of 2000), Tunoi JA held as follows:

> It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.

31. They submitted that the Respondent averred that the appellant committed fraud by failing to disclose the precise use of the car and that the Appellant used the car for commercial purposes. They prayed that the court find that the threshold was not met. They submitted that the court erred in taking judicial notice of matters it cannot take judicial notice of, under section 60 of the *Evidence Act*. It was their submissions that payment of fares is not among the facts that Courts take judicial notice of.

32. They submitted that the submissions by the Respondent that the alleged passengers were fare-paying and that is why they sued the Appellant for injuries suffered, and the Appellant owed a duty of care, are fallacious. They submitted that even in accidents involving personal cars carrying friends and family, the occupants in the car have a right to claim compensation for injuries suffered and that the duty of care is applicable in all instances.

33. They submitted that as a fact, even for comprehensive insurance policies, the policyholder has a right to claim compensation for injuries and material damage to the car. Reliance was placed in the case of Saham Assurance Company Limited v Paul Musee Shimoli [2021] eKLR, where the court stated as follows:

> 25. ... Notwithstanding what I have just stated, I find that the investigation report does not add any value to the Plaintiff's case. I say so because the key supporting documents, being the statements allegedly made by the persons who were passengers in the vehicle, were not signed. This state of affairs is disconcerting and in disfavour of the Plaintiff's case when one considers that the same witnesses prepared and signed statements which were produced by the Defendant. In the statements exhibited by the Defendant, all the passengers averred that they were being given free rides in the Defendant's ill-fated motor vehicle.
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> 26. In a situation where there are signed and unsigned statements by the same witnesses, the Court is inclined to rely on the signed statements. The signed statements lead this Court to conclude that the passengers did not pay any fare. In reaching this conclusion, it is observed that none of the witnesses who testified for the Plaintiff and the Defendant was present when

the accident occurred. The police abstract filled for the victims simply stated that the victims were passengers without specifying whether they paid any fare or not. Being a passenger in a car is not the same thing as paying fare for the ride.

27. Considering the evidence adduced by the parties in this case, it follows that the Plaintiff has failed to prove that the passengers who were being ferried in the Defendant's vehicle were being transported for hire or reward. The Plaintiff has therefore failed to establish a ground for invalidating the contract it signed with the Defendant. That being so, I find no merit in the Plaintiff's case, and the same is therefore dismissed.

34. It was submitted that the respondent had a duty to prove fraud. They relied on the case of Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR, which also cited with approval the case of Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR (Civil Appeal No. 106 of 2000), where Justice Tunoi JA stated as follows:

> It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.

35. It was also submitted that parties are bound by their pleadings. This was in relation to paragraph 8 of the Plaint, which sets out the particulars of the fraud. They submitted that none of the 3 witnesses were at the scene of the accident, none of them gave firsthand testimony, and their testimony is merely hearsay, which is not admissible under the rules of evidence.

36. He further submitted that the alleged written witness statement never existed and was not attached to the Respondent bundle of documents. The policy only required the Appellant to fill out the insurance claim form, which he did, and the same was not contested, and no fraud was discovered from the claim form. He stated that Judicial notice is guided by Section 60 of the *Evidence Act*, and payment of fares is not among the facts that Courts take judicial notice of.

37. They posited that the investigation report does not add value. Reliance was placed on the case of Saham Assurance Company Limited v Paul Musee Shimoli [2021] KEHC 1387 (KLR) where this court, W. Korir, as he then was, posited as follows:

25. … Notwithstanding what I have just stated, I find that the investigation report does not add any value to the Plaintiff's case. I say so because the key supporting documents, being the statements allegedly made by the persons who were passengers in the vehicle, were not signed. This state of affairs is disconcerting and in disfavour of the Plaintiff's case when one considers that the same witnesses prepared and signed statements which were produced by the Defendant. In the statements exhibited by the Defendant, all the passengers averred that they were being given free rides in the Defendant's ill-fated motor vehicle.

26. In a situation where there are signed and unsigned statements by the same witnesses, the Court is inclined to rely on the signed statements. The signed statements lead this Court to conclude that the passengers did not pay any fare. In reaching this conclusion, it is observed that none of the witnesses who testified for the Plaintiff and the Defendant was present when the accident occurred. The police abstract filled for the victims simply stated that the victims were passengers without specifying whether they paid any fare or not. Being a passenger in a car is not the same thing as paying fare for the ride.

27. Considering the evidence adduced by the parties in this case, it follows that the Plaintiff has failed to prove that the passengers who were being ferried in the Defendant's vehicle were being transported for hire or reward. The Plaintiff has therefore failed to establish a ground for invalidating the contract it signed with the Defendant. That being so, I find no merit in the Plaintiff's case and the same is therefore dismissed.

38. He submitted that the Respondent did not discharge his burden of proof to the required standard, especially in this case where he alleges a serious allegation of fraud. As such, without cogent evidence, this Honourable Court, as a temple of justice, cannot be used to rubber-stamp actions bordering on consumer fraud.

39. They submitted that the accident was duly recorded, and that the police abstract was merely a record of it. Reliance was placed on the case of:

40. xxxxxxxxxxxxx

41. xxxxxxxxxxxxx

42. xxxxxxxxxxxxx

Analysis

44. The memorandum of appeal raises only a single issue for determination, that is, whether the respondent proved its case for repudiation of the insurance policy. There is an auxiliary issue regarding whether the counterclaim was proved. The rest of the so-called issues are merely ancillary, repetitive, and prolix, amounting to a waste of judicial time.

45. It is not edifying to raise a single issue in thirteen paragraphs that serve only to obfuscate, rather than clarify, the real question for determination. The tenets of conciseness and precision in the drafting of a memorandum of appeal are well settled and are expressly provided for under Order 42 Rule 1 of the Civil Procedure Rules, which provides:

    1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.

    2. The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

46. The Court of Appeal [Nambuye, Karanja & M'Inoti, JJ.A.] had this to say about compliance with Rule 86 (now Rule 88) of the Court of Appeal Rules (which is pari materia with Order 42 Rule 1 of the Civil Procedure Rules) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] KECA 224 (KLR)

> We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules

of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:

> We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs. The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues...

47. The court abhors repetitiveness of grounds of appeal which tend to cloud the key issues in dispute for determination. In the case of Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] KECA 472 (KLR), the court of appeal[Nambuye, M. Warsame & Otieno-Odek JJA] observed that:

> Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In Koross (Legal personal representative of Elijah CA Koross) v Komen & 4 others [2015] KECA 906 (KLR), this Court stated:
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> The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better.

48. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

> ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.

49. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as in the lower court, as parties cannot read into them matters extrinsic to them. In the case of Peters vs Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:

> It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...

50. However, it is a different story when it comes to documents. They must, as a corollary, speak for themselves. There can be no parol evidence introduced as to its meaning. The court of appeal in the

case of In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017)eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

> Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.

51. The appellant is said not to have disclosed the fact that the vehicle was to carry fare-paying passengers. If the fact was concealed, such a circumstance amounts to fraud, and the policy is therefore void. It does not matter that non-disclosure was a single event or a series of events. Even where the suppression occurs by mistake and without any fraudulent intent, the underwriter is nonetheless deceived. The policy is void because the risk actually run is materially different from the risk understood and intended to be run at the time the contract was concluded.

52. Having settled the principles to govern the decision of the law, parties must at all times be guided by Section 112 of the *Evidence Act* when dealing with insurance. Section 112 of the *Evidence Act* provides proof of special knowledge in civil proceedings. The same provides as follows:

> In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

53. It is therefore never an answer that there was no proof of use. It is that the information supplied by the insurer, which is within his knowledge, is correct and given with utmost good faith. The issue in the lower court, as set out by the respondent, was whether the motor vehicle registration number, KCT 557 H, Toyota Voxy, was used to carry fare-paying passengers contrary to the policy in situ between the parties. An auxiliary question was whether the respondent was, as a result, entitled to avoid policy number NGN/701/183957/2020.

54. It was a common agreement that the vehicle was comprehensively insured as a private vehicle vide policy number NGN/701/183957/2020. The policy commenced on 1/11/2020 and was expiring on 2.11.2021. It was also undisputed that the impugned accident occurred during the policy's currency. It was also not in dispute that the particular vehicle was a private, not a public service vehicle. The user was limited to social, domestic, and pleasure purposes only.

55. The appellant averred that he diligently serviced the police, and the respondent is under an obligation to settle claims. The matter had initially been filed as E002 of 2021 in the High Court of Kenya at Kisii. It was transferred and re-assigned a new number. The breach is not related to the payment of premiums or to the servicing of the insurance contract.

56. The evidence of the defense witnesses leads to one conclusion only. The vehicle had 5 passengers. One of them was said to be a girlfriend. None of them was called as a witness. The evidence was that the appellant did not know them, but they were to attend a campaign. It is not fathomable that people from diverse backgrounds who had never met the appellant were going to his campaign during a time when there were no campaigns in the country.

57. The police gave the names of the passengers, whom PW3 identified. Though he was investigating, after the fact, PW3 gave circumstantial evidence that irresistibly led to the conclusion that the appellant's vehicle was carrying fare-paying passengers. The driver was interviewed in his office in a transport

hub. The appellant and his family were not in the vehicle. Vincent and Duncan did not rebut the respondent's evidence.

58. It is not expected that the respondent is to be at the centre of the accident. They will and must use investigators. however, this is not a normal contract. It is a contract of insurance where the insurer bears a heavier burden due to the doctrine of uberrimae fidei, which governs the law and practice in this area of law. In this principle, utmost good faith is required due to the information asymmetry between the parties. In the case of Co-Operative Insurance Company Ltd v David Wachira Wambugu [2010] KECA 481 (KLR), the court of appeal [E. M. Githinji, P. N. Waki and Alnashir Visram JJ.A], posited as follows:

> The learned judge was right in saying that a contract of insurance is one of good faith. As was said in Joel vs Law Union & Crown Insurance Company (2) [(1908) 2 K B at page 883] by Fletcher Moulton, L.J.:
>
> The contract of life insurance is one of uberrimae fidei. The insurer is entitled to be put in possession of all material information possessed by the insured. This is authoritatively laid down in the clearest language by Lord BLACKBURN in Brownlee vs Campbell 5 A C 925 at page 954:
>
> 'In policies of insurance, whether marine insurance or life insurance, there is an understanding that the contract is uberrimae fidei, that, if you know any circumstance at all that may influence the underwriter's opinion as to the risk he is incurring, and consequently as to whether he will take it, you will state what you know. There is an obligation there to disclose what you know, and the concealment of a material circumstance known to you, whether you thought it material or not, avoids the policy.
>
> The learned authors of Bullen & Leake, Precedent of Pleadings, 14th Edition, Vol. 2 states at page 908:
>
> Contracts of insurance are contracts of the utmost good faith. This gives rise to a legal obligation upon the insured, prior to the contract being made, to disclose to the insurer all material facts and circumstances known to the insured which affect the risk being run. Lord Mansfield's words in Carter vs Boehm (1766) Burr. 1905 have stood the test of time:
>
> Insurance is a contract of speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist and to induce him to estimate the risqué as if it did not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived, and the policy is void, because the risqué run is really different from the risqué understood and intended to be run at the time of the agreement... The policy would be equally void against the underwriter if he concealed... The governing principle is applicable to all contracts and dealings. Good faith forbids either party, by concealing what he privately knows to draw the other into a bargain from his ignorance of the fact and his believing the contrary...
>
> Thus, it was incumbent upon the respondent to make full disclosure to the insurer,...

59. The appellant need not have waited for the insurer to find out who the passengers were. He ought to have then disclosed that they were relatives or otherwise. Given the asymmetry of information between

the parties, the duty to disclose lies with the insurer. The fact that none of the passengers' statements were produced does not place the burden on the insurer. The burden is on the insured under a contract of insurance, as they are the ones in possession of the bulk of the information.

60. There was no filial or affinity relationship pleaded. The defence did not disclose who the passengers were or the raison d'être for being in the insured motor vehicle. The appellant cannot place the burden of disclosing the purpose of the passengers being in the vehicle on the respondent. In the absence of family members in the vehicle, the appellant had a duty to disclose who the passengers were and the purpose for which they were being carried. The appellant is bound by the pleadings filed. In the case of Malawi Railways Ltd vs Nyasulu [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled The Present Importance of Pleadings published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

> As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings ....for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....
>
> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called Any Other Business in the sense that points other than those specific may be raised without notice.

61. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in an election petition: -

> In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings...

62. The evidence gathered by the respondent was corroborated in material particulars by the appellant. The appellant was in Mogonga while the driver was in a Voi stage in Nairobi at the time of the interview. The information gathered by PW1 and PW3 indicated that the vehicle was habitually used as a passenger service vehicle. The names of passengers were given by PW2 and PW3. These names differed from the names given by DW1. In any case, the admission that one of the passengers was

DW2's girlfriend showed that the vehicle was not for use of the appellant's business, domestic, or social purposes.

63. The last aspect is the allegation that the passengers were picked up along the road. It may as well be true. However, that is evidence that the passengers were not together for one purpose. The appellant failed to displace the evidence on record. I find that the court below was justified in making the necessary finding. in the end. I find that the appellant failed to impeach the judgment of the court below.

64. The court finds, therefore, that the court below was correct in finding that the appellant breached the policy in situ and, in particular, the doctrine of uberrima fidei. A special condition in the policy provided that motor vehicle registration number KCT 557 H, a Toyota Voxy, was to be used solely for social, domestic, and pleasure purposes. It is, however, apparent from the foregoing that the vehicle was used to ferry fare-paying passengers, contrary to that condition.

65. Consequently, the appeal lacks merit and is accordingly dismissed. The next issue is who is to bear costs. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

    (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

    (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

66. Costs are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> " It is our finding that the position in law if that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

67. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Rai & 3 others v Rai & 4 others [2014] KESC 31 (KLR), as follows:

    18. It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation

    22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this

Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

68. Costs follow the event. The event is the dismissal of the appeal. The respondent is entitled to costs. a sum of Ksh. 65,000/= will suffice.

Determination

69. In the upshot, I make the following orders: -

   a. The Appeal is unmerited and is dismissed in limine .

   b. Costs of the Appeal to the Respondent of Kshs. 65,000/=

   c. 30 days stay of execution.

   d. The file is closed.

DELIVERED, DATED AND SIGNED AT VIRTUALLY ON THIS 28 TH DAY OF JANUARY 2026 . JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Ojong'a for the Respondent

Court Assistant- Michael