



Britam General Insurance Company (Kenya) Ltd v Absalom (Civil Case E002 of 2024) [2026] KEHC 3252 (KLR) (12 March 2026) (Judgment)

Neutral citation: [2026] KEHC 3252 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL CASE E002 OF 2024
CM KARIUKI, J
MARCH 12, 2026**

BETWEEN

BRITAM GENERAL INSURANCE COMPANY (KENYA) LTD PLAINTIFF

AND

OTIENO ONOKA ABSALOM DEFENDANT

JUDGMENT

Introduction

1. This is a declaratory suit filed by the Plaintiff against the Defendant arising out of a motor vehicle insurance contract. By a Plaint dated 19th April 2024, the Plaintiff seeks a declaration that it is entitled to avoid Motor Private Insurance Policy No. 594/700/1/009498/2020/11 issued in respect of motor vehicle registration number KCV 940Z, and that it is not liable to indemnify the Defendant or satisfy any third-party claims arising from a road traffic accident that occurred on 9th July 2023.
2. The Plaintiff's case is that although a valid private comprehensive motor insurance policy existed between the parties at the material time, the Defendant breached the express terms of the policy by using the insured motor vehicle for carriage of passengers for hire or reward—an expressly excluded use under the policy.
3. It is pleaded that on 9th July 2023, the Defendant hired out the motor vehicle to ferry church members from Narok to Njambini in Nyandarua County. On the return journey, at Kijabe along the Kijabe–Mai Mahiu Road, the vehicle was involved in a self-involving accident resulting in bodily injuries to seven passengers.
4. Subsequently, the injured passengers instituted suits against the Defendant in the Chief Magistrate's Court at Narok, being CMCC Nos. E214, E215, E216, E217, E218, E219, and E220 of 2023, seeking compensation for their injuries.



5. The Defendant failed to enter an appearance or file a defence despite proper service. An interlocutory judgment was entered on 8th July 2025, and the matter proceeded for formal proof on 19th September 2025. The Plaintiff called one witness and thereafter filed written submissions.

Introduction And Pleadings

6. The Plaintiff pleaded that it issued a comprehensive private motor insurance policy to the Defendant covering the period from 5th November 2022 to 4th November 2023. The policy covered total loss, material damage, theft, and third-party risks, subject to payment of premiums and compliance with its terms and conditions.
7. An express term of the policy limited the use of the insured vehicle to social, domestic, and pleasure purposes and for the Defendant's personal business. The policy expressly excluded use for racing, rallies, trials, or the carriage of passengers for hire or reward.
8. The Plaintiff contends that the Defendant breached the policy by hiring out the vehicle to transport church members for payment, thereby using the vehicle for commercial purposes contrary to the limitation as to use clause.
9. The Plaintiff therefore seeks:
 - a. A declaration that it was entitled to avoid the policy for breach of its terms.
 - b. A declaration that it is not liable to make any payment under the policy in respect of claims arising from the accident of 9th July 2023.
 - c. Costs and interest.

Evidence

10. The matter proceeded by way of formal proof.
11. PW1, Mr. Peter Makau, a Legal Officer of the Plaintiff, testified that the Defendant held a comprehensive private motor insurance policy in respect of motor vehicle KCV 940Z. He produced the policy document in evidence and confirmed that it limited the use of the vehicle to social, domestic, and pleasure purposes and expressly excluded use for hire or reward.
12. He testified that investigations conducted after the accident revealed that the vehicle had been hired to transport church members for payment. An investigation report was produced as evidence. The investigations further established that the driver was not a regular employee of the Defendant but had been engaged for the specific trip.
13. An amendment was allowed to correct paragraph one of PW1's witness statement to clarify that the policy was comprehensive private insurance cover and not a commercial policy.
14. The Defendant neither entered an appearance nor tendered any evidence in rebuttal. Consequently, the Plaintiff's evidence remained uncontroverted.

Plaintiff's Submissions

15. On whether the Defendant breached the terms of the policy, the Plaintiff submitted that it discharged its burden of proof under Section 107(1) of the *Evidence Act* (Cap. 80), which places the burden upon the party asserting the existence of facts.



16. Counsel argued that the unchallenged evidence demonstrated that the vehicle was used to ferry passengers for hire or reward, an expressly excluded use under the policy.
17. Reliance was placed on *CIC General Insurance v Chuka Farmline Stores Limited & 2 others* (Civil Appeal No. 95 of 2019) [2025] KENS 18321 (KLR) (24 November 2025), where the Court of Appeal affirmed that the principle of utmost good faith (*uberrimae fidei*) applies from the proposal stage through the claims process, and that misrepresentation or non-disclosure entitles an insurer to avoid the policy.
18. The Plaintiff further relied on *Bweco v Kenya Orient Insurance Co. Ltd* (Civil Appeal E083 of 2023) [2024] KEHC 9387 (KLR) (30 July 2024), which reiterated that the burden of proof lies on the party who would fail if no evidence were adduced.
19. In addition, reliance was placed on *Trust Bank Limited v Paramount Universal Bank Limited & two others* [2009] eKLR, where the Court held that failure to adduce evidence renders the opposing party's evidence uncontroverted and unchallenged.
20. It was submitted that in the absence of any defence, the Plaintiff had proved, on a balance of probability, that the Defendant breached both the limitation to use clause and the duty of utmost good faith.
21. On whether the Plaintiff is liable to settle third-party claims, on this issue, the Plaintiff submitted that once a breach of an express policy term is established, the insurer is entitled to avoid liability.
22. Reliance was placed on *Occidental Insurance Company Limited v Dulu* (Civil Appeal No. 03 of 2022) [2023] KENS 20188 (KLR) (30 May 2023), where the Court held that use of an insured vehicle for hire or reward contrary to policy terms amounts to a breach absolving the insurer from liability.
23. The Plaintiff also relied on *Madison Insurance Company Kenya Limited v Kiarie & another* (Civil Appeal E077 of 2021) [2023] KENS 17553 (KLR) (16 May 2023), where a declaration was issued that the insurer was not liable where the insured vehicle was used unlawfully and contrary to policy terms.
24. In that decision, the Court cited *Kenyan Alliance Insurance Company Limited v Pizzaro Kaungania & another* [2018] eKLR, where it was emphasized that insurance contracts are founded on utmost good faith, and non-disclosure or misrepresentation of material facts entitles the insurer to avoid the contract.
25. Reference was also made to the classical authority of *Carter v Boehm* (1766) 3 Burr 1905, where Lord Mansfield articulated the doctrine of *uberrimae fidei*, and to *Pan Atlantic Insurance Co Ltd & Another v Pine Top Insurance Co Ltd* [1994] 3 All ER 581, which clarified the principles governing avoidance for non-disclosure.
26. Further reliance was placed on *Kenya Alliance Insurance Co Ltd v Kioko* (Civil Appeal E143 of 2021) [2023] KENS 1819 (KLR) (2 March 2023), and the well-settled principle in *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR, that courts cannot rewrite contracts and parties are bound by the terms of their agreements unless vitiating factors are proved.
27. The Plaintiff therefore urged the Court to find that it had established breach of the policy terms and was entitled to avoid liability, and to enter judgment as prayed in the Plaint.

Analysis And Determination

28. Having carefully considered the pleadings, the evidence tendered at formal proof, and the written submissions filed on behalf of the Plaintiff, the Court is of the considered view that the dispute turns on three substantive questions. First, whether the Defendant breached the express terms of Motor Private



Insurance Policy No. 594/700/1/009498/2020/11 by using the insured motor vehicle for carriage of passengers for hire or reward. Second, if such a breach is established, whether the Plaintiff is entitled in law to avoid the policy and decline indemnity in respect of the accident of 9th July 2023. Third, whether, notwithstanding the breach, the Plaintiff remains liable to satisfy the third-party claims filed in the subordinate court. Underpinning all these issues is the question of whether the Plaintiff has discharged its burden of proof in this declaratory suit.

29. The starting point is the nature of the contract between the parties. The Plaintiff produced in evidence a comprehensive private motor insurance policy covering the period 5th November 2022 to 4th November 2023. The policy expressly limited use of the insured vehicle to social, domestic, and pleasure purposes and for the insured's personal business. It expressly excluded use for racing, rallies, or the carriage of passengers for hire or reward. The limitation as to use clause was clear, specific, and unambiguous.
30. The Plaintiff's witness testified and produced an investigation report showing that on 9th July 2023, the Defendant hired out the motor vehicle to transport church members from Narok to Njambini for payment. The accident occurred on the return journey. It was further established that the driver was engaged for that specific trip and was not a regular employee of the Defendant. The Defendant did not enter appearance, file a defence, or adduce any rebuttal evidence. The Plaintiff's evidence, therefore, stands uncontroverted.
31. The burden of proof in civil cases rests upon the party who asserts the existence of facts. Section 107(1) of the *Evidence Act* (Cap 80) codifies this principle. The High Court in *Bweko v Kenya Orient Insurance Co. Ltd* reiterated that the party who would fail if no evidence were called bears the legal burden of proof. In the present case, the Plaintiff bore the burden of proving breach of the policy terms. The documentary evidence and oral testimony tendered at formal proof established, on a balance of probabilities, that the vehicle was used to ferry passengers for reward—an expressly excluded use.
32. Where a defendant fails to adduce evidence in rebuttal, the plaintiff's case remains unchallenged. In *Trust Bank Limited v Paramount Universal Bank Limited & two others*, the Court of Appeal held that uncontroverted evidence, where credible, is sufficient to sustain a claim. There being no contrary evidence before this Court, I am satisfied that the Plaintiff has proved that the Defendant breached the limitation as to use clause.
33. Insurance contracts are governed by the doctrine of utmost good faith (*uberrimae fidei*). The classical exposition of this doctrine is found in *Carter v Boehm*, where Lord Mansfield held that insurance is a contract upon speculation and requires full and frank disclosure of material facts. The doctrine was further clarified in *Pan Atlantic Insurance Co Ltd & Another v Pine Top Insurance Co Ltd*, where it was held that material non-disclosure or misrepresentation that induces the contract entitles the insurer to avoid it.
34. The Kenyan courts have consistently applied these principles. In *CIC General Insurance v Chuka Farmlines Stores Limited & two others*, the Court of Appeal affirmed that the duty of utmost good faith subsists throughout the life of the insurance relationship, and that material breach entitles the insurer to repudiate liability. Similarly, in *Occidental Insurance Company Limited v Dulu*, the Court held that the use of a motor vehicle for hire or reward contrary to the terms of a private policy constituted a fundamental breach absolving the insurer from liability.
35. The limitation as to use clause is not a peripheral term; it defines the nature and extent of the risk assumed by the insurer. A private motor policy attracts a different premium and contemplates a different risk profile from a commercial passenger-carrying policy. The unauthorized conversion of the vehicle to commercial use materially altered the risk exposure and went to the root of the contract.



36. This Court is guided by the settled principle that courts do not rewrite contracts for parties. In *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another*, the Court of Appeal emphasized that parties are bound by the terms of their contract unless vitiating factors such as fraud, mistake, or misrepresentation are established. No such factors have been pleaded or proved in this case. The contractual exclusion must therefore be given effect.
37. On the question of whether the Plaintiff remains liable to satisfy third-party claims, the Court is mindful of the protective policy underlying compulsory motor vehicle insurance legislation. However, declaratory proceedings are specifically designed to determine whether an insurer is bound to satisfy judgments against an insured. Where it is established that the insured fundamentally breached an express and material term defining the permitted use of the vehicle, the insurer is entitled to avoid liability in respect of that risk. where *Insurance Company Kenya Limited v Kiarie & another*, the Court affirmed that where a vehicle is used contrary to policy terms, the insurer is entitled to a declaration that it is not liable to indemnify the insured or satisfy resultant claims.
38. In light of the foregoing analysis, I find that.
- i. The Plaintiff has discharged its burden of proof on a balance of probabilities. The Defendant breached the express limitation as to use clause by using the insured motor vehicle for the carriage of passengers for hire or reward. That breach was material and went to the root of the contract. The Plaintiff is therefore entitled to avoid the policy in respect of the accident of 9th July 2023 and is not liable to indemnify the Defendant or satisfy the third-party claims arising therefrom.
 - ii. Accordingly, judgment is entered for the Plaintiff as prayed in the Complaint, together with costs and interest as applicable.
39. It is so ordered.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS
12TH DAY OF MARCH 2026**

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CHARLES KARIUKI
JUDGE
12/03/2026

