

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CIVIL SUIT NO. E006 OF 2023
PACS INSURANCE CO.
LTD.....PLAINTIFF
VERSUS
ZACHARIAH NYAKIRORI
ONTWEKA.....DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit by way of a Plaint dated 15th November 2023. The Plaintiff seeks a declaration that it is not liable to indemnify the Defendant under the subject insurance policy cover in respect of any claim arising from death or bodily injury to any person arising out of a road traffic accident that occurred on 24th February 2023 along Kipkelion Fort-Ternan at Tunnel area involving the Defendant’s Motor Vehicle Registration Number KCM 909E. The Plaintiff also prays for costs of the suit and interest thereon.

2. Despite being duly served with summons to enter appearance and the pleadings herein, the Defendant failed to enter appearance or file a Statement of Defence within the stipulated timelines. Consequently, interlocutory judgment was entered against the Defendant, and the matter proceeded for formal proof.

3. The hearing took place on 30th July 2025, where the Plaintiff called two witnesses to testify and produce documents in support of its case.

4. PW1, Raphael Kilonzo David, an investigative expert from Uptown Loss Assessors (K) Ltd, testified and produced an investigation report dated 13th June 2023 as Plaintiff's Exhibit No. 2 (PEXh 2). The report was compiled following investigations into the accident involving motor vehicle registration number KCM 909E, which occurred on 24th February 2023 along the Kipkelion-Fort Ternan Road at Tunnel Area in Kericho County. The accident resulted in fatal injuries to the driver, Mr. Kevin Onyango Onselu, and three passengers; Miss Monah Onselu (a juvenile), Belinda Awour Onselu, and Consolata Atieno Owuor.

5. The investigation report, which was comprehensive and detailed, contained the following key findings;

a) At paragraph 5 of the report, the Defendant explicitly stated that he was using the subject motor vehicle "for taxi business on freelance basis operating from the Shell Service Station near Greenspan Shopping Mall in Donholm, Nairobi." He confirmed that this taxi business was his sole source of income.

b) The Defendant recorded a statement with the investigators on 8th May 2023, which was annexed to the report. In that statement, the Defendant made key admissions which this court has considered.

c) The investigators noted several inconsistencies;

· *The Defendant claimed the driver was his friend, yet he could not provide basic information about him, including his residence or occupation beyond being a social media influencer, had never visited his home, and did not attend the burial.*

· *The Defendant claimed he gave out the vehicle for free over a weekend, yet the taxi business was his only source of income. The investigators opined that this was implausible.*

· *When asked to provide M-Pesa statements, the Safaricom line he provided (0745 454 336) only became active on 25th February 2023, a day after the accident. He admitted having another line (0102 255 027) on the Airtel network but did not provide its M-Pesa statement.*

· *The investigators opined; "We opine that the insured being a businessman, likely has another line where he transacts with M-Pesa, but did not want to disclose it to us, probably on purpose. Further, from the fact that he confirmed the taxi business was his only source of income, it is unlikely that he gave out the vehicle to the driver to use for three days free of charge, not forgetting that their alleged friendship is in doubt."*

d) The investigation established that the driver lost control of the vehicle after negotiating a leftward corner, likely due to speeding. The vehicle rolled on the tarmac and came to rest in a trench on the right verge. The OCS Fort Ternan Police Station, IP Ocharo, confirmed having visited the scene and coordinated reporting to the next of kin.

e) The driver's father, Mr. Thomas Nyangweso - 0722 702 815, a Property Manager with Hypothemix Ltd, confirmed that the driver and the three passengers; Monah Onselu, Belinda Awour Onselu, and Consolata Atieno Owuor, were his children. He stated that he was preparing to lodge injury claims on behalf of the victims.

f) The investigators concluded;

"From our investigations, we are convinced that the subject accident occurred as reported and the damage was consistent with the scene and accident circumstances. The insured confessed that he was using the vehicle for taxi business operating from Shell Service Station near Greenspan Shopping Mall where the driver picked up the vehicle from. The use of the vehicle was therefore in violation of the policy conditions having noted that it was insured for private use but the insured was using it as a taxi."

3. PW2, **Morine Wangeci Munene**, the Legal Manager of the Plaintiff Company, testified and produced the List of Documents dated 15th November 2023. The documents produced included; Police Abstract dated 15th March 2023 - Plaintiff's Exhibit No. 1 (PEXh 1), Insurance Policy Document - Plaintiff's Exhibit No. 3 (PEXh 3), Motor Vehicle Policy Schedule for KCM 909E - Plaintiff's Exhibit No. 4 (PEXh 4) and Bancassurance application for Motor Insurance- Plaintiff's Exhibit No. 5 (PEXh 5).

4. PW2 testified that the Defendant approached the Plaintiff for issuance of a Motor Vehicle Insurance Policy for his vehicle KCM 909E, representing that the vehicle would be used for private purposes only. Based on these representations, the Plaintiff issued Policy Cover Number 010/0070/145194/2022 effective from 13th October 2022 to 12th October 2023.

5. This court has keenly perused the policy document which was expressly titled "MOTOR PRIVATE INSURANCE" as clearly indicated on the cover page and the content thereof.

6. The Plaintiff filed written submissions dated 15th August 2025, which this court has carefully considered. The Plaintiff submitted that;

a) The Defendant breached the terms of the insurance policy by using the vehicle for hire and reward purposes contrary to the "LIMITATION TO USE - MOTOR PRIVATE" clause.

b) The Defendant was guilty of material non-disclosure and misrepresentation at the time of contracting, having failed to disclose that he intended to use the vehicle for taxi business.

c) The doctrine of *uberrima fidei* (utmost good faith) requires full disclosure of all material facts, and the Defendant's failure to disclose the commercial use of the vehicle entitles the Plaintiff to avoid the policy.

d) The investigation report produced as PExh 2, together with the Defendant's own admissions, conclusively proves that the vehicle was being used as a taxi at the material time.

e) The Plaintiff is entitled to the declaration sought and costs of the suit.

7. The Plaintiff relied on several authorities which I have taken into account.

8. From the pleadings, evidence adduced, and submissions, the following issues arise for determination:

a) Whether the Defendant breached the terms of the subject Motor Vehicle Insurance Policy Cover;

b) Whether the Plaintiff is entitled to the declaration sought;

c) Who should bear the costs of the suit.

9. Sections 107, 108 and 109 of the Evidence Act, Chapter 80 of the Laws of Kenya place the legal and evidential burden of proof on the party who wishes the court to believe in the existence of a particular fact. In this case, the Plaintiff bears the burden of proving, on a balance of probabilities, that the Defendant breached the terms of the insurance contract.

10. The standard of proof in civil cases was aptly explained by Lord Denning in ***Miller v Minister of Pensions [1942] 2 ALL ER 372***, where he stated that the evidence must carry a reasonable degree of probability, and if the tribunal can say "we think it more probable than not," the burden is discharged.

11. The Defendant failed to enter appearance or file a defence, and did not adduce any evidence to challenge the Plaintiff's case. In ***Karuru Munyororo v Joseph Ndumia Murage & Another, Nyeri HCCC No. 95 of 1988***, it was held that uncontroverted evidence which is credible ought to be acted upon by the court. The Plaintiff's evidence therefore remains unchallenged.

12. The insurance policy document produced as PExh 3 and the Policy Schedule produced as PExh 4 are expressly titled "MOTOR PRIVATE INSURANCE" and indicate the cover type as "COMP PVT." More importantly, the policy contains an explicit clause titled "LIMITATION TO USE - MOTOR PRIVATE" which states unequivocally; "Use for social domestic and pleasure purposes."

13. This court takes judicial notice that in the insurance industry, policies are classified based on the use of the vehicle. A "Private" policy is issued for vehicles used for social, domestic, and pleasure purposes only, while a "Commercial" or "Taxi" policy is issued for vehicles used for hire or reward. The premiums for these different classes of policies vary significantly, with commercial policies attracting higher premiums due to the increased risk. The premium paid by the Defendant was Kshs. 56,794, which is consistent with a private policy.

14. The "LIMITATION TO USE - MOTOR PRIVATE" clause is unambiguous and leaves no room for interpretation. The vehicle was insured for social, domestic, and pleasure purposes only. Any

use outside these purposes, including commercial use as a taxi, constitutes a breach of the policy terms.

15. The Investigation Report dated 13th June 2023 produced as PExh 2, which this court finds thorough, credible, and uncontroverted, established conclusively that the Defendant was operating a taxi business as his sole source of livelihood. The Defendant's own statement to the investigators, which forms part of the report, contains a clear and unequivocal admission; "I was previously working as a taxi. I was using the subject motor vehicle for taxi business but I stopped the business after the subject motor vehicle got involved in the accident. I was based at Greenspan Mall where I used to get my customers from."

16. This admission is fatal to the Defendant's case. It demonstrates that at all material times, including at the time of contracting the insurance policy, the Defendant intended to use the vehicle for commercial purposes. The representation made to the Plaintiff that the vehicle would be used for private purposes was therefore false, and the actual use of the vehicle at the time of the accident was in direct contravention of the express "LIMITATION TO USE - MOTOR PRIVATE" clause.

17. The report further revealed significant inconsistencies that undermine the Defendant's credibility; The Defendant claimed the driver was his friend, yet he could not provide basic information about him, had never visited his home, and did not attend the burial. He claimed he gave out his only source of income for free

over a weekend, a proposition that defies logic. He also failed to provide M-Pesa statements that could corroborate his narrative, and the line he did provide only became active after the accident. He also admitted that he never attended the victims' burial and has never had any contact with their relatives, which is inconsistent with a genuine friendship.

18. The investigators' opinion that the Defendant likely had another M-Pesa line which he did not disclose, and that it was implausible that he gave out his only source of income for free, is reasonable and this court accepts it.

19. The Court of Appeal in ***Heritage Insurance Co. Limited v Alex N. Migore [2009] eKLR*** held that a Motor Private Insurance policy together with the general exceptions clause and limitations of use clause excludes liability where the insured vehicle is used for hire and reward or as a taxi. The court affirmed that breach of such conditions operates to repudiate the policy contract.

20. Similarly, in ***Paul Mutsya v Jubilee Insurance Company of Kenya Limited [2018] eKLR***, the court held that violation of terms and conditions restricting use to private purposes, where the vehicle was actually used for hire and reward, was sufficient grounds to discharge the insurance company from the obligation to indemnify the insured.

21. Beyond the express terms of the policy, contracts of insurance are governed by the doctrine of *uberrima fidei* (utmost good

faith). Both parties are required to observe utmost good faith and candour in the disclosure of material facts. In ***Co-operative Insurance Company Ltd v David Wachira Wambugu [2010] 1 KLR 254***, the Court of Appeal held that the insurer is entitled to be put in possession of all material information possessed by the insured. Any circumstances that may influence the underwriter's opinion as to the risk must be disclosed.

22. In ***Kenyan Alliance Insurance Company Limited v Pizzaro Kaungania & another [2018] eKLR***, Justice Majanja (as he then was) reiterated that once there is non-disclosure or misrepresentation of material facts, the insurer is entitled to avoid the insurance contract. The court quoted with approval the old case of *Carter v Boehm* [1766] 3 Burr 1905 where Lord Mansfield stated;

"Insurance is a contract upon speculation. The special facts upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the underwriter trusts to his representation, and proceeds upon the 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 risk as if it did not exist. Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact, and his believing the contrary..."

23. At the time of making his proposal, the Defendant failed to disclose that he intended to use the vehicle for his taxi business. This was a material fact which, if disclosed, would have resulted in a different class of policy attracting different premiums. The Defendant is therefore guilty of material non-disclosure and misrepresentation.

24. Section 10(4) of the Insurance (Motor Vehicle Third Party Risks) Act Cap. 405 reinforces this position, providing that no sum shall be payable by an insurer if it has obtained a declaration that it is entitled to avoid the policy on the ground that it was obtained by non-disclosure of a material fact or by a false representation of fact in a material particular.

25. The Plaintiff has adduced credible and uncontroverted evidence through PExh 2 (the Investigation Report) and the testimony of PW1, Raphael Kilonzo David, and PW2, Morine Wangeci Munene, demonstrating on a balance of probabilities that the subject motor vehicle was being used for hire and reward at the material time, in clear contravention of the express "LIMITATION TO USE - MOTOR PRIVATE" clause. The Defendant's own admission in his recorded statement leaves no doubt that a breach occurred.

26. This court finds that the Plaintiff has discharged its evidentiary burden and proved, on a balance of probabilities, that the Defendant's conduct amounted to a breach of the express terms of the insurance policy.

27. Having found that the Defendant breached the terms of the insurance policy by using the vehicle for hire and reward purposes contrary to the express "LIMITATION TO USE - MOTOR PRIVATE" clause, and having further found that the Defendant was guilty of material non-disclosure and misrepresentation at the time of contracting, this court holds that the Plaintiff is entitled to avoid the policy.

28. Consequently, the Plaintiff is not liable to indemnify the Defendant in respect of any claims arising from the road traffic accident that occurred on 24th February 2023 involving Motor Vehicle Registration Number KCM 909E.

29. The court further notes that third-party claims are anticipated, as confirmed by the driver's father, Mr. Thomas Nyangweso, who stated he was preparing to lodge injury claims on behalf of the deceased victims. The declaration issued herein shall protect the Plaintiff from liability in respect of those anticipated claims.

30. Section 27(1) of the Civil Procedure Act provides that costs of and incidental to all suits shall be in the discretion of the court, and costs shall follow the event unless the court for good reason orders otherwise.

31. The Plaintiff has successfully prosecuted its case, has maintained proper conduct throughout these proceedings even though the suit was not defended, and there is no reason why it should be denied costs. The Plaintiff is therefore entitled to costs of the suit at a lower scale since the suit is undefended.

32. On the prayer for interest, Section 27(2) of the Civil Procedure Act grants the court discretion to award interest on costs at a rate not exceeding fourteen per cent per annum. This court finds it just to award interest on costs at court rates from the date of filing suit.

33. In light of the foregoing, this court makes the following orders:

a) A declaration be and is hereby issued that the Plaintiff is not liable to indemnify the Defendant under Insurance Policy Cover Number 010/0070/145194/2022 in respect of any claim arising from death or bodily injury to any person arising out of the road traffic accident that occurred on 24th February 2023 involving Motor Vehicle Registration Number KCM 909E.

b) The Plaintiff is awarded costs of this suit.

Dated, signed and delivered at Kericho this 10th day of March, 2026.

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J. K. SERGON
JUDGE

In the Presence of:-

C/Assistant - Rutoh

No Appearance