Directline Assurance Co (Kenya) Limited v Jefwa & another (Civil Suit 1 of 2021) [2026] KEHC 2617 (KLR) (19 February 2026) (Judgment)

Neutral citation: [2026] KEHC 2617 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MARSABIT

CIVIL SUIT 1 OF 2021

JN NJAGI, J

FEBRUARY 19, 2026

BETWEEN

DIRECTLINE ASSURANCE CO (KENYA) LIMITED ..... PLAINTIFF

AND

NELSON JEFWA ..... DEFENDANT

AND

CRISPUS MUSILI KITILI & 22 OTHERS ..... INTERESTED PARTY

JUDGMENT

1. Vide a Plaint dated December, 7 2021 the Plaintiff sought the following orders against the Defendant;
    a. A declaration be made that the Plaintiff is entitled to avoid or repudiate the Policy of Insurance Number 00151224 and/or any claims arising thereto or any addendums, endorsements and renewals thereof issued by itself to the Defendant.
    b. A declaration be made that the Plaintiff has no contractual or legal liability to satisfy any judgment obtained pursuant to the accident which occurred on 10th April, 2021 along Malindi- Garsen Road against the Defendant.
    c. Costs of the suit.
    d. Any other relief the court may deem just to grant.
2. The case for the Plaintiff was that they provided the Defendant with a comprehensive motor insurance cover under policy N0. 00151224 with respect to motor vehicle registration number KCP 965Q, Nissan Matatu, for a period commencing 18/11/2020 to 01/12/2020. That the motor vehicle had a sitting capacity of 14 passengers but due to the COVID 19 pandemic, it was allowed to carry up to a maximum of eight (8) passengers as shown in the Schedule (a) of the Policy Schedule.

3. That in the month of September 2021 they received a total of 23 claims from passengers said to have been injured in the motor vehicle in an accident said to have occurred on 10/4/2021 of which the defendant had not informed them about. That it is not until the 4th November, 2021 that it received a Motor Accident Report form dated 3rd November, 2021 from the Defendant informing them of the accident of 10th April, 2021.

4. It is the Plaintiff's case that they were entitled to repudiate liability under the policy in respect to the twenty-three claims as the Defendant was allowed to carry up to a maximum of eight passengers but carried 23 in clear breach of the policy. Additionally, that the Defendant breached the policy by failing and/or delaying to notify them of the occurrence at least within six months after the occurrence of the alleged accident. That in the premises they were entitled to repudiate the contract in its entirety and filed the instant suit against the Defendant.

5. The Defendant did not enter appearance or file any Defence denying the claim. The Plaintiff requested for Judgment against the Defendant on the 22nd day of December, 2022 and the same was entered in their favor. However, the Interested Parties who had filed declaratory suits against the Plaintiff and obtained judgments against them were enjoined into the suit by consent. They opposed the orders sought herein through their witness statements.

6. The Plaintiff called one witness in the case, Kelvin Ngure PW1, who was its Assistant Claims manager. The Interested parties similarly called one witness in the case, Namina Nyavula Njemo, DW1, who was one of the claimants in the 23 declaratory suits filed against the Plaintiff.

7. The issues in the case were canvassed by way of written submissions of the counsels for the Plaintiff and counsels for the Interested Parties.

Plaintiff's submissions

8. The Plaintiff identified three issues for determination:

    (1) Whether there existed a valid contract of insurance between the Plaintiff and the Defendant as at 10th May, 2021 when the accident occurred;

    (2) Whether the Defendant is in breach of the contract of insurance between the Plaintiff and the Defendant herein and

    (3) Whether the Plaintiff is liable to honour any claims related to the aforesaid accident or to indemnify the insured under the policy.

9. On whether there existed a valid contract of insurance between the Defendant, the plaintiff relied on the policy schedule and a police abstract which indicated that the Plaintiff company was the insurer of the subject motor vehicle. That the existence of a policy of insurance between the Plaintiff and the Defendant was not disputed.

10. On the 2nd issue whether the Defendant was in breach of the contract of insurance, the plaintiff submitted that the fact of carrying passengers beyond the agreed carrying capacity was neither controverted by the defendant and or interested parties. Neither was it disputed that the defendant did not notify the defendant of the occurrence of the accident within 6 months.

11. It was submitted that pursuant to Schedule (a) of the Policy dated 18th November, 2020 the Defendant was allowed to carry up to a maximum of eight passengers. That this was also indicated on the Motor Accident Report form filled by the Defendant dated 3rd November, 2021. The plaintiff submitted that

it was a clear breach of the Insurance Policy for the defendant to carry 23 passengers when he was required to carry a maximum of eight passengers.

12. On whether the Plaintiff is liable to honour any claims related to the aforesaid accident, the plaintiff submitted that at the time of taking out the policy, it knew that the vehicle was to be used to carry a maximum of 8 passengers. That the defendant did not disclose that he was going to use the motor vehicle for hire to carry passengers in the excess of 8 passengers. That failure to do so amounted to failure on the part of the defendant insured to disclose to the insurer a fact material to the risk. The plaintiff in this respect relied on the case of British American Insurance Company Limited v Daniel Amoth Owino (2021) eKLR where the court cited with approval the decision in the case of Co-operative Insurance Company Ltd vs David Wachira Wambugu (2010) 1 KLR 254 where the Court of Appeal discussed the nature of contracts of Insurance and stated that:

> " The learned Judge was right in saying that a contract of insurance is one of uberrimae fidei. The insurer is entitled to be put in possession of all material information possessed by the insured. In policies of insurance, whether marine insurance or life insurance, there is an understanding that the contract is uberrimae fidei, if you know any circumstances 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...Contracts of insurance are contracts of utmost good faith and 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. Insurance is a contract of speculation and 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. 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."

13. The plaintiff further submitted that section 10(4) of the Insurance (Motor Vehicle Third Party) Risks Act requires disclaimer suits to be filed within three months after the commencement of the primary suit. That the plaintiff learnt of the breach of the policy upon receiving summons that were in excess of the eight insured passengers. That the last demand letter and statutory notice was received on 15/9/2021 and the instant suit filed on 7/12/2021. Therefore, that the suit was filed within three months as required by the law. The plaintiff urged the court to allow the suit as prayed with costs.

Interested Parties' Submissions.

14. The Interested Parties identified two issues for determination, namely:

    (1) Whether the suit is competently before the court, and

    (2) Whether the Plaintiff is deserving of the declaration sought.

15. On whether the first issue, the Interested Parties submitted that it is not in dispute that a suit to repudiate liability under Section 10(4) Cap 405 ought to be filed before or within three months after commencement of proceedings in the primary suit. That the dispute is whether the suit was filed in time.

16. The Interested Parties submitted that contrary to the submissions by the Plaintiff, the last demand letter (IP Exh.4) was served on 5/08/2021 and no demand letter was filed in the month of September 2011 as contended by the plaintiff. Therefore, that by the time this suit was being filed on 17/12/2021, three months had lapsed and hence the suit is time barred.

17. The interested parties submitted that time begins to run upon receipt of the notice of proceedings. In this they made reliance on the decision in the case of Fidelity Shield Company Limited v Njathi (Civil Case No.11 (B) of 2022 (2024) KEHC 8755 (KLR) where the court held that:

    There is also a demand letter dated 11th July, 2020 issued by the law firm of S. N. NGARE & COMPANY representing the accident victims as well as the statutory notice dated 21st July 2021 to Fidelity Insurance Co. Ltd notifying the Applicants of the filing of the suit. Therefore the period of time began to run from 21st July 2021 when the Applicants were notified of the existence of the suit. By this time the Applicants had already received the investigation report revealing the alleged misrepresentation.

18. The Interested Parties relied on the provisions of Section 10(2) (a) of Cap 40 in submitting that a notice required under the section can be given before or after the commencement of proceedings. They relied on the case of Philip Kimani Gikonyo vs Gateway Insurance Company Limited (2007) eKLR.

19. It was submitted that the provisions of section 10(4) that the suit to repudiate liability must be filed within 3 months is mandatory. Reliance was placed in the case of Geminia Insurance Company Limited v EN (Minor suing through his father and next friend AOO (2019) eKLR where the court stated that:

    An analysis of the above provision leads me to the inevitable conclusion that the appellant could not rely on the declaration issued by the court in HCCC No. 453 of 2001. The respondent filed the suit against the appellant's insured to avoid the policy on the grounds of material non-disclosure on 21st March 2001. On his part the respondent had filed the suit against the appellant's insured on 19th February 1998 therefore by the time the appellant's declaratory suit was filed, the statutory period of 3 months under section 10(4) of the Act had lapsed.

    12. I understood the appellant to submit that the trial court was bound by the declaration issued by the High Court in HCCC No. 453 of 2001. Such a declaration under the Act is a specific cause of action that must comply with the conditions of the statute in order to take effect and be binding on claimant with a decree against the insured. It is not a judgment in rem which is binding on the trial court. That is why, the proviso to section 10(4) of the Act required the plaintiff in the primary suit to be served with a notice after the insurer files the declaratory suit. I therefore reject the appellant's submission that the respondent ought to have filed an application to set aside the judgment in HCCC No. 453 of 2001. In Gateway Insurance Co., Ltd v Moses Jaika Luvai ELD HCCC No. 3 of 2008 [2008]eKLR, the court stated as follows:

    The aforesaid provision is clear and speaks for itself. The Plaintiffs in the suits which the Insurer seeks to avoid liability under Section 10 (1) by way of declaratory suit must be notified of the institution of the declaration suit and after which the said Plaintiffs are entitled to be made parties to the Insurer's suit if they think fit.

The provision is mandatory and the Court has no discretion on the matter. The discretion and election lies with the Plaintiffs who have sued the insured for damages and losses arising from motor accidents. It is a right which none of the parties or the Court can take away.

13. As regards the notice under the proviso to section 10(4) of the Act. The respondent stated that it was never served with a disclaimer of the insurance from the appellant. Although the appellant's witness stated that its advocate informed it that the notice had been served no notice was produced to prove that fact. I therefore find that the appellant failed to issue notice that to the respondent that it had filed HCCC No. 453 of 2001 within 14 days as required.

14. The respondent proved that it had a valid decree against the appellant's insured, and that it had served the appellant with a notice of intention to sue in line with section 10 (2) of the *Insurance (Motor Vehicles Third Party Risks) Act*. The appellant failed to comply with the provisions of section 10(2) of the Act hence it was duty bound to settle the claim in Kisii CMCC No. 304 of 2006. For the reasons I have given, I do not find any reason to depart from the trial court's decision and hereby dismiss the appeal.

20. Also cited was the case of Britam General Insurance Company Limited v Simon Benjamin Njoroge Karanja & another (2021) eKLR where it was reiterated that such a suit must be brought before or within three months of filing of the primary suits.

21. It was submitted that the Plaintiff's claim is time barred and as such this court cannot grant the remedy sought. That by seeking a declaration for claims for which it is time barred, the Plaintiff is asking this court to perpetuate an illegality. 22. Reliance was placed in the case of Kenya Airways Limited vs Satwant Singh Flora (2013) eKLR where the court while citing with approval the decision in Scott v Brown, Doering, McNab & Co. (3) (1892) 2 QB 74 held that no court ought to enforce an illegal contract.

23. On whether the Plaintiff is deserving of the declaration sought, the Interested Parties submitted that under Section 10 (4) of Cap 405 the grounds under which an insurer is entitled to repudiate liability are non-disclosure of a material fact or misrepresentation of a material fact. This was emphasized in the case of Blue Shield Insurance Co. Ltd vs Samuel Nyaga Ngurukiri (2008) eKLR.

24. It was submitted that the Plaintiff did not plead any non-disclosure and/or misrepresentation and instead pleaded in paragraph 9 of the plaint breach of the insurance policy. That the evidence of the Plaintiff's witness, PW1, as regards non-disclosure and/or misrepresentation is a material departure from the pleadings. That it is a principle of law that parties are bound by their pleadings. That evidence at variance with pleadings ought to be disregarded. The case of Daniel Otieno Migore vs South Nyanza Sugar Co. Ltd (2018) eKLR was cited in this respect. Therefore, that the evidence of PW1 as aforesaid ought to be disregarded.

25. The Interested Parties submitted that under Cap. 405, the fact of excess passengers is not a valid ground to repudiate third party claims as the Act expressly bars repudiation on this ground under section 8 and 16 of the Act. Section 8 provides as follows:

> 8. Certain conditions in policies of insurance of no effect.
>
> Any condition in a policy of insurance providing that no liability shall arise under the policy, or that any liability so arising shall cease, in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy, shall, as respects such liabilities as are required to be covered by a policy under section 5, be of no effect:

Provided that nothing in this section shall be taken to render void any provision in a policy requiring the persons insured to repay to the insurer any sums which the latter may have become liable to pay under the policy and which have been applied to the satisfaction of the claims of third parties.

26. Section 16 provides thus:

16. Avoidance of restrictions on scope of policies.

Where a certificate of insurance has been issued under section 7 to the person by whom a policy has been effected so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any of the following matters—

(a) the age or physical or mental condition of persons driving the vehicle; or

(b) the condition of the vehicle; or

(c) the number of persons that the vehicle carries; or

(d) the weight or physical characteristics of the goods that the vehicle carries; or

(e) the times at which or the areas within which the vehicle is used; or

(f) the horse-power or value of the vehicle; or

(g) the carrying on the vehicle of any particular apparatus; or

(h) the carrying on the vehicle of any particular means of identification other than any means of identification required to be carried by or under the *Traffic Act* (Cap. 403), shall, as respects such liabilities as are required to be covered by a policy under paragraph (b) of section 5, be of no effect:

Provided that nothing in this section shall require an insurer to pay any sum in respect of the liability of any person otherwise than in or towards the discharge of that liability, and any sum paid by an insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this section shall be recoverable by the insurer from that person.

27. The Interested parties cited the Court of Appeal decision in the case of The New Great Insurance Company of India Limited v Lilian Evelyn Cross and another (1966) EA 90 where it was stated thus:

> " The effect therefore of this Section is that a condition in a policy of insurance providing that no liability shall arise under the policy is ineffective in so far as it relates to such liabilities as are required to be covered by a policy under Section 5(b) of the Act and in, so far as any such condition is prayed in aid to avoid liability to a third party who has been injured. In so far, however as the relationship of the insurer and the insured is concerned then, by virtue of the provision to the section, if the policy contains – provision requiring the insured to repay to the insurer any amount which the insurer has had to pay to a third party in the circumstances in which condition applies, such a provision is perfectly valid (Emphasis supplied.)

28. To emphasize the point, the Interested Parties cited the case of ICEA Lion General Insurance Co. Limited vs Board of Governors Rioma Mixed Secondary School & 24 others (2016) eKLR the court applied the cited Court of Appeal decision and held that:

> " On the facts of this case, however, the liability was both required to be covered by Section 5(b) and was in fact, so covered and therefore the condition which excludes liability in the case of overloading is, by dint of the very clear provisions Section 8 rendered ineffective.

29. It was consequently submitted that the Plaintiff cannot repudiate liability on ground of excess passengers.

30. The Interested Party submitted that the Plaintiff did not prove either breach of the policy of Insurance or that they were entitlement to repudiate liability. That the Plaintiff did not produce the policy document but only produced the policy schedule. That its witness PW1 did not give reasons for failure to produce the policy document. That in the circumstances the plaintiff did not prove the allegation of breach as pleaded in Paragraphs 6 and 9 of the plaint. That in leading evidence of breach of policy schedule the plaintiff was departing from its pleadings, which evidence is for rejection. Additionally, that the conclusion by failure to produce the subject document invites the inference that had the same been produced it would have been adverse to the plaintiff's case, as held in Central Microfilm Operators (1990) Limited v Teachers Service Commission (2015) eKLR.

31. Secondly, that under the policy schedule, there is no express and fundamental term that the Defendant would lose any rights under the policy on exceeding the carrying capacity as pleaded in paragraph 6 of the Plaint. That page 4 of the policy schedule provides that the seating capacity was to be indicated in the proposal form and the insurance certificate.

32. It was submitted that there was no evidence that the Defendant was made aware of the policy schedule so as to be bound by the contents there of. Reliance was placed in the case of Directline Assurance Co. Ltd v Peter Mucheni Mugo (2018) KEHC 3010 KLR where it was held that:

> The contra proferentem rule in my view though not expressly stated at the trial court was nevertheless applied. It is the appellant who prepared the policy document and the proposal form which the trial court correctly stated, are ordinary standard forms filled as a formality at the time an insurer is paying the insurance premiums. It is upon the insurer who at that time obviously occupies an advantageous position to exercise due diligence. If it fails to do so then he cannot be expected to turn back and say it is avoiding responsibility because of a hidden clause in the insurance policy especially if an insurer paying was oblivious about the clause. Accepting premiums without much ado and later failing to provide the cover when the need arises owing to hidden clauses or looking for excuses to avoid the policy in not fair or equitable.

33. The Interested Parties submitted that there was no evidence that the defendant breached the policy. That what the plaintiff is doing is asking the court to re write the policy and include the carrying capacity and express term of losing rights upon breach of the carrying capacity which is against the law, see National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd (2002) 2EA 503.

34. It was submitted that the Plaintiff did not prove that under the policy it was entitled to repudiate liability in the event of late notification as pleaded in paragraph 9 (b) of the Plaint as the subject clause is only applicable in third party damage claims. The clause provides that:

> " It is hereby agreed and understood that notwithstanding anything contained herein to the contrary, that in the event of the happening of an event which gives rise to Third Party Property Damage claim(s) which the insured is otherwise entitled to indemnity. (Emphasis added).

Analysis and determination

35. I have considered the evidence adduced before the court, the pleadings and the submissions tendered by the respective counsels for the parties. The issues for determination are:

    (1) Whether the suit is time barred.

    (2) Whether the Defendant was in breach of the contract of insurance between the Plaintiff and the Defendant herein

    (3) Whether the Plaintiff is liable to honour any claims related to the aforesaid accident or to indemnify the insured under the policy.

Whether the suit is time barred

36. Section 10(4) of the Act requires a suit repudiating liability to be commenced before or within three months after the commencement of the proceedings. The Plaintiff argued that they came to learn that the Respondent was in breach of the insurance policy when thy received more claims than the anticipated maximum carrying capacity of the Defendant's Motor vehicle. Their witness PW1 stated in his evidence in court that they received the last demand letter and statutory notice on 27th September, 2021 and the instant suit filed on 17th December which is within the 3 months allowed by the Act. The interested party on the other hand states that the last statutory notice was served on 5th August 2021 and therefore that by the time the suit was filed in December 2021, three months had already lapsed.

37. I have perused the court file. I have not seen a statutory notice received by the Appellant 0n 27th September 2021 but there is one bearing the stamp of Plaintiff dated 22nd September 2021, which is the date it was received. The court record shows that the suit was filed on 17thDeceembr 2021, which date falls within three months from 22nd September 2021. Going by that date, it is clear that the suit was then filed within there months upon service of the statutory notice as required by the law. Th suit is therefore not time barred.

    Whether the defendant was in breach of the policy

38. An insurance company that has entered into an insurance policy with an insured is required under Section 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act to satisfy judgments against third parties injured in the insured motor vehicles. The section states as follows:

    (1) If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the

liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

39. The insurance company may however repudiate the policy if the conditions stated in Section 10(4) of the Act are met. The section provides that:

> No sum shall be payable by an insurer under the foregoing provisions of this section if in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, 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:

40. The Plaintiff argues that the Defendant was in breach of the insurance policy by carrying 23 passengers instead of the authorized 8 passengers. The Interested Parties on the other hand argue that the Plaintiff did not produce the policy document to show the carrying capacity of the motor vehicle. More so that carrying of excess passengers is not a ground for repudiating the policy.

41. The witness for the Plaintiff PW1 admitted that they did not produce the policy document as an exhibit in the case. They only produced the policy schedule and did not give any reason for not producing the policy itself.

42. The policy schedule states as follows on page 4:

> Legal carrying capacity
>
> Subject to Government directive on COVID-19 the insured (policy holder) will only be indemnified upto the seating capacity indicated in the proposal form for fare paying passenger(s) vehicle to the maximum of the seating capacity appearing in the insurance certificate.

43. It is therefore the proposal form and the insurance certificate that indicated the maximum number of passengers that the insured could be indemnified for. Failure by the Plaintiff to produce the proposal form and insurance certificate can only invite the inference that had the documents been produced they would be unfavourable to the Plaintiff.

44. Even then, any condition in an insurance policy restricting the number of persons that the motor vehicle can carry is barred by the provisions of Sections 8 and 16 of the Insurance (Motor Vehicle Third Party Risks) Act. It is clear from the provisions of section 16 that where the insured has carried excess passengers than permitted by the policy, the insurance company is under an obligation to pay those injured in the insured motor vehicle and claim the excess payment from the insured. The argument by the Appellant that they could repudiate liability on ground of excess passengers or that the insured could lose rights under the policy for carrying excess passengers is not correct. A provision to that effect ran counter to the provisions of the law and is thus of no consequence, see the case of The Great Insurance Company of India Limited v Lilian Evelyn Cross and another (supra) and Thomas Muoka Muthoka & another v Insurance Company of last Africa Limited (2008) KLR. It is therefore my holding that the Defendant was not in any breach of the contract of insurance.

45. Besides that, an insurance company can only repudiate a contract on grounds stated in Section 10(4) of the Act which are that of non-disclosure of a material fact or by a representation of a fact which is false in some material particulars. There was no proof of any of these by the Appellant.

46. in addition, I am in agreement with the submission by the Interested parties, that the clause on late payment did not expressly state that the Plaintiff was entitled to repudiate liability in the event of late notification. The plaintiff cannot at this stage introduce new conditions which were not contained in the policy document.

47. In view of the foregoing, I do not find sufficient grounds for the Plaintiff to repudiate the policy of insurance taken out with the Defendant. The Plaintiff is obligated to honour the claims by the Interested Parties.

48. Accordingly, the suit filed herein has no merit and the same is dismissed with costs to the Interested Parties.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 19TH DAY OF FEBRUARY, 2026.

J. N. NJAGI

JUDGE

In the presence of;

Ms Oile for Plaintiff

Mr. Mutua for Interested Parties

Court Assistant - Rahma