REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL SUIT NO. E012 OF 2023

TAKAFUL INSURANCE OF AFRICA LIMITED ..... PLAINTIFF

=VERSUS=

ROBERT KIPLAGAT KIMUTAI ..... DEFENDANT

Coram: Justice R. Nyakundi

M/S Matiri Mburu & Chepkemboi Advocates

M/S Morgan Omusundi Law Firm Advocates

JUDGMENT

1. Before this Court is a declaratory suit filed by the Plaintiff/Insurer in a contract of insurance involving the Defendant as claimed in the plaint dated 25th July 2023 in which it avers as follows:

(a) The Plaintiff is a limited liability Company, duly incorporated under the Companies Act Cap 486Laws of Kenya; and carrying on insurance business under the Insurance Act. Its address for service for the purpose of this action shall be care of Messrs. MATIRI MBURU & CHEPKEMBOI ADVOCATES GIBCON HOUSE, 2ND FLOOR, KIGABE ROW, P.O BOX 3101-20100 NAKURU.

(b) The Defendant is a male adult of sound mind carrying out business within Republic of Kenya. (Service of Court process through the offices of the Plaintiff's Advocates).

(c) The Defendant, vide a proposal duly filled by him, requested the Plaintiff to issue him with an insurance policy cover for his Motor Vehicle Registration Number KBR 219S; which motor vehicle, according to his representation to the Plaintiff, was to be used as a private motor vehicle for the Defendant's personal use.

(d) The Plaintiff avers that pursuant to the said proposal request, the Plaintiff issued the Defendant with a Motor Vehicle Insurance Policy

Number P/ELD/2023/101/145879 upon payment of the requisite premium.

(e) It was a term of the said Insurance Policy Cover afore-stated that the Plaintiff would indemnify the Defendant in the event of loss/damage/claims arising from a road traffic accident caused arising from the use of the motor vehicle registration number KBR 219S - within the contractual user of the Motor Vehicle, as a private motor vehicle.

(f) On or about 7th April 2023 the Defendant's subject Motor Vehicle was involved in a road traffic accident along the Maroon-Sambalat Road at Cherotich area as a consequence of which several passengers aboard the Defendant's motor vehicle injured.

(g) The Plaintiff avers that according to the Occurrence Book Entry in relation to the occurrence of the accident and investigations carried out by the Plaintiff the Defendant's motor vehicle registration number KBR 219S was being used to transport diesel to Safaricom boosters and on board were four passengers, two being police officers offering security.

(h) The Plaintiff avers that its investigations into the occurrence of the accident further disclosed that the Defendant's motor vehicle was being used for hire and reward at the time of the accident contrary to the provisions of the insurance policy entered into by the Plaintiff and the Defendant.

(i) That it is neither legally nor contractually liable to indemnify the Defendant or the injured passengers onboard the Defendant's motor vehicle as this would go beyond the scope of the insurance contract between the Plaintiff and the Defendant and beyond the scope of a mandatory insurance cover within the meaning of Sections 4 and 5 of Insurance (Motor Vehicle Third Party Risk) Act, CAP 405 of the Laws of Kenya.

(j) The Plaintiff therefore avers that the Defendant was in breach of contractual arrangement between him and the Plaintiff, and that he

should bear the liability for any claims by such passengers arising from the said use of his motor vehicle for hire and reward.

2. The particulars of breach of insurance policy terms and conditions are as follows:

a) Using his motor vehicle for hire and reward.

b) Using his private motor vehicle for transporting Company goods.

c) Willfully breaching the terms of the insurance policy.

3. Consequently, and within the confines of the Insurance (Motor Vehicle Third Party Risk) Act, CAP 405 of the Laws of Kenya, the Plaintiff avers that it is neither legally nor contractually liable to compensate the passengers injured as a result of the accident and is legally not obligated to satisfy any judgment(s)/decree(s) for compensation of such claimants.

4. Reasons wherefore the Plaintiff prays for judgment against the Defendant for:-

   (a) A Declaration that it is not bound to pay /or satisfy any judgment in any suit arising from the said accident and /or indemnify the Defendant against any claim in respect of bodily injury or death to any person, damage to property or satisfy any claim whatsoever arising out of the accident which allegedly occurred on 7th April 2023 along Maroon-Sambalat Road at Cherotich area involving the Defendant's Motor Vehicle Registration Number KBR 219S.

   (b) Costs of this suit.

   (c) Interest on (b) above at Court rates.

5. In a rejoinder to this claim the Interested Parties swore a joint affidavit alleging as follows:

   (a) That we are the applicants and/or intended interested parties herein, hence competent to swear this affidavit in support of the instant application now before court.

   (b) That we desire to be enjoined in this suit as the intended interested parties herein to allow for fair, just, expedient and all-

inclusive hearing, consideration and final determination of this suit.

(c) That we filed several suits in Iten Law Courts against the Defendant herein for compensation for severe injuries, pain and suffering for and accident caused by the defendant therein, through our advocate's Morgan Omusundi Law firm Advocates.

(d) That the instant application is made in good faith, in interest of justice and fairness and therefore justly imperative that it allowed as prayed.

(e) That the respondent won't suffer any irreparable prejudice if this application is allowed.

(f) That we swear this affidavit in support of our application seeking leave to be enjoined as the interested parties in the suit herein.

6. It is from these basic pleadings the matter was set down for hearing hence the following case summary for both the Plaintiff and the Defendant. Apparently, the Defendant was duly served but failed to enter appearance or file defence. On the part of the Plaintiff, the star witness Dolphine Moindi told the Court on oath that the Plaintiff was approached by the Defendant for an insurance policy of his motor vehicle registration No. KBR 219S. That as the insurer issuing insurance policies to cover various risks there was offer and acceptance in which Policy No. P/ELD/2023/101/14879 upon payment of the premium was issued to the Plaintiff. It was further the evidence of the Plaintiff that the Policy instrument set out the terms of the insurance contract upon which indemnity was based in the event of loss or damage arising out a road traffic accident. According to the Plaintiff witness this motor vehicle on 7th April 2023 was involved in a road traffic accident along Maroon-Sambalat Road at Cherotich are as a consequence of which several passengers aboard the Defendant's motor vehicle were injured.
7. The witness further told the court that investigations were conducted by the National Police Service who confirmed that the motor vehicle Registration No. No. KBR 219S was being used to

transport diesel to Safaricom boosters and on board were four passengers and two Police Officers securing the assignment. It was further PW1's evidence that from both the Police Occurrence Book entry and independent investigations conducted by the insurer the Plaintiff to this case, in the report dated 5/6/2023 it was established as follows:

(a) *That through our contact at KRA that Britcom (K) Limited of PIN P051884018F is owned by two directors i.e. Daniel Odhiambo Otiende (A004604284Z) and Tophil Ochieng Odhiambo (A005160035W).*

- *We note that the insured's vehicle was working under a Britcom (K)as in the police booking and not under the insured's driver as recorded in his statement with us. Further, the insured is not the owner of the said company and therefore the insured vehicle was on hire to attend a Safaricom assignment.*

(b) *During our visit to Iten Police Station, the Investigating Officer, CI Charles Misai of contact (0720 330 755) provided us with the recorded statements of the driver and one of the passengers, APC Allan Onyongo. From the statements, we noted the following; (See attached statements obtained from IO's diary: photograph 17, 18, and 19).*

- *The insured's driver recorded that he had hired the insured vehicle to do an assignment ie. transport diesel tanks to Sambalat. He was accompanied by a Safaricom booster engineer i.e. Austin Oduor.*
- *They were transporting three drums of Diesel (600 liters) to various Safaricom Boosters within Sambalat.*
- *The police officer i.e. Allan Onyongo, recorded that they had been hired to escort the vehicle carrying diesel tanks to Embubut and Chesongoch regions.*
- *The road was under maintenance.*

- *They were warned of the rough terrain and steep descent heading to Sambalat.*
- *Contrary to the above, the insured's driver refuted claims that he had indicated that he had hired the insured's vehicle. He indicated that he borrowed the vehicle from Robert Kiplagat. Further, he indicated that as of the time of recording his statement with the police, he was still sickly and pending recovery.*
- *The insured, in his statement recorded with us, also indicated that no payment was to be made for his provision of the insured's vehicle to the driver.*
- *Further, he confirmed that they were indeed carrying Safaricom booster's generator diesel since Austin Oduor who was to direct him to access roads' construction sites was required to do the delivery on the same day.*
- *From the above, the insured vehicle was on hire to transport diesel to various sites within Kapsowar, Embubut and Chesongoch as per the driver's statement.*
- *We also note that the vehicle was on hire to attend to a Safaricom duty of fuelling their booster generators, which is contrary to the driver's statement that he had gone to view access roads sites pending construction.*
- *The insured's driver also hired the insured vehicle through the insured's cousin i.e. Wilfred Cherotich.*
- *From the hired police officer's statement, we also noted that he recorded that they had been hired and scheduled on duty to offer escort services for the insured's vehicle ferrying diesel to Embubut and Chesongoch. This is contrary to insured's driver's statement who recorded with us that he had gone to visit road construction sites.*

(c) During our visit to Iten Police Station, The IO indicated that three persons had provided their filled P3 Forms with the following details;

Name	***Degree of Injury***

(i) Austin Oduor Odige — Grievous Harm

(ii) Allan Oluese Onyongo — Grievous Harm

(iii) Milton Oluoch: — Harm

However, the Investigating Officer declined to share the respective copies of the P3 forms.

(d) From the above observations and findings, we confirmed that indeed the accident occurred at the said, date, time, and place as narrated by the insured's driver and booked by the police. However, the material damage claim is not genuine for consideration. The use of the vehicle as at the time of this accident was contrary to the policy terms and conditions. The vehicle was on hire as per PC Allan Onyongo's statement and from the police booking. The vehicle was being used to transport diesel to Safaricom boosters under Britcom (K) Limited which is contracted by Safaricom as a service provider. Whenever police officers are hired, it must be clearly indicated the nature of work and where the destination. The police who was hired has clearly stated the nature of work that was being done. The Investigating Officer has not blamed anyone for causing this accident. The injuries sustained by the occupants in the insured vehicle which a claim is anticipated, are perils covered by yourselves but inadmissible as per the policy.

8. The parties at the close of the evidence filed written submissions answering the following questions. On the part of the Plaintiff Learned Counsel contended that it is true Motor Vehicle Registration No. KBR 219S was insured vide Policy **P/ELD/2023/101/145879** which was private cover. Learned Counsel further submitted that in the accident which occurred the entries to the Occurrence Book and the independent report from their own investigator showed that the Defendant had breached the terms of the policy and therefore any claims arising out of that accident are not eligible for payment. In the same breath Learned Counsel for the Plaintiff submitted that within the scope of Section 4 & 5 of Cap 405 of the Laws of Kenya

on the principles in the authorities relied upon such as; *Madison Insurance Co. Ltd v Kiarie & Others [2023], Kenyan Alliance Insurance Company Limited v Naomi Wambui Ngira & another (suing as the legal representatives and Administrators of the Estate of Nelson Machari Maina (Deceased) [2021] eKLR, Fidelity & Commercial Bank Ltd v Kenya Grange Vehicle Industries Ltd [2017] eKLR and The Great Insurance Company of India Ltd vs Lillian Everlyn Cross and Another [1966] E.A 90.*

9. The gist of the guiding principles in the above case laws is that the Plaintiff has no contract liability to honor any claims or judgments arising out of the tort of negligence involving the Claimants who were on board the subject motor vehicle on the 7th of April 2023 in which they suffered personal physical injuries capable of being compensated by way of damages. Learned Counsel therefore urged this Court to dismiss the claim for want of merit and for it running foul the provisions of Cap 405 of the Laws of Kenya and the terms of the Policy itself.

10. In this trial, the other key actors were the Interested Parties who are the holders of the judgments and decree arising out of the decisions made by the Magistrates Courts at Iten in Civil Cases No. 49, 50 & 51 of 2023. In their respective submissions dated 5th December 2025 they urged this Court that the Defendant's failure to challenge, repudiate and/or produce before the trial Court a Certificate of Insurance to proof its case and show that it took all the procedural steps required by law in repudiating the claim. Moreover, the evidence of the PW1 is uncorroborated and not reliable as the Investigating Officer was not availed before Court to testify and confirm the assertions by PW1. It was further Learned Counsel Mr. Omusundi's contention on behalf of the Interested Parties for this Court to apply the guidelines in the Case of **Muthui v Directline Insurance Company Limited & 2 Others [2022] eKLR** in which the Court while interpreting Section 10(4) observed that the said Section creates four obligations on the insurer;

Obligation to avoid policy in respect of liability; Obligation to repudiate policy within 3 months of primary suit; Obligation to indemnify the insured/third party; Obligation to issue notice to the third party of intention to repudiate. It is therefore the duty of the insurer to repudiate policy upon receipt of the notice of institution of suit. Learned Counsel therefore was of the view that the burden of proof has not been established to warrant the orders on repudiation of the Policy by the Plaintiff.

Decision

11. This is the evidential material to be weighed by the Court to establish whether the burden which rests with the Plaintiff has been established. The standard and burden of proof is a matter which must be discharged by a party under Section 107-109 of the Evidence Act. The Superior Courts have already set the bar on what constitutes the burden of proof on a balance of probabilities:

- **Mwangangi v Gathogo (2025) KEHC 2764:** The court upheld that failure to provide sufficient evidence (police abstracts, medical reports) regarding liability results in failure to meet the balance of probabilities. Likewise in **Njoroge v Gakere & another (2025) KEHC 4048:** Reiterated that the standard in civil cases is the "balance of probabilities" as established by Lord Denning, requiring reasonable certainty. The Court also in **Homa Bay Civil Appeal 18 of 2014 (2014) KEHC 8850:** The court held that if a party fails to establish their case initially, the opposing party is not obligated to disprove it, and the claim fails on the balance of probabilities. Last but not least, in **Statpack Industries v James Mbithi Munyao (2006) KEHC 3343:** Confirmed that the burden of proving negligence lies squarely with the Plaintiff to link injuries to the defendant's actions. The Court of Appeal also discussed the standard of proof in a civil liability claim in **Mumbi M'Nabea vs David M. Wachira [2016] eKLR** in which it stated as follows:

> *"In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by*

each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.... This position was re-affirmed by the Court of Appeal in ***Maria Ciabaitaru M'mairanyi & Others v Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280*** *where it was held that: "Whereas under section 107 of the Evidence Act, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."*

12. In this suit the dispute is between the insured and the insurer with regard to the policy which insured the risks which may occur against motor vehicle Registration KBR 219S. The contract was based on the Policy document whose terms were reiterated in the instrument dated 23rd June 2023 which provided as follows:

The Motor Private policy agrees to indemnify the Insured, against:-

Loss or damage.

We will pay for the loss of or damage to the vehicle(s) or its/their accessories and spare parts while in or on the vehicle.....The policy is however subject to, among others, the following condition:

- *Limitations as to use clause. The type of policy under which we insured the above vehicle was for, private use only, conversely, the vehicle was being used for hire and reward through; Britcom (K) Limited, contracted by Safaricom as a service provider, for the transportation of diesel fuel to Safaricom boosters, which is contrary to the purposes for which we issued insurance. This is an exclusion in the Motor Private Takaful Policy, therefore, the policy liability does not attach.*

- *Fraud*

  If any claim is found to be fraudulent and you or any one acting on your behalf has given us any false documents or information you may lose any rights under this Policy. We WILL refer such cases to the law enforcers. We Investigated the claim and noted the following: As per your statement, you had authorized your vehicle to be used by the driver, for site visits in relation to civil engineering work in Sambalat, Marakwet. Contrary to that, the investigation reveals that the vehicle was being used for the transportation of diesel fuel to Safaricom boosters through Britcom (K) Limited, contracted by Safaricom as a service provider. This is a breach of the principle of Utmost Good faith, subsequently, liability does not attach.

13. When it comes to the rule of burden of proof in a suit of this nature based on a policy of insurance the plaintiff has to prove facts necessary for establishing his cause of action and the burden of proving affirmative defence lies with the insurer. The expectation of the law on contract of insurance was clearly articulated in the persuasive authority in **Thomsom v Weems and Others LR 1884 9 AC 671** in which it was remarked. " *is competent to the contracting parties. if both agree to it and sufficiently express their intention so to agree, to make the actual existence of anything a condition precedent to the inception of any contract ; and if they do so the non-existence of that thing is a good defence. And it is not of any importance, whether the existence of that thing was or was not material; the parties would not have made it a part of the contract if they had not thought it material, and they have a right to determine for themselves what they shall deem material*

"*When the truth of a particular statement has been made the subject of warranty. no question can arise as to its materiality or immateriality to the risk, it being the very purpose of the warranty to exclude all controversy upon that point. As the Lord Chancellor*

(Cranworth) said in Anderson v. Fitzgerald (2) Nothing, therefore, can be more reasonable than that the parties entering into that contract should determine for themselves what they think to be material and if they choose to do so and to stipulate that unless the assured shall answer a certain question accurately, the policy or contract which they are entering into shall be void, it is perfectly open to them to dos o, and his false answer will then avoid the policy,

14. For the contract of insurance, the obligations of the insurer and insured vary in importance dependent upon the terms known as conditions and warranties. In this branch of law condition is treated as a vital term going to the root of the contract at its entry which entitles the insured to repudiate the entire contract, whereas warranty is construed as a collateral of subsidiary promise which though part of the contract does not go to the root of it and usually it does not entitle any party to repudiate the contract in its entirety.

15. A perusal of the wordings used in this part would reveal that all the things which are required to be done under this part are related to an occurrence of an accident. On occurrence of an accidental loss, the insured is required to immediately give a notice in writing to the company. This appears to be so that the company can assign a surveyor so as to assess the damages suffered by the insured/ vehicle. It further provides that any letter, claim, writ, summons and/or process or copy thereof shall be forwarded to the company immediately on receipt by the insured. As such, the intention would be clear.

16. In my reading of the evidence admitted before this court the existence of an Insurance Policy issued to the defendant in this case it is not in dispute. It could be understood that the defendant filled all the necessary forms which throws light the terms and conditions governing the relationship. There would be a proposal form which I have said throws light on what is the meaning and the

content material. In insurance procedural law proposal form means:

"Proposal Form" means a form to be filled in by the proposer for insurance, for furnishing all material information required by the insurer in respect of a risk, in order to enable the insurer to decide whether to accept or decline, to undertake the risk, and in the event of acceptance of the risk, to determine the rates, terms and conditions of a cover to be granted. Explanation: "Material" for the purpose of these regulations shall mean and include all important, essential and relevant information in the context of underwriting the risk to be covered by the insurer Thus the Regulation also defines the word “Material to mean and include all important, “essential” and relevant information in the context of guiding the insurer in deciding whether to undertake the risk or not.

17. That the basic rules to be observed in making a proposal for insurance may be summarized as follows:

(a) A fair and reasonable construction must be put upon the language of the question which is asked, and the answer given will be similarly construed. This involves close attention to the language used in either case, as the question may be so framed that an unqualified answer amounts to an assertion by the proposer that he has knowledge of the facts and that the knowledge is being imparted. However, provided these canons are observed, accuracy in all matters of substance will suffice and misstatements or omissions in trifling and insubstantial respects will be ignored.

(b)(b) Carelessness is no excuse, unless the error is so obvious that no one could be regarded as misled. If the proposer puts 'no'when he means 'yes' it will not avail him to say it was a slip of the pen; the answer is plainly the reverse of the truth.

(c)(c) An answer which is literally accurate, so far as it extends, will not suffice if it is misleading by reason of what is not stated. It may be quite accurate for the proposer to state that he has made

a claim previously on an insurance company, but the answer is untrue if in fact he has made more than one.

(d) Where the space for an answer is left blank, leaving the question un-answered, the reasonable interference may be that there is nothing to enter an answer. If in fact there is something to enter as an answer, the insurer are misled in that their reasonable inference is belied. It will then be a matter of construction non-disclosure, whether this is a mere the proposer having made no positive statement at all, or whether in substance he is to be regarded as having asserted that there is in fact nothing to state.

(e) (Where an answer is unsatisfactory, as being on the face of it incomplete or inconsistent the insurers may, as reasonable men, be regarded as put on inquiry, so that if they issue a policy without any further enquiry they are assumed to have waived any further information. However, having regard to the inference mentioned in head (4) above, the mere leaving of a blank space will not normally be regarded as sufficient to put the insurers inquiry. on

(f) A proposer may find it convenient to bracket together two or more questions and give a composite answer. There is no objection to his doing so, provided the insurers are given adequate and accurate information on all points covered by the questions.

(g) Any answer given, however accurate and honest at the time it was written down, must be corrected if, up to the time of acceptance of the proposal, any event or circumstance supervenes to make it inaccurate or misleading. (Source: Halsbury's Laws of England, Forth Edition, para 375 Vol. 25: Insurance)

18. The insurance contracts are dependent heavily on the reciprocal obligations between the insurer and the insured. It has often been said that the insured in most of the time enters into this contract with little awareness and information as the terms included are

technical requiring more information and explanation to understand each one of them fully. Intact it is often said the proposal forms should be more exhaustive, simple and meaningful so as to ensure that the insured is explained the terms of interpretation of the queries and the replies there to by the insurer. This is where the legal controversy is centered before our courts. That is why Insurance Contract Reputation frequently hinge on breaches of *uberrimae fidei (utmost good faith), material non-disclosure, or policy usage violation (e.g) private vehicles used for public service) Key cases include* ***Britam v Njoki (2024)*** *Madison Insurance v Muange (2024) and Bashir V CIC (2024) which highlight requirements for proving valid claims, proper notice, and adherence to policy terms.*

19. Legal Principles in Repudiation Cases
    a) *Doctrine of Uberrimae Fidei: Insurance contracts require full and frank disclosure of material facts.*
    b) *Notification and Investigation: Insurers must acknowledge claims within 30 days and complete investigations within 90 days, as per sections 203 and 204 of the Insurance Act.*
    c) *Written Reasons for Denial: Section 205 of the Insurance Act requires insurers to provide written reasons for denying liability.*
    d) *Material Non-Disclosure: Concealment of facts that would influence an insurer's decision to take on a risk allows for repudiatio*
    e) *Burden of Proof: The insurer must prove that the policy was breached to validly avoid a claim.*
20. The contract between the insureds and the insurer was in respect of the Motor Vehicle registration No. KBR 219S. The risk covered was Road Traffic Accident. This is not in dispute. There is clear evidence that the Defendant Motor vehicle was involved in the road traffic accident while delivering diesel as Safaricom Booster Station. Unfortunately, according to the Plaintiff on board were

passengers who included Police Officers who had been hired to secure the assignment. It was on the 7.4.2023 when this accident occurred and the passengers namely Milton Oluoch, Alan Onyongo, Austine Oduor, Gilbert Kirui and Evans Kiptarus sustained personal injuries which were later to be treated at Endo Mission Hospital and Moi Teaching and Referral Hospital Eldoret. The circumstances of the offence as captured from the investigations conducted by the Plaintiff are inter-alia "According *to the insured's driver, on 07/04/2023 at about 0800Hrs, he commenced his journey from Eldoret destined for Sambalat town, in the company of two passengers. He picked two police officers at Kapsowar to accompany them in the journey due to the intense security condition. He was driving to Sambalat town where he was to check on some sites i.e. access roads pending construction that he was planning to later submit tender bids. At about 1500Hrs, upon reaching the Cherotich area along Maroon-Sambalat Road, they were involved in this accident. It happened that as they were descending the steep section of the road at an average speed of 20Kph, the vehicle developed mechanical problems i.e. brake failure. As a result, the vehicle became uncontrollable, and due to the steep state of the road, it gained speed winding down the steep road while negotiating its sharp corners. He lost control of the vehicle, veered off the road, hit guardrails on the left side of the road, and landed by the roadside facing downhill. The vehicle landed onits left side.*

21. The context and text of this case can be better explained by the principles in the persuasive case of Indravadan Gandhi v. New India Assurance Co. Ltd., (2021) 7 SCC 151, wherein it was observed that any exemption of liability clause in an insurance contract must be construed, in case of ambiguity, contra proferentem against the insurer. In the said case reliance was placed on Export Credit Guarantee Corpn. (**India) Ltd. v. Garg**

Sons International, (2014) 1 SCC 686, wherein this Court held as under:

> "*The insured cannot claim anything more than what is covered by the insurance policy. "The terms of the contract have to be construed strictly, without altering the nature of the contract as the same may affect the interests of the parties adversely." The clauses of an insurance policy have to be read as they are. Consequently, the terms of the insurance policy, that fix the responsibility of the Insurance Company must also be read strictly. The contract must be read as a whole and every attempt should be made to harmonise the terms thereof, keeping mind that the rule of contra proferentem does not apply in case of commercial contract, for the reason that a clause in a commercial contract is bilateral and has mutually been agreed upon."*

22. A contract of insurance is one of utmost good faith (uberrima fides) and as such, the requirement of good faith must be observed by both the insured and the insurer throughout the existence of the contract. In practice the requirement of uberrima fides means simply that an applicant for insurance has a duty to disclose to the insurer all material facts within the applicant's knowledge which the insurer does not know. There is a duty of disclosure and a duty not to misrepresent facts.
23. Firstly, from the analysis of the evidence of this claim what comes out very clearly is that the fact of the accident is not disputed and the defendant at the same time had taken out a policy of insurance to secure any risks which might arise in respect of motor vehicle KBR 219S. However, it turned out that the passengers onboard on the material day the accident occurred within the spectrum of the policy they were not insured. Therefore, the defendant has not discharged the burden of proof under Section 107, 108 & 109 of the Evidence Act that the Plaintiff must satisfy the various decrees in favor of the Interested Parties arising out of the judgment being

Iten SPMC NO. 49, 50 & 51 of 2023. The Court in **DDA v Durga Chand Kaushish, AIR 1973 SC 2609**, it was observed:

> *"In construing document one must have regard not to the presumed intention of the parties, but to the meaning of the words they have used. If two interpretations of the document are possible, the one which would give effect and meaning to all the parts should be adopted and for the purpose, the words creating uncertainty in the document can be ignored."*

24. The law is settled on what the policy holder is entitled out of the contract underpinned on the risks insured and the premium paid to calculate the nature of the compensation within the four corners of the agreement. This is what the Court had in mind in the case of **Export Credit Guarantee Corpn. (India) Ltd v. Garg Sons International, (2014) 1 SCC 686** where it was observed as follows:

> *"The insured cannot claim anything more than what is covered by the Insurance policy. "The terms of the contract have to be construed strictly, without altering the nature of the contract as the same may affect the interests of the parties adversely." The clauses of an insurance policy have to be read as they are. Consequently, the terms of the insurance policy, that fix the responsibility of the Insurance Company must also be read strictly. The contract must be read as a whole and every attempt should be made to harmonize the terms thereof, keeping in mind that the rule of contra proferentem does not apply in case of commercial contract, for the reason that a clause in a commercial contract is bilateral and has mutually been agreed upon."*

25. In the case at hand, there was a clause in the policy that risks involving passengers onboard the motor vehicle were not part of the terms negotiated and entered into by the parties herein being the Plaintiff and the Defendant. There was a deviation on the part of the Defendant not to comply with his obligations as agreed with the

Plaintiff. This was a fundamental term of the policy on exclusion clauses which therefore underlie the whole contract so that if it is not complied with by the Defendant the performance becomes something totally different from that which the insurance contract between the parties contemplated. If the Defendant in his proposal form had given a description on the nature of the business to be carried out the subject motor vehicle KBR 219S he cannot claim compensation having deviated from the condition precedent set out in the agreement. To me that is a fundamental breach, one has to have regard to the character of the breach which in my view as a consequence of the conduct and nondisclosure this contract is not enforceable.

26. One way of looking at the matter would be to ask whether the party in breach has by his breach produced a situation fundamentally different from anything which the parties could as reasonable men have contemplated when the contract was made. Then one would have to ask not only what had already happened but also what was likely to happen in future. This is what the Court answered vividly in comparative jurisprudence in the case of **Huin Steamship Co. Ltd v Tote and Lyle Ltd [1936] 2 All ER 597**, Thus Lord Upjohn said of fundamental breach (at p 421):

> *"...there is no magic in the words "fundamental breach", this expression is no more than a convenient short hand expression for saying that a particular breach or breaches of contract by one party is or are of such to go to the root of the contract which entitle the other party to treat such a breach or breaches as a repudiation of the whole contract. Whether such a breach or breaches do constitute a fundamental breach depends on the construction of the contract and on all the facts and circumstances of the case. The innocent party may accept the breach or breaches as repudiation and treat the whole contract at an end and sue for damages generally or he may at his option*

prefer to affirm the contract and treat it as continuing on foot in which case he can only sue for damages for breach or breaches of the particular stipulation or stipulations in the contract which have or have been broken."

27. This is a frustrated contract of insurance and there is nothing the Plaintiff can do to redeem it for purposes of enforcement of the policy duly issued in favor of the Defendant. Let the chips fall where they may and the claim as pleaded by the Plaintiff for a declaration to repudiate the contract be and is hereby allowed with costs to the Defendant.

DATED, SIGNED AND DELIVERED AT ELDORET VIA CTS THIS 13TH DAY OF MARCH 2026

.....

R. NYAKUNDI

JUDGE