



**Old Mutual General Insurance Kenya Limited v Board of Directors, Oder Boys Boarding Special School (Civil Case E003 of 2023) [2024] KEHC 9895 (KLR) (8 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 9895 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL CASE E003 OF 2023  
RE ABURILI, J  
AUGUST 8, 2024**

**BETWEEN**

**OLD MUTUAL GENERAL INSURANCE KENYA LIMITED ..... PLAINTIFF**

**AND**

**THE BOARD OF DIRECTORS, ODER BOYS BOARDING SPECIAL  
SCHOOL ..... DEFENDANT**

**JUDGMENT**

1. This suit, the pleadings and the evidence that was adduced unveils certain issues which schools and other institutions ought to take note of. Schools, mostly, are the culprits of what is about to be unraveled in this case. They purchase Buses and insure them for use by students and staff. However, on other occasions, they rent out the said motor vehicles at a fee to ferry people from the neighborhoods or school sponsors, going to funerals and to attend weddings.
2. It is not uncommon, especially during crusades and other religious gatherings in this country's major cities, to see all school vehicles lined up from all parts of the nation in their beautiful yellow colours, scaling heights and going down the valleys, leading to those crusades, carrying believers or worshippers.
3. However, the insurance policy that they take out happens to exclude those kinds of passengers otherwise known as unauthorized passengers. When accidents occur, the policy is avoided or voided and the injured passengers or dead passengers' loved ones end up being mere pious explorers in the pursuit of justice and bearing barren decrees as the schools can barely bear the burden of settling such claims which are left to them.
4. Therefore, the Boards of Management of schools, beware and for those who hire school buses, ensure that you read the insurance policy in respect of the usage of those buses before you part with any money and risk the lives and limb of the innocent unauthorized passengers.



5. I do trust and hope that this brief judgment will be circulated to all schools in the country through the County Directors of Education to alert School Management Boards, of the dangers associated with the practice, which danger only comes to the fore when there is an accident upon suits being filed by those affected.
6. I say beware because it clearly appears from the facts of this case that the schools do not read and adhere to the terms of the binding insurance contracts. Those contracts are written in very small prints to discourage readership. The insured often assume the risks and mostly, is out of ignorance. The unauthorized passengers, on the other hand, are oblivious of the risks. The insurance companies assume no risk and rightly, legally, which risks are not covered by the contract of insurance.
7. Now, onto the facts of this case as pleaded are that the plaintiff, Old Mutual General Insurance Kenya Limited filed suit vide a plaint dated 2nd September 2023 seeking the following orders:
  - a. A declaration that the plaintiff is and has at all material times been entitled to avoid the aforesaid Policy of Insurance 140/813/001141/2012 and any provision contained therein on the ground that the terms of the policy had been breached by the defendant.
  - b. A declaration that the plaintiff is not liable to make any payment under the aforesaid policy of insurance 140/813/001141/2012 in respect of any claims against the defendant herein arising out of the injuries sustained as a result of the accident on 23rd April 2023 involving the motor vehicle registration number KBL 230G and/or from any accident involving the motor vehicle during the pendency of the said insurance policy.
  - c. Any other or further relief that this honourable court may deem fit to grant.
  - d. Cost of this suit.
  - e. Interest thereon.
8. The plaintiff averred that it entered into a learning institution motor insurance policy in respect of motor vehicle registration No. KBL 230G and it subsequently issued insurance policy number 140/813/1/001141/2012 under which it was an express term of the insurance policy cover under liabilities to third parties that the plaintiff would not be liable to pay for death of or bodily injuries to any person other than a passenger carried by reason of or in pursuance of a contract of employment being carried in or upon or entering, getting onto or alighting at the time of the occurrence of the event out of which any claim arises.
9. The plaintiff further averred that it was an express term of the insurance policy under the general exceptions that the company would not be liable in respect of any accident, loss, damage or liability caused, sustained or incurred whilst the motor vehicle was being used otherwise that in accordance with the limitations as to use.
10. It was the plaintiff's case that on the 23rd April 2023, the subject motor vehicle KBL 230G was involved in an accident along the Kakamega – Kisumu road and several passengers therein were injured. Further, that the defendant blatantly breached the express terms of the policy using the said vehicle commercially for hire and reward purposes.
11. The plaintiff averred that subsequently, the injured persons instituted several suits in the Small Claims Court at Kisumu which the plaintiff was not liable in law to indemnify the defendant or any of the claiming parties.



12. PW1 Joy Muthoka testified in support of the plaintiff's case reiterating the averments in the plaint. In cross-examination, PW1 testified that the vehicle was not being used for the purposes for which it had been insured. He further testified that despite withdrawal of the suits against the insured, the plaintiff sought a disclaimer as there was nothing that barred the claimants from filing fresh suits.
13. The defendant entered appearance and filed a statement of defence dated 11th October 2023 denying the plaintiff's allegations and putting it to strict proof. DW1, Benard Ochieng Juma, the head teacher of the special school adopted his witness dated 11.10.2023 as his evidence in chief.
14. It was his testimony that the subject motor vehicle was registered in the name of the school and as the Seventh Day Adventist Church was the School sponsors, it was authorised to use the bus when the need arose, which the Church did on the material date, ferrying church members to Kakamega having fueled the bus and paid the driver the daily stipend.
15. He further testified that as the church was part of the school, its members had withdrawn their claims against the plaintiff as at 9.6.2023 and that as such, the cause of action had been overtaken by events.
16. In cross-examination, DW1 testified that the insurance policy only covered school employees and students and that on the material date, the bus was ferrying church members.
17. The parties filed submission.

### **The Plaintiff's Submissions**

18. It was submitted that the suit motor vehicle was at the time of the accident comprehensively insured by the Plaintiff under Learning Institution Motor Insurance Policy Number 140/813/1/001141/2012 and further that the aforementioned insurance policy was valid as at the time of occurrence of the accident.
19. The plaintiff further submitted that it is an express term of the insurance policy under Exceptions to Section 2 on liabilities to third parties that the Plaintiff would not be liable to pay for inter alia death of or bodily injury to any person other than a passenger carried by reason of or in pursuance of contract of employment being carried in or upon or entering or getting onto or alighting from the motor vehicle at the time of the occurrence of the event out of which any claim arises.
20. Further, that it was also a general exception within the insurance policy that the insurance company, the plaintiff herein shall not be liable in respect of any accident, loss, damage or liability caused sustained or incurred whilst the suit motor vehicle is being used otherwise than in accordance with the limitations as to use and that the Defendant evidently breached these provisions as was held in the case of *Heritage Insurance v Kagwanja* ( Civil Suit 6 of 2006) (2022) KEHC 3014 (KLR) ( 23 June 2022) Ruling).
21. The plaintiff thus submitted that it was not liable to make any payments in respect of any claim filed or to be filed by the unauthorized passengers that were being ferried by the suit motor vehicle on the 23/4/2023 when the accident occurred and thus, it was not liable to make payments in respect of any claim against the Defendant insured involving the suit motor vehicle by any of the passengers that were aboard the suit motor vehicle on the 23rd April, 2023.

### **The Defendant's Submissions**

22. It was submitted in admission that the persons that were passengers in the bus were church members who were sponsors of the school and liability of the Plaintiff does not extend to them and further that all the suits arising from the said accident were withdrawn and that therefore, the substratum of the suit had been overtaken by events.



23. It was further submitted that the plaintiff sought to disclaim themselves from any other accident during the pendency of the policy which was extremely unfair as the extent of disclaimer should only extend to unauthorized passengers who were on board.

### **Analysis and Determination**

24. I have considered the pleadings, evidence adduced and submissions for and against the claim. The issue for determination is whether the plaintiff is entitled to all the prayers sought in the plaint.
25. It is undisputed that the parties herein entered into a Contract of Insurance under Policy number 140/813/001141/2012 under which it was an express term of the insurance policy under Exceptions to Section 2 on liabilities to third parties that the Plaintiff would not be liable to pay for inter alia, death of or bodily injury to any person other than a passenger carried by reason of or in pursuance of contract of employment being carried in or upon or entering or getting onto or alighting from the motor vehicle at the time of the occurrence of the event out of which any claim arises and further, that it was also a general exception within the insurance policy that the insurance shall not be liable in respect of any accident, loss, damage or liability caused sustained or incurred whilst the suit motor vehicle is being used otherwise than in accordance with the limitations.
26. The defendant admitted that on the material date, the 23rd April 2023 when the accident occurred, the persons that were passengers in the bus were church members who despite being sponsors of the school, were not covered under the insurance policy thus liability did not attach to the Plaintiff.
27. Section Section 5 (b) (i) of the *Insurance (Motor Vehicle Third Party Risks) Act* (hereinafter referred to as the Act) provides that:

“ 5. Requirements in respect of insurance policies

In order to comply with the requirements of Section 4, the policy of insurance must be a policy which –

- (a) Is issued by a company which is required under the *Insurance Act, 1984* (Cap 487) to carry on motor vehicle insurance business; and
- (b) Insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road:

Provided that a policy in terms of this section shall not be required to cover –

- i) Liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or
- ii) Except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons



being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arose; or

- iii) Any contractual liability.
- iv) Liability of any sum in excess of three million shillings, arising out of a claim by one person.”

28. Turning to the provisions of Section 10 (1) of the Act, the same provides as follows: -

“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.”

- 29. In the premises, it would be erroneous to compel an insurance company to settle a Judgment which arises from liability not contemplated by the legislature and even then, which is not the subject of an insurance policy between the parties involved.
- 30. In the instant case, the liability has been expressly excluded by virtue of the aforesaid Section 2 of the Policy under liabilities to third parties as well as an express term of the insurance policy under the general exceptions that the company would not be liable in respect of any accident, loss, damage or liability caused, sustained or incurred whilst the motor vehicle was being used otherwise than in accordance with the limitations as to use. The defendant does concede as much.
- 31. Should the insurer be obligated to settle any such Judgment, this would not only have the effect of ascribing on parties that which they did not contract, but also to find against the provisions of the law. The end result would be to confer an unnecessary benefit on an undeserving party while punishing the insurer for that which it did not contract and/or acquiesce to.
- 32. This in effect does not mean that the plaintiff or insurance company is liable to avoid the entire policy in future as prayed for under prayer one in the plaintiff’s plaint but rather, only those circumstances not contemplated in the policy or in law.
- 33. Further, I do note that there is no dispute, as testified by the parties herein, that all the nearly 100 suits filed by the unauthorised and uninsured passengers who were members of the church who were involved in the accident as passengers in the subject insured motor vehicle on the 23rd April 2023 were withdrawn.
- 34. The upshot of the above is that the instant suit is partially successful to the following extent:
  - a. A declaration is hereby issued that the plaintiff is not liable to make any payment under the aforesaid policy of insurance 140/813/001141/2012 in respect of any claims against the defendant herein arising out of the injuries sustained as a result of the accident on 23rd April 2023 involving the motor vehicle registration number KBL 230G.



- b. Each party do bear costs of the suit herein as all cases filed against the defendant insured herein were withdrawn.
- c. The judgment to be circulated to the Ministry of Education through County Directors of Education for noting and guidance to school Management.
- d. This file is accordingly closed.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 8TH DAY OF AUGUST, 2024**

**R.E. ABURILI**

**JUDGE**

