REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 559 OF 2017

HELGA CHRISTA OHANY.....APPELLANT

VERSUS

ICEA LION GENERAL INSURANCE COMPANY LTD.....RESPONDENT

(Being an appeal from the judgment of Kabaria, SRM delivered on 22nd September 2017 in Nairobi CMCC No. 1426 of 2014.)

JUDGMENT

1. This appeal emanates from the judgment delivered on 22nd September 2017 in **Nairobi CMCC No. 1426 of 2014**. The suit was commenced in the lower court by way of a plaint filed on 19th March, 2014 and amended on 29th June, 2015 by **German School Nairobi** as the 1st Plaintiff and **Helga Christa Ohany** as the 2nd Plaintiff (hereafter the Appellant) against **ICEA Lion General Insurance Company Ltd**, the defendant in the lower court (hereafter the Respondent). The claim was for the sum of Kshs. 462,555/- arising from a Group Personal Accident Insurance Policy No. 020/992/10/21370/2004 dated the 20th Day of August 2004 (hereafter the policy) between the **German School Nairobi** and the Respondent that was renewable from time to time.

2. Under the policy, the Respondent undertook to indemnify staff members of the **German School Nairobi** in respect of disability arising from personal accident occurring during the subsistence of the policy. It was averred that on or about the 3rd Day of April, 2007 while the said policy was in force, the Appellant, an employee of the German School and a beneficiary by virtue of the policy, suffered temporary total disablement as a result of a road traffic accident, and in accordance with the provisions of the said policy the Respondent was under contractual obligation to pay the Appellant the sum of Kshs. 462,555/-, the equivalent of nine weeks' salary.

3. The Respondent filed a statement of defence denying the key averments in the plaint and averred that the Appellant herein, not being privy to the contract of insurance could not sue in that regard and that she was only entitled to payment in the sum of Kshs. 2,500/- weekly for the period she suffered temporary total disability. The suit proceeded to full hearing during which evidence was adduced by the respective parties. In its judgment, the trial court found in favour of the Appellant and entered judgment in her favour for a sum of Kshs. 22,500/- with costs and interest thereon.

4. Aggrieved with the outcome, the Appellant preferred this appeal that is anchored on the following grounds: -

"1. THAT the learned Senior Resident Magistrate grossly erred in law and fact in failing to appreciate that the German School Society (the insured) had a self-renewing policy with the Respondent for the benefit of its employees upon which the insured would in each subsequent year advice the Respondent the kind of risk or risks it wanted the Respondent to undertake and cover on behalf of its employees at an agreed premium.

2. THAT the learned Senior Resident Magistrate grossly erred in law and fact in failing to note that at the commencement of the original policy the Respondent agreed to underwrite four risks on behalf of the insured's employee namely; -

a) Death…….... Kshs. 200,000/=;

b) Permanent Total Disablement…. Kshs. 200,000/=;

c) Temporary Total Disablement…. Kshs. 2,500/= per week max. 104;

d) Medical expense ……. Kshs. 2,500/=.

while by a letter dated 25th July, 2006 and received by the Respondent on 10th August, 2006 the insured varied the risks it wanted the Respondent to cover for its employees to only two namely, "Permanent Total Disablement – 300,000/=" and "Temporary Total Disablement – Actual weekly earnings."

3. THAT the learned Senior Resident Magistrate grossly erred in law and fact in failing to appreciate that for the initial risks agreed premium was Kshs. 43,326/= while for the two risks the agreed premium was Kshs. 34,555/=.

4. THAT the learned Senior Resident Magistrate grossly erred in law and fact in failing to hold that the Respondent in agreeing that the premium to be paid for the two risks would be Kshs. 34,555/= agreed to pay any of the insured's employees who might be involved in an accident and who suffered "Temporary Total Disablement" the sum equivalent to that employee's "Actual weekly earnings" for a period determined by a doctor subject to maximum of 104 weeks.

5. THAT the learned Senior Resident Magistrate grossly erred in law and fact in failing to find that the Respondent was under an obligation to pay the Appellant the sum of Kshs. 462,555/= being her actual weekly earnings for a period of nine (9) weeks as determined by the doctor and not the sum of Kshs. 22,500/=." (sic)

5. The appeal was canvassed by way of written submissions followed by oral highlighting. Counsel for the Appellant primarily reiterated the evidence of the Appellant in the lower Court in his submissions. He asserted that the Appellant's weekly earnings were Kshs. 51,395/- and that her nine-week temporary total disablement started from 3rd April, 2007 which fell within the period of insurance running from 1st August, 2006 to 31st July, 2007. Citing the letter by **Adrian & Associates Insurance Agency** dated 25th July, 2006 by which the Respondent was advised to renew the cover in respect of two risks namely, permanent total disability and temporary total disability, counsel pointed out that the instructions to the Respondent concerning temporary total disability was to cover the actual weekly earnings of a beneficiary, and not Kshs. 2,500/- per week as had been the case in the previous two years of the policy. Counsel asserted that pursuant to the instructions, the Respondent, revised the annual premium in respect of the two risks covered from a sum of Kshs. 43,200/- previously charged in respect of four risks initially covered, to a new premium of Kshs. 34,555/-.

6. That the above was in keeping with the practice between the Respondent and the agency that the latter would on behalf of German School communicate to the former, the intention to renew the policy and specifying the risks to be covered by the Respondent in the renewed policy, and request assessment of premium payable for the risks. Counsel contended that the renewal letter by the agency fundamentally

changed the risks that the Respondent had previously insured between 1st August, 2005 to 31st July, 2006 and that it was incumbent upon the Respondent, if not agreeing with the renewal terms, to expressly reject the new risk proposal, which it failed to do. Thus, the premiums having been paid to cover the two new risks, the Appellant was entitled to the sum of Kshs. 462,555/-, being her actual weekly earnings for nine weeks of temporary total disability.

7. Invoking the dicta in **Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) E.A 123** counsel submitted that the Respondent's invitation for the appellate court to re-evaluate evidence related to issues which did not form the basis of the judgment, is untenable there being no cross appeal by the Respondent. The court was urged to allow the appeal.

8. The Respondent defended the trial court's findings. Counsel based his submissions on the decisions in **Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) E.A 123** and **Peters v Sunday Post Limited (1958) E.A 424** concerning the principles to be observed by an appellate court on a first appeal. The Respondent argued that **German School Nairobi** was not the insured of the Respondent; that the trial court correctly observed that the insurance contract was between **'German School Society'** and the Respondent; and that according to the policy and schedule attached to the policy, the insured and beneficiary of the policy was the latter society and not the Appellant. That the Appellant therefore had no *locus standi* to file the suit or the instant proceedings, a fact that was allegedly not considered by the trial court. In conclusion, counsel submitted that the evidence on record supported the assertion that temporary disability was to be computed at the rate of Kshs. 2,500/- per week to which the Appellant was entitled in the material period. The court was thus urged to dismiss the appeal.

9. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in **Selle –Vs- Associated Motor Boat Co. [1968] EA 123** in the following terms: -

> **"An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.**
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> **An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.**
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> **In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."**
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> See also; **Peters v Sunday Post Limited (1958) EA 424** and **Williams Diamonds Limited v Brown (1970) EA 1.**

10. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See **Ephantus Mwangi & Another vs Duncan Mwangi Wambugu [1982 – 1988] IKAR 278).**

11. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. In the court's view, the appeal turns on the question whether the Appellant was entitled to the sum claimed in the amended plaint, and whether therefore the trial court erred in awarding her the sum of Kshs. 22,500/- instead. Pertinent to the determination of issues are the pleadings, which form the basis of the parties' respective cases before the trial court. In **Wareham t/a A.F. Wareham & 2 Others Kenya Post Office Savings Bank [2004] 2 KLR 91**, the

Court of Appeal stated in this regard that: -

> **"We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail."** (Emphasis added).

12. The Appellant by her amended plaint averred at paragraphs 5, 6 and 7 that:

> **"5. By a contract of Group Personal Accident Insurance Policy (No. 020/992/10/21370/2004) (hereinafter called "the Policy") between the 1st Plaintiff and the defendant dated the 20th day of August 2004 renewable from time to time the defendant undertook to indemnify staff members of 1st Plaintiff in respect of any personal accident occurring when the policy was in force.**
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> **6. On or about the 3rd day of April, 2007 when the said policy was in force the 2nd Plaintiff suffered temporary total disablement as a result of a road accident and in terms of the said policy the defendant was under contractual obligation to pay to her the sum of Kshs. 462,555/- in respect thereof being her nine (9) weeks salary in accordance with the provisions of the said policy.**
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> **7. By letter dated 15th day of April, 2008 the defendant refused to pay the 2nd Plaintiff the said sum of Kshs. 462,555/- due to the 2nd Plaintiff in respect of temporary total disablement and persists in such refusal."**

13. The Respondent filed a statement of defence in traversing the averments in the amended plaint and further averred that the Appellant herein was not privy to the said policy by stating at paragraphs 5, 6, 7 and 8 of the defence statement that:

> **"5. In reply to paragraph 5 of the amended plaint, a Group Personal Accident Policy number 020/992/10/21370/2004 was issued by the Defendant's predecessor in title. The Defendant avers that; -**
>
> > **(a) the 1st Plaintiff was not privy to the said policy.**
> >
> > **(b) the policy was governed by the terms therein set out and the Defendant shall refer to the said policy for its full purport and meaning. The Plaintiffs are put to strict proof otherwise.**
>
> **6. By way of further defence, the Defendant avers that the Group Personal Accident Policy was taken for the benefit of the parties and on the terms therein set out.**
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> **7. In reply to paragraph 6 of the amended plaint, the Defendant puts the plaintiffs to strict proof of the matters therein pleaded. The defendant avers that the temporary total disablement payable under the subject policy was limited to Kshs. 2,500/- per week for a maximum of 104 weeks and the Plaintiffs put to strict proof otherwise.**
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> **8. In reply to paragraph 7 of the amended plaint, the defendant puts the plaintiffs to strict**

proof of any contractual relationship existing between the plaintiffs and the defendant in respect of the matters pleaded therein.'

14. The existence of a renewable policy between the Respondent and the German School Society was not in dispute. Further, it is not contested that the Appellant as an employee of German School Society was a potential beneficiary under the policy and that, as a result of an accident that occurred on 3rd April 2007 in which she sustained injuries and was incapacitated for 9 weeks, her rights as a beneficiary under the policy had crystallized. What the Appellant asserted in her pleadings and evidence before the lower court, and on this appeal, was that the Respondent was contractually obligated to pay the equivalent of nine weeks temporary total disablement which amounted to Kshs. 462,555/- pursuant to the policy in respect of the period 2006 to 2007.

15. During the hearing **Adrian Mambiri Meja (PW1),** the managing director of the insurance agency known as **Adrian & Associates Limited** testified in his evidence-in-chief that:

"When we renewed the cover in 2006, we deleted the death and medical benefits and left permanent disability and temporary disability. Permanent disability we had put at Kshs. 300,000/- and temporary total disability they (Respondent) **were to apply the weekly salary of the staff, so you simply divide the salary by four and multiply by the weeks she was away.** (The Plaintiff) **was away as certified by the doctor for nine weeks. Her monthly income was Kshs. 205,000/- and I calculated the figure the weekly pay was Kshs. 51,395/-.**

16. Under cross examination by the defence counsel he stated that:

"The letter dated 25th July, 2006 was from our company…….we looked forward to receiving the endorsement. No we didn't get the endorsement. An endorsement is document that brings in changes on existing terms of a policy. We don't have the endorsement but the premium charged was as per the terms we had agreed on".

17. The Appellant testifying as **PW 2** adopted her written statement as her evidence-in -chief. Confirming that she worked for the German School as a Chief Accountant during the period of the subject insurance policy, she asserted that pursuant to injuries sustained in a road traffic accident that occurred on 3rd April, 2007, she was rendered disabled for nine weeks and as such, the Respondent ought to have settled her claim as lodged.

18. **Samuel Maina Ng'ang'a** testified as **(DW 1)** on behalf of the Respondent. Equally, he adopted his witness statement as his evidence-in-chief and proceeded to state that:

"Yes, we renewed the cover in 2006-2007, the document is the one from 1st August 2006 - 31st July, 2007, it is titled 'renewal advice-German School Society-staff." The benefits renewed were: on death there was no cover, on permanent total disablement, the cover was Kshs. 300,000/-, on temporary total disablement, the cover was Kshs. 2,500/- per week, there was no limit of the number of weeks. On medical expenses, there was no cover…As per the benefits of the policy, the plaintiff was entitled to Kshs. 2,500/- per week for nine weeks, a total of Kshs. 22,500/-"

19. During cross examination, he reiterated that although the renewed policy incorporated changes in risks covered, there was no record of the payment due for temporary total disability risk being amended to cover the actual weekly earnings of the beneficiary employees**.** He stated concerning the insurance agent's request for renewal letter in respect of the year 2006 – 2007 that he could not tell who made cancellations thereon on 10th August, 2006 whose effect was to delete the words *"Actual weekly earnings* "as payable in respect of temporary total disablement, as proposed in the renewal letter.

20. In its judgment the trial court accepted the defence evidence by stating as follows:

"…. I have looked at the evidence according to Ms. Ohany she was involved in an accident on the 3rd April, 2007. I see the plaintiff's exhibit 2(i) confirming the renewal of the policy for the period 1st August, 2006 to 31st July, 2007. Overleaf against temporary disability is a figure Kshs. 2,500. No mention is made there how the computation would be done and certainly no mention of weekly earnings (or any earnings at all). …. The evidence therefore is that Ms. Ohany was entitled to a sum of Kshs. 2,500/-, now whereas there is no indication whether this was to be a one-off payment, the defendant does tell the court that this was the amount due to her weekly. There is no contest, that Ms. Ohany suffered that disability for a period of nine weeks. I therefore find that Ms. Ohany was entitled to receive from the defendant a sum of Kshs. 2,500/- per week for those nine weeks therefore a sum of Kshs. 22,500/-.

I therefore enter judgment in favour of the 2nd plaintiff for a sum of Kshs. 22,500/- with interest thereon computed at court rates from the date of filing suit until payment in full." (sic).

21. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the Evidence Act. The duty of proving on a balance of probabilities the averments contained in the amended plaint lay squarely on the Appellant. However, before delving into the evidence, this court must determine the preliminary issue raised before the trial Court and reiterated on this appeal by the Respondent regarding the Appellant's legal standing to enforce the contract of insurance. It was the Respondent's position that the Appellant was not privy to the insurance contract in question and therefore lacked the necessary *locus standi* in these proceedings. The trial Court disagreed with the Respondent in its judgment and found that there were exceptions to the privity of contract doctrine enabling beneficiaries of such contracts through third parties, to enforce a contract under which they stood to derive a benefit.

22. The trial Court supported this proposition by citing the Court of Appeal decision in the case of **Aineah Liluyani Njirah v Aga Khan Health Services [2013] eKLR,** which I find useful to quote *in extenso.* The Court stated that:

"Privity of contract is a long-established part of the law of contract. In the earlier part of the last century, it was identified by Viscount Haldane LC as one of the fundamental principles of the English Contract Law. See Dunlop Pneumonic Tyre v. Selfridge and Co. Ltd.[1]The essence of the privity rule is that only the people who actually negotiated a contract (who are privy to it) are entitled to enforce its terms. Even if a third party is mentioned in the contract, he cannot enforce any of its terms nor have any burdens from that contract enforced against him.[2]".

23. After reviewing developments in other countries leading to reform of the privity of contract rule, the Court stated**:**

"More fundamentally, however, when the contracting parties intend to give a right of enforcement to a third party, "it is difficult to see how it can be said that effect is given to that intention by allowing the promisee, but not the third party, to sue...where an unjust or illogical result is caused by the privity rule.[8] (Emphasis supplied). It would surely be much simpler and clearer to give effect to the intentions of the contracting parties by allowing the third party to enforce the contract….

There are now many exceptions to the privity rule, both at common law and in the statute books. They developed in an ad hoc fashion as a response to specific situations where the courts or the legislatures ascertained a need to grant third parties the right to enforce a contract made for their benefit.[11] Second, a third party should be able to enforce a term of the contract when the contract expressly states that the third party has a right of enforcement, regardless of whether or not the contract benefits the third party. Third, the third party should have a right to rely on a term of a contract which excludes or limits the liability of the third party, provided that was the intention of the parties.

There is, however, an important distinction made between express and implied benefits which

are enforceable under a contract by a third party. When a contract expressly benefits the third party, there is a presumption that the contracting parties intended the third party to have a right of enforcement. However, if the contract only impliedly benefits a third party, there is no such presumption, and the third party has no rights unless the contract expressly gives that third party a right to enforce the contract. This creates certainty for, and protects, contracting parties, in that third parties cannot enforce contracts which only incidentally benefit them unless the contract expressly states that they may do so.

These presumptions can be rebutted by the contracting parties (or rather, the promisor) if they can show that they did not intend for the third party to have any such a right.

When ascertaining the intentions of the parties, the court should interpret the contract "in light of the surrounding circumstances which are reasonably available to the third party."[12]The English Court of Appeal confirmed this position in Prudential Assurance Co Ltd v. Ayres[13] although it is unclear whether or not there is a requirement that these surrounding circumstances should be readily available to the third party.[14]

Rule 55(2) of the Court of Appeal Rules restrains us from relying on any additional evidence that was not before the single Judge. However, considering the fact, as we have pointed out, that the applicant was dismissed for allegedly making false claims under the same policy; that his case as well as the application before the single Judge of this Court were dismissed on the ground that under the policy, there was no privity of contract between the applicant and the respondent; and the applicant was and is still unrepresented; in the interest of doing substantial justice to the parties pursuant to Article 159(2)(a)& (d) of the Constitution and Sections 3A and 3B of the Appellate Jurisdiction Act, we are constrained to interfere with the decision of the single Judge. We are satisfied that had the fact that the policy of insurance was for the benefit of UN employees including the applicant been placed before him, the single Judge would most likely have allowed the application for extension of time".

24. The above decision reiterated previous decisions of the Court of appeal concerning exceptions to the privity of contract rule, including **Gakombe v Automobile Association of Kenya & Another (2006) eKLR** which affirmed the English decision in **Shanklin Pier Ltd V Detel Products Ltd (1951) 2QB 854, and** in **Kenya Women Finance Trust v Bernard Oyugi Jaoko & 2 Others (2018) eKLR.** The **Aineah Likuyani Njirah** decision was followed in **Karuri Civil Engineering (K) Limited v Equity Bank Limited [2019] eKLR** where the Court of Appeal observed that:

"In Aineah Likuyani Njirah vs Aga Khan Health Services (2013) eKLR, this court expressed that there are now many exceptions to the privity rule, both at common law and in the statute books. One of the exceptions is the need to grant third parties the right to enforce a contract made for their benefit. In our considered view, the doctrine of privity of contract cannot be used to oust responsibility to a third-party beneficiary of a performance bond."

See also **Darlington Borough Council v Witshire Northern Ltd [1995] 1 WLR 68 (**as cited in **Mark Otanga Otiende V Dennis Oduor Aduol (2021)e KLR**) to demonstrate the rationale behind exceptions to the privity of contract rule per **Lord Steyn :**

> **"The case for recognizing a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the reasonable expectations of contracting parties. Principle certainly requires that a burden should not be imposed on a third party without his consent. But there is no doctrinal, logical or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties. Moreover, often the parties, and particularly third parties, organize their affairs on the faith of the contract. They rely on the contract. It is**

therefore unjust to deny effectiveness to such a contract."

25. Consequently, nothing turns on the objection raised by the Respondent as to the Appellant's locus in enforcing the insurance cover under which she was admittedly a beneficiary. The trial Court cannot be faulted on this account.

26. Now moving on to the substance, there was no dispute that the Appellant was an employee of the German School Society **(**see **P. Exh. 2(xvii)),** that she was injured in a road traffic accident during the currency of insurance policy between the Respondent and German School Society pursuant to which she was a beneficiary, and that she suffered temporary total disablement or disability lasting nine weeks. The sticking point is whether the Appellant proved on a balance of probabilities that she was entitled to the sum of Kshs. 462,555/- in that regard. The Group Personal Accident Insurance Policy No. **020/992/10/21370/2004** was renewed on 1st August, 2006 to 31st July, 2007. The renewal of the policy and amendment to the terms thereto was to have been effected through a letter dated 25th July, 2006 - **(P. Exh. 2(iii)).**

27. Essentially, the said letter originating from **Adrian & Associates Insurance Agency** proposed that two earlier risks be done away with while enhancing the benefit under temporary and permanent total disability. At paragraph 9 of **P. Exh. 2(iii),** at Item B on temporary total disability, the original words "*Actual weekly earnings"* are crossed out, whereas the revised annual premium is indicated to be Kshs. 34,555/-. Though the hand-written amendments in the renewal letter are counter-signed and dated 10th August, 2006, neither the Appellant and **PW 2** nor even **DW1** could shed light as to the circumstances or identity of the person who introduced the said amendments. It was Appellant's case that temporary total disability ought to be calculated based on weekly earnings per the original proposal in the renewal letter and she relied on the revised annual premiums of Kshs. 34,555/- and the terms of the policy in the succeeding year (2007-2008) **(P. Exh. 2 (vii & viii))** as corroboration.

28. However, a perusal of **(P. Exh. 2 (v))** being the undisputed renewal advice issued by the Respondent on 1st September, 2006 for the period 1st August, 2006 to 31st July, 2007 reveals that the agreed revised policy and the premiums remitted therein listed the following risks:

"ON DEATH – NO COVER

ON P.T.D – Kshs. 300,000

ON T.T.D – Kshs. 2500

ON MEDICAL – NO COVER" (sic)

29. The trial court correctly observed that from the above, it was not clear how temporary total disability was to be computed, but nevertheless used the figure of Shs. 2,500/- to compute the Appellant's dues by multiplying the figure with the number of proven disability weeks. The state of the record of the material transaction between the Respondent and insurance agency, and by extension the insured is such that it is difficult to determine the agreed terms concerning temporary total disability under the renewed policy. In the circumstances, the Appellant's argument that the Respondent should be held to the terms of the proposals in the renewal letter because they did not issue an endorsed policy or expressly reject the said terms appears tenuous. Equally, the assertion that the altered policy premium was evidence of the acceptance of proposed terms is of no avail. The renewal advice expressly stated terms other than proposed in the agency's renewal letter in respect of temporary total disablement, but the insured and her agents appear not to have taken up the matter themselves.

30. The Court of Appeal in **Musimba Investments Limited v Nokia Corporation [2019] eKLR** stated that:

"One of the principles of contractual interpretation is that parties have the freedom to

contract; to contract even to resolve their disputes away from the courts; and that courts should not re-write terms of a contract for them.

We restate the words of Lord Neuberger, the former President of the Supreme Court of the United Kingdom, in Arnold v Britton [2015] UKSC 36 that:-

> **"When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focusing on the meaning of the relevant words".**

31. In the oft-cited decision of **National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR** the same Court held as follows:

> **"A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved".**

32. The Appellant strongly argued that the renewal letter by the insurance agency fundamentally changed the risks that the Respondent had previously insured and as such, it was incumbent upon it to clearly respond to the agency's letter stating that as regards the risk of temporary total disablement, the benefit due to an employee would remain Kshs. 2,500/- per week, and not based on the actual weekly earnings as proposed. This contention ignores the contents of the renewal advice issued by the Respondent. Thus, while it is not disputed that by dint of **(P. Exh. 2(iii)),** and available correspondence from the insured that the German School Society through **Adrian & Associates Insurance Agency** had intended to alter certain aspects of Policy No. **020/992/10/21370/2004** to reflect the necessary changes as captured in Paragraph 9 of the said letter, the Respondent on its part varied the proposal regarding temporary total disability to be based not upon the weekly earnings of the beneficiary, but on the sum of Shs.2500/-, possibly weekly. The computation method is not clear from the endorsements on the proposal letter or the renewal advice.

33. In the case of **Kenya Breweries Ltd v Kiambu General Transport Agency Ltd [2000] EA 398** the Court of Appeal observed that:

> **"A variation of an existing contract involves an alteration as a matter of a contract, of contractual relations between the parties; hence the agreement for variation must itself possess the characteristics of a valid contract. To effect a variation therefore, the parties must be *ad idem* in the same sense as the formation of a contract and the agreement for variation must be supported by consideration. …... A written contract cannot be amended by an implied stipulation unless it can be said to be mutually intended and necessary to give efficacy to the contract."** (Emphasis added).

34. Notwithstanding the contents of the agency's renewal letter, the letter could not unilaterally alter or create new terms in the policy between the Respondent and its insured unless there was clear acceptance by the latter. Moreso as the renewal advice containing terms to the contrary was never countered by the agency or the insured. It seems to me therefore that there was no clear meeting of the mind between the contracting parties concerning the new terms under the renewed policy regarding the temporary total disability risk cover, even though the premium payable was altered. In the circumstances, the trial Court was entitled to compute the Appellant's compensation based on the sum of Shs. 2,500/- weekly, as admitted by the Respondent at the trial. The trial court cannot therefore be faulted. There is consequently no merit in the appeal and the same is dismissed. Parties will bear own costs on this appeal.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 14TH APRIL 2022

C.MEOLI

JUDGE

In the presence of:

For the Appellant: Mr. Kipchumba h/b for Mr Ombete for the Appellant

For the Respondent: Mrs. Ngechu

C/A: Carol