



Pioneer Holdings (Africa) Limited v Concord Insurance Company Limited & another (Civil Case 817 of 1998) [2022] KEHC 305 (KLR) (Commercial and Tax) (4 April 2022) (Judgment)

Neutral citation: [2022] KEHC 305 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 817 OF 1998
WA OKWANY, J
APRIL 4, 2022**

BETWEEN

PIONEER HOLDINGS (AFRICA) LIMITED PLAINTIFF

AND

JUBILEE INSURANCE COMPANY LIMITED 1ST DEFENDANT

CONCORD INSURANCE COMPANY LIMITED 2ND DEFENDANT

JUDGMENT

1. The Plaintiff herein initially filed this suit under the name "Pioneer General Assurance Society Limited" but by a Special Resolution made on 15th November 2001, its name was changed to "Pioneer Holdings (Africa) Limited". The Plaintiff's name was consequently amended in these proceedings pursuant to leave granted by this Honourable Court on 30th April 2019.
2. The Plaintiff was at all material times (and still is) the registered owner of all that piece and parcel of land known as Land Reference Number 209/4286 situate in Nairobi wherein it erected a seven-storey building known as "Pioneer House". The Plaintiff occupied part of the building and leased out the rest to various tenants.
3. On or about 1st December 1995, the Plaintiff and the Defendants entered into an insurance contract (hereinafter called "the Insurance Contract") under which Pioneer House was insured, by the Defendants, against loss or damage caused by, inter alia, fire, explosion, riot, strike and malicious act of any person. The Plaintiff was issued with a Policy of Insurance Number N/F/268528 and 1220788 (hereinafter called "the Insurance Policy").
4. Under the said Insurance Contract, the 1st Defendant undertook to cover 70% of any insured loss while the 2nd Defendant undertook to cover the remaining 30% of any insured loss.



5. On 7th August 1998, Pioneer House and its contents were severely damaged as a result of a powerful bomb explosion which occurred at the US Embassy that was then in close proximity to Pioneer House. The plaintiff's claim is that that as a result of the said explosion, it suffered loss amounting to Kshs 117,963,516.21.
6. On 8th August 1998, the Plaintiff sent a Notice of Claim, in writing, to the Defendants in respect to the loss and damage occasioned to Pioneer House by the explosion.
7. The Defendants however denied liability to indemnify the Plaintiff under the terms of the Insurance Contract, thereby precipitating the filing of the instant suit.

The Plaintiff's Case

8. Through the Amended Plaint dated 22nd March 2019, the Plaintiff seeks the following orders: -
 - a. Judgment against the first defendant for Kshs 82,574,461.34
 - b. Judgment against the Second defendant for Kshs 35,389,054.86.
 - c. Judgment against the first and second defendants for damages for the breach of the policy terms.
 - d. Interest on (a), (b) and (c) above at court rates which this Honourable court deems fit to grant.
 - e. Costs of this suit.
 - f. Any further relief which this Honourable court deems fit to grant.
9. The Plaintiff's case is that it suffered loss and damage as a result of the explosion which occurred on 7th August 2008 in the vicinity of the Plaintiffs building called "Pioneer House" situated along Moi Avenue, Nairobi, which loss and damage it maintains was covered under a Policy of Insurance issued by the Defendants.
10. At the hearing of the case, which commenced before this court on 23rd July 2019, the Plaintiff called two witnesses.
11. PW1 Mr. Shiraz Jeraz, the Plaintiff's Administration Manager and Director relied on his filed witness statement as his evidence in chief. He also produced a bundle of documents dated 7th February 2013 as Plaintiff's exhibit 1. He testified that the United States government through United States of America Agency for International Development (USAID) paid the plaintiff a grant in the sum of Kshs. 22,971,717 in recognition of the fact that the plaintiff's building was damaged by the explosion. He however maintained that the payment made by the US government was not a substitute for the insurance claim.
12. PW2, Mr. Jonathan Mukiiri Mbui, was the Consulting engineer at Atkins Consulting Engineers. He relied on his witness statement and stated that the Plaintiff hired him to assess the building, after the bomb blast, in order to establish its structural integrity, mechanical and electrical damage, to procure contractors and to supervise the repair works to completion.
13. On cross-examination, PW2 testified that the plaintiff paid Kshs 10.3 Million in respect to the works on hold but added that he was not sure if the rehabilitation of the 5th and 6th floors of the Plaintiff's building fell under the works on hold and whether there was fiberglass insulation before the blast.

The Defendant's Case



14. The 1st defendant opposed the suit through the amended defence dated 15th March 2019 wherein it admits having entered into the Insurance Contract with the Plaintiff. It adds that since the explosion in question was an act of terrorism targeted at the US embassy, which was adjacent to the plaintiff's property, the 1st defendant was not liable to indemnify the plaintiff under the Standard explosion clause as read together with the Special condition 1 to endorsement 3 of the insurance policy.
15. The defendant denied the allegation that the plaintiff suffered any loss or damage covered by the policy and contended that the grant of Kshs 22,971,717 received by the plaintiff from USAID following the said bomb blast was sufficient compensation for any loss that it suffered as a result of the explosion.
16. DW1, Mr. Mr. Amin Dato, the 1st defendant's Technical Director, adopted his witness statement as evidence in chief and produced the 1st defendant's bundle of documents as exhibits. On cross-examination, he testified that the policy documents were prepared by Jubilee Insurance General claims department and that the terms of the insurance contract were subject to proposals that were accepted. He stated that the insurance policy was on a standard policy document adopted by the industry. He noted that the proposal detailed the extent of the insurance cover. He further testified that it was apparent that the policy document was signed before the premium was paid and that the terms of the policy were not before court. He further stated that the insureds signature was not required in the policy document.
17. DW2, Mr. John David Minera, the Director of Cunningham Lindsey Kenya Limited, adopted his witness statement dated 18th June 2013 and testified that the project management costs were not covered under the policy.
18. The 2nd Defendant did not call any evidence in its defence.

Plaintiff's submissions

19. The plaintiff identified the following issues for determination: -
 - a. Whether the Defendants are liable to indemnify the Plaintiff under the terms of the Insurance Contract for the loss and damage it suffered because of the explosion of 7th August 1998.
 - b. Whether the explosion was excluded by virtue of the Terrorism Exclusion Clause contained in Special Condition 1 to the Standard Explosion Endorsement (Endorsement 3) of the Insurance Policy.
 - (1) Whether the Terrorism Exclusion Clause was incorporated into the Insurance Clause and if so has the burden of proof shifted to the Plaintiff under the reverse onus clause?
 - (2) Whether the loss in question occasioned by an act of terrorism?
 - (3) What is the quantum of the Plaintiffs loss and damage for which the Defendants are liable to indemnify the Plaintiff under the terms of the Insurance Contract?
 - c. Whether the Defendants liable to pay interest to the Plaintiff on any sums awarded to the Plaintiff and if so at what rate?
 - d. Who should bear the costs of this suit?
20. On the defendants' liability to compensate the plaintiff for the loss suffered following the explosion, the plaintiff observed that the defendants do not dispute the existence of the Insurance Contract or that the policy was in force at the date and time of the explosion. The plaintiff noted that although the



defendants denied the quantum of loss as pleaded by the Plaintiff, they did not dispute the fact that Pioneer House was damaged by the explosion or that the Plaintiff suffered loss as a result thereof.

21. The plaintiff further noted that the defendants' sole defence was based on the exclusion clause contained in the Insurance Policy which clause excluded the defendants from liability where the explosion was occasioned by "acts of terrorism committed by a person or persons acting on behalf of or in connection with any organization."
22. The plaintiff submitted that the insurance policy did not exist at the time the parties entered into the contract and that there was no evidence to show that the exclusion clause was brought to the plaintiffs notice prior to the explosion. The plaintiff referred several decided cases on this point including the case of *Sita Steel Rolling Mills Ltd vs Jubilee Insurance Co. Limited* [2007] eKLR where Maraga J. (as he then was) was held that a binding and enforceable insurance contract had been reached and concluded orally between the plaintiff and the defendant and that the defendant was therefore not entitled to rely upon a clause contained in the policy which was issued subsequently and which purported to exclude the defendant's liability for the loss. The Learned Judge stated:-

“Even if I were to agree with Mr. Okayo that the rate given by the defendants was based on tariff 50 which relates to the goods in enclosed premises, I am clear in my mind that the contract of insurance reached on 5th December 1997 was not varied as contended by the defendants. Both the defendants' said letter of 10th March 1998 which contained the revised rate and the policy reached the plaintiffs after the flooding. There is therefore no agreement on the alleged variation. In the circumstances the defendants are also not entitled to repudiate their liability under clause 5 (iii) of the policy.” (Emphasis added)

23. It was submitted that in insurance contracts the burden of proof rested on the insured demonstrate that the loss claimed falls within the policy and that the insurer bore the reverse onus to prove that the loss falls under the exception clause that it sought to rely. For this argument the Plaintiff cited the decision in the case of *British Foreign Marine Insurance Co. Ltd vs Gaunt* [1924] 2AC 41 where the court held that: -

“In order to claim under the policy, the insured must establish that he has suffered a loss caused by the risk covered by the policy. However where the policy contains exceptions to the cover, the burden is on the insurer to prove that the insured loss was caused by one of the exempted risks.”

24. The plaintiff's case was that the defendants should prove, on a balance of probabilities, that the explosion was caused by an act of terrorism as defined by the terrorism exclusion clause. The plaintiff outlined the various definitions to the word terrorism and submitted that there was an ambiguity in the word political in the exclusion clause and that it must therefore be interpreted as related to the Kenyan State and Government. The plaintiff added that the word public should also be interpreted like political to mean the Kenyan public.
25. The plaintiff referred to the documents produced by the defendants in respect to criminal proceedings that were conducted in the United States of America following the explosion, (hereinafter “the US Documents”) and submitted that they do not show the intention of the perpetrators of the explosion. The plaintiff maintained that the US Documents could not therefore form a basis for the claim that the explosion amounted to the use of violence. According to the plaintiff, there was absolutely no evidence in the US Documents about the “ends” or intentions of the perpetrators of the explosion. It was the plaintiff's case that there is no basis for the claim that the said explosion amounted to the use of



violence for political ends, and that consequently, there is no evidence to show that the said explosion was an act of terrorism as defined under the Terrorism Exclusion Clause.

26. The plaintiff argued that that a proper and reasonable interpretation of the Terrorism Exclusion Clause would limit the context of the term "political" to the Kenyan government and state, and the term "public" to the Kenyan public. It was submitted that there is absolutely no indication anywhere in the US Documents that the explosion was directed to the government or people of Kenya. The plaintiff argued that to the contrary, the explosion was directed only at the US, and was in fact more religious than political.
27. The plaintiff submitted that the Defendants are not entitled to rely upon the Terrorism Exclusion Clause to evade their liability under the Insurance Clause.
28. On quantum of damages, the plaintiff submitted that the defendants did not adduce any evidence to show the extent of the loss suffered by the plaintiff and that the expert evidence produced by the plaintiff was therefore not controverted.

Defendant's submissions

29. The defendant submitted that the insurance policy was in respect to loss and damage occasioned by fire or lightning and that any loss or damage occasioned by explosion was not covered, unless expressly stated. It was submitted that the policy was subject to two endorsements attached to the policy, to wit, the Standard Explosion Endorsement and the Malicious Damage Endorsement. It was submitted that the Standard Explosion Endorsement under special condition 1 provided that the company was not be liable for loss or damage occasioned by acts of terrorism.
30. The 1st defendant submitted that the issue of whether or not the Terrorism Exclusion Clause was incorporated into the policy was not pleaded and does not form part of the issues to be determined in this case. It was the defendant's case that the burden of proof rested on the plaintiff to establish that the explosion was not caused by an act of terrorism. The defendant maintained that the plaintiff could not choose part of the policy endorsement that was favorable to it and reject the part that covered the explosion. It was submitted that the plaintiff had notice of the Special Condition 1 before it renewed the insurance cover and that the plaintiff did not request for a cover for acts of terrorism.
31. On balance of proof, the 1st defendant submitted that the 3rd paragraph of the Special Condition 1 reverses the burden of proof where the insurer alleges that the loss or damage was not covered because of the provisions of special condition 1. The defendant maintained that Sections 107 and 109 of the [*Evidence Act*](#) should be read in light of a contractual agreement.

Analysis and Determination

32. I have considered the pleadings filed by the parties herein, their oral and documentary evidence, submissions together with the authorities cited. I find that the main issue for determination is whether the defendants are liable to indemnify the plaintiff for the loss arising from the explosion that occurred on 7th August 1998. The court will also consider the following issues: -
 - i. Whether the loss in question was occasioned by an act of terrorism and whether the Terrorism Exclusion Clause was incorporated into the insurance contract and if so;
 - ii. Whether the burden of proof shifted to the Plaintiff under the reverse onus clause; and depending on the findings on the above issues;
 - iii. The quantum of damages, if any, payable to the plaintiff under the terms of the Insurance Contract.



- iv. Whether the defendants are liable to pay interest to the Plaintiff on any sums awarded and if so at what rate.
- v. Who should bear the costs of this suit?

Terrorism Exclusion Clause

33. It was not disputed that the parties herein entered into the Insurance Contract in which the defendants issued an Insurance policy in respect to the plaintiff's building known as Pioneer House. It was also not disputed that the insurance policy was in force at the time of the explosion on 7th August 1998. It was further not disputed that parts of the Pioneer House were damaged following the explosion thus occasioning loss and damage to the plaintiff. The defendants however repudiated liability based on an alleged exclusion clause in the Insurance policy that excluded the Defendants' liability under the Insurance Contract if the explosion, which caused the loss, was occasioned by "acts of terrorism committed by a person or persons acting on behalf of or in connection with any organization."
34. The Defendants argued that the explosion was an act of terrorism and that accordingly, their liability under the Insurance Contract was excluded by virtue of the terrorism exclusion clause. The defendants contended that the explosion was a consequence of an act of terrorism connected to an organization with the intention of using violence for political ends and that, as such, the Standard Explosion Clause read together with the Special Condition 1 to Endorsement 3 to the Insurance Policy absolved them from any liability.
35. The plaintiff's case, on the other hand, was that its building was, at the time of the explosion, insured against loss and damage caused by fire, explosion, riots, strike and the malicious acts of any person. The plaintiff maintained that the defendants were therefore liable to compensate it for the loss arising out of the explosion. It submitted that the Terrorism Exclusion Clause does not form part of the terms of the Insurance Policy and was introduced into the policy without its notice, knowledge or consent.
36. The plaintiff placed heavy weight on the definition of the word terrorism in the interpretation of the insurance policy and argued that the explosion was not caused by an act of terrorism. It was the plaintiff's case that there are several definitions of the word terrorism thereby creating an ambiguity in the meaning of the word and that it was therefore not possible to tell if the explosion in question was caused by an act of terrorism.
37. The plaintiff contended that there was no universally accepted or common definition of terrorism and that the exclusion clause provided the definition of terrorism to mean use of violence for political ends and use of violence to put the public or any section of the public in fear. The plaintiff submitted that the political should be construed to mean the people of Kenya.
38. On its part, the 1st defendant argued that there is not ambiguity in the term 'terrorism' as the dispute revolves around the explosion of a bomb at the United States Embassy in Nairobi the extent of which was summarized in the letter to the plaintiff from USAID wherein the author referred to "terrorist bombing". The defendant argued that it was difficult to see how the plaintiff could claim that there is ambiguity as to whether the act in question involved "the use of violence" or that it put "the public or any section of the public in fear" in the light of the clear evidence of the effect of the "terrorist bombing".
39. The defendant further submitted that the acts of terrorism were substantiated by the affidavit of Peter Rossi and stated that the incident affected the public and put the public in fear as more than 250 people died while more than 5000 were injured. The defendant further submitted that there was no requirements that the political ends of the bombers should be directed at the Kenyan Government.



40. In the case of *Baj (Run Off Ltd) vs Durlian and Others* [2012], UK Supreme Court 14 the court held as follows on the guiding principles in interpretation the contract of insurance:

“To resolve these questions it is necessary to avoid over concentration on the meaning of single words or phrases viewed in isolation, and to look at the insurance contracts more broadly. As Lord Mustil observed in *Charter Reinsurance Co. Ltd v Faganc* [1977] AC 313, 384 all such words must be set in the landscape of the institution as a whole carry instinctive response to their meaning must be verified by showing the other terms of the contract, placed in the context of the factual and commercial background of the transaction. The present case has given rise of considerable argument about what constitutes and is admissible as part of the commercial background to the insurance, which may shape their meaning. But in my opinion considerable insight into the scope, purpose and proper interpretation of each of these insurances is to be gained from shoddy of its language, read in its entirety so for the moment, I concentrate on the assistance to the gained in that connection.”

41. I have perused the letter dated 16th June 2000 from USAID to the plaintiff and I note that USAID stated as follows in the opening paragraph of the said letter: -

“As a result of the August 7, terrorist bombing outside the U.S. Embassy in Nairobi, over 250 people were killed, more than 5000 injured, and over 3000 businesses and buildings were damaged or destroyed. We recognize the extent of the damages to your building. The United States Government wishes to make a contribution to help alleviate some of the financial burden incurred in repairing your damaged building.”

42. I have perused this court’s proceedings of 23rd September 2009 wherein Kimaru J. ordered that the copies of the judgments and judicial records of the United States District Court, Southern District of New York exhibited to the affidavit of, Mr. Peter Rossi be admitted in evidence without calling the makers thereof. An examination of the judgments records attached to Mr. Rossi’s affidavit shows the nature of the charges levelled against the convicted persons especially the guilty plea by Mr. Ali Mohamed and the amount of violence that was meted out on the members of the public.

43. *Black’s Law Dictionary 10th Edition* defines “terrorism” as the use of threat of violence to intimidate or cause panic, esp. as a means of achieving a political end.

44. My analysis of the documents annexed Mr. Rossi’s affidavit reveals that five people, namely; Ali Mohamed, Wadih El Hage, Mohamed Sadeek Odell and Mohamed Rashed Dauod Al ‘Owhali were convicted in New York for acts of terrorism in connection with the attack on the US Embassy in Kenya on 7th August 1998. The correspondence between the plaintiff and the U.S. Government, through USAID, also indicate that from the outset, there was clarity that the incident of 7th August 1998 was an act of terrorism.

45. My finding is that the uncontested evidence on record shows that an act of terrorism was committed by persons acting on behalf of or in connection with an organization through violence for political ends. The evidence contained Mr. Rossi’s affidavit further shows that one of the accused persons, Ali Mohamed, pleaded guilty to the charges related to terrorism and confessed that he was a member of the al Qaeda organization. The objective of the said organization was to attack any Western target in the Middle East in order to force the government of the Western countries to pull out from the Middle East and conspired to murder persons who were involved in government agencies and embassies overseas.



46. The evidence presented in this case leaves no doubt in my mind that the explosion of 7th August 1998 was an act of terrorism that affected the public and put the public, or at least a substantial section of it, in fear. My further finding is that even though the evidence on record shows that the terrorists' target was the United States embassy in Nairobi and not on the Kenyan government per se, I note that there was no requirement, under the policy, that the "political ends" of the terrorists should be specifically directed at the Kenya government. This court takes judicial notice of the fact that Kenyans in general, and by extension, the Kenyan government, were directly affected by the bomb blast of 7th August 1998 where the death toll and damage to property was at a scale never witnessed before in the history of this country. It is noteworthy that even though the terrorists target was the U.S. Government, the attack took place on the Kenyan soil in Nairobi and it cannot therefore be said that the Kenyan government and its people. A perusal of the Insurance policy reveals that it provided for the definition of the word terrorism.
47. I therefore find that any attempt to give the word terrorism a different definition from the one stated in the policy will be akin to interfering with the contract between the parties. I find that the defendant provided sufficient evidence to demonstrate that the activities that led to the explosion at the American Embassy building, whose effects spilled over and caused damage to the plaintiff's Pioneer House, were terrorism related. I take judicial notice of the undisputed fact that that the unprecedented explosion that led to injuries and loss of lives affected the Kenyan public. Kenyans were subjected to fear and uncertainty. From the undisputed facts of this case, the explosion in question cannot be equated to the normal fire explosion covered under the subject insurance policy.
48. I note that the plaintiff did not controvert the evidence of terrorism contained in the US Documents by adducing evidence to show that the explosion had another cause other than terrorism. In other words, the evidence by the defendant in this respect was entirely uncontroverted. In *Safarilink Aviation Limited vs. Trident Aviation Kenya Limited & Another* [2015] eKLR, the court expressed the view that: -
- “...failure to rebut evidence tendered by one party leaves the court with no option but to draw an inference that the facts as presented are true...”
49. A perusal of the Insurance policy reveals that it provided for the definition of the word terrorism. I therefore find that any attempt to give the word terrorism a different definition from the one stated in the policy will be akin to interfering with the contract between the parties. I find that the defendant provided sufficient evidence to demonstrate that the activities that led to the explosion at the American Embassy building, whose effects spilled over and caused damage to the plaintiff's Pioneer House, were terrorism related.
50. I take judicial notice of the undisputed fact that that the unprecedented explosion affected the Kenyan public as it less to injuries and loss of lives. The Kenyan public was subjected to fear and uncertainty. From the undisputed facts of this case, the explosion in question cannot be equated to the normal fire explosion covered under the subject insurance policy.
51. I find that the 1st defendant established, on a balance of probabilities, that the explosion was caused by an act of terrorism and that the burden of proof therefore shifted to the plaintiff to prove otherwise.

Standard Explosion Clause

52. The plaintiff's case was that the Standard Explosion Clause in the policy was not applicable to the case and could not be invoked by the 1st defendant as it neither formed a part of their agreement nor was it brought to its attention prior to the explosion. For this argument the plaintiff relied on the decision



in the case of *Securicor Courier (K) Ltd vs Benson David Onyango & Another* [2008] eKLR where the court held that:-

“In our jurisdiction however, such contracts are purely governed by the common law. It seems that the current law governing the exemption clauses is as expressed by the House of Lords in *Photo Production Ltd. (supra)* and in *George Mitchell (Chesterhall) Ltd. (supra)*.

The House of Lords has however, held that a limitation clause was not subject to the very strict principles of construction applicable to clauses of complete exclusion of liability or of indemnity (see *Ailsa Craig Fishing Co. Ltd. vs. Malvern Fishing Co. Ltd. [1983] 1 All E.R. 101* which was applied in *George Mitchell (Chesterhall) Ltd. vs. Finney Lock Seeds Ltd. (supra)*).

In *Ailsa Craig*, Lord Wilberforce said in part at page 102 -103 j:

“Whether a condition limiting liability is effective or not is a question of construction of that condition in the context of the contract as a whole. If it is to exclude liability for negligence, it must be most clearly stated and unambiguously expressed, and, in such a contract as this, must be construed *contra proferentem*. Clauses of limitation are not regarded by the courts with the same hostility as clauses of exclusion; this is because they must be related to other contractual terms, in particular to the risks to which the defending party may be exposed, the remuneration which he receives and possibly also the opportunity of the other to insure”.

.....

That notwithstanding, the statement of the law by the superior court to the effect that a party cannot be bound by a contract which has not been brought to his attention is no doubt correct. Indeed, where clauses incorporated into a contract contain particularly onerous or unusual condition, the party seeking to enforce that condition has to show that he did what was reasonably sufficient to bring it to the notice of the other party, otherwise, the condition does not become part of the contract. (See *Thornton vs. Shoe Lane Parking Ltd. [1971] 2 Q.B. 163*; *Interfoto Picture Library Ltd vs. Stiletto Visual Programmes Ltd. [1989] 1 Q.B. 433*).

An exemption clause can be incorporated in a contract by, *inter alia*, signature or notice. Generally speaking, if a party signs contractual documents containing an exemption clause, he is bound by it even though he has not read the terms, unless he signed the documents through fraud or misrepresentation. In *L’Estrange vs. F. Graucob Ltd. [1934] 2 K.B. 394*; *Scrutton L.J.* said at page 403:

“When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not”

53. The 1st defendant, on the other hand, argued that the “Standard Explosion Endorsement” was a standard document common to the entire insurance industry and was therefore a provision that the plaintiff was familiar with, as an insider in the insurance industry. The said clause stipulates as follows: -

It is hereby agreed and declared that the insurance under this clause shall subject to special conditions herein contained extend to include;



Loss of or damage to the property insured by fire or otherwise directly caused by explosion, but excluding loss or damage to boilers, economizers or other vessels machinery or apparatus in which pressure is used or their contents resulting from their explosion.

Provided always that all the conditions of this policy (except in so far as condition No 7(h) is hereby expressly varied) shall apply as if they have been incorporated herein and for the purpose hereof any loss or damage by explosion as aforesaid shall be deemed to be loss or damage by fire within the meaning of this policy.

Special Conditions

1. The company shall not be liable under this extension, for loss or damage occasioned by or through or in consequence directly or indirectly of acts of terrorism committed by a person or persons acting on behalf of or in connection with any organization

For the purpose of this condition “terrorism means the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear

In addition, suit or other proceedings where the company alleges that by reason of the provisions of the conditions any loss or damage is not covered by insurance, the burden of proving that such loss or damage is covered shall be upon the insured.

Condition 6

This insurance does not cover any loss or damage occasioned by or through or in consequence directly or indirectly of any of the following occurrences, namely: -

A war invasion, act of foreign enemy, hostilities or war like operations (whether war to be declared or not) civil war

B mutiny, civil commotion assuming the proportions of or amounting to a popular rising, military rising insurrection, rebellion revolution military or usurped power

C Acts of terrorism committed by a person or persons acting on behalf of or in connection with any organization.

For the purpose of this condition, “terrorism means the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear

In any action, suit or other proceedings, where the company alleges that by reason of the provisions of this condition any loss or damage is not covered by this insurance the burden of proving that such loss or damage is covered shall be upon the insured.

54. At the hearing of the case, Mr. Shiraz Jeraj (PW1) produced the plaintiff’s bundle of documents dated 7th February 2013 as exhibit 1. I note that the Insurance Policy appears at pages 25 to 53 of the said bundle of documents. The standard Explosion Clause highlighted hereinabove appears at 32 and 33 of the plaintiff’s said bundle of documents. I further note that even though the plaintiff submitted that it was not aware of the Standard Explosion Clause and that the same was not brought to its attention/ notice prior to the explosion of 7th August 1998, it is the plaintiff who produced the policy document that contains the contested clause.



55. It is also noteworthy that at no point during their testimony did the plaintiff's witnesses state that they were not aware of the Standard Explosion contained in the documents that they produced as an exhibit. The undisputed fact that the plaintiff is a major player in the insurance industry did not also escape this court's attention. In this regard, the expectation is that the plaintiff should be familiar with the Standard Explosion Clause.

56. *MacGillivray & Parkington on Insurance Law, 6th Edition* paragraph 210 page 210 states as follows on the standard terms of an insurance contract: -

“Insurers’ usual terms. A court will not require the parties to have reached separate agreement on all the terms of the insurance, apart from the essential terms described above, in order that a contract should be held to exist. It will readily be assumed that, when an applicant seeks insurance cover from particular insurers, he impliedly offers to take an insurance on the insurer’s usual, or standard, terms of cover, just as the insurers’ interim cover note will be issued impliedly subject to the usual conditions contained in their policies. When, therefore, the insurers come to issue their policy, their only obligation is to issue it with the terms and conditions usually attached to their policies, in so far as these are not inconsistent with the express terms of the parties preliminary contract”.

57. In the case of *Alisa Craig Fishing Co. Ltd v Malven Fishing Co. Ltd* [1983] ALL ER 101 the court stated as follows on exclusive clause: -

“The key requirement is that an exemption clause must be clear and unambiguous. If it is clear and unambiguous, the court will as a general rule enforce it.”

58. My finding is that the Standard Explosion Clause formed an integral part of the insurance policy document that plaintiff produced as an exhibit. It thus follows that the plaintiff cannot on one hand rely on the said policy as the basis of its claim for indemnity and on the other hand disown parts of the document that appear not to be favorable to its case.

59. The plaintiff further maintained that since it did not sign the insurance policy, the explosion clause did not form part of the contract. I find this argument to be self-defeating because one would then ask why the plaintiff is making a claim under a policy that it did not sign.

60. The 1st defendant’s position was that the initial insurance policy was for the period of 1st December 1995 to 1st December 1996 and that there were two subsequent renewals of the policy before the explosion incident in August 2018. DW1 testified that the plaintiff was aware of the Standard explosion endorsement before the two renewals. The 1st defendant submitted that the renewal of a policy creates a new policy that was presumed to be on the terms of the earlier policy. DW1 testified as follows concerning the Special Conditions in the policy: -

“Refer page 33 (plaintiff’s bundle) special conditions are made known to the insured at the time the policy was given to them. I have no document to show when the plaintiff became aware of the conditions. This is a standard policy for fire cover. Terrorism exclusion clause is contained in the policy so the plaintiff knew about it through the policy when they received it.”

61. I note that the 1st defendant pleaded the said special conditions at paragraph 3A (b) of the Amended Defence as follows: -



By Special Condition 1 to Endorsement 3:

The Company shall not be liable under this extension, for loss or damage occasioned by or through or in consequence directly or indirectly of acts of terrorism committed by a person or persons acting on behalf of or in connection with any organization

For the purpose of this condition “terrorism means the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear

In addition, suit or other proceedings where the company alleges that by reason of the provisions of the conditions any loss or damage is not covered by insurance, the burden of proving that such loss or damage is covered shall be upon the insured.

62. From the above averments in the amended defence, it is clear that the plaintiff was aware of the 1st defendant’s intention to rely on the Special Condition 1 to Endorsement 3 of the policy. It was therefore incumbent upon the plaintiff to tender evidence to counter the 1st defendant’s claim and establish that it was not aware of the endorsement or that the explosion was not caused by a terrorists attack under the reverse onus doctrine. I however note that despite the centrality of the terrorism exclusion clause as the basis of declining liability, a fact which was known to the plaintiff long before it filed this case, nowhere in the plaintiff’s pleadings, witness statements or oral evidence did it state that it was not aware of the said clause. I find that the plaintiff’s claim that it was not aware of the terrorism clause or that the same did not form part of the policy is an afterthought and a belated attempt to deny a fact that was all along in their knowledge.
63. The plaintiff contended that the rule of evidence as captured under Sections 107 to 109 of the [Evidence Act](#) provides that “he who alleges must prove.” The plaintiff’s case was that the defendants had to prove that the explosion was caused by an act of terrorism.
64. It is not in doubt that the basic principle of proof in civil matters is stipulated in Section 107(1)(2) of the [Evidence Act](#) that provides thus:
- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
65. Section 109 of the [Evidence Act](#) is on the other hand explicit that:-
- “The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence...”
66. In *Spinneys Ltd & Others vs Royal Insurance Co Ltd* [1980] the court held, *inter alia* that the insurers cannot bring a clause into play simply by asserting that the loss was excluded by a particular exception and challenge the insured to prove the contrary but that the insured must produce evidence from which it can reasonably be argued that; (a) a state of affairs existed or an event occurred falling within an exception and (b) the excepted peril directly or indirectly caused the loss.



67. Guided by the above authority, I find that the defendant herein discharged its burden by demonstrating that the bomb explosion and its attendant damage fell within the terrorism exclusion clause and the ball was therefore in the plaintiff's court to disprove it.
68. The plaintiff submitted that it did not sign the policy in which the terrorism exclusion clause appears and neither was it notified of the exclusion clause in which case, the defendant could therefore not rely on the said clause.
69. My finding is that the plaintiff's claim that it did not sign the policy is contradictory and self-defeating, as it cannot on one hand produce the policy as proof that it was insured by the 1st defendant and on the other hand disown the policy on the basis that it did not sign it. It is trite that a contract can be oral, written in a single document or in a series of documents like in this case here. It is also a settled legal principle that parties are bound by the terms of their contract. I am guided by the decision in *Mamta Peeush Mahajan [Suing on behalf of the estate of the late Peeush Premal Mahajan] vs Yashwant Kumari Mahajan [Sued personally and as Executrix of the estate and beneficiary of the estate of the late Krishan Lal Mahajan]* [2017] eKLR where it was held:
- “It is common cause and trite law that not all agreements need be in writing. An agreement will be deemed duly formed and binding where there consideration in present and accepted having been offered. An agreement need not be in any special form or in writing unless statute expressly provides for it: see for example the Law of Contract Act (Cap 23), the Hire Purchase Act (Cap 507), the Bills of Exchange Act (Cap 27) and the Marine Insurance Act (Cap 390).
82. Where therefore parties reach an agreement on all the terms of contract they regard (or the law requires) as essential, a contract is deemed to have been formed. What is essential is the legal minimum to create a contract. These are the intention to create legal obligations and consideration. Other terms are secondary as far as formation of a contract is concerned. The reason is that the law does not require commercially sound terms or sensible terms. Parties may agree to any terms and the court will, once it is shown that the parties agreed and valid consideration exists, always hold the parties to their bargain.”
70. Similarly, in *National Bank of Kenya Ltd vs Pipe Plastic Samkolit (K) Ltd and another* (2002) EA 503 the court observed that it is a basic requirement of the law of contract that parties should be held to their bargain and that the mere fact that the bargain turns out to be less favourable is not a reason to resign from it.
71. Having regard to the above-cited authorities and having found that the endorsements were part of the insurance policy, I find that they were binding on the plaintiff.
72. I have already noted that indeed, the plaintiff produced the policy document to court as an exhibit. The plaintiff did not tender any evidence to support its claim that it received the policy together with the endorsements after the explosion. I find that since it is the plaintiff who alleged that the documents in question were brought to their attention after the explosion, the burden of proving such an allegation rested on the plaintiff. I find that in view of the fact that the plaintiff presented the policy documents to this court as part of its exhibits, the only logical conclusion that the court can make it that the plaintiff was well aware of the document and the terms thereof.



73. Having found that the explosion was caused by an act of terrorism that was not covered under the insurance policy, I find that the defendants are not liable for the damage caused to the plaintiff's property following the 7th August 1998 bomb blast.
74. In view of the finding on liability, I do not find it necessary to belabor the other issues listed for determination hereinabove. I find that the plaintiff's suit was not proved to the required standards and I accordingly dismiss it. I direct that each party shall bear its own costs of the suit considering the tragic and unprecedented nature of the 7th August 1998 terrorists' attack and its devastating impact on the lives and property of the Kenyan people.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 4TH DAY OF APRIL 2022

W. A. OKWANY

JUDGE

In the presence of: -

Mr. Sarvia for the plaintiff.

Mr. Fraser for 1st defendant.

No appearance for 2nd defendant.

Court Assistant: Sylvia

