



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HCCC NO. 410 OF 2017

UZURI FOODS LIMITED.....PLAINTIFF

VERSUS

OCCIDENTAL INSURANCE COMPANY LIMITED.....DEFENDANT

JUDGMENT

1. On 2nd December 2015, a silo containing grain collapsed at the premises of Uzuri Foods Limited (Uzuri or the Plaintiff). The collapse resulted in the discharge of grain and damage of two adjacent silos, elevators and conveyors and sadly, five (5) fatalities.

2. A dispute has arisen as to whether fire insurance policy OLG/F/04/83335/09 issued by Occidental Insurance Company Limited (Occidental or the Defendant) to Uzuri covered the loss or damage suffered as a result of that incident. It is the case for Uzuri that Occidental is liable to indemnify it in respect of the loss and seeks the following orders:-

a) A declaration that pursuant to the policy No. OLG/F/04/83335/09 between the Plaintiff and the Defendant, the Defendant is liable to indemnify the Plaintiff in respect of its loss arising from the collapse of the silo.

b) An indemnity in the sum of Kshs.304,887,535.17 or alternatively special damages in the said sum for breach of the Policy.

c) Consequential damages suffered by the Plaintiff as a result of the Defendant's breach of the Policy.

d) Interest on (b) and (c) at Court rates from the date of filing suit until payment in full.

e) Costs of this suit.

3. In defence to the claim, Occidental asserts that the loss and damage did not fall within any of the perils insured against in the policy, which was a fire insurance policy with limited extensions set out in the endorsement to the policy.

4. Answering a request of particulars dated 22nd November 2017 by Occidental, Uzuri stated that it was not aware as to what exactly caused the collapse of the silo. It however stated that on basis of the Loss Adjusters report commissioned by Occidental, the peril insured against could fall under either "shock" under the "Earthquake, Fire and Shock" endorsement or "Explosion" under the "Standard Explosion" endorsement. And that the claim for indemnity was for the loss suffered in respect to shock and/or explosion.

5. Three witnesses gave evidence. That evidence is considered where it assists the Court determine the issues that arise in this dispute.

6. The parties did not agree on issues and each was left to file its own. But a cursory examination of the two sets of issues reveals that the point of divergence is on the first issue. Uzuri sees it as:-

"What caused, or most probably caused, the collapse of the Plaintiff's silo?"

Occidental prefers to frame it as:-

"Whether the cause of the loss or damage suffered by Plaintiff was within any of the perils insured against the Defendant".

7. Occidental chooses to start the journey with what is similar to the second issue of Uzuri. The insured's second issue is:-

“Whether the cause of the loss or damage suffered by the Plaintiff was within any of the perils insured against by the Defendant.”

8. This Court leans towards the issues as framed by Uzuri because to be able to understand whether the cause of loss or damage fell within any of the insured perils, one would have to find out the cause or most probable cause of the incident. That is the starting point.

9. For that reason, and combining the two sets of issues, the Court sees the following as arising for determination:-

- i. What caused, or was the most probably cause, for the collapse of the Plaintiff's silo.
- ii. Whether the cause of the loss or damage suffered by the Plaintiff was within any of the perils insured by the Defendant.
- iii. Whether the Defendant had reasonable cause to repudiate the Plaintiff's claim.
- iv. Whether the Defendant ought to indemnify the Plaintiff for the loss suffered by the Plaintiff.
- v. What is the quantum of the loss suffered by the Plaintiff?
- vi. Costs.

10. As a precursor to examining the evidence presented, it is critical that the Court addresses the burden of proof in this type of dispute. On this the parties do not disagree. The general rule is that burden of proving that the loss in respect of which the claim arose from a covered peril is on insured. This is what McGillivray on Insurance Law 12th Edition Paragraph 20-006, cited by the Defendant's counsel states:-

“Generally on the assured. The burden of proving that the loss was caused by a peril insured against is on the assured.³² It is not necessary for him to prove precisely how the casualty occurred, but he must show that the proximate cause falls within the perils insured against. For example, the assured will discharge his burden under an all risks policy if he can show that the loss occurred accidentally.”

11. With this in mind, I turn to examine the case as constructed by Uzuri. In its pleadings, the Insured proceeded on the premise that the first silo burst in “unclear circumstances” resulting in its collapse. Uzuri then quotes a portion of a letter written by the insurer to the insurance broker that:-

“The cause of the shock loading and the resultant collapse could not be established as there was insufficient information on the rate of discharge and the condition of the stored material. Therefore they concluded that the cause of the loss was not due to any insured peril as mentioned in the Fire Policy.”

12. One of reasons put forward by Uzuri in its proposition that the claim is payable is that as the Loss Adjusters could not conclusively establish the cause of the collapse, then Occidental cannot conclusively or in good faith determine that the loss is not an insured peril under the policy.

13. Second, is that even assuming that the cause of the collapse of the initial silo was not ascertainable, the damage and loss caused to the surrounding silos, elevators and conveyors was clearly ascertainable and duly covered as a peril under the Policy. This argument is, of course, not without difficulty because what would matter is the cause of the collapse of the first silo. If the initial loss was not an insured peril then the aftermath would also not be covered unless the policy provided otherwise. Uzuri did not point out such provision.

14. To be gleaned from Uzuri's pleading, and as correctly submitted by counsel for the Insurer, Uzuri's case is that it was not aware of what exactly caused the collapse of the silo. As a fact, save for suggesting that the damage and loss that happened after the collapse of the initial silo was ascertainable, Uzuri does not state the cause or probable cause of the first collapse. The Plaintiff would be starting on the wrong footing because the expectation of the law is that it had to make out a *prima facie* case that the cause or probable cause of the loss and damage was within the insured perils and it would have to lead evidence that follows its pleadings.

15. That said, the prospects of Uzuri's case improved when Occidental requested it for particulars. It was in response to those particulars (see this elsewhere in the judgment) that it puts forth a case that, although not sure of the exact cause, the loss was caused by shock and/or explosion. I take it that notwithstanding any shortcomings in its pleadings, Uzuri had now clarified the basis of its action. An answer to a request for particulars under the provisions of Order 2 Rule 10 of the Civil Procedure Rules is a good opportunity for a party to make up for imprecise pleadings.

16. I turn to consider whether the Plaintiff has established that the cause or probable cause of the collapse of the silo was an explosion. But first, I observe that whilst the policy was essentially a Fire policy, the cover was extended to cover explosion under a Standard Explosion Endorsement which reads:-

“It is hereby declared and agreed that the insurance under this policy shall, subject to the special conditions herein after contained extend to include:-

Loss or damage to the property insured by fire or otherwise directly caused by explosion, but including loss of or damages to boilers,

economisers 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 had 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 the Policy.”

17. Aneez Lalji (PW1) is a director of Uzuri and gave evidence on behalf of the company. Nowhere in his written statement does he state that the collapse of the silo was caused by an explosion. However, in his oral evidence he says that on the fateful day he was leaving his office when he heard a loud explosion after which he saw one of the silos drop and disappear. He was later to say that the bursting of the silo was accompanied by the sound of an explosion.

18. Under cross-examination, he stated that it was the skin of the silo that burst but he did not know what caused it to do so. He further stated that explosions do not always involve a fire. It being common ground that there was no fire.

19. Asked whether the noise was loud, he answered:-

“Yes, it sounded like an explosion.”

He disputed that the noise could be from the rupture of the skin of the silo.

20. As to why he came to the conclusion that the sound was of an explosion, he stated that it sounded like fire crackers. Put to him that even the skin of the silo bursting could make a noise he answered:-

“It probably did, but you must keep in mind there were 3,000 tonnes of grain on top, so any, sounds are muted initially under the grain”.

In re-examination the witness sought to differentiate between the sound of a skin bursting and the sound of an explosion. He reiterated that the sound of an explosion is like a fire cracker but that of bursting are sounds of sheets “tearing or pulling apart.”

21. There is further evidence that in the course of investigations, the insured told the investigators that the bursting was accompanied by the sound of “an explosion”. This is captured in the Loss Adjusters report.

22. On the part of the insurer, the Loss Adjustor concluded as follows:-

“The wall of the silo No. 1 ruptured at a height above the floor of some 3m along approximately vertical lines in three locations around the silo. The ruptures were due to a “shock” load of internal pressures of the contents of the silo: it was almost full at the time of collapse. The approximate cause of failure is not thought to be due to yield stresses of wall material being somewhat less than apparently specified: if it were the initial failure would probably have occurred in a single location. The cause of the shock loading could not be established as there was insufficient information on the rate of discharge and the condition of the stored material. Rapid discharge of grain from the bursting of silo No. 1 led to severe damage to its neighbours, Nos 2 & 6, to supports of handling machinery and to minor damage to silo Nos 3 & 7 which can be repaired.”

23. So what is to be made of this evidence?

24. From my reading of the submissions of counsels for both sides, it is agreed that the decision in Rutgens Distributors Inc –vs- United States Fidelity and Guaranty Company 94 111 App 3d 753 (1981) the Appellate Court of Illinois – Third District is good guide on the burden of proof where a dispute involves the coverage of a policy insuring against loss by explosion. This Court agrees that the decision is a good proposition of the law in that regard and is really in line with the general rule that the burden of proof is on the insured to prove that the proximate cause is an insured peril within the terms of the policy. The Court held:-

“The general rule pertaining to the burden of proof in cases where a question arises as to the coverage of a policy insuring against loss by explosion is succinctly stated in Couch's treatise on the law of insurance: "When the policy covers loss and damage by explosion, the burden of proof is upon the insured to establish that there was an explosion. The insured under the explosion policy, however, has only the burden of proving that there was an explosion and need not prove in what particular way the explosion was caused...The coverage that the insured has purchased is coverage against loss from explosion. Therefore, all the insured should have to prove to make a prima facie case within the coverage of the policy is that an explosion occurred. The cause of the explosion is irrelevant unless the insurer, by the very terms of the policy, limits its coverage by excluding explosions from specified causes.”

25. For the insured, it is submitted that PW1's testimony that he heard an explosion right before the silo collapsed was unshaken and it rendered explosion as a plausible cause of the loss. That as the evidence of the witness survived a rigorous cross-examination, then it has to be taken as the truth of the matter stated. I was referred to the holding in Kenya Akiba Micro Financing Limited –vs- Ezekiel Chebii & 14 Others [2012] eKLR:

“In my view, a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter”.

26. Occidental on the other hand makes heavy weather of the fact that explosion as a cause of the loss was neither pleaded nor raised in the

statement of evidence of Mr. Lalji. Further, it is not the evidence of Lalji that he was standing looking at the silo so that he could assert that the explosion came before the rupture of the wall sheets.

27. It is submitted that even at its highest point, the evidence by the Plaintiff that there was a sound like an explosion does not establish explosion within the terms of the policy. Counsel for the insurer submits that the evidence falls short of establishing “*an event which was violent, noisy and caused by rapid chemical or nuclear reaction or bursting out of gas or vapour under pressure.*” This is drawn from the decision of Staughton J in Commonwealth Smelting Ltd & Another -vs- Guardian Royal Exchange Assurance Ltd [1984] 2 Lloyd's Rep 605 in which his Lordship grappled with the meaning to be assigned to the word “explosion” as an insured peril. He held:-

“It is apparent that the word “explosion” may have different shades of meaning according to its context. Thus Mr. Adams and Mr. Westlake both perceived an explosion. It seems to me that they used the word correctly for the purpose of relating it to others or to the court what they saw and heard that night. They are using it in the sense of Oxford English Dictionary meaning (2) or Wild meaning (1). But I am concerned with the meaning of the word as one of the perils covered by a policy of insurance. In that context it is proper to pay more attention to the cause of a particular event than to what it looks or sounds like to an observer some yards away. The perils in a policy of insurance are, after all, an attempt to define certain causes of loss.

It seems to me that the word ‘explosion’ is used in these policies to denote the kind of catastrophe described in Webster 1961 and Encyclopaedia Britannica: an event that is violent, noisy and are caused by a very rapid chemical or nuclear reaction or the bursting out of gas or vapour under pressure.”

28. Mr. Lalji who gave evidence of what he heard on that day was fairly firm that he heard a loud noise which preceded the collapse of the silo. As to the nature of the noise, he said that it was like that made by a fire cracker. He thus concluded that it was a sound of an explosion. If it is true that the noise was of that nature then it could be taken to be the noise of an explosion that fits the meaning assigned to it in **Commonwealth Smelting Ltd** (*Supra*) as the noise was violent, loud and noisy. It was also clear to this witness that although the bursting of the skin would produce a loud noise, it would be of a different character involving tearing or pulling apart of sheets. A noise that he did not hear!

29. As there was no evidence to the contrary on this aspect and since the evidence did not stumble under cross-examination, the Court holds that Lalji heard a loud noise that he made out to be an explosion. That noise preceded the collapse of the silo.

30. As to whether this alone is apparent (or put differently *prima facie*) evidence that there was probably an explosion, so as to shift the burden of proof to the insurer to prove otherwise is the more vexed question. Again, I observe that Lalji’s evidence in relation to the sound of an explosion was raised even before the presentation of these proceedings. In the course of investigation of the accident he had told the loss adjuster that the bursting of the silos was accompanied by the sound of an explosion.

31. Yet it has to be asked, why, if the insured was of the conviction that the probable cause of the collapse was an explosion did it not state so in the claim form that it filled on 6th July 2016. The insured did not give any answer to the question:-

“Describe fully how loss or damage occurred.”

32. The uncertainty as to the probable cause of the loss persists in the case pleaded. Not once in the Pleat does the Uzuri suggest that the probable cause of the accident was an explosion. At one point it was content to plead that the silo burst in unclear circumstances. At another, willing to accept that the ruptures were due to shock load of internal pressure of the contents of the silo as reported by the loss adjusters (See Paragraph 15 (c) of the Pleat).

33. When I take the hesitant pre-suit position of the insured that found its way into the pleadings, together with the evidence that there was a noise of an explosion before the collapse of the silo, as opposed to evidence of an actual explosion, I am unable to find that the Uzuri has made out a *prima facie* case that the probable cause of the accident was an explosion. For that reason the Plaintiff has not done enough to require the Defendant to disprove that the probable cause of the loss or damage was an explosion.

34. But let me, for a moment, assume that my conclusion is wrong.

35. In answer to the request for particulars by Occidental, Uzuri stated that it was not aware of what exactly caused the collapse of the silo but relying on the Loss Adjuster’s report, the peril insured could fall under “Shock” under the Earthquake, Fire and Shock endorsement or “Explosion” under the Standard Explosion Endorsement.

36. Two critical issues arise from this statement. The first is that in seeking to rely on Loss Adjuster’s reports, Uzuri does not doubt the conclusion reached in the report. Uzuri sought to rely on it in proving its case. Second, and this is repeated in its submissions, that an insurance claim may entail a concurrent causation where two perils occur at the same time, and the mere occurrence of one peril does not negative the possibility of occurrence of another.

37. I take it therefore that the Plaintiff’s case is that a causation by a shock is distinct from a causation by an explosion, although the insured makes it clear, in its submissions, that it is not its proposition that the two happened concurrently.

38. The Loss Adjuster’s conclusion is then all important:-

“The wall of the silo No. 1 ruptured at a height above the floor of some 3m along approximately vertical lines in three locations around the silo. The ruptures were due to a “shock” load of internal pressures of the contents of the silo: it was almost full at the

time of collapse. The approximate cause of failure is not thought to be due to yield stresses of wall material being somewhat less than apparently specified: if it were the initial failure would probably have occurred in a single location. The cause of the shock loading could not be established as there was insufficient information on the rate of discharge and the condition of the stored material. Rapid discharge of grain from the bursting of silo No. 1 led to severe damage to its neighbours, Nos 2 & 6, to supports of handling machinery and to minor damage to silo Nos 3 & 7 which can be repaired.”

39. The report is emphatic that the rupture was due to a shock load of internal pressure of the contents of the silo. On the other hand, it reports that the cause of the shock loading could not be established. As the causation of a shock and an explosion are different, then this report, whose findings were not faulted by the Plaintiff, is evidence that the possible cause of the collapse was a shock and not by an explosion.

40. I turn now to consider Uzuri’s twin issues that the collapse of the silo was caused by a shock and that shock is an insured peril.

41. Uzuri leans on the Loss Adjuster’s report as proof that the incident was caused by a shock. This indeed is the tone of the report whose conclusion I have just reproduced.

42. Occidental asserts that, notwithstanding the findings of the Loss Adjuster, Uzuri has been unable to establish that the cause of the collapse was shock. It is submitted on its behalf, that the loss adjuster’s opinion is an inconclusive speculation. On my part I have no doubt that the report is inconclusive in one respect; that the cause of the shock loading could not be established. Yet it is emphatic that the ruptures on the wall of silo No. 1 was due to a “shock”. Shock was the cause of the collapse but what caused the shock was not determined. If there was an unqualified policy against an incident caused by shock, then the evidence that shock caused the collapse would be sufficient to hold the insurer liable.

43. The more intriguing issue has to be whether what is intitled “Earthquake, Fire and Shock endorsement” in the policy makes “shock” an insured peril. The difficulty arises because the provisions of the substantive clause seems to be more narrow than the heading. It reads:-

EARTHQUAKE, FIRE AND SHOCK ENDORSEMENT

“In consideration of the payment of the insured to the Company of an additional premium, the company agrees notwithstanding what is stated in the printed conditions of this Policy to the contrary, that this insurance covers loss or damage occasioned by or through or in consequence of earthquake.

PROVIDED always that all the conditions of this Policy (except in so far as Condition No. 6(a) is hereby expressly valid) shall apply as if they had been incorporated herein and for the purpose hereof any loss or damage by earthquake as aforesaid shall be deemed to be loss or damage by fire within the meaning of this Policy.”

44. Uzuri takes the view that as the word shock is in the title then shock is an insured peril. It makes the further argument that if there is an ambiguity then that ambiguity should be resolved in its favour.

45. Occidental perceives no vagueness and its witness, Mr. Kimani, explained that the shock covered under the endorsement is shock that is related to or results from an earthquake.

46. As a starting point, I would have to agree with counsel for Uzuri that, with reference to insurance, the tendency has to be to hold for the assured than for the company where there is ambiguity in a policy; (Fitton -vs- The Accidental Death Insurance Co (1864) 17 C.B (N.S) 123. That the rule of contra proferentem applies strongly to policies of insurance is discussed in English -vs- Western (1940) 2 K.B 156:-

“I am of the opinion, therefore, that in the case of insurance, the principle that the document must be construed ‘contra preferentes’ strongly applies. The language is the insurers’ own, and in an exception it must be read contra preferentes. If they intended no more than “handed over” they should have said so, and the more plainly the better.”

47. As observed earlier, the heading of the relevant clause appears to be at odds with the contents of the clause itself. Counsel for Uzuri submits:-

“To clear the ambiguity (no pun intended) there is glaring inconsistency between the heading of the endorsement and the wording of the clause with the former providing for shock and the latter making no reference to shock. One is therefore left wonder to whether or not shock is covered.”

48. Counsel further argues that headings of clause are no less important than the clause itself. This is what the Court held in SBJ Stephenson -vs- Mandy (1999) EWHC 276:-

“Although interpretation clause 21(B) of the agreement provides that clause headings are inserted for convenience only and shall not affect the construction of the agreement, it seems to me that the convenience which they provide is to tell the reader at a glance what the clause is about.”

49. Citing the case of Cott UK Ltd -vs- F.E. Barber Ltd [1997] 3 All E.R. 540, counsel for Occidental retorts that the heading of a clause could not prevail over the express wording of the clause or create ambiguity where no ambiguity was present. It is asserted that there is no ambiguity in the operative parts of the endorsement and a word in the heading cannot prevail over the substantive wording of the endorsement or create ambiguity where none exists.

50. I have read the decisions in SBJ Stephenson (supra) and Cott UK Ltd (supra). This Court has also read the decision in Doughty Hanson & Co Limited -vs- Roe [2007] EWCC 212 (Ch) in which the Court held:-

“While Article 3 provides that “Headings are for convenience only and shall not affect construction”, that heading is descriptive of what the provision is about (that is doubtless the convenience - See SBJ Stephenson -vs- Mandy [2000] FSR 286 @ 297.”

51. In Gregory Projects (Halifax) Ltd -vs- Tenpin Halifax Ltd & Another [2010] 2 ALL ER (COMM) 646 the Court held:-

“The cases are divided on the question whether in these circumstances a heading should be taken into account (SBJ Stephenson Ltd v Mandy [2000] FSR 286, 297 and Doughty Hanson & Co Ltd v Roe [2009] BCC 126 § 71 say "Yes", while Orleans Investments Pty Ltd v MindShare Communications Ltd [2009] NSWCA 40 § 68 says "No"). Where, as here, the contract says in terms that headings "shall not affect the interpretation" it seems to me that respect for party autonomy means that the headings cannot be allowed to alter what would otherwise have been the interpretation of the clause in question.”

52. Reading those decisions it seems that headings of a clause will be given constructional significance if it is consistent with the substantive contents of the clause. Where the substantive contents are not ambiguous, then the heading cannot be used to destroy what has been clearly expressed by the parties to be the intention of a clause. The clause must be read in its entirety to determine the overall meaning. Where the substance is without ambiguity then to use a heading to suggest a different meaning to the substantive provision is contrary to the Courts role and mandate which is simply to uphold the true intention of the contracting parties.

53. Take SBJ Stephenson (supra) as an example. It was an action brought by a company of Insurance brokers against a former employee, seeking to enforce the terms of restrictive covenants contained in a service agreement. One of the provisions in the agreement was:-

“Confidential information

(A) The Executive shall not either before or after the termination of his employment hereunder disclose to any person or persons any information in relation to the affairs of the company any other group company or any client thereof of which he has become or may have become possessed whilst in the service of the company except in the proper course of his duties hereunder or as authorized by the Board or as ordered by the Court of competent jurisdiction.”

The Court held that an ordinary sensible person reading this clause would read it as applying to information which would justify a restriction. The Court further held that even if the word “confidential” was inserted before “termination” in the body of the clause, one would still have to identify information which would be legitimately protected. The Judge did not find the heading of the clause and the substance of the clause to be inconsistent.

54. While the proposition that headings of a clause will not be used to overawe the meaning of an unambiguous substantive clause holds particularly true for a document with a provision that headings are to be ignored in interpreting the document, the decision in Cott UK Ltd (supra) suggests that in the absence of such a provision, the due weight to be given to the words used in the headings becomes critical. Put differently, in the absence of such a provision, a heading will be considered in construing a clause but it should not be given undue weight or importance so as to read an ambiguity in a substantive provision which is otherwise without uncertainty.

55. It is not doubted that ambiguities in an insurance contract should be resolved in favour of the insured. In this regard, Uzuri also relied in the Court of Appeal decision of Masari Distributors Limited -vs- UAP Provincial Insurance Company Limited [2017] eKLR which stated:-

“It has been held in various jurisdictions that where a condition in a policy is not clear, such condition is to be construed against the insurance company - this was part of the holding in Jones & Another (supra). A useful discussion on this is to be found in a decision of the Supreme Court of the Philippines in Eternal Gardens Memorial Park Corporation v The Philippine American Life Insurance Company, G.R. No. 166245 of 2008 where the following passage appears:

"It must be remembered that an insurance contract is a contract of adhesion which must be construed liberally in favour of the insured and strictly against the insurer in order to safeguard the latter's interest. Thus, in Malayan Insurance Corporation v Court of Appeal this Court held that:

'Indemnity and liability insurance policies are construed in accordance with the general rule of resolving any ambiguity therein in favour of the insured, where the contract or policy is prepared by the insurer. A contract of insurance, being a contract of adhesion, par excellence, any ambiguity therein should be resolved against the insurer; in other words, it should be construed liberally in favour of the insured and strictly against the insurer. Limitations of liability should be regarded with extreme jealousy and must be construed in such a way as to preclude the insurer from non-compliance with its obligations'".

56. Yet it is not my understanding that the rules of interpretation of contracts should be artificially stretched when construing insurance contracts so as to find or force an ambiguity or uncertainty where there is none. The Court understands the law simply to be that once there is a true ambiguity, then that ambiguity should be readily or liberally construed in favour of the insured.

57. With this appreciation of the law, the Court turns to examine the contract. The insurance policy, admittedly, does not have the boilerplate clause prohibiting use of the headings to interpret the document, and so this Court will give the words in the heading due weight.

58. Because of its centrality to this dispute I reproduce the controversial clause;

EARTHQUAKE, FIRE AND SHOCK ENDORSEMENT

“In consideration of the payment of the insured to the Company of an additional premium, the company agrees notwithstanding what is stated in the printed conditions of this Policy to the contrary, that this insurance covers loss or damage occasioned by or through or in consequence of earthquake.

PROVIDED always that all the conditions of this Policy (except in so far as Condition No. 6(a) is hereby expressly valid) shall apply as if they had been incorporated herein and for the purpose hereof any loss or damage by earthquake as aforesaid shall be deemed to be loss or damage by fire within the meaning of this Policy.”

59. Condition 5 of the policy provides that it does not cover any loss or damaged occasioned by or through or in consequence, directly or indirectly of earthquake amongst other perils. The endorsement, as correctly pointed out by the counsel for Occidental is a “give back” as it grants extension to a peril otherwise expressly excluded. The substantive contents of the clause are not ambiguous, and I do not hear Uzuri argue against that. On the other hand, the heading suggests that the endorsement is also in respect to fire and shock. How much weight should be given to this heading in construing the entire clause? Because it seems inconsistent with the substance of the clause, to give it disproportionate or undue weight will result in creating an ambiguity in the substantive part of the provision. It will be to allow the heading to overawe substantive provisions which on their own are without ambiguity. The outcome will be that the heading will have destroyed the entire meaning of the clause by including a peril that is not granted in the body of the clause. For this the Court is reluctant to give much weight to the heading and holds that the endorsement did not extend to the perils caused by shock. And so to the question whether the Defendant had reasonable cause to repudiate the Plaintiff’s claim, the Court’s answer is in the affirmative.

60. However, had this court found the Defendant liable then it would have made an award of Kshs.257,500,132/=. There is consensus on this in the submissions of both the Plaintiff and Defendant.

61. Otherwise for reasons given, I hereby dismiss the Plaintiff’s claim with costs to the Defendant.

Dated, Signed and Delivered in Court at Nairobi this 27th Day of July 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Judgment has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Mr Mbaluto for the Plaintiff.

Mr Fraser S.C. for the Defendant