**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL SUIT NO. 1 OF 2013**

**GIANFRANCO MANENTI.....1ST PLAINTIFF**

**ANTONIETTA FARINATO.....2ND PLAINTIFF**

**VERSUS**

**AFRICA MERCHANT ASSURANCE CO. LTD.....DEFENDANT**

**JUDGEMENT**

1. This is a special damages claim based on an insurance policy in which the 1st Plaintiff, Gianfranco Manenti was the insured, the 2nd Plaintiff, Antonietta Farinato, the registered owner of the parcel of land upon which the insured property was erected and the Defendant, AMACO Assurance Company Limited, the insurer.

2. The plaintiffs, Italians who frequented Kenya, were husband and wife. The 1st Plaintiff passed away in the course of the trial.

3. Order 24 Rule 1 of the Civil Procedure Rules, 2010 kicked in upon the demise of the 1st Plaintiff. It states:

> **"The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues."**

4. Rule 2 of the same Order clarifies matters thus:

> **"Where there are more plaintiffs or defendants than one, and any one of them dies, and where the cause of action survives or continues to the surviving plaintiff or plaintiffs alone or against the surviving defendant or defendants alone, the court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants."**

5. By virtue of the cited Rule, the cause of action continued to survive to the 2nd Plaintiff .

6. The plaintiffs claim was that the specified subject being a villa was consumed by fire, a peril against which the insurance policy was taken out. The amended plaint as filed on 18th May, 2015 indicates that the insurance policy was taken out in or about August 2007 for a period of one year. The Defendant conducted all due diligence including valuing the developments erected on the land and the plaintiffs subsequently paid premium for a cover of approximately Kshs. 23,000,000. The cover expired in August, 2008 and the same was extended by the plaintiffs for another year so as to expire on or about 25th August, 2009. During the pendency of the policy one of the risks covered being fire occurred on 21st June, 2009.

7. The plaintiffs contacted their contractor to follow up on the issue as they were back in their motherland. On presenting their claim to the Defendant, they were offered an initial deposit of Kshs. 500,000 with no indication as to how much the Defendant would be paying. Subsequently, when the Defendant failed to make a confirmation on the payable amount despite numerous attempts by the plaintiffs to get a clear indication, the plaintiffs declined to take up the offer. The Defendant thereafter became evasive and non-committal compelling the plaintiffs to commence the repairs at their own cost which they finalized in November 2011. The Defendant did not budge even upon being served with a demand notice indicating the plaintiffs' intention to seek legal redress.

8. The plaintiffs' claim is for Kshs. 11,620,000 being costs of repairs and construction of the villa at Kshs. 10,500,000 plus Kshs. 1,120,000 for the furniture and furnishings lost in the fire.

9. The Defendant's defence as conveyed through the statement of defence amended on 28th May, 2015 is basically a denial of the claim in total adding that if the property was destroyed by fire, which is also denied, the cause of the same was not a peril covered under the insurance hence the Defendant is not liable to compensate the plaintiffs at all.

10. The 2nd Plaintiff who testified as PW1 told the court that she is the owner of the villa that was insured by the Defendant. At the material time she had hired two housekeepers to maintain the property. One of the housekeepers was on leave when the incident occurred. The fire whose cause she did not know destroyed 30 villas. Police officers visited the scene. It was her testimony that the loss was in the region of 100,000 pounds. The insurer was notified through their Malindi offices of the loss. It was her evidence that the Defendant offered Kshs. 500,000 as initial deposit with no indication of what the full compensation would be. A valuation done disclosed the total cost of repairs was Kshs. 10,500,000 and the furniture was Kshs. 1,120,000. Her evidence was that this was the amount used to repair and refurnish their house. PW1 also relied on her written statement plus the bundle of documents which was produced as exhibit.

11. Upon cross-examination PW1 stated that the housekeeper who informed her of the incident was not a witness in the matter and confirmed that she did not know the cause of the fire. She admitted that she had averred in her affidavit that the fire was caused by a faulty Kenya Power transformer. According to her that was the information she had received from other residents. She stated that she did not hire an expert to establish the cause of the fire. It was further her evidence that the contractor who originally constructed the house reconstructed it and proof of payment had been produced. The makuti roof had been replaced with another type of roofing material during reconstruction.

12. In re-examination PW1 confirmed that the fire spread from elsewhere affecting about 40 villas and destroying everything at her house save for the four walls. She stated that the contractor gave her a quotation and the initial offer by the Defendant was 5,000 euros.

13. DW1 Kennedy Kiprop is the Defendant's Business Development Manager in charge of research and relationships. He testified that he was the Claims Manager with the Defendant at the material time and was thus familiar with the facts of this case. His evidence was that the Defendant had a fire policy No. AND/030/00153/2009/05 with the plaintiffs in respect of a residential building. He stated that the plaintiffs had taken a cover for Kshs. 10,000,000 comprised of Kshs. 9,000,000 for the building under Section A of the policy and Kshs. 1,000,000 for the contents under Section B of the policy. He further testified that a fire destroyed the house and the Defendant paid part of the claim based on the interim adjustment. DW1 stated that the Defendant hired Universal Loss Adjusters, a loss adjuster, to assess the claim and in a report submitted on 15th April, 2011 the loss adjuster recommended payment of Kshs. 3,291,158 against the plaintiffs' claim of Kshs. 14,426,400. According to DW1, the insured had underinsured the property as the actual value of the property as found to be Kshs. 33,500,000.

14. DW1 explained that by applying the rule of average the sum insured is divided by the actual value of the property and multiplied by the claim made. In this case it emerged that a sum of Kshs. 2,700,000 was to be paid out to the insured for the building and Kshs. 591,158 for the furnishings thus making a total of Kshs. 3,291,158 minus the interim payment. DW1 explained that the balance of Kshs. 2,791,158 was however not paid as the insured claimed the compensation was low hence the suit. DW1 indicated the Defendant's willingness to pay the balance. DW1 also relied on his written statement and a bundle of documents which he produced in evidence.

15. Responding to questions put to him during cross-examination, DW1 admitted that there was a fire policy taken out by the plaintiffs payable upon occurrence of the risk covered but for the amount he had talked about.

16. The parties filed their submissions which were highlighted. It was submitted for the plaintiffs that the policy taken out was number AMD/030/000041/07/08 for Kshs. 22,000,000 for which a premium of Kshs. 165,000 was made. It was further submitted that the house was completely razed down by the fire necessitating repairs. It was also urged for the plaintiffs that though special damages ought to be specifically pleaded, the Defendant had admitted the quotation provided by the plaintiffs.

17. It was generally submitted for the Defendant that the amounts payable were for the building and the contents as per the loss adjuster's findings. It was further submitted for the Defendant that the plaintiffs did not prove the specific loss of the contents of the house that were insured as they were not specifically listed. On this point the Defendant relied on the Court of Appeal decision in **Hahn v Singh, Civil Appeal No. 42 of 1983**.

18. The question is whether the plaintiffs suffered loss as a result of the occurrence of a risk that they had insured.

19. Basically, a contract of insurance binds an insurer who has received a premium from the insured to make payment to the insured or a third party upon the occurrence of the event that is the object of the risk.

20. **P. Ramanatha Aiyar: the Major Law Lexicon, 4th edition** defines a contract of insurance thus:

> **"It may be defined as a contract whereby one party (the insurer) promises in return for a money consideration (the premium) to pay the other party (the insured) money or money's worth on the happening of an uncertain event more or less adverse to the interest of the insured."**

21. The Court of Appeal in **Madison Insurance Company Limited v Solomon Kinara t/a Kisii Physiotherapy Clinic [2004] eKLR; Civil Appeal No. 263 of 2003 (Kisumu)** after quoting a passage from the **Law of Insurance, 2nd Edition at page 4 by Preston and Colinvaux** provided its own definition of a contract of insurance as follows:

> **"… the passage nevertheless brings out the basic concept underlying a contract of insurance, namely that the party whose property is being insured pays premium not with the intention of making any profit out of the transaction but rather with the intention that were the items assured to be destroyed, stolen or damaged, the other party offering the policy would replace the stolen or destroyed item or pay the reasonable charges for its repair."**

22. In the passage cited by the Court of Appeal, it was stated that:

> **"Indemnity, it has been said, is the controlling principle in insurance law, and by reference to that principle a great many difficulties arising on insurance contracts can be settled. Except in insurance on life and against accident the insurer contracts to indemnify the assured for what he may actually lose by the happening of the events upon which the insurer's liability is to arise, and in no circumstances, is the assured in theory entitled to make a profit or loss. That rule might be inferred as being the intention of the parties, having regard to the aim of a contract of insurance, but there are further powerful reasons for its application. Were it not so, the two parties to the contract would not have a common interest in the preservation of the thing insured and the contract would create a desire for the happening of the event insured against. Where in fact the assured has a prospect of profit, there and there only can arise the temptation to commit crime, fraud or such carelessness as may bring about the destruction of the thing insured."**

23. In a contract of insurance, the insured can only get the thing insured or its money equivalent. When a person takes out an insurance policy, he is not venturing into business so as to make a profit upon the occurrence of the event. Indeed the occurrence of the event is uncertain. A person who takes out an insurance cover is only interested in protecting what he already has in case of the occurrence of an unforeseeable calamity.

24. Though it was denied by the defence in this case, it came out clearly that there was no dispute that a contract of insurance subsisted during the occurrence of the peril insured against. Further, it was no longer disputed that fire was one of the perils the insurance covered. The risk therefore having attached, the insurer was obligated to act. The Defendant therefore became liable. Indeed this was admitted by DW1 who stated that they took steps to pay the plaintiffs' claim.

25. The Defendant urged that the special damages were not specifically pleaded and specifically proved hence not awardable. The Defendant is indeed correct that not only are special damages supposed to be specifically pleaded, they must also be specifically proved. In **Hahn** (supra) it was held that:

> **"Now the next two grounds of the memorandum concern special damages which must be not only claimed specifically but proved strictly for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the acts themselves."**

26. In **Capital Fish Kenya Limited v the Kenya Power & Lighting Company Limited [2016] eKLR; 189 of 2014 (Nairobi)**, the Court of Appeal again stated on the subject that the time tested principles is **"that special damages should not only be specifically pleaded but must also be strictly proved."**

27. The plaintiffs in this case produced the quotations requested for by the insurer on the repairs and also an inventory of the items destroyed or lost during the fire and those replaced and their value. The loss adjuster's report produced as an exhibit by the defence indicates that the claim form presented by the insured to the insurer had a contents list and a quotation on the repair of the building. The adjuster actually used the quotation by the plaintiffs'contractor who repaired the building as the basis of arriving at the adjustment using the rule of average. The Defendant by showing willingness to pay what it believes is the balance owed based on the adjustment is indicative of the admission of the claim save that the Defendant referred to a different policy document. DW1 upon being challenged by counsel for the plaintiffs could not produce any evidence of an interim payment as claimed. The Defendant is therefore estopped from denying the claim. In my considered view, the quotation by the contractor and the list of contents suffice as specific proof.

28. Under the particular circumstances of this case, I also find that the pleading was specific. There is a claim of Kshs. 10,500,000 being the cost of reconstructing the building and a claim of Kshs. 1,120,000 being the cost of replacement of the furniture.

29. It emerged from the evidence that the Defendant referred to a different policy number from the one issued to the plaintiffs. The one issued to the plaintiffs was for a cover worth Kshs. 22,000,000. The policy indicates that the basis of settlement was repair of the damaged or destroyed property or reinstatement of the same at full replacement value. For the contents, being the pieces of furniture, the basis was full replacement value less a reasonable deduction for wear and tear depreciation. The insurer could elect to make **"payment, reinstate or repair the property damaged, stolen or destroyed."**

30. The Defendant admitted it offered an initial amount of Kshs. 500,000 but did not produce any evidence that the amount was actually paid out. According to the plaintiffs although the offer was made the Defendant did not thereafter give an indication of what the money was for in terms of the exact amount that would be the full and final settlement or whether it had elected to repair or replace the property damaged by the fire. The communication in the plaintiffs' bundle of documents gives an impression that the Defendant was reluctant to act hence the suit.

31. An insurance contract is one of utmost good faith. The Defendant having received premium and having issued the policy cannot now disown its obligations as there was no breach of the contract by the plaintiffs. There was an attempt to paint the plaintiffs as dishonest persons for having undervalued the property. DW1 claimed the loss adjuster found that the actual value of the property was over Kshs. 30,000,000 but there was no valuation report exhibited to this effect by the defence. In my view, the amounts claimed by the insured were covered under the policy taken out.

32. The plaintiffs' case therefore succeeds and the amount payable is the cost of reconstructing and refurbishing the villa and the cost for refurnishing the villa as claimed in the plaint. The plaintiffs' counsel suggested the amount of Kshs. 22,000,000 should be paid. This approach would defeat the purpose of insurance. As already stated, an insurance contract is not a money making venture for the insured.

33. The plaintiffs only need to be reinstated to the financial position in which they were before the fire gutted their property. Judgement is therefore entered in favour of the plaintiffs and against the Defendant in the sum of Kshs. 11,620,000 plus interest at court rates from the date

of this judgement until payment in full. The plaintiffs will also have the costs of the suit from the Defendant.

**Dated, signed and delivered at Malindi this 19th day of December, 2018.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**