REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 482 OF 2010

CO-OPERATIVE INSURANCE COMPANY LIMITED ……1ST APPELLANT

VERSUS

SECUCENTRE LIMITED …….....……..1ST RESPONDENT

SUSAN KAHOYA T/A SUSAN KAHOYA & COMPANY ADVOCATES.....2ND RESPONDENT

JUDGMENT

1. This appeal arises from the judgment and decree of Honourable A.K. Ndungu (Mr) Senior Principle Magistrate (as he then was) delivered on 29th October 2010 in Milimani CM CC No. 5079 of 2008. Secucenter Limited V Susan Kahoya T/A Susan Kahoya & Company Advocates and Co-operative Insurance Company Limited. The appeal dated 9th November 2010 sets out 11 grounds of appeal namely:-

1. The Learned Magistrate erred in law and in fact in finding and awarding general damages and or awarding general damages were (sic) so excessive as to amount to an abuse of discretion.
2. The Learned Magistrate erred in law and in fact in finding and holding that he appellant was 100% liable or in any way liable for the loss sustained by the 1st respondent.
3. The Learned Magistrate erred in law and in fact in failing to make a proper assessment of the losses allegedly sustained by the respondent.
4. The Learned Magistrate erred in law and in fact in applying wrong principles in awarding general and special damages.
5. The Learned Magistrate erred in law and in fact in upholding the evidence tendered on behalf of the 1st respondent in respect of the claim filed and ignoring the law on this subject tendered by the appellant
6. The Learned Magistrate erred in law and in fact in totally ignoring the evidence, the law and the submissions put in by the appellant thereby arriving at a wrong decision on both liability and quantum of damages.
7. The Learned Magistrate misdirected himself on the applicable measures of award of general damages in favour of the 1st respondent.
8. The Learned Magistrate erred in law and in fact in failing to apportion liability between the defendants and yet a notice of claim against co-defendant was filed.
9. The Learned Magistrate erred in law and in fact in failing to make a finding that the suit before him was incurably defective since no cause of action was disclosed against the appellant.
10. The Learned Magistrate erred in law and in fact in failing to make a ruling that the suit was defective for wrongful joinder of defendants.

11. The Learned Magistrate erred in law and in fact in applying the wrong principles on avoidance of an insurance policy.

2. The appellant prayed that the appeal be allowed; judgment of the lower court passed on 29th October 2010 be quashed and or set aside; the court do make its own finding on liability and assessment of damages awardable to the 1st respondent; the respondent do pay the costs of the appeal and the lower court; and any other relief deemed appropriate in the circumstances.

3. The genesis of the dispute giving rise to the present appeal is that vide plaint filed in court on 27th August 2003 by Secucenter Limited, the company claimed that it has insured its motor vehicle registration No. KAQ 601B which was involved in an accident on 18th April 2003 whilst carrying one Mr Jared Maina Mageto who was not its employee. The comprehensive insurance cover was with Co-operative Insurance Company Limited the appellant herein.

4. That the plaintiff, who are the 1st respondents in this appeal and defendants in Milimani CM CC 8313/2003 were served with summons to enter appearance and plaint which they immediately forwarded to the appellant insurance company and it also instructed its advocate T.O. K'opere & Company Advocates which latter advocate on entering appearance on behalf of his client 1st respondent herein found that the appellant had already instructed their advocates Susan Kahoya (2nd respondent herein) who had by then entered an appearance and filed defence on behalf of the 1st respondent hence M/S T.O. K'opere advocates ceased acting on instructions of the appellant.

5. Later, on the 14th June 2006, the 1st respondent was surprised when its properties were proclaimed and attached for satisfaction of decrees in the named suit whereas it was not aware that the suit had proceeded for hearing and determination. The 1st respondent on inquiry from the appellant was informed that legal representation had been withdrawn. The 1st respondent claimed that he was never notified of any hearing date or even the intention to withdraw legal services/representation by the 2nd respondent who had actively participated in the proceedings on its behalf.

6. The 1st respondent was compelled to settle decree and had to engage legal services of another lawyer to avert execution and therefore blamed the appellant and 2nd respondent for the loss and damage suffered due to their negligence. He also claimed for reimbursement of the amount settled as decree in the sum of kshs 80,385; amount paid to auctioneers as charges kshs 14,243.30 and the amount paid to T.O Kopere advocates who tried to set aside the judgment entered against the 1st respondent in vain kshs 10,000 all totaling kshs 104,628.30. The 1st respondent also prayed for general damages for professional negligence together with costs an interest at court rates.

7. The appellant filed defence on 11th September 2008 denying the 1st respondent's claim in toto and contending that it was not obliged to settle the claim against the 1st respondent as they had no insurance cover with the 1st respondent; that it had notified the 1st respondent that it had no responsibility to settle the claim; that it consented to information (sic) which was never challenged hence there was no binding contract between the parties and prayed for dismissal of the suit with costs.

8. The 2nd respondent too filed defence on 26th September 2008 denying the 1st respondent's claim and blamed the 1st respondent for failing to provide her with all necessary co-operation to facilitate the defence of the claim; failed to reply to correspondence; failed to act in spite of clear and unequivocal communication from the 1st defendant (2nd respondent). She prayed for dismissal of the suit with costs.

9. The suit was heard by A.K. Ndungu (Mr) Senior Principal magistrate (as he then was) and in his judgment delivered on 29th October 2010, he allowed the 1st respondent's claim, awarding it kshs 100,000 general damages and kshs 104,628.30 special damages hence provoking this appeal by the appellant, challenging the said judgment which was entered against the appellant and 2nd respondent

jointly and severally.

10. The parties' advocates agreed to canvass the appeal by way of written submissions. In their submissions filed on 29th October 2014 the appellant framed 5 issues for determination namely-

1. ***Whether the appellant is liable for the misconduct of the 2nd respondent***. It was submitted that the appellant could not be held liable for negligent acts of the 2nd respondent advocate because although the advocate was initially instructed to represent the appellant's insured the 1st respondent herein, the instructions were withdrawn before the suit was heard and determined upon the appellant's discovery that the cover issued to the 1st respondent under the policy of insurance did not extend to the employees of the insured. That the 2nd respondent having failed to act as per the appellant's instructions by failing to withdraw from acting for the 1st respondent, the aggrieved party should seek a remedy against the advocate personally and not against the instructing client hence the trial magistrate erred in finding that the appellant was liable to the 1st respondent. The appellant maintained that it was not privy to the misconduct and or inaction of the 2nd respondent.
2. ***Whether the 1st respondent was entitled to be indemnified by the appellant***. It was submitted that the appellant was not bound to indemnify the 1st respondent as the policy issued by it did not cover employees of the 1st respondent and that the 1st respondent was aware of this as the condition was contained in the terms and conditions of the policy and was pointed out to it by the appellant .
3. ***Whether the 1st respondent was responsible for the loss in any way.*** It was submitted that the 1st respondent having been notified that legal representation had been withdrawn due to the fact that the insurance policy did not extend to or cover its employees, should have taken steps to engage its own counsel to attend to the case and having failed to do so, the appellant could not be blamed for what transpired as a result of that omission.
4. ***Whether the award of damages was excessive and or unreasonable the circumstances.*** It was submitted on behalf of the appellant that though the general rule is that an appellate court should not disturb an award unless it was excessive and unreasonable, that rule could not have applied to the appellant who had already issued withdrawal instructions in the matter and no professional negligence could be attributed to it either through vicarious liability or otherwise.
5. ***What orders as to costs?*** It was submitted that since the appellant was an innocent party who had been dragged to court, it must have costs of the proceedings as the dispute only existed between the respondents hereto. The appellant prayed that the appeal be allowed, dismissing the 1st respondent's case in the lower court with costs.

11. The 1st respondent filed its submissions on 7th November 2014 giving the history of the dispute and contending that no evidence was adduced to prove the allegation that the injured person/claimant Jared Maina Mageto in CM CC 8318/03 was an employee of the 1st respondent and therefore not covered under the insurance policy in respect of motor vehicle KAQ 601 B. Secondly, that the insurer having accepted the claim forms, received payments for excess on the claim, and appointed an advocate to defend the claim in court, they were bound by the contractual obligations and statutory provisions under Sections 4,5, and 10 of the Insurance (third party) Motor Risks Act, Cap 405 Laws of Kenya. That the only option available to the appellant would have been to repudiate liability under Section 10(4) of Cap 405 by commencing proceedings within 3 months of the filing of the claim to avoid liability under the policy. That having appointed an advocate for the 1st respondent during the hearing and after judgment, they could not repudiate liability by merely writing a letter to the advocate to withdraw from acting which the advocate never did hence the loss and that the instructions to the advocate to withdraw from acting could not in law amount to repudiation of liability under Section 10(4) of Cap 405 especially when the said advocate never withdrew from acting and neither was the first respondent informed of the intended withdrawal so as to enable the 1st respondent appoint its own advocate. The 1st respondent supported the findings of the trial magistrate that the appellant and 2nd respondent were negligent.

12. According to the 1st respondent, the failure by the appellant to settle the claim after judgment amounted to violation of the provisions of the Insurance Act Cap 487 and the advocate's failure amounted to violation of Section 2 and 46 (1) of the Advocates Act Cap 16.

13. On quantum the 1st respondent contended that the award of general damages of shs 100,000 was reasonable and supported by judicial authorities cited and that in any case the appellant has not in this appeal cited any authority to prove that the awarded damages were excessive or unreasonable.

14. The 1st respondent further submitted that the appeal was without any merit and prayed that it be dismissed with costs since the appellant's witness confessed of his ignorance of Section 10 of Cap 405 on repudiation of liability and that no ground of appeal has been proved to warrant interference with the judgment of the lower court.

15. In the 2nd respondent's submissions filed on 10th November 2014 the 2nd respondent Susan Kahoya T/A Susan Kahoya and Company Advocates submitted that the trial court erred in finding her liable to the 1st respondent because she was not privy to the contract between the 1st respondent and the appellant. Further that the trial court erred in arriving at the decision that he did without considering whether the outcome of the trial court case would have been different had she attended court which should not be construed to mean that she refused or recklessly decided not to attend court during the second hearing having religiously attended all previous hearings. The 2nd respondent submitted that since the material accident was self involving and the claimant was a passenger, what was in issue was damages payable and that under no circumstances would she have been required to settle the sums adjudged due by the court, noting that the claimant testified that he was at the material time of the accident working with the 1st respondent as his employer.

16. In her view, her failure to attend court did not disadvantage the 1st respondent in any way. It was further contended that in any case the 1st respondent did not raise any technical ground on which the case could have been dismissed and therefore have avoided liability. On the award of general damages for negligence to the 1st respondent it was submitted that the claim could only be maintainable against the appellant for breach of insurance contract since the 2nd respondent was not privy to the contract between the appellant and the 1st respondent. Further, that albeit the 1st respondent pleaded for general damages for professional negligence, the trial magistrate awarded damages to what seemed like defamation which latter claim was statute barred under Section 4(2) of the Limitation of Actions Act yet the 1st respondent never particularized any claim for defamation.

17. The 2nd respondent also maintained that the said damages were excessive under the circumstances. She urged the court to allow the "appeal by her" with costs.

18. This being the first appeal, his court is obliged by Section 78 of the Civil Procedure Act to re assess and reexamine all the evidence before the trial court and in so doing perform as nearly as possible the same duties as are conferred and imposed by the Act on the court of original jurisdiction. This court thus has the power to:

a. Determine a case finally
b. Remand a case
c. Frame issues and refer them for trial
d. Take additional evidence or require the evidence to be taken
e. Order for a new trial

19. Nonetheless, in reassessing and re-examining the evidence as adduced and evaluated in the trial court, this court must give an allowance to the fact that it never saw nor heard the witnesses as they testified See **Sielle V Associated Motor Boat Company Ltd.** In addition, this court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles

in reaching his conclusion. See **Mkube V Nyamuro [1983] KLR 403.**

20. Applying the above principles, and examining the evidence on record, the 1st respondent called PW1 Christopher Opondo the director of the company who testified that on 18th April 2003 motor vehicle KAQ 601 B Nissan Pick Up which was involved in an accident was insured by the appellant. The driver had lifted a stranger known as Gerald Maina Mageto as a passenger. The company was sued for damages in CM CC 1318/2002 and the company forwarded pleadings to the appellant who instructed the 2nd respondent Susan Kahoya advocates to represent 1st respondent in court.

21. PW1 testified that the suit proceeded to hearing without the knowledge of the 1st respondent and his company only learnt that the suit had been determined against the company upon Ideal Auctioneers descending on their property on 4th June 2005 with a proclamation which surprised them. When the company inquired from the advocate (2nd respondent) she became evasive saying she had been instructed by the appellant (CIC) to withdraw from the case. The 1st respondent denied ever receiving any communication regarding withdrawal of legal representation by Susan Kahoya. It therefore instructed T.O. Kopere Advocates who filed an application for setting aside of the judgment but the court declined to allow the application hence he had to pay the decretal sum as well as their new advocates fees which they claimed for reimbursement. They blamed the 2nd respondent for failing to attend court and for failing to inform them of progress of the case. They also blamed the appellant for taking up the case but failing to ensure that the 1st respondent was ably represented in court. They complained that it was embarrassing for auctioneers taking summons to their place as if they were criminals which affected their reputation.

22. In cross examination by Mr Gakune PW1 confirmed that the motor vehicle KAQ 081B was owned by the 1st respondent company and that the injured/plaintiff in the case was a passenger therein. He denied receiving any communication from the 1st respondent.

23. In cross examination by Mr Bosire, he stated that the policy was comprehensive. He confirmed that under clauses 2 & 3 the cover did not cover employees in their employment. He also confirmed that the injured was described as a guard.

24. In re-examination by Mr Kopere the 1st respondent's witness stated that he never received any letter from the appellant repudiating the policy and that neither was he served with any order or plaint to that effect. He also denied receiving any application or withdrawal notice from the 2nd respondent ceasing to act for the 1st respondent.

25. The appellant called one witness Lucy Machel its employee and a claims analyst who produced a general motor commercial policy which had terms and conditions of the policy and claimed that the plaintiff in CC 8318/03 was the 1st respondent's employee. She admitted that the appellant instructed an advocate to represent the 1st respondent in that case but at some point instructed that advocate to cease acting for it. She produced an advisory letter from the said advocate Susan Kahoya advising that the motor vehicle had no cover for employees travelling while on duty hence the appellant instructed the advocate to cease acting based on that advisory and that the appellant copied the letter to the insured 1st respondent. She maintained that the appellant was not liable.

26. In cross examination the witness for the appellant stated that the policy document produced did not indicate the motor vehicle being covered and neither was it signed. She stated that the names of the parties were in the premium schedule which she did not have in court. She admitted that at the time of instructing Susan Kahoya advocate there was a claim form and that she was not aware of the procedure provided for in Section 10 of Cap 405 for repudiation of policy.

27. The 2nd respondent advocate did not testify and neither did she call any evidence.

28. The parties then filed written submissions and authorities. In his judgment delivered on 29th October 2010. Honourable Ndungu A.K. (as he then was) found that as the appellant had not taken any actions envisaged under Section 10(4) of Cap 405, it could not avoid the statutory duty to satisfy judgments against or in respect of which liability is required to be covered under paragraph (b) of Section 10(5) of Cap 405 once such judgment is obtained, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy.

29. The trial magistrate also found the appellant vicariously liable for acts of the 2nd respondent since instructions were given to her by the appellants. He also awarded to the 1st respondent general damages of shs 100,000 for professional negligence.

30. It is that judgment which provoked this appeal.

31. I have carefully considered the appeal herein and the submissions filed by all the parties advocates. I must however note that there is only one appeal and no appeal filed by the 2nd respondent. However, the 2nd respondent's submissions are framed in such a way that she purports to be the 2nd 'appellant' and she even proceeds to urge the court to allow her 'appeal' which is nonexistent. The court further notes that the 2nd respondent despite her active participation in the proceedings in the trial court, she did not testify to tender any evidence in defence to rebut the 1st respondent's testimony/evidence as a whole.

32. In this appeal, the appellant has shifted all the blame to the 2nd respondent. Yet again, the 2nd respondent has not controverted that submission that it was her fault that the 1st respondent suffered damages as claimed. She instead alleges that since she was not privy to the contract between the appellant and 1st respondent, she cannot be held liable.

33. At one point, this court did recall this judgment with a view to seeking clarification from the 2nd respondent's counsel as to why there was strong reference to her as an appellant in her submissions when there was no appeal by her pending in this file for determination and on 10th December 2015 Mr Kimathi for 2nd respondent advocate informed the court that indeed there was no appeal by the 2nd respondent but that the 2nd respondent had erroneously been referred to as 2nd appellant. On my perusal of the lower court record in preparation of this judgment which has been rescheduled severally on account of that issue of whether or not the 2nd defendant is an appellant, I came across an application dated 24th November 2010 and in the affidavit sworn by the 2nd respondent herein Susan M. Kahoya seeking for stay of execution of decree in CM CC 5079/2008, she annexed a copy of Memorandum of Appeal dated 24th November 2010 and filed in the High Court at Nairobi vide HCCA 515 of 2010 challenging the judgment of the trial court. I therefore do not have the slightest idea why her counsel did not seek to have that appeal consolidated with this appeal for hearing and determination assuming that it does exist and as to why Mr Kimathi was categorical that his client had not appealed.

34. That notwithstanding I find no appeal or cross appeal herein filed by the 2nd respondent for my determination and I therefore proceed to determine the appeal herein as filed by the appellant CIC Insurance Company Limited. None of the parties to this appeal relied on any case law in their propositions/submissions. I find the issues framed by the appellant appropriate for determining the merits and demerits of this appeal.

35. On the first issue of whether the appellant is liable for the misconduct of the 2nd respondent, the appellant contends that the trial court should have condemned the 2nd respondent for failure to inform the client and for not ceasing to act for the client as instructed by the appellant.

36. The trial magistrate however found that there was no evidence that either the appellant and or the 2nd respondent notified the 1st respondent of withdrawal of legal representation. He found that the 2nd respondent was liable for professional negligence and as she was the appellant's agent, it was vicariously liable for acts of its agent, the 2nd respondent.

37. The trial magistrate's findings of fact have, in other words not been challenged by the 2nd respondent that indeed the 2nd respondent was negligent in failing to notify the 1st respondent of a hearing date and or cessation to act. The 2nd respondent never adduced any evidence to challenge the evidence adduced by the 1st respondent against her. She also did not adduce any evidence to prove any of the acts of negligence that she alleged were committed by the 1st respondent as per her statement of defence filed in the lower court. She opted to close her case without calling any evidence not even a letter notifying the 1st respondent of a hearing date or that she had been instructed by the 1st respondent's insurers, the appellants herein, to cease acting for the 1st respondent in the matter following the alleged repudiation of liability by the appellant. She has nonetheless put up a spirited fight purporting to challenge the decision of the trial magistrate and urging this court to allow her 'appeal' which 'appeal' this court was not given an opportunity to consider and neither was the appellant or 1st respondent given an opportunity to respond to that 'appeal.' The 2nd respondent's 'appeal' is therefore imaginary in the eyes of this court.

38. The duty of an advocate retained by a client is to execute the client's instructions unless those instructions are withdrawn or contrary to law or public policy. In this case, the appellant instructed the 2nd respondent advocate to represent its insured, the 1st respondent. The advocate took/accepted the instructions and entered an appearance and filed defence on behalf of the insured 1st respondent as instructed by the insurance company. She then went ahead and actively participated in the proceedings. The said advocate also advised the appellant instructing client in writing that in view of the revelation that the 1st respondent's suit was initiated by a person/claimant who happened to have been the 1st respondent's employee described in the documents as a guard, then the insurance company/client should repudiate the contract of insurance since the contract did not cover employees of the 1st respondent. The appellant then instructed the 2nd respondent to cease acting for the 1st respondent, following the legal advise by the 2nd respondent.

39. From that point, regrettably, the 2nd respondent never ceased to act for the 1st respondent. She continued acting for him without instructions of the appellant and she thereafter absconded going to court to inform the court that she no longer had instructions to represent the 1st respondent in the matter without notifying the 1st respondent that she no longer acted for them and that they were therefore at liberty to instruct another advocate. Ceasing to act for a party cannot be by way of abandonment without notice. There is an established legal procedure for ceasing to act for a party so that from that point when the court makes an order of cessation or withdrawal by an advocate, the adverse party would be directed and be required to serve the party directly to participate in the proceedings. In this case, the advocate never notified the 1st respondent and neither did she file any notice of cessation to act. She did not obtain an order from the court granting her leave to cease acting for the 1st respondent in line with the client's/appellant instructions, Order 9 Rule 13 of the Civil Procedure Rules is clear on the procedure for withdrawal of advocate who has ceased to act for a party. The advocate in this case never followed that procedure. It therefore follows that it was indeed the advocate's fault not to represent the client whom she had not ceased acting for despite the instructing client's instructions for her to cease acting. In **Kinluck Holdings Ltd V Mint Holdings Ltd & Macharia Njeru Advocate Civil Application 264/97**,the Court of Appeal held, inter alias that:-

> ***"Advocates are retained d to look after the interests of a client. It is common ground that the meaning of retainer as set out in Halsbury's Laws of England Third Edition paragraph 84 is correct. The learned authors set out the following " meaning of retainer": the act of authorizing of employing a solicitor to act on behalf of a client constitutes the solicitor's retainer by the client; consequently the giving of a retainer is equivalent to the making of a contract for the solicitor's employment, and the rights and liabilities of the parties duties under the contract will depend on any terms which they have expressly agreed. Partly on the terms which the law will infer or imply in the particular circumstances with regard to maters on which nothing has been expressly agreed and partly on such statutory provisions as are applicable to the particular contract. By the giving and acceptance of the retainer the solicitor acquires his***

authority to act for and bind the client and the client becomes bound both personally as between himself and his solicitor and as between himself and third parties with whom the solicitor deals within the limits of his authority on behalf of his client."

40. Thus, as was held in the above Court of Appeal case, the law implies clearly that an advocate will protect the interests of his or her client. In this case, the instructing client was the appellant, who required the 2nd respondent to provide legal representation to the 1st respondent in court under the principle of subrogation. The appellant was under the doctrine of subrogation or transfer of risk bound to defend the interests of its insured the 1st respondent, and where judgment was entered against him, to settle the claim. The appellant instructed the 2nd respondent to defend or take care of its interests and the 2nd respondent besides filing defence and an appearance to the suit, she went further and advised the appellant how it could avoid the claim against the 1st respondent since the insurance policy between them in respect of the accident motor vehicle did not cover the 1st respondent's employees. The appellant having instructed the advocate to cease acting based on her 'wise' counsel, the question that disturbs this court is, why did the advocate not cease acting in the matter? It is trite law that a retainer binds an advocate to act for his/her client in such a manner as to protect his or her client's interests and not to jeopardize his interests. In this case, the advocate/2nd respondent's inaction no doubt jeopardized the client/appellant's as well as the 1st respondent's interests. The 2nd respondent was obliged not only to give an advisory to her client but to take and act on instructions to cease acting. She failed to do so as a result of which the 1st respondent suffered damages which it claimed from the appellant insurance company and its 2nd respondent agent.

41. In my humble view, the client/appellant has a genuine and bona fide claim against the advocate/2nd respondent for breach of contract as well as possible negligence. At common law, the obligations of advocate arising out of a retainer are set out in **Cordeny's Laws Relating to Solicitors 7th Edition page 150** where the learned authors say:

B. Obligations arising out of retainer

1. TO BE SKILFUL AND CAREFUL

" At common law, a solicitor contracts to be skilful and careful for a professional man gives an implied undertaking to bring to the exercise of his profession a reasonable degree of care and skill. It follows that this undertaking is no fulfilled by a solicitor who either does not possess the requisite skill or does not exercise it. It is immaterial whether the solicitor is retainer for reward or volunteers his services, or whether or not he has a practicing certificate in force at the time. A solicitor's duty is to use reasonable care and skill in giving such advise and taking such action as the facts of the particular case demand. The standard of care is that of the reasonably competent solicitor, and the duty us directly related to the confines of the retainer. It has been said that the court should beware for imposing on solicitors duties going beyond the scope of what they are requested and undertake to do. There is no such thing as a general retainer imposing on the solicitor a duty. Whenever consulted to consider all aspects of the clients interests generally. A solicitor is not bound to have a perfect knowledge of the law, but he should have a good knowledge eg: he should know about the statutes of limitation. Although a solicitor is not liable for a mistake as to the construction of a doubtful statute, difficult to interpret or unexplained by decisions, he may be liable if he fails to realize that the statute presents difficulties of interpretation. On the question as to how far a solicitor may be liable in negligence for delay, it has been said that it would be wrong to hold a professional man guilty of negligence because everything is not dealt with by return of post."

The **House of Lords in Stevenson V Roward [1830] 6 ALL ER 668** held that:

"If an agent departs from the usual practice of introducing the double manner of

holding, and having neglected to procure confirmation, he was bound to make good the loss."

42. The Court of Appeal in the **Kinluck Holdings (supra**) case summed up the ratio decidendi of the case of **Stevenson** (supra) as follows:-

" A law agent is bound to obey the instructions given to him by his employer, and if he exceeds or falls short of these instructions, he may be justly made liable for the damages which result from disregard of them."

43. Thus, the 2nd respondent's acceptance of retainer by the appellant put on her certain obligations. She owed the appellant a duty of care to safeguard the interests of her client, the appellant.

44. The contract of retainer between the appellant and the 2nd respondent was for the benefit of the 1st respondent. Accordingly, albeit the 2nd respondent purported to submit that there was no privity of contract between her and the 1st respondent, it should be noted that the only exception to the privity of contract rule is where a contract is made for the benefit of third parties. In this case, the contract for retainer between the appellant and the 2nd respondent was for the benefit of the 1st respondent. It therefore follows that there was an equally binding retainer contract between the 1st respondent and 2nd respondent and the latter owed the former a duty of care the same way she owed the appellant a duty of care. The commencement point is Cap 405 Laws of Kenya which provides statutory exceptions to the doctrine of privity of contract of insurance for the benefit of third parties. Similarly, where a contract expressly benefits the third party, there is a presumption that the contracting parties intended the third party to have a right of enforcement. In the Case of **Aineah Likuyani Njirah V Aga Khan Health Services [2013]e KLR Civil Appeal Nairobi 194/2009** the Court of Appeal while considering the concept of third party rights under a contract held as follows:

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

45. In this case, it is clear that indeed the 2nd respondent was a retained agent for the appellant to represent the appellant for the benefit of a third party the 1st respondent, in legal proceedings where the 1st respondent was the party in a matter where the appellant was under a contractual duty to protect the interests of the 1st respondent under the principle of subrogation.

46. It is useful at this juncture to define what an agency relationship is. This was defined by **Bow stead and Reynolds on Agency Seventeen Edition Sweet & Maxwell page 1-001** which defines an agency relationship to be:

"a relationship which exists between two persons, one whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents so to act or so acts."

47. In **Branwhite V Worcester Works Finance Ltd [1969] 1 A.C 552 at page 587**, Lord Wilberforce stated that :

"***While an agency must ultimately derive from consent, the consent need not necessary***

be to the relationship of principal and agent itself(indeed the existence of it may be denied) but it may be to a state of fact upon which the law imposes the consequences which result from the agency.

Even where the consent to create the agent principal relationship is not express, parties to the contract will be held to have consented if what they have agreed upon amounts in law to such a relationship. Sometimes they may not recognize it themselves and may have even professed to disclaim it but the consent to create the agent principal relationship may be found to exist by implication from their words and conduct."

48. From the above analysis, no doubt, this court finds that there existed a client/advocate relationship between the 2nd respondent and the 1st respondent, which was contractual in nature, which contract was created between the appellant and the 2nd respondent for the benefit of the 1st respondent, and which contract was breached by the 2nd respondent.

49. Notwithstanding the appellant's strong arguments and the finding by the court as above, regarding the role of the 2nd respondent and her duty as an advocate, the question is, did the appellant lay any blame by way of pleadings and evidence against her in the lower court?

50. I have perused the appellant's defence dated 11th September 2008 and filed on the same day. At paragraph 8 of that defence, the appellant pleaded as follows:

"In reply to paragraph 7 of the plaint, the 2nd defendant states that:

a. ***It is true that the 1st defendant was instructed to withdraw from acting in the suit being CMCC No. 8318 of 2003 by the 2nd defendant.***
b. ***The plaintiff was kept informed at all timed by the 2nd defendant that it has instructed the 1st defendant to withdraw from acting in this suit.***
c. ***The 2nd defendant will refer to correspondence showing that it had informed the plaintiff that the plaintiff must appoints its own advocates.***
d. ***If as all the plaintiff was not served with an application to withdraw from acting, or an order in that respect, then the 2nd defendant states that it is a matter between the plaintiff and the 1st defendant, for which the 2nd defendant cannot be blamed at all as it had discharged its obligation.***
e. ***The plaintiff's remedy, if any, which is denied lies with proceedings against the 1st defendant and not the 2nd defendant.***

51. The 2nd defendant /appellant also went further and filed and served on the 2nd respondent/1st defendant (advocate) a Notice of claim against co-defendant under Order 1 Rule 21 of the Civil Procedure Rules. The notice is dated 29th January 2009 filed in court on 30th January 2009. The notice claimed for indemnity/or contribution in full in respect of all the claims for special and general damages, costs of the suit and interest made against the appellant by the 1st respondent and among others for :

(iv) Being negligent in not complying with express instructions that she withdraws from defending the 1st respondent/plaintiff in CC 8318/2003.

(v) Failing to inform he plaintiff/1st respondent of the withdrawal/failing to withdraw from acting and instead fixed hearing dates for the case.

(vi) Being negligent in failing to serve application for withdrawal on the plaintiff/1st respondent.

(vii) Failing to advise the appellant of the need to file a suit to disclaim liability to settle

the nature of the claim that was alleged in CC 8318/2003.

(viii) The 2nd respondent would be liable to pay any losses/damages as a result of negligence on her part and that she was liable.

52. The appellant's notice of claim against co-defendant was never responded to by the 2nd respondent. In other words, the 2nd respondent never filed any defence challenging the averments in that notice of claim by the appellant. Secondly, she did not adduce any evidence in court, whether in support of her defence as filed, or disclaiming or challenging the contents of the notice of claim against her as filed and served upon her by the appellant. She left everything to the court to decide and had consistently filed written submissions denying that she was liable arguing that there was no privity of contract between her and the plaintiff/1st respondent.

53. This being a first appeal, this court is permitted by Section 78 of the Civil Procedure Act to delve into the factual situation of a suit and hence the above analysis. Having found that the 2nd respondent was negligent in the manner that I have detailed above, and having further found that the 2nd respondent did not attempt to challenge the plaintiff's suit against her by way of adduction of evidence, and further having found that the appellant served her with notice of claim for indemnity/contribution against her which she did not challenge; and in view of the appellant's evidence in the court below that the 2nd respondent failed to act according to the established law regarding withdrawal or cessation to act for a client; I hold that the trial magistrate erred in law and fact in holding that the appellant was vicariously liable for acts of its agent the 2nd respondent. I say so because the appellant discharged the burden of proving, on a balance of probabilities that it had given all the instructions to its advocate the 2nd respondent, regarding withdrawal from acting for the 1st respondent particularly following the said 2nd respondent's legal advice on repudiation of liability. And it was not enough for the 2nd respondent advocate to so advice for repudiation of liability. As a suit was pending in court and the appellant had already filed defence, the next step was to file suit repudiating that liability for a determination by the court on whether or not the contract of insurance covered employees of the 1st respondent and or whether or not the claimant in the material accident was a stranger or employee of the 1st respondent.

54. Failure to advise the appellant correctly and to cease acting in the matter without notice to the 1st respondent deprived the 1st respondent an opportunity to ably defend itself from the claim whether it would succeed on that defence or not; and also deprived the appellant an opportunity to be heard on a claim repudiating the claim against it under the doctrine of subrogation.

55. From the foregoing, this court also finds that the merits or demerits of the arguments as to whether or not the appellant was liable for damages suffered by an alleged employee/claimant of the 1st respondent is immaterial at this stage since there was no suit upon which such issue could substantively be tried on merit. In **National Bank of Kenya Ltd. V.E Muriu Kamau & Njoroge Nani Mungai & T/A Muriu Mungai & Company Advocates HCC 539 of 2004 (Nairobi)** Warsame J (as he then was) held inter alia:

> ***"……In deciding whether the defendant committed an act which constitutes negligence, it is important to address the degree and circumstances surrounding the whole issue. The starting point is there is no specific provision in the Advocates Act setting out the standard of duty required by an advocate in the discharge of his professional duties but generally the law recognizes that an advocate may be liable to his client for negligence. The extent of an advocate's liability to his client for negligence has been a mute point for judicial consideration. In my view, it is not enough to prove that the advocate had made an error of judgment or ignorance of some particular point of law. But the error must be one that ordinarily a competent and skilled advocate exercising due care would not have made or shown it. It would be extremely difficult to define exact limit by which the skill and diligence which an advocate undertakes to furnish in conduct of a case is founded. It is also difficult to define precisely the dividing line between what is reasonable skill and diligence which appears to satisfy his***

undertaking for which he is undoubtedly responsible.

It is well known hat litigation is always hazardous, therefore, an advocate ***must always realize that most questions have more than one aspect or interpretation. It is not possible to lie down any hard and fast nice that an advocate would be required to follow in the discharge of his duties/mandate. It suffices to say, that the variety of matters with which an advocate has to have some familiarity increases by the day due to the emerging trend of litigation which involves a lot of special skill, sophiscation and modern ingenuity. I must add that the conduct of litigation is preeminently an art, which requires exceptional ingenuity or foresight to avoid ordinary perils to a client. In such circumstances an advocate is required to display reasonable skill and care to avoid perils to his client. He must show that he fully and properly performed his instructions and that he faithfully carries out the client's instructions to the letter."***

56. In the above **National Bank of Kenya Ltd. V.E Muriu Kamau & Njoroge Nani Mungai & T/A Muriu Mungai & Company Advocates** case, the advocates had been instructed to file a case with all relevant documents before court on behalf of the plaintiff. They filed documents with defects which led to the striking out of the plaint at a preliminary stage on a point of law raised to the effect that the verifying affidavit did not comply with Section 5 of the Oaths and Statutory Declaration Act Cap 15 Laws of Kenya. The advocate set down the matter for hearing without seeking leave of court to file proper affidavit which conformed with the requirements of the law. The suit was struck out and the client filed suit for loss and damage suffered as it had to pay costs. It blamed the advocate for professional negligence and breach of contractual duty of care. The court held inter alia:

> ***" The law is clear that an advocate who holds himself out to his client as having adequate skills and knowledge to conduct the case he is instructed owes a duty to his client both in contract and tort. Where the advocate is in breach of his contractual obligation/duty to his client or where he fails to used proper care towards the fulfillment of the instructions he was given, he is liable in damages in so far as the client suffers the loss…….when a client goes to an advocate, it is a reasonably foreseeable consequence that if anything goes wrong to the litigation, owing to the advocate's negligence, there will be a liability that would arise or occur. It is also clear that a charge of negligence against an advocate is a serious matter and must be strictly and distinctly proved."***

57. The court awarded the plaintiff/client special damages which it had incurred as party and party costs as a result of the suit that was struck out. It also awarded the plaintiff general damages for loss of prospect of a successful outcome had the case gone for full trial, which prospect was terminated prematurely and wrongly determined by the negligence of the defendant advocates. The court found that the client had lost an opportunity to present its case on merit and have its claim considered by the court and that "***once again that hope or prospect was cut short by flagrant and reckless negligence of the defendant, the redress o the plaintiff is therefore entitled to damages for the loss of the chance of a favourable outcome and the damage ought to be sums prayed for in the plaint."***

58. From the above decision, which I agree with wholly, I am persuaded that the 1st respondent in this case was deprived of prospects of a favourable outcome and therefore the damages which he paid to the plaintiff/claimant in that suit is recoverable together with legal fees incurred and general damages for professional negligence in tort.

59. In my view, the above comprehensive analyses and findings settles issues No. 1 on w***hether the appellant is liable for the misconduct of the 2nd respondent which I find in the negative; issue No 2 on whether he 1st respondent was entitled to be indemnified by the appellant whose answer is in the negative.***

60. The above comprehensive analyses and findings also settles issue No. 3 on whether the 1st respondent was responsible for the loss in any way which answer is in the negative, reasons being that it was never served with any withdrawal application or notice or order of the court by the 2nd respondent ceasing to act

for the 1st respondent.

61. On whether the general damages as awarded were excessive or inordinately high, the law is clear that damages are in the discretion of the trial court and an appellate court will therefore not disturb such award of damages unless it is inordinately high or low as to present an entirely erroneous estimate. It must also be shown that the trial magistrate proceeded on wrong principles or that he misapprehended the evidence in some material aspect and so arrived at a figure which was either inordinately high or low.

62. Albeit the appellant has alleged that the awarded damages were excessive and unreasonable, it has not demonstrated the excessiveness or unreasonableness of the awarded damages. It only alleged that the award should not have applied to the appellant as it had already issued withdrawal instructions in the matter and no professional negligence can be attributed to it either through vicarious liability or otherwise. Regrettably the reasons given for such challenge to the awarded damages is not and cannot be a ground for interfering with an award of damages which this court finds reasonable and therefore no justification for interfering with the award. It is therefore upheld for the following reasons: the plaintiff/1st respondent claimed for special damages being an amount he paid to the claimant in CMCC 8313/2003 being kshs 104,628.30. He also claimed for the money paid to his advocate and auctioneers' charges. Those were special damages specifically pleaded and strictly proved by way of receipts/payment vouchers. That being the case, I find and hold that special damages were proved d as pleaded and therefore the question of excessiveness or unreasonableness does not arise.

63. On general damages of kshs 100,000/- for professional negligence awarded by the trial court to the 1st respondent, albeit the 2nd respondent has in a bid to challenge the award on appeal submitted as if she was a co- appellant and argued that there was no privity of contract between her and the 1st respondent, I have already determined that she was negligent to her client the appellant who would in turn be liable to the 1st respondent under the doctrine of subrogation and that her relationship with the 1st respondent fell in the category of exceptions to the privity of contract doctrine.

64. The 2nd respondent has also argued that the damages were awarded for defamation and not professional negligence. I beg to differ from that observation. The 2nd respondent has isolated paragraphs of the trial magistrate which were merely observatory and therefore obiter the main holding in awarding general damages. The excerpt given cannot be taken in isolation of the entire holding by the trial magistrate. At page 18 last paragraph of the record of appeal, the trial magistrate was clear that:

> " ***In addition to proving payment of the sum of kshs 104,628.30 due to the omission of the defendants the plaintiff demonstrated that there was professional negligence unwelcome visit by auctioneers …….Mr Kopere for the plaintiff has suggested a figure of kshs 100,000 for damages. He has relied on the cases of Champion Motor Spares Ltd V Phadke & Others (1969) EA 42 KCB VS Kabita t/a Kabita Valuers [2002] KLR 419. I have considered the circumstances of this case and I am persuaded that kshs 100,000 would be a reasonable compensation to the plaintiff under this head."***

65. I have examined the above authorities relied on in the lower court by the 1st respondent. The said decisions relate to professional negligence in tort or in contract and not to defamation. The 1st respondent's submissions in the lower court as contained on page 7 at paragraph 3 on ***" general damages for negligence against a professional"*** also relate to professional negligence and that is where the authorities and prayer for general damages in the sum of kshs 100,000/- is made. In my view, any prayer for general damages for defamation of character has to be ignored since there was no pleading on that aspect and as there was no award for general damages for defamation, the complaint by the 2nd respondent must be dismissed.

66. Accordingly, I reject the 2nd respondent's submissions which was not founded on any appeal or cross appeal against the trial court's decision.

67. On the question of liability for payment/reimbursement of kshs 104,628.30 which the 1st respondent paid to the claimant inclusive of his alternative advocate's charges and other charges in CMCC 8313/2003, albeit the 2nd respondent pleaded innocence and for not being privy to the contract between the 1st respondent and the appellant, the appellant having shifted liability to the 2nd respondent owing to her negligent handling of that case and in breach of her duty of care to the appellant/client, which claim the 2nd respondent did not deny by way of adduction of evidence to controvert the allegation, I find that the trial magistrate erred in finding the appellant vicariously liable for the negligent acts of the 2nd respondent. I therefore set aside that finding and substitute it with a finding that the 2nd respondent was wholly to blame for the loss and damages suffered by the 1st respondent.

68. Before I conclude, I must however mention that the 2nd respondent in her defence filed on 26th September 2008 dated 24th September 2008 pleased particulars of negligence on the part of the 1st respondent. The law is trite that he who alleges must prove. It is not enough to plead or tread accusations against a party. In this case, the 2nd respondent treaded accusations against the 1st respondent contending that it :

a. *Failed to provide her with all necessary cooperation to facilitate the defence of the claim.*
b. *Failed to reply to correspondence from the plaintiff (sic).*
c. *Failed to act in spite of clear and unequivocal communication from the 2nd respondent.*

69. However, the 2nd respondent did not attempt to adduce any evidence to prove any of those serious allegations/particulars of negligence against the 1st respondent. She kept away from the suit and has all along reappeared during submissions hoping to technically knock out the 1st respondent's claim against her and the appellant's claim for indemnity against her. Regrettably, as submissions are not evidence and neither are answers gathered in cross examination, there is no defence available to her and in the absence of any appeal or cross appeal, her submission are all but a marketing strategy in vain.

70. In the end, I find this appeal succeeds on some grounds only to the extent that I have stated above. Consequently, I set aside the judgment and decree of the trial magistrate on vicarious liability. In its place I enter judgment for the 1st respondent as prayed as against the 2nd respondent on liability for professional negligence. I further enter judgment in favour of the 1st respondent against the 2nd respondent herein Susan Kahoya advocate for kshs 104,628.30 being special damages claimed and general damages of kshs 100,000 for professional negligence together with costs and interest at court rates to be paid by the 2nd respondent. Interest on special damages to accrue from date of filing suit in the lower court until payment in full whereas interest on general damages will accrue from date of judgment in the lower court until payment in full. I also award costs of this appeal to the appellant against the 2nd respondent.

Dated, signed and delivered in open court at Nairobi this 23rd day of February 2016.

R.E. ABURILI

JUDGE

In the presence of Ms Wamucii for 1st Respondent

N/A for appellant (Esther Njue Court Clerk for Opondo & Co in Court)

N/A for 2nd respondent

Adline: Court Assistant