REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

HIGH COURT CIVIL CASE NO. 145 OF 2012

GRANATA ERNESTO SUING AS ATTORNEYOF DENISE GRANATA ……..…… PLAINITIFF

-VERSUS-

INVESCO ASSURANCE COMPANY LTD…….....….DEFENDANT

J U D G M E N T

The Pleadings

1. By the plaint filed on 6/9/2012, Granata Ernesto suing in his capacity as the Attorney of Denise Granata sought judgment for a sum of Shs 13,000,000/= against Invesco Assurance Company Ltd, the Defendant herein(the Insurer). It is averred that the Plaintiff (hereinafter the Insured) entered into a one year insurance contract with the Insurer against fire risks and burglary, in respect of her house and property on Plot No. 794/4 Angels Bay Mambrui, commencing 23rd December 2010. Also covered was property in the house, workmen's compensation and occupier's personal liability. The Plaintiff duly paid the requisite premium of Kshs 72,500/=.

2. It is averred that the premises were consumed by a fire which also destroyed a motor vehicle, make Mercedez Benz on 7th October 2011; and the matter reported to the Insurer. That the Insured rejected the sum of Shs 2,794,144/= allegedly offered as compensation by the Insurer. That based on the contracted cover amount and the averred total loss of the insured property, the Insured is entitled to a sum of Shs 9,000,000/= in respect of the damaged house; Shs 3,000,000/= for the destroyed property therein; and Shs 1,000,000/= under occupier's personal liability in respect of the damaged Mercedez Benz vehicle.

3. In the amended statement of defence filed on 7/3/2014, the Insurer admitted issuance of the cover note to the Insured in the sums stated and that the premium was duly paid. The Insurer averred that the cover was subject to special conditions in the policy and denies that a Mercedez Benz vehicle comprised part of insured property. The Insurer asserts that the Insured's claim was fraudulent or fraudulently exaggerated. In addition the Insurer averred that there was discrepancy in the description of the Insured's house and construction materials thereof in the Proposal Form and the subsequent claim.

4. Another discrepancy pleaded relates to the particulars of the actual plot upon which the house was constructed and the site of the loss. The Insurer takes issue with the alleged repairs undertaken by the Insured before mutual concurrence. It is pleaded further without prejudice that the value of risks as Insured was inadequate and that the proper value ought to be Shs 27,000,000/=. Hence it was averred that the lower sum offered as compensation was adequate.

5. The Insured in her Reply to the amended statement of Defence took issue with the allegations of fraud,

and misdescription and maintained that the vehicle was included under the subject insurance cover. She further denied that the premises were under-insured adding that the Insured was compelled to repair the premises, used as a holiday home, as the Insurer could not do it.

The Plaintiff's Evidence

6. In the course of the trial, both parties adduced evidence in support of their respective cases. Granata Ernesto (PW1) testifying on behalf of Denise Granata stated that the latter, his daughter, was the owner of the suit house standing on **Plot No. 798 Mambrui (Original 794/4).** He produced ownership documents as **Exh. 2**. He also produced an insurance provisional cover note and policy document (**Exh. 3A, B**) as evidence of the insurance policy against fire and burglary taken out by the daughter in respect of her house. He stated that after due assessment of the property by the Insured, the requisite premium was paid. He said that following the fire that the gutted the house, the insurance company sent assessors to inspect the damaged property, and eventually offered a sum of Shs 2,294,114/= vide an email dated 12th April 2012 (**Exh. 5**).

7. Through his lawyer the Insured rejected the offer and demanded compensation for the full sum insured. The Insurer responded by disputing the claim and alleging, interalia, that in breach of the condition precedent to liability, the Insured had misrepresented material facts. PW1 stated that the Insured storeyed house had a *makuti* (palm leaves) roof, and was inspected by the agent of the Insurer prior to the cover being issued. That the subsequent fire completely destroyed the house. Moreover, he asserted that the plot stated as the site of the house was the only one owned by the Insured. He denied that the claim was fraudulent.

8. During cross-examination PW1 was shown the Policy Proposal Form indicating that the roof was constructed out of concrete ceiling with *makuti* decoration. He responded that the roof was all *makuti* atop a concrete ceiling. He further stated that the loss adjuster had visited the scene prior to the commencement of repairs of the house, explaining that he could not wait indefinitely as the house would have collapsed since it was leaking. Regarding the Mercedez Benz vehicle, he asserted that it was covered in the policy under machines and that it was damaged by the falling roof. He admitted however that the said vehicle was insured with another company and was not included in the schedule to Policy Cover and Proposal. He said that **Exh.6** (correct marking is **3A & B** – the cover note and policy) is what he obtained after paying the premium.

9. In Re-examination PW1 denied that the signature on the Proposal Form was his and explained that the same was completed by the agent of the Insurer, Isaac Njoroge (PW2). An insurance agent, PW2 stated that he had surveyed the Plaintiff's property and introduced them to the Insurer. He said that the Proposal Forms (**Exh. 9**) was completed with details he obtained from PW1. Later, he allegedly contacted the Invesco Manager at Malindi for purposes of establishing the payable premium. Under cross-examination PW2 explained that he completed required details and signed declaration on the proposal on behalf of PW1 who did not understand English. He explained that the house had no second storey as such but an upstairs room. In re-examination he stated that he completed the Proposal Form as an agent of Insurer.

The Defendant's Evidence

10. The Insurer called two witnesses. DW1 was Paul Gichuhi, the Legal Manager of the Insured between 2005 and 2014. He testified that he scrutinized the documents related to the Insured's claim (**D. Exh. 6**) including a quotation from Kuwaka Construction Services for the reconstruction of the destroyed house (**D. Exh. 7**). That having noted several discrepancies in the documents regarding the description of the house and the extent of damage he had recommended that a loss assessor be appointed. The assessor, Universal Loss Adjustors submitted their Preliminary Advice (**D. Exh. 9**) indicating that, contrary to the Proposal Form, the roof of the subject house was all *makuti* without concrete and that the house was underinsured.

11. It was also reported that the claimant had unilaterally commenced reconstruction 3 weeks after the fire. The Insured was unhappy with the contents of the final report by the first assessor, and the alleged

unauthorized offer made by assessor to the Insured. Hence they appointed a new firm – Safety Surveyors – who prepared the Report produced as **Exh. 10**. The report highlighted the discrepancies which DW1 claimed amounted to material non-disclosure, resulting in the under-valuing of risk at Kshs 9,000,000/=. Further DW1 said that no receipts for scheduled goods were presented. In conclusion DW1 said that there was breach of utmost good faith on the part of the Insured, rendering the insurance contract voidable under Section 156 of Insurance Act.

12. Under cross-examination, the witness confirmed knowledge that 20 houses were burnt down at Angels Bay on the material date but also said that the Plot Number given by the Insured was 794/4, and did not include No. 798. He maintained that the Insurer undertook to underwrite the risk on the basis of representations made by the Insured, which ought to have been truthful. For their part the Insurer did not have to physically verify the statements as the declaration in the proposal is sufficient. The Insured, he said, can sometimes admit on *ex gratia basis* claims that are otherwise rejectable. He stated that the agent acted both on behalf of the Insurer and Insured on this occasion saying that was possible.

13. Kigo Kariuki, a risk surveyor with Safety Surveyors testified as DW2. He testified that on instructions of the Insurer, he visited the damaged premises on two occasions in October 2012, and eventually prepared his final report. His conclusion highlighted several disparities including the following:

> (a) "**Description of plot and property as described in proposal and as found on ground while the Proposal Form indicated as single storey concrete roof with *makuti*, on the ground was a double storey building and no concrete roof." (sic)**

14. He stated that buildings constructed out of combustible roofing and walls attract special risk underwriting conditions. Under cross-examination, DW2 admitted that reconstruction at PW1's including the walls and roof had been completed at the time of his visit to the property. He pointed out the alleged disparity regarding the Land Reference numbers of the plot but admitted that the same appeared to have been carved out of a larger land portion. He however maintained in re-examination that the insured house was described as a single storey while the destroyed house was a double storey.

The Submissions

15. The parties filed their written submissions after the trial. However, since the trial Judge was on transfer, no judgment date could be given and the same was ordered to be on notice. The delay is regretted. In brief, the Insured's counsel Mr. Lughanje submitted that the alleged misdescription of the suit property land reference has been explained and further that no discrepancy was proved concerning the house storeys, roofing or the materials in the Proposal Form. He pointed out that the fact that the Insurer instructed the Insured to deal with one Mayaka of Universal Loss Adjustors who also offered a settlement represents an admission of liability on the part of the Insurer.

16. The Insured asserts that there has been no material non-disclosure on her part. That the Insurer has engaged in many tactics including denouncing their own agents and raising non-existent discrepancies, to avoid liability. Finally, the Insured asserts entitlement to full compensation based on the insured sum.

17. Counsel for the Insurer Mr. Gathua framed four issues in submissions as follows:

> **"i) Is the agent from Mustard Insurance Agency an agent of the Plaintiff or the Defendant at the time of filling I the proposal form on behalf of the Plaintiff?**
>
> **ii) Is the Property on the ground the same as that in the Proposal form, Claim form?**
>
> **iii) Is the Claim a valid claim under the Law?**
>
> **iv) Has the Plaintiff proved their case on a balance of probabilities?"**

18. On the first issue, the Insurer cited the case of **Biggar –Vs- Rock Life Assce. Co. [1902] 1 KB 516** for the proposition that where an agent completes a proposal form on behalf of an applicant, he is deemed to be the applicant's agent, but nonetheless, the applicant is duty bound to read the answers in the proposal before signing. Hence in this case, it is the Insurer's position that in completing the proposal, PW2 was acting as the agent of the Insured.

19. With regard to the second issue, the Insurer highlighted alleged discrepancies in the description of the building in the Proposal Form and the actual building on the ground with regard to kind of roofing used and existing storeys, items claimed but not listed in the schedule to the proposal, namely, pool beds and a Mercedez Benz vehicle. It was submitted that there was misrepresentation of the property in the Proposal Form. Further the Insurer submitted that insurance contracts necessarily enshrine the doctrine of utmost good faith (*uberrimae fidei*). That based on the description of the Insured's property, the Insurer assessed the risk at a lower sum.

20. Hence the Insurer is entitled to avoid the contract as was the case in **Carter –Vs- Boelm [1766] 3 Burr 1905,** cited in **Sita Rolling Mills Ltd – Vs- Jubilee Insurance Co. Ltd [2007] eKLR**. Arguing that the Insured violated the principle of utmost good faith through deliberate misdescription of the property the subject of the cover, it was contended that the claim made subsequently is not valid. The Insurer contends that through his hurried, unauthorized reconstruction of the house before full assessment by the Insurer, the Insured denied the Insurer the benefit to the fundamental right of subrogation.

21. Finally, the Insurer submitted that the claim has not been proved on a balance of probabilities. It was argued that the offer made by Universal Loss Adjusters to the claimant was not authorized by the Insurer as liability had not arisen.

Analysis and Determination

22. There is no dispute that a domestic cover issued to the Insured by the Insurer was in place during the material period. There is no dispute that the cover was based on a Proposal Form completed by the Insured. The Insured property consisted of a house at Mambrui and contents therein. Additional risks covered related to workmen's compensation and personal occupier's liability. Further that in October 2011 the Insured lodged a claim for compensation as a consequence of a fire on 7th October 2011, which allegedly damaged the Insured's property and goods therein. Two loss assessors were appointed by the Insurer to inspect the premises, but a dispute arose as to the liability of the Insurer. The Insured eventually filed the present suit.

23. Upon considering the pleadings, evidence on record and submissions of the parties, I think that the issues falling for determination are generally along the lines proposed by the Insurer in their submissions. These can be restated as follows:

a) Whether PW2, the Insurance Agent was at the time of completing the proposal form acting as an agent of the Insurer or Insured.

b) Whether or not there is misdescription of the insured property amounting to material non disclosure as to render the contract avoidable.

c) Whether the Insured is entitled to the compensation sought.

I will proceed to consider these issues in sequence.

a) Whether PW2 was the Agent of the Insured or the Insurer

24. The plaintiff called PW2 as his witness in proof of his case and in particular the process of initiation of the insurance contract. In this regard, PW2 admitted that he completed the Proposal Form which he produced as **Exh. 9** on behalf of the Insured whom he described as his client, because the latter did not understand English. He also signed the document. PW2 said that he obtained all relevant details for the

Insured in addition to visiting the property. PW2 is an insurance agent operating his own agency known as Mustard Insurance Agency. PW1 freely admitted the role played by PW2 and clearly staked his case upon the Proposal Form completed by him.

25. I have looked at the fields and questions in the Proposal Form. These clearly require the input of the Insured as most of the information sought could only be within his knowledge, as for example question 11, seeking the antecedents of the proposer and the section on articles in the building. Finally, at the end of the Proposal Form is a declaration which terminates with a space provided for the signature of the proposer.

26. The declaration reads, interalia:

> **"I/We declare that to the best of my/or knowledge and belief**
>
> > **1. The premises are and will be kept in a good state of repair.**
> >
> > **2. Neither I/we nor any person (s) whose property is to be insured hereunder have been convicted of arson or any offence involving dishonesty of any kind (e.g. fraud, robbery, theft or handling stolen goods) nor is any prosecution pending.**
>
> **I/We hereby warrant that the statements made in this proposal are true and complete and that, to the best of my/our knowledge, nothing material affecting the risk has been concealed by me/us.**
>
> **I/We also declare that the sum insured against each item represents the estimated actual value of the property being proposed for insurance. I/We further agree that this proposal shall be incorporated in and taken as the basis of the proposed contract between me and the Invesco Assurance Company Limited whose usual policy form for this class of Insurance I/We agree to accept……."**

27. It is crystal clear, from my observation, that the completion of proposal form was the responsibility of the Insured. To suggest that the Insurer takes on the responsibility for the task merely because the Form is on its letter head amounts to a *non sequitur*. At some point during his re-examination PW2, like PW1, did contrary to earlier assertions claim that he completed the Proposal Form on behalf of the Insurer. DW1 also did confirm that as intermediaries insurance agents can act both for the Insured and the Insurer. But from the facts before me I have no difficulty in finding that in completing the proposal, PW2 was acting on behalf of the Insured whose responsibility it is to complete the form. That is consistent with the decision in **Biggar –Vs- Rock Life Assce Co. [1902] 1 KB 516**, quoted by the Insurer.

28. In **Benjamin Onkoba Nyaachi & Anor –Vs- Victoria Insurance Brokers [2010] eKLR a** case where a vehicle owning company refused to pay dues to the broker for insurance services, the Court of Appeal stated that the broker company remains the agent of the Insured. [See also **Silverstar Automobiles Limited –Vs- Fidelity Shield Insurance Co. Limited [2014] eKLR].** I accept the evidence and submission by the Insurer that PW2 completed the Proposal Form as an agent of the Insured.

b) Whether or not the Proposal Form contains misdescriptions of the insured property amounting to material non-disclosure

29. By their amended Defence, the Insurer raised the following alleged misdescriptions:-

i) house misrepresented as single storey;

ii) house represented as standing on different plot from actual site;

iii) house roofing represented as constructed from concrete with *makuti* decorations whereas the

roofing was all *makuti*.

30. Item (ii) can be disposed of right away. From the oral and documentary evidence by PW1, the house in question stood on Plot 798, original plot reference being No. 794/4. A report by Safety Surveyors Ltd produced as D. Exh. 10 highlighted this anomaly at page 4 as follows:-

> **"2 Both the proposal form and policy indicates the risk location as situated on Plot No. 794/4 at Angels Bay. During our visit we noted that that plot number as Plot No. 798. Plot 794/4 and 798 are two distinct plots" (sic)**

31. The report's recommendation that the matter be clarified by a map of Angels Bay, the general location of the house, was seemingly not carried through. All that remains is therefore the alleged tag reading "*Nyumba Mukingiri* Plot 798" seen and photographed by PW2 at the entrance of the Insured's compound, to prove this discrepancy. Such evidence cannot in any way displace the lease or indenture **Exh. 2** and the Power of Attorney (**Exh. 1**), both produced by PW1, which clearly show the relationship between Plot 798 and 794/4, the original number. There is no doubt that this property is the same one regarding which PW1 and 2 spoke and completed the Proposal Form. The Insurer appears to have wisely abandoned this question as it was not addressed in the final submission. There is no merit whatsoever in that matter.

32. It is items (i) and (iii) of the alleged misdescription that were the mainstay of the repudiation by the Insurer. I propose to deal with both misdescriptions jointly. Starting with the Proposal Form, (**P. Exh. 9, D. Exh 2**) the relevant parts are Questions 1 and 2 thereon. The portion bears instructions at the head in the following terms:

> **"The following questions (1 to 16) constitute a part of the proposal and must be answered fully."**

As completed, the questions 1 and 2 with answers read as follows:

> **"1. Of what materials is the dwelling constructed: <u>CORAL BLOCK.</u>**
>
> **(a) Walls <u>Coral block</u>**
>
> **(b) Roof concrete <u>ceiling and *makuti* decoration</u>.**
>
> **2. How many storeys has the dwelling? <u>NONE</u>"**

33. In his evidence in chief PW1 confirmed that the "**Insured house was the house roofed with *makuti*"**. He described it as a "storeyed house". In cross-examination the matter was again put to him. Admitting he did not sign the proposal form, he nonetheless stated:

> **"Yes it (Proposal) says at 1b that roof was concrete with *makuti* decoration. Roof was all *makuti*. Ceiling was concrete…..item 2 shows the house not storeyed."**

Later during re-examination he sought to attribute the Proposal Form to the Defendant's agent who allegedly completed it.

34. PW2 whom the court found to have completed the proposal form stated that he gave the description of the house in the Proposal. He explained item 2 therein by stating that the **"house was not storeyed but has an upstairs room"** and that the Defendant's manager also visited the home. The initial loss adjustor appointed by the Insurer (Universal Adjusters Kenya Ltd), first visited the premises about 3 weeks since the fire (on 1/11/11). Although the Insurers through DW1 took issue with the report and were unhappy with the alleged unauthorized negotiations with the Insured, they produced the Preliminary Advise dated 18th November 2011 and the First and Final Report dated 3rd April, 2012 by the said firm. [**D. Exh. 9**]

35. The former records [**D. Exh. 9**] that the insured had commenced repair works on the house while

indicating that the Insured's house **"featured a *makuti* - thatched roof."** Nonetheless, the photograph annexed thereto clearly represent one storey above the ground floor of the house. The premises are described in greater detail in the Final Report. The house is stated to be **"double storeyed constructed of cement, rendered natural stone walls beneath a *makuti* thatched roof underlined by a Lamu ceiling."**

36. For their part, Safety Surveyors Ltd conducted their assessment subsequently, almost a year later. The general description of the house given in their Report **D. Exh. 10** is that there was a double storey structure of coral blocks and *makuti* roof, the latter which was consumed by fire. Under the head "Description of the House" the report states:

> **"The Insured private dwelling is a one-storey 4 bedroom building constructed of rendered coral stones with a concrete ceiling on the ground floor reinforced with treated timber. The ceiling to the ground floor serves as the floor to the storey which similarly has a concrete ceiling reinforced with treated timber……"**

37. The report goes on to describe the ground floor and the upper floors of the house, noting that the house was previously roofed with *makuti*. The report highlights the fact on page 4 as follows:

> **"In the proposal form, the Insured indicates that the house has no storeys but the fire damaged house that forms the basis of this claim is a two-storey house."**

38. The report appears to refer to the house both as a **"one storey"** and **"double storey"** house. A full reading of the description however indicates that there were two floors. This confusion is typical in this part of the world where many people equate the term "storey" with the first floor upon the ground floor. The **Oxford Reference Dictionary** defines a storey as:-

> **"…….each of the parts into which a building is divided horizontally; the whole of the rooms each having a continuous floor…."**

39. Did PW2 suffer from such confusion while describing PW1's house? I doubt it. If he did, he would have at least indicated one floor rather than "none" in answering Question 2. In cross-examination he admitted that there was an upper room or floor. PW1 too described his house as storeyed, meaning that it had at least one floor atop the ground floor.

40. From the evidence of PW1 and PW2, it is inescapable, that the house had two stories in the dictionary sense: the ground storey and the upper storey. According DW2's report, the misdescription appears significant as practically all the four bedrooms of the house were upstairs on the second storey. I think on the evidence before me it is clear that question 2 on the Proposal Form was not correctly answered. I will be returning to consider the full import of this misdescription of the insured house later in this judgment.

41. Concerning the roofing materials, the Proposal Form stated that it was made out of "concrete ceiling & *makuti* decoration." It may be arguable whether a concrete ceiling is a roof in the true sense of the word, but from the evidence of PW1 the *makuti* was the actual roof. This is confirmed by the two assessors report **D. Exhibit 9** and **10**. It is not clear why PW2 chose to describe the *makuti* on top of the ceiling as decoration. This is a critical matter as DW2, an experienced loss adjustor stated that in assessing fire risk, insurance companies consider the degree to which construction materials are combustible. This is clearly a common sense statement.

42. Possibly, by indicating under Question 2 of the Proposal that the roofing was made of concrete ceiling and *makuti* decoration, the impression given was that the roof was concrete. However it is also a common sense conclusion from the description that the external roofing was the *makuti* howsoever described. And this is clear from PW1's evidence. The reason given for the fire's quick spread at Angels Bay was the use of *makuti* roofs on the affected houses.

43. PW1's proposal was accepted and a Provisional Cover Note (**D. Exh. 4**) issued on 23rd December

2010 to cover the period 1st January 2011 to 31st December 2011. Under the item **RISK COVERED** the note states interalia:

> **"COVER AGAINST FIRE AND PERILS AND BURGLARY"**

Under INTEREST AND SUM INSURED it states interalia:-

> **"SECTION A- ON BUILDING CONSTRUCTED OF CORAL BLOCKS WITH MAKUTI ROOFING AND CONCRETE CEILING – KSHS 9,000,000/=. (**emphasis added**)**
>
> **SECTION B – ON CONTENTS KSHS 3,000,000/= (SCHEDULE TO BE PROVIDED WITH SERIAL NUMBERS ON EACH ITEM)."**

44. Eventually the policy itself was issued (**D. Exh. 8**). On the first page, the policy states that the *"The proposal and declaration made by the insured is the basis of and forms part of this contract."* The Insured valued and basis of settlement in respect of buildings is clearly stated to be at **"full replacement value."** From the provisional cover note (**D.Exh. 4 & P. Exh. 3A**) it is evident that the Insurer understood the answer to question 1b in the Proposal to mean that the house of the Insured was **"constructed of coral blocks with *makuti* roofing and concrete ceiling."**

45. The subsequent Policy document does not depart from this. It cannot therefore lie in the mouth of the Insurer to assert as averred in paragraph 7B of the Amended defence and in evidence that the Proposal Form indicated that the roofing material was done with concrete and *makuti* decorations and that **"the Defendant does not insure any building constructed of *makuti* roof."**

46. It is true as argued by the counsel for the Insurer that the doctrine of *uberrimae fidei* (utmost good faith) is inbuilt in contracts for insurance. In the case of **Sita Steel Rolling Mills Limited –Vs- Jubilee Insurance Company Limited [2007] eKLR,** the Plaintiffs took out an insurance cover against loss and damage, in respect of machinery. Subsequently the goods were damaged in floods. The Defendants repudiated liability, for reasons interalia, that at the inception, the claimants failed to disclose to the Insurers the existence of a water channel running next to the Insured's premises, which channel overflowed, leading to flooding, and further that the claimants misrepresented to the owners that the machinery was stored in an enclosed godown.

47. The Insurer as in the instant case relied on the holding in the English case of **Carter –Vs- Boehm (1776) 3 Burr 1905** to the effect that Insurance is a Contract based upon speculation and further that:

> **"The special facts, upon which the contingent chance is to be amputed, lie most commonly in the knowledge of the Insured only: the underwriter trusts t his representation, and proceeds upon the confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist and to induce him to estimate the risqué as if it did not exist."** (emphasis added)

48. Maraga J (as he then was) stated in the **Sita** case that:

> **"The principle of (*uberrimae fidae*) imposes on the proposer or Insured the duty to disclose to the Insurer, prior to the conclusion of the contract, but only upto that point, all material facts within his knowledge that the latter does not or is not deemed to know. A failure to disclose however innocent, entitles the Insurer to avoid the contract *ab initio* and upon avoidance it is deemed never to have existed – Mackender –Vs- Feldia Act (1967) 2."**

49. Of course not every undisclosed fact or misrepresentation gives rise to this consequence, and as Maraga J went on to state the Insurer has the onus to prove that:

i) the fact not disclosed was material.

ii) It was within the knowledge of the Insured.

iii) the fact was not communicated to the insurance.

And, a fact is material if it is one which is likely influence the *"mind of a prudent intelligent Insurer, in determining whether he will underwrite the policy at all, or at what premium he will underwrite it……"* see **Pan Atlantic Insurance Co. –Vs- Pine Top Insurance Co. Ltd [1994] 3 ALLER 581**.

50. With the foregoing in mind, and considering PW2's evidence regarding the classification of risk based on construction materials used, I have no difficulty in finding that the question whether the Insured property's roof was constructed of *makuti* was material. Secondly, it was within the knowledge of the Insured. He has stated as much in his evidence. However, the Insurer in this case cannot state that this fact was not communicated to them. True, the proposal form referred to the roofing as consisting of concrete ceiling and *makuti* decoration.

51. In the issued cover note (**Exh 3b, D. Exh. 4)** the Insurer captured the detail accurately as "makuti roofing and concrete ceiling." Where is the non-disclosure? The cover note indicates clearly that the Insurer was keenly aware of the kind of risk it was underwriting. The present assertion by the Insurer that it only discovered later that the roofing was "all makuti" atop a concrete ceiling appears to me an insincere and belated attempt to undo what it had already committed to under the contract. I find no merit in this ground of alleged misdescription and/or non disclosure. It has not been borne out.

52. Turning now to the question whether the Insured is guilty of failing to disclose that the house was double storeyed, it is clear that the proposal form did not disclose this fact. PW1 himself admitted that his house was storeyed. The Insurer tendered uncontroverted evidence that the house was a double storey. Even PW2 the insurance agent conceded in his evidence that the house had an upper floor although he claimed the same was merely an upstairs room.

53. Reports by both loss assessors namely Universal Loss Adjustors Kenya and Safety Surveyors Limited clearly describe a double storeyed house. Whether or not the Insurer's agent surveyed the premises prior the issuance of cover does not take away the obligation on the part of the Insured to make a full declaration of all material facts. In this case, the fact in question was within the knowledge of the Insured but was not communicated to the Insurer.

54. The question that has exercised my mind is whether the fact of the house being double storeyed was material in the sense of tending to influence the Insurer in its estimation of the risk and premium payable. I think that there is no gain saying the fact that the nature of the construction insured could well rank close to the nature of the materials from which it is constructed. The test however is that information held back or misrepresented must be of such a nature as to mislead or induce the underwriter to enter into a contract on terms based upon a faulty or distorted estimation of the risk. (**See Carter –Vs- Boehm**).

55. The Insurer's counsel submitted that the Insured negligently and purposely misled the Insured to assess the risk at Shs 9,000,000/= rather than 27,000,000/=. The latter figure appears to be based on the report by Universal Loss Adjusters, whom as I indicated, did not give any reason for the conclusion that the risk was underinsured. The Insurer appeared to have been unhappy with the said loss adjustor. Indeed DW1 termed his report as erroneous for several reasons, including its failure to address liability and ascertain value of damaged contents. The Insurer went ahead to appoint another assessor. It is therefore surprising that where it suited them, the Insured have sought to place reliance on the report by Universal Loss Adjusters. Be that as it may the second appointed loss assessor Safety Surveyors Ltd did not expressly state in their report that the building was under insured.

56. And while it is true that the insurance cover was based on the proposal form completed by the Insured, the Insurer had the onus of proving that the alleged non-disclosure (of the fact that the house was a double storey) induced them to underwrite the risk at the stated premium.

57. Maraga J in the **Sita** case quoted **Lord Lloyd** in the **Pan Atlantic Insurance Co. Ltd** case as

follows:-

> **"Whenever an Insurer seeks to avoid a contract of insurance or reinsurance on the ground of misrepresentation or non disclosure, there will be two separate closely related questions**
>
> **1) Did the mispresentation or non-disclosure induce the actual Insurer to enter into contract on those terms?**
>
> **2) Would the prudent Insurer have entered into the contract on the same terms if he had known of the misrepresentation or non-disclosure immediately before the contract was concluded?**
>
> **<u>If both questions are answered in favour of the Insurer, he will be entitled to avoid the contract but not otherwise."</u> (**emphasis supplied**)."**

58. The second question is clearly an objective question, whose answer on the facts of this case would have to be in the negative. I am not so sure about the first question, which is one of fact, and which places the onus of proof of inducement on the Insurer. DW1 in his evidence highlighted the various discrepancies related to the claim lodged by the Insured, concluding that:

> **"There was breach of utmost good faith rendering the contract voidable under Section 156 of the Insurance Act because he (Insured) grossly underinsured his property." (sic)**

59. This statement is in reference to the much maligned report by Universal Loss Adjustors whose conclusions are clearly not in harmony with the later report by Safety Surveyors. While the former firm's report advised that "liability is engaged" the latter advised that the "Insurers' liability may not attach in this instance." In cross-examination DW1 was to further accuse Universal Loss Adjustors of "colluding" with the Insured. He reiterated that the Insurer underwrote the risk on the basis of representations by the Insured, and further, that liability is conditional on the Insured giving full and truthful information.

60. DW2's evidence dwelt on discrepancies in the proposal form as opposed to what was on the ground, including the question of the double storey. The Malindi based manager of the Insurer identified by PW2 as Wycliffe and who was admittedly involved at the inception of the insurance contract was not called to testify. Wycliffe, according to PW2 conveyed the premiums payable. Wycliffe *aka* Shasuvila appears to be the author of the Internal Memo **D. Exh.** 1 dated 26/10/2011 which forwarded the Insured's claim to the underwriting manager in Nairobi. The cover note and policy are also duly signed on behalf of the Insured. The DW1's work as described in his evidence was primarily a post contract evaluation of documentation related to the claim, including the proposal form and assessors' reports.

61. In addition, DW1 threw in general statements on the consequences of the alleged breach of utmost good faith by the insured. I have examined the evidence adduced by the Insurer through DW1 and DW2. I cannot find any credible statement that the Insurer was induced to underwrite the risk on the basis of the non-disclosure regarding whether the house was double or single storeyed. If I understood DW1's closing statements in reference to the alleged "gross" under insurance of the property, there was a silent implication that since the house had 2 storeys, it should have attracted a higher premium. But the reports by the two assessors did not explicitly say that. Indeed there is no evidence tendered by the Insurer to explain the basis of the computation of the value of the risk and the premiums payable.

62. In the **Sita** case, Maraga J. adopted the test in **Pan Atlantic** case as further developed by Longmore J in **Mac Rich & Co. AG –Vs- Portman [1996] 1 ALLER 430**, regarding proof of inducement, as follows:

> **"In most cases in which underwriter is called to give evidence and is cross-examined, the court will be able to make up its mind on the question of inducement……(if) it genuinely cannot make up its mind on that question…… [then] the Insurers defence of non disclosure should fail because he will not have been able to show that he had been induced to enter into**

the insurance on the relevant terms. At the end of the day it is for Insurer to prove that the non-disclosure did induce the writing of the risk on the terms in which it was written."

63. As I have observed, DW1 even if taken to be the underwriter could only surmise from the documentation that there was non-disclosure or misdescription but not give direct evidence of consequent inducement. The assessor DW2 was not placed in a position to plausibly comment on inducement arising from the non-disclosure. There is no actual evidence that the premium charged was based on the fact that the house was a single storey or that the Insurer would have offered different terms, or rejected the proposal if made aware that the house was a double storey.

64. In my considered view, the Insured was content to rely only on answering the second part of the questions outlined by Lord Lloyd in **Pan Atlantic**, namely the objective question whether a prudent Insurer would have entered into the contract on the same terms if aware of the non-disclosure prior to the conclusion of the contract. I find, upon considering all relevant matters that the Insurer has failed to prove the element of inducement, and ultimately material non-disclosure based on the description of the nature of the house (double storeyed or not), entitling it to repudiate liability in this case.

c) **Whether the Insured is entitled to the compensation sought**

65. No attempt was made by the Insurer to establish its claim that the claim by the Insured was fraudulently exaggerated as pleaded in paragraph 5 of the Amended defence. The averment in paragraph 7C concerns the complaint that the Insured commenced repairs without the authority or concurrence of the Insurer. PW1 denied this in a half hearted manner even though the earlier assessor on the ground (Universal) confirmed in its report that re-construction had commenced prior to the first visit on November 1, 2011.

66. The repairs were apparently complete by the time DW2 visited in October 2012. DW1 stated that the premature repairs denied the Insurers a chance to ascertain the value of loss and salvage. There was no complaint by DW1 or statement by DW2 that as a consequence of the said unauthorized repairs any action that the Insurer could have pursued under the doctrine of subrogation was prejudiced, as is now submitted by counsel for the Insurer.

67. Besides, the Universal Loss Adjuster's report had indicated that in the circumstances in which the fire broke out, *"there is no evidence upon which a third party necessary action can be pursued."* Equally DW2's report stated that the **"exact cause of the fire is not known but ……the fire started from one of the houses to the south of the Insured's dwelling……blowing wind from the Indian Ocean fanned the fire by blowing fire embers within the bay there by igniting close to 100 house within Angels Bay."**

68. There is clearly no basis in the contention by the Insured that the claim should be defeated for the alleged breach by the Insured of the doctrine of subrogation. This limb of the defence appears to be a shot in the dark, even though the law on abrogation in the submissions is accurately stated. The Insurer went to great lengths to disown the offer of settlement made by Universal Loss Adjusters to the Insured, by the email produced as **P.Exh. 5.** I accept the Insurer's evidence that based on the Insurer's letter of introduction dated 12th January 2012 to the Insured, **(Exh. 6)** it was clear that Universal Loss Adjusters had no authority to settle the matter with the Insured. The offer was in any event rejected by the Insured who apparently only raised it to demonstrate that the Insurer had accepted liability.

69. In conclusion I find that nothing turns on the fact that the Insured commenced repairs before the go-ahead by the Insurer or that an offer to settle was made by Universal Loss Adjustors. In light of all the foregoing, I am satisfied that the Insurer is liable to make good the Insured's losses. Regarding the extent of the loss, there is a dispute as to whether that the building was totally burnt down, but it does seem that some parts of it survived, including walls. The two assessors' reports and the quotation proffered by the Insured from **Kuwaka** (**D. Exh. 7**) indicates partial damage which did not require fresh reconstruction of the house. Unfortunately the Insured did not engage his own assessor to value the loss before calling for the quotation from **Kuwaka**.

70. I am inclined to agree with the adjustment logic contained in the Report by DW2, in connection with on the quotation by **Kuwaka Construction Services,** except that I do not understand the basis of deduction of a sum of Shs 393,900.40 being10% betterment. This was an indemnity policy and the net was worked out after factoring in depreciation. Repairs to the house were not for the improvement of the house as such but for replacing the loss incurred. Be that as it may the Insured did not deem it necessary, beyond the quotation, to tender evidence of actual payments made in respect of the repairs. In the circumstances I will award the sum of Shs 4,648,024.72 for the loss of the house to the Insured.

71. As regards electrical items or contents in the house, these were neither specifically pleaded nor proved. It does not seem that the Insured ever presented documents and particulars of items in the schedule (**D. Exh. 3**) as required under the cover. Receipts or other proof of the value of lost goods were neither furnished to the assessors nor tendered before this court. Similarly, the alleged damaged motor vehicle, a Mercedez Benz whose full particulars were neither pleaded nor proved is not included in the contents schedule **D. Exh. 3**.

72. In the case of **Nizar Virani T/a Kisumu Beach Resort –Vs- Phoenix of East Africa Company Ltd [2004] eKLR** which involved an insurance claim, the Court of Appeal essentially agreed with the High Court that an insurance claim is in the nature of a claim for special damages.

73. The Court stated:

> **[A] claim for special damages should not only be pleaded but strictly proved. There is a long list of authorities on that principle but we only cite Eldama Ravine Distributors Ltd & Anor –Vs- Samson Kipruto Chebon …… where the Court stated:**
>
> **"It has time and again been held by the Courts in Kenya that a claim for each particular type of special damage must be pleaded."**
>
> **In Ouma –Vs- Nairobi City Council [1976] KLR 304 after stressing the need Chesoni J. quoted in support the following passage from Bowen LJ's Judgment on pages 532, 533 in Ratcliffe –Vs- Evans (1892) 2 QB 524, an English leading case on pleading and proof of damage;**
>
> **"The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable having regard to the circumstances and to the nature of the act themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."**

74. The Court of Appeal reiterated that the insurance contract is in the nature of an indemnity contract and noted that in the case before it the sum insured could not *"simply be paid without verification by the Insurer, both on liability and quantum."* It did appear in the case before me that the Insured expected full payment of the insured sum, notwithstanding the pleadings or proof placed before the court. That is a misdirection in my view. The claim made in respect of "electrical" items and motor vehicle must fail for want of specific pleading and proof.

75. In the result only the claim in respect of the damaged house has been allowed in the sum of Shs 4,648,024.72. Judgment is accordingly entered for the Plaintiff against the Defendant in that sum, with costs and interest.

Written and signed at Naivasha this 29th day of April, 2015.

C. MEOLI

JUDGE

DATED AND DELIVERED AT MALINDI THIS 9TH DAY OF JULY, 2015.

BY S.J. CHITEMBWE

JUDGE

ON BEHALF OF:

C. MEOLI

JUDGE