



REPUBLIC OF KENYA



**Moi Teaching and Referral Hospital v Alexander Forbes Healthcare Limited  
(Civil Suit 13 of 2016) [2025] KEHC 7694 (KLR) (4 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 7694 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL SUIT 13 OF 2016  
RN NYAKUNDI, J  
JUNE 4, 2025**

**BETWEEN**

**MOI TEACHING AND REFFERAL HOSPITAL ..... PLAINTIFF**

**AND**

**ALEXANDER FORBES HEALTHCARE LIMITED ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff instituted this suit vide a Complaint dated 31<sup>st</sup> August, 2016 seeking an order of specific performance against the Defendant, compelling it to perform its contractual obligations under a contract entered into by the parties. The Plaintiff sought the following orders;
2. The defendant filed a statement of defence dated 03/05/2019 admitting that the parties entered into a contract for the provision of comprehensive insurance for the Plaintiff which contract was duly performed by the defendant and the defendant was then discharged from its obligations under the contract. However, the defendant denied the particulars of breach and put the Plaintiff to strict proof of the same.

**Plaintiff's Reply to Defence.**

3. The plaintiff filed a reply to defence dated 22/03/2024 through the firm of Messrs. Kalya & Company Advocates. The plaintiff averred that it does not understand and is a stranger to the contents of paragraph 2 of the Defence. It reiterated that at all material times to this claim and the contract the Defendant was duly registered as a Private Limited Company and licensed and regulated by the Insurance Regulatory Authority, a statutory government Agency established under the *Insurance Act* (Amendment) 2006, under the name Alexander Forbes Healthcare Limited. The Defendant was put to strict proof thereof.
4. The Plaintiff denied the contents of paragraphs 3, 5 and 7 of the Defence and more particularly: - Denied that the Defendant duly performed its obligations under the contract; has been discharged



from its obligations owed to the Plaintiff under the Contract; did not breach the terms and conditions of the contract as particularized in paragraph 6 of the Plaintiff and that it did not issue the Defendant demand notice to rectify its breach.

5. The Plaintiff reiterated the contents of paragraphs 3, 4, 5, 6, 7, 8, and 9 of the Plaintiff in addition, averred as follows:-
- i. It entered into a contract on 1-03-2011 with the Defendant wherein it was agreed that the Defendant shall provide comprehensive medical cover to the Plaintiff's member of staff at a consideration of KShs.88, 340,000/=
  - ii. The Defendant admits the existence of the aforementioned contract in paragraph 3 of its statement of Defence dated 3<sup>rd</sup> June 2019.
  - iii. The Defendant breached its obligation under the aforesaid contract to the detriment and loss of the Plaintiff hence the current suit.
  - iv. The Defendant in its letter dated 9<sup>th</sup> November 2012 admitted owing the Plaintiff money and proposed to make monthly payments of KShs.2, 500,000/= until full payment.
  - v. The Defendant further admitted the debt and gave an undertaking to make full payment of the arrears in its letter dated 11<sup>th</sup> December 2012 to the Plaintiff via its counsel as at then D.K.Korir Esq
  - vi. The Defendant pursuant to the aforementioned admission made a total payment of KShs.10, 065,943.72 to the Plaintiff pending receiving an actual outstanding amount from the Plaintiff.
  - vii. The Plaintiff based on the above admission by the Defendant did reconcile its accounts and communicated to the Defendant the actual outstanding amount owing is KShs.20,176,662/=.
  - viii. As admitted by the Defendant this claim of KShs.20, 176,662/= arises from the contract entered between it and the Plaintiff.
  - ix. Based on the above facts, the Defendant has admitted having not settled the amount owing and due to the Plaintiff.
  - x. It will be unconscionable for the Defendant to continue withholding public funds of KShs.20, 176,662/= in light of the express admission made in its correspondence to the Plaintiff and blatant breach of its contractual obligations herein.
6. The Plaintiff reiterated that the Defendant was never discharged from its obligations under the contract herein, urging that a perusal of the Defence confirms the same. The Plaintiff prayed that the Defence be struck out with costs.

### **Hearing of the Suit.**

7. The Plaintiff called 1 witness in support of its case. PW1 was Thomas Ngetich, the Plaintiff's Finance Manager who admitted his witness statement as evidence in chief. He testified that the parties executed a Standard Service Agreement dated 01/10/2008 where the defendant procured health services from the Plaintiff for eligible members of its healthcare scheme. Further, that on 01/03/2011 the Plaintiff entered onto a contract with the defendant for the provision of comprehensive medical care for its staff for the sum of KShs. 88,340,000 which sum the plaintiff paid under the terms of the contract.
8. The witness stated that on 11/12/12 the defendant had committed to settling the pending claims by paying KShs. 2,500,000/- every month and as at that date the outstanding amount was KShs.



- 39,546,224. It was his testimony that through a letter dated 11/12/2023 the defendant acknowledged the claim and committed to settling the same and further, that it made payments of Kshs. 19,369,562 towards settling the claim. He stated that the outstanding balance was Kshs. 20,176,662/-.
9. The defendant called one witness in its defence. DW1 was Benard Apput, the Defendants' general manager from 2011 to 2012. He adopted his witness statement dated 31/01/2025 as evidence in chief and testified in open court. It was his testimony that the parties entered into a Contract for the provision of Comprehensive Medical Cover to the Plaintiffs staff for the sum of Kenya Shillings Eighty-Eight Million, Three Hundred and Forty Thousand (Kshs. 88,340,000/=). Further, that the duration of the said Contract was for One Year/Twelve Calendar Months, with effect from 1<sup>st</sup> March 2011 to 28<sup>th</sup> February 2012. However, vide the Letter dated 1<sup>st</sup> March 2012 the Plaintiff, requested for an extension of the Contract for One (1) more month, thus, the Contract was extended from 1<sup>st</sup> March 2012 and lapsed on 31<sup>st</sup> March 2012. He stated that vide the Letter dated 9<sup>th</sup> December 2012, he confirmed that the Defendant's Acting Managing Director Lydiah Macharia wrote a Letter to the Plaintiff on the outstanding account with the Defendant herein. The Letter expressly indicated that the outstanding balance between the two institutions has not been agreed. In this regard, the Acting Managing Director requested for cooperation with Moi Teaching & Referral Hospital towards finalizing the reconciliation of the account in order to determine the correct amount owed to the Plaintiff, Moi Teaching & Referral Hospital. The Acting Managing Director also confirmed paying the sum of Kenya Shillings Two Million, Five Hundred Thousand (Kshs. 2,500,000/=) since August 2012 to reduce the outstanding amount. Additionally, the Managing Director sought indulgence from Moi Teaching & Referral Hospital to continue with the instalment plan pending reconciliation of the account and agreement on the final outstanding amount and a full and final settlement of the same.
  10. The witness stated that having not received any response to the Letter dated 9<sup>th</sup> December 2012, the Defendants Acting Managing Director, Lydiah Macharia wrote another Letter dated 11<sup>th</sup> December 2012 to the firm of KTK Advocates who were representing the Plaintiff, and yet again, the Defendant's Acting Managing Director expressly indicated that they have not refused to settle the Plaintiffs outstanding bills and reconciliation of the outstanding account needs to be done for both Moi Teaching & Referral Hospital and Alexander Forbes Healthcare Limited to come to an agreement on the actual outstanding amount. The Defendant's Acting Managing Director reiterated that they were committed to paying the sum of Kenya Shillings Two Million, Five Hundred Thousand (Kshs. 2,500,000/=) towards the debt as reconciliation goes on.
  11. The witness testified that to date, the Plaintiff has never furnished the Defendant with any documentation for the Defendant to know the actual outstanding sum due and owing to the Plaintiff as severally sought by the Defendant. Additionally, the requested reconciliation of accounts has never been done to ascertain the outstanding amount for both the Plaintiff and Defendant to agree on the amount due and owing to the Plaintiff, if any. In the absence of the said reconciliation, it is impossible even for the Plaintiff itself to confirm that indeed the sum of Kenya Shillings Twenty Million, One Hundred and Seventy-Six Thousand, Six Hundred and Sixty-Two (Kshs. 20,176,662/=) as sought in the Plaintiff is due and owing.
  12. It was the witnesses' testimony that in light of the foregoing, the Suit herein is in law ill-conceived, vexatious, discloses no reasonable cause of action in law against the Defendant and is otherwise an abuse of Court process. Further, that the Plaintiff has deliberately withheld material information in an attempt to mislead the Court to procure a possible favourable order and outcome.



### **Plaintiff's Submissions.**

13. Learned counsel for the Appellant filed submissions dated 25/04/2025 through the firm of Messrs Kalya & Company Advocates. Counsel submitted that the relationship between the Plaintiff and the Defendant was initiated by the Standard Service Agreement dated 1<sup>st</sup> October, 2008. The basis of the said of the said agreement was to define the relationship and obligations of parties to the agreement. It was a term of the service level agreement that the Plaintiff would provide medical services to the Defendant's staff members at consideration agreeable by the parties. It was a term of the agreement that the Plaintiff would prepare invoices and share the same to the Defendant, thereafter the Defendant would settled the sum in 30 days from the date of receipt of fully documented invoices.
14. Counsel stated that in 2011, the parties entered into the agreement dated 1<sup>st</sup> March, 2011 for the provision of Comprehensive medical cover. It was agreed that the Defendant would provide comprehensive medical cover to the Plaintiffs staff members in the sum of Kshs.88, 340,000/= . Counsel urged that it is the Plaintiffs case that the Defendant failed to pay outstanding sums arising from the Service level agreement and the contract of 1<sup>st</sup> March, 2011 to the tune of 20,176,662/= plus interest accruing thereof necessitating the present suit.
15. It is the Plaintiffs position that the Defendant blatantly breached the contracts entered between the Plaintiff and the Defendant. Counsel submitted that PW-1 referred the court to a number of letters addresses to the Defendant requiring them to pay outstanding sums owing to the Plaintiff as follows;
  - i. In the letter dated 12<sup>th</sup> January, 2012, the Plaintiff enclosed a detailed statement of services to the Defendant for the period December 2010 to December, 2011, In the said letter the Plaintiff indicates that it has been submitting invoices and account statements but payment has never been made.
  - ii. In the letter dated 1<sup>st</sup> March, 2012, the Plaintiff requested for an extension of medical cover for its staff members for a month effective 1<sup>st</sup> March, 2012 to 31<sup>st</sup> March, 2012. The Plaintiff additionally requested the Defendant to settle its pending claims which at the time was Kshs. 29,699,147/=
  - iii. In the letter dated 5<sup>th</sup> April, 2012, the Plaintiff further demanded the Defendant to settle its outstanding sums which was Kshs. 44,897,645/= . A cursory at paragraph one of the letter, the Plaintiff confirm that reconciliation of accounts was done.
  - iv. In its letter dated 9<sup>th</sup> November, 2012, the Defendant admitted that there was an outstanding sum between the Plaintiff and the Defendant. In the letter, the defendant explains that it has been going through a restructuring process. It committed to pay the sum of Kshs. 2, 500,000/= to full and final settlement of the outstanding sum.
  - v. In the letter dated 11th December, 2012 , the Defendant under paragraph one admitted that there is an outstanding sum that needs to be paid by the Plaintiff and committed to pay Kshs.2, 500,000/= until full settlement.
16. Counsel urged that the courts have been clear on the role of the Court in dealing with contractual obligations between parties. He cited the cases of Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited (2017) KECA 152 (KLR) and South Nyanza Sugar Co. Ltd vs Leonard O. Arera [2020] eKLR in this regard.



17. Counsel urged that a cursory look at page 2 of the contract dated 1<sup>st</sup> March, 2011, the Defendant agreed as follows;

“ the Procuring entity hereby covenants to pay the tenderer in consideration of the provision of the services and remedying of defects therein , the contract price or such other sum as may become payable under the provision of the contract at the times and in the matter prescribed by the contract ”

18. Further, that the Defendants letters dated 9<sup>th</sup> December, 2012 and 11<sup>th</sup> December, 2012 are a clear admission that there was an outstanding sum that the Defendant had failed to pay the Plaintiff. In light of the above, counsel urged the court find that the Defendant was in breach of its contractual obligations to the Plaintiff.

19. Counsel pointed out that it is the Defendant’s case that they failed to settle the outstanding sum because the Plaintiff failed to reconcile its accounts, contrasting that with the fact that it is clear that from the letters dated 12<sup>th</sup> January, 2012, 1<sup>st</sup> March, 2012 and 5<sup>th</sup> April, 2012 that reconciliation of accounts was constantly on-going between the parties. He submitted that the Defendant only raised the issue of reconciliation in its letters dated 9<sup>th</sup> December, 2012 and 11<sup>th</sup> December, 2012 after it was served demand letters by the Plaintiff. From the bundle of letters dated, the Plaintiff made it clear to the Defendant how much money was owing.

20. Counsel submitted that the agreement between the parties is also silent on how often reconciliation should be done. He explained that reconciliation is the process of verifying that two sets of financial records are consistent and accurate. Counsel posited that, without prejudice to the foregoing, the Defendant; at all material times, never communicated to the Plaintiff what figures appeared from their financial records to facilitate the reconciliation process. Further, that it is the Plaintiffs position that reconciliation was regularly done and it is the Defendant that neglected to pay the outstanding sum to the Plaintiff, under the guise that reconciliation was not done. Counsel further drew the court’s attention to clause 11 (h) of the service level agreement dated 1<sup>st</sup> October, 2008 which notes the following in respect to Statement of Accounts;

“ The Hospital’s statement of account shall be proof of the company’s indebtedness unless a dispute has been raised, in writing, within (21) days from the date of receipt of the statement”

21. Counsel urged that the above -quoted contract indicates that the Statement of Account shall be sufficient proof of indebtedness. In the present circumstances, the Defendant did not make a complaint within 21 days before issuance of the Statement of Accounts. He submitted that it is clear that the Plaintiffs Statement of Account is sufficient evidence of the Defendants indebtedness. Counsel reiterated that the role of the Court is not to rewire contracts between parties, citing the case of Omega Foundation v SBM Bank Limited Formerly Chase Bank (2022) KEHC 2432 (KLR) in support of this submission.

22. Counsel further submitted that the Defendant has additionally failed to provide any material before the Court from their financial records indicating that they anticipated paying a certain amount to settle the debt between the two parties or any figures to the contrary of what the Plaintiff has provided in respect to the transaction between the two parties. Counsel cited the case of Muguga General Stores Ltd vs Pepco Distributors Ltd (1987) KLR 150 in support of this submission. Counsel urged the Court to see the mischief in the Defendant’s case which has taken a back seat and refused to pay the Plaintiff money which they admit is owing under the guise of non-reconciliation of accounts.



23. On whether the contractual period was extended, counsel urged that in the letter dated 1<sup>st</sup> March, 2012, the Plaintiff sought an extension of the duration of the contract for a further one month, that is from 1<sup>st</sup> March, 2012 to 31<sup>st</sup> March 2012. He stated that it is the Plaintiffs case that the period of engagement between the parties continued for over the timelines set out in the agreement and further, that the Defendant's witness during cross examination confirmed this position. Counsel urged that after expiry of the agreement, the parties continued to engage with each other creating an implied contract. He cited the decision of the Court of Appeal in *Ali Abdi Mohamed vs. Kenya Shell & Company Limited* (2017) eKLR and the case of *Sherry v Children Transformation Project (K)* [2022] KEELRC 1429 (KLR), urging the court find that an implied contract was created when the contract expired but parties continued to engage in the commercial transactions.
24. Counsel urged that the Plaintiff has proved its case on a balance of probabilities and is entitled to the orders sought. He summarised this by urging that the Plaintiff has provided evidence before the Honourable Court on the following facts;
- a. That there existed a valid contract between the parties {See PEhx No. 2 &3}
  - b. That it was the obligation of the Defendant for services rendered.
  - c. That the Plaintiff demanded for payment of outstanding sum being payment for services rendered {See PEhxNo.6-8}
  - d. That the Defendant acknowledged indebtedness and even committed to pay outstanding sum.
  - e. That the Defendant has not settled outstanding sum owing to the Plaintiff.
  - f. That the Defendant has not presented any material claiming that the owes a different sum of money to the Plaintiff
  - g. The Defendant's main defence is that they were awaiting reconciliation to settle outstanding sum
25. He pointed out that at the hearing of the suit, the Defendant challenged the Statement of Account claiming that it was not supported by the relevant invoices, but it is notable that the Defendant never provided any evidence to the contrary. He submitted that it is trite law that the standard of proof required in civil cases is 'proof on a preponderance or balance of probability That is, the Plaintiff must prove that what he or she alleges is more likely than not, the truth in the circumstances in the case. He cited the case of *Job Evans Okello v Stephen Z.K. Njoroge* [2005] eKLR and *Miller v Minister of Pensions* (1947) 2 All ER 372 in this regard. He reiterated that the Defendant merely disproved the Statement of Accounts prepared by the Plaintiff and did not offer any evidence to the contrary. Further, that DW-1 admitted that ordinarily, the Plaintiff would share invoices to the Defendant who would later settle the same. Subsequently, the Defendant was in custody of the relevant invoices which were regularly shared between the parties. Counsel urged the court to find that the Plaintiff proved its case to the required standard.
26. He prayed the court to accordingly award the Plaintiff the costs of the suit as per the provisions of section 27 of the [Civil Procedure Act](#).

### **Defendant' Submissions.**

27. The defendant filed submissions through the firm of Messrs Otunga Law Advocates LLP. Counsel cited Sections 107,108 and 109 of the [Evidence Act](#) on burden of proof and urged that the Plaintiff has not established its claim as against the Defendant and is therefore not entitled to the reliefs sought.



28. Counsel referred the Court to various documents annexed in the Plaintiffs List of Documents dated 5<sup>th</sup> February 2024 including; Plaintiff's exhibit No, 2; The Standard Service Agreement dated 1<sup>st</sup> October 2008 ,where the Defendant is referred to as the "Company" while the Plaintiff is referred to as the "Hospital". Counsel reproduced the contents of Clause 9 and 10 of the agreement and reiterated that the Plaintiff has not discharged its burden of proof in respect of the allegation that the Defendant's Account is overdue by Kshs. 20,176,662/=, Counsel attributed this to the failure of the Plaintiff to produce evidence to prove the said allegations, absence of which, confirms that the said allegations are unsubstantiated. Further, that without prejudice to the foregoing, the claim being a claim for special damages has not been proved as required in law.
29. Counsel submitted that before any payment could be made, the Plaintiff had a duty to dispatch Invoices to the Company's last known postal or physical address as per the agreed schedules as expressly indicated in Clause 9(b) of the Standard Service Agreement. He pointed out that during cross-examination, the Plaintiffs Witness confirmed that no documentary evidence in the form of Invoices in the very least had been produced to support the alleged Statement of Accounts for the period 1<sup>st</sup> August 2012 to 11<sup>th</sup> December 2012. Additionally, that the Plaintiffs' Witness confirmed that the Statement of Account neither bears any acknowledgement stamp nor signature from the Defendant Company to prove that service of the Statement of Account was effected upon the Defendant. Further to support this, the Defendant's Witness also confirmed having neither seen nor received the said Statement of Account, as the first time he came across the "list" is in Court.
30. Counsel urged that the Plaintiff in its Written Submissions mischievously and selectively relies on Clause 11(h) of the Standard Service Agreement dated 1<sup>st</sup> October 2008 and sought to draw the Court's attention to Clause 9 and 10 of the Agreement which expressly indicate that payment will be done within thirty (30) days once the Defendant receives the fully documented invoices. Further, the Plaintiff has also not proved that it effected service of the Statement of Account upon the Defendant for the alleged payment to be settled.
31. Counsel sought to draw the attention of the court to the letter dated 12<sup>th</sup> January 2012 (P.E. No. 6); highlighting the following issues therein;
- i. As at 12<sup>th</sup> January 2012, the Plaintiff alleged the outstanding amount was Kshs. 4,480,764/=;
  - ii. The Plaintiff did not attach a detailed statement of the services allegedly rendered to the Defendant's Clients at the Plaintiffs Private Wing (II) Memorial Wing during the period December 2010 - December 2011;
  - iii. The Plaintiff did not attach any Invoices which were allegedly submitted to the Defendant;
  - iv. The Plaintiff did not attach any Account Statements allegedly sent to the Defendant as indicated in the said Letter;
  - v. Thus, the sum of Kshs. 4,480,764/= requested vide the Letter dated 12<sup>th</sup> January 2012 has not been substantiated;
  - vi. There is no signature or stamp confirming that the Letter was received by the Defendant.
32. For the Letter dated 1<sup>st</sup> March 2012 (P.E. No. 7) he pointed out that as at 1<sup>st</sup> March 2012, the Plaintiff alleged the outstanding amount was Kshs. 29,699,147/=; and further, that the Plaintiff did not produce any proof to substantiate the Claim for Kshs. 29,699,147/=; No Invoices were annexed to the said Letter and no Statements of Account were tendered to substantiate the sum of Kshs. 29,699,147/=; There is no signature or stamp confirming that the Letter was received by the Defendant.



33. For the Letter dated 5<sup>th</sup> April 2012 (P.E. No. 8) he pointed out as follows; The Plaintiff confirmed that reconciliation of accounts had been done and the amount due from the Defendant was Kshs. 44,897,645/= (as at 5<sup>th</sup> April 2012); The Plaintiff indicated that the amount remains unsettled and they shall take steps to suspend services to the Defendant's members and that there is no signature or stamp confirming that the Letter was received by the Defendant.
34. With regards to the Memo from Moi Teaching and Referral Hospital Credit Control to the Legal Officer dated 14<sup>th</sup> August 2012 he pointed out that as at 14<sup>th</sup> August 2012, the Plaintiff alleged that the outstanding amount was Kshs. 47,180,362/= He additionally highlighted the letter dated 9<sup>th</sup> November 2012 ,11<sup>th</sup> December 2012 and Memo from Moi Teaching and Referral Hospital Ag. Finance Manager to the Legal Officer dated 23<sup>rd</sup> Mav 2012 and urged that e it is clear that for the Plaintiffs claim for special damages to succeed, the same must be clearly ascertained, quantified and proved and further the same must be ascertained from the pleadings and proved by supportive documentary evidence. He relied on the case of M'Bita Ntiro versus Mbae Mwirichia & another [2018] eKLR and the case of Vishva Stone Suppliers Company Ltd versus RSR Stone 2006 Limited [2018] eKLR on claims for special damages, urging that the Plaintiff had failed to prove the same.
35. Counsel pointed out the Plaintiffs Witness Statement by one Thomas Ngetich who testified on behalf of the Plaintiff urging that apart from alleging that the Defendant's Account is overdue by Kshs. 20,176,662/= did not lead any evidence at all to support the alleged outstanding amount. He urged that in that regard, the Suit herein ought to be dismissed with costs to the 1<sup>st</sup> Respondent.

#### **Analysis & Determination.**

36. The following issues arises for determination; Whether the Plaintiff has proved its case to the required standard
37. The plaintiff seeks an order for specific performance compelling the defendant to perform its contractual obligation under the said contract by regularizing the overdue account of Kshs. 20,176,662.00/-. The contract from which the cause of action arises as per the pleadings is dated 01/03/2011. The contract was for the provision of, in a nutshell, comprehensive medical cover to the Plaintiff for the sum of Kshs. 88,340,000.00. The particulars of the alleged breach of contract were that the defendant had failed to pay claims to the Plaintiff's members of staff since 2013 and further, failed to provide comprehensive cover and regularise accounts for an overdue sum of Kshs. 20,176,662.00/-.
38. In *Gharib Suleman Gharib v Abdulrahman Mohamed Agil LLR No. 750 (CAK) Civil Appeal No. 112 of 1998* the Court held that: -

“The jurisdiction to order specific performance is based on the existence of a valid and enforceable contract and being an equitable relief, such relief is more often than not granted where the party seeking it cannot obtain sufficient remedy by an award of damages the focus being whether or not specific performance will do more perfect and complete justice than an award of damages.”

39. Further, in *Thrift Homes Ltd vs. Kenya Investment Ltd 2015 eKLR*, the court stated that: -

“specific performance like any other equitable remedy is discretionary and will be granted on well settled principles. The jurisdiction of specific performance is based on the existence of a valid enforceable contract and will not be ordered if the contract suffers from some defects or mistake or illegality. Even where a contract is valid and enforceable, specific performance will not be ordered where there is an adequate alternative remedy. The court then posed the



question as to whether the Plaintiff who was seeking specific performance in that case had shown that he was ready and able to complete the transaction".

40. It is a principle of law that whoever lays a claim before the court against another has the burden to prove it as per the provisions of Sections 107 and 108 of the *Evidence Act*. The burden of proof was discussed in the case of Muriungi Kanoru Jeremiah vs Stephen Ungu M'mwarabua [2015] eKLR where the court held as follows:-

As I have already stated, in law, the burden of proving the claim was the appellant's including the allegation that the respondent did not pay the sum claimed as agreed; i.e. into the account as provided....The trial magistrate was absolutely correct in so holding and did not shift any legal burden to the appellant...The appellant was obliged in law to prove that allegation; after the legal adage that he who asserts or alleges must prove.....In the circumstances of this case, the respondent bore no burden of proof whatsoever in relation to the debt claimed. By way of speaking, the shifting of burden of proof would have arisen had the trial court magistrate held that the respondent bore burden to prove that he deposited the sum of Kshs. 98,200/- the debt being claimed herein.

41. Similarly, in the Halsbury's Laws of England, 4th edition, Volume 17 at paras 13 and 14:-

The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he had failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.

The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence.

42. It follows that the burden of proof of the particulars of breach falls on the Plaintiff. The plaintiff produced the contract to wit; the standard service agreement dated 01/10/2008 and the contract dated 01/03/2011 and therefore the existence of the contract is not in contention. I also note that the defendant. Vide the letter dated 09/11/2012 acknowledged the existence of an outstanding balance and that payments of Kshs. 2,500,000/- had been made monthly since August 2012 pending reconciliation of accounts to determine the exact outstanding balance. Additionally, the defendant, vide a letter dated 11/12/2012 reiterated the need for the reconciliation and stated that Kshs. 10,065,943.72 had been paid as at that date.
43. In my view, the claim of the specific amount of Kshs. 20,176,662.00/- that is to be paid by the Defendants, is the crux of the dispute. It is akin to one seeking for special damages. It is trite law that



special damages must not only be specifically pleaded but they must also be proved. In *Richard Okuku Oloo v South Nyanza Sugar Co. Ltd* [2013] eKLR the Court of Appeal observed as follows: -

“We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.

In the *Jivanji* case (*supra*), a decision of this court differently constituted, it was held that the degree of certainty and particularity depends on the nature of the acts complained of. The following passage which partly quotes *Coast Bus Service Limited v Murunga & Others Nairobi CA No. 192 of 1992* (ur) appears in the *Jivanji* case:

“It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those of *Kampala City Council vs Nakaye* [1972] EA 446, *Ouma v Nairobi City Council* [1976] KLR 297 and the latest decision of this Court on this point which appears to be *Eldama Ravine Distributors Limited and another v Chebon Civil appeal number 22 of 1991 (UR)*. In the latest case, *Cockar JA* who dealt with the issue of special damages said in his judgment:

“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 v Nairobi City Council* [1976] KR 304 after stressing the need for a plaintiff in order to succeed on a claim for specified damages. *Chesoni J* quoted in support the following passage from *Bowen LJ*’s judgment at 532-533 in *Ratcliffe v Evans* [1892] QB 524, an English leading case of 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 the 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 acts 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.”

44. In order for the court to award said prayer, it is upon the plaintiff to prove to this court that the amount was due and give evidence as to where it arises from. The standard service agreement entered into before the contract was signed served the purpose of governing the provision of the services by the defendant to the plaintiff. Notably, the service agreement is not expressly stated to be amongst the documents construed to be part of the contract dated 01/03/2011. Additionally, the same was entered into three years before the contract which the plaintiff claims was breached was entered into by the parties.
45. A common thread running through the pleadings and the testimonies is that there was never a conclusive reconciliation for the outstanding balance that the Plaintiff claims it is owed. PW1 claimed that the outstanding amount as at 11/12/12 was Kshs. 39, 546,224/-. What is not clear is how this amount was arrived at. In the reply to the defence, the plaintiff stated that the accounts were reconciled but sought to rely on its statement of accounts as proof of the same despite stating that reconciliation is the process of verifying two statements of accounts. This then raises the question as to how the plaintiff claims to have reconciled the accounts by solely referring to its statements of accounts, which in my view, would present a one-sided argument.
46. The parties have sought to rely on the service level agreement as the document governing the contract between the parties and specifically, on the issue of claim management. It is for this very reason that I



bring up the terms of the contract entered into on 01/03/2011 and specifically clause 3 which expressly states as follows;

2. The following documents shall be deemed to form and be read and construed as part of this agreement, viz;
  - a. The tender form and the price schedule submitted by the tenderer.
  - b. The schedule of requirements
  - c. The details of cover
  - d. The general conditions of contract
  - e. The special conditions of contract.
  - f. The procuring entity's notification of award.
47. The service level agreement the parties rely on was dated 01/10/2008 and is not among the documents expressly stated to be deemed to form part of the contract. As such, the terms and conditions therein cannot be applied to the contract. Be that as it may, even if the court were to consider the terms therein to be applicable to the contract, clause 9 of the agreement provides that the defendant was to dispatch invoices to the company's last known postal address and further, that reconciliation was to be carried out within sixty days of a request by any of the parties. The defendant, while committing to pay Kshs. 2,500,000/- per month, requested reconciliation on 09/11/2012 and 12/11/2012 in order to establish the outstanding amount. The plaintiff has not produced any invoices, if it indeed dispatched any, as proof of where the claimed amount arises from. It has instead opted to file its own statements of accounts, in support of the claimed outstanding balance.
48. The nature of this commercial contract is akin to the principles elucidated in the case of Photo Production Ltd vs Securicor Transport Ltd 1980 AC 827,848, 849 in which the court observed: "The contract, however, is as much the source of secondary obligations as it is of primary obligations. Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract breaker to which it gives rise by implication of the common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach"
49. I have the advantage of appreciating the evidence as adduced by the Plaintiff and the rebuttal by the defendant and the million-dollar question is whether there is sufficient evidence upon which this court applying its mind within the statutory framework of Section 107 (1), 108 & 109 of the *Evidence Act*, to rule that the Plaintiff has established a prima-facie case touching on the elements of the contract to warrant the remedy in the Plaintiff. In the instant case the insurance contract is not disputed, what is in issue are certain fundamental conditions which were set within the instruments voluntarily entered into by both parties to actualise the contract. It is also implicit from the evidence that the contract as stipulated between the Plaintiff and the Defendant is yet to be fully actualized within the letter and spirit of the service level agreements.
50. The validity of a standard form contract like the one entered into between the Plaintiff and the Defendant is not necessarily to be disputed. The necessity being that standard form of contract has become a necessity in relation to efficiency and effectiveness in the performance of the terms set out by the parties to a contract. Legal liability in drawing up standard form of contract is very fundamental so that in cases of disputes arising, from such category of contract the court should be able to examine who should be responsible and how far such responsibility can be apportioned. In the real sense, the principles on liability of standard form contracts fall within the canons of fault, presumption of



liability, presumption of non-liability, and limitation of liability. This claim by the Plaintiff assessed from the outline of the evidence does demonstrate a contract to be doing both parties which involves 3<sup>rd</sup> parties being patients seeking medical services the plaintiff's Referral Hospital. In principle the legal standing or status of both the Plaintiff and the Defendant is crucial in making of an enforceable contract. That is not disputed in this claim before this court. Notably, the point of departure as between the defendant and the plaintiff is on certain variations of what was expected as a condition precedent for the delivery and settlement of the claims falling due and payable within the stipulated contract. According to the defendant, the claim forms and invoices of the respective patients seeking medical services at the Plaintiffs Teaching and Referral Hospital was such that they would provide the basis of re-imbursement of the sum insured arising out of the services rendered at any one given time. It is trite that every contract derives its effect from the intention of the parties. For this reason, the legal relationship that existed between the plaintiff and the defendant, imposed certain obligations for benefit of actualising accrued rights and benefits from that contractual agreement. This privity of contract between the Plaintiff and the Defendant should not be interpreted in a manner that would affect third parties who were not privy to the primary contract.

51. In my considered view, the continuity relevance of the essential terms of the contract in question remain undisputed. It is trite that courts should strive to preserve rather than to destroy, bargains more so where commercial transactions are concerned the intention of the parties relating to the performance of the contract within the ambit of their liability should be subjected to precise construction on the facts. Generally, I hold the view the plaintiff has discharged the burden of proof on a balance of probabilities to hold the defendant reliable on the undertaking of financial responsibility for the outstanding medical claims on the basis of the aforementioned insurance contract. The issues at stake are as to the element of workability on the precise outstanding claims which are due and owing to the Plaintiff as part of the agreement entered into in the primary contract. There is no evidence that the claim so pleaded by the Plaintiff is one which can be classified as an unjust enrichment following the failure to supply the necessary documentation herein referred to as claim forms or invoices.
52. The upshot of this an agreed firm of Chartered Accountant be appointed to undertake detailed analysis of all necessary documents and evidence on record as they relate to the insurance contract between the Plaintiff and the defendant as also defined in the service level agreements to establish the outstanding claims and thereafter repair a forensic report to be availed to this court for the purposes of rendering final judgement on quantum. That under these circumstances, it is felt necessary that the appointment of the chartered accountant firm with expertise and competence of finetuning the scope of the audit be undertaken within a period of 30 days from the delivery of this judgement. The status conference to receive the report be held on 20.7.2025. The order on costs to await the outcome of the 2<sup>nd</sup> limb of this claim.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 4<sup>TH</sup> DAY OF JUNE 2025**

**R.NYAKUNDI**

**JUDGE**

