



**Omwerema & another v Namunyak Nkurrurah Advocates (Civil Appeal E002 of 2022) [2023] KEHC 977 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 977 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
CIVIL APPEAL E002 OF 2022  
F GIKONYO, J  
FEBRUARY 16, 2023**

**BETWEEN**

**JOSEPH OMWEREMA ..... 1<sup>ST</sup> APPELLANT**

**OCCIDENTAL INSURANCE CO LTD ..... 2<sup>ND</sup> APPELLANT**

**AND**

**NAMUNYAK NKURRUNAH ADVOCATES ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. G. N. Wakabiu (C.M) delivered on 17/02/2022 in Narok CMCC No. 149 of 2018)*

**JUDGMENT**

1. Nature, importance and effect of proposal form

The Respondent filed a plaint dated 9<sup>th</sup> July 2018 seeking the following reliefs against the appellant herein;

- a. Specific damages of Kshs. 6,720,000.
- b. A refund of the Kshs. 20,130 paid as premiums.
- c. A medical insurance cover for a period of two years (bearing the same terms as that offered in the contract).
- d. Interest in (a) and (b) above.
- e. Costs of this suit.

2. The respondent alleged that on or about 24/08/2017, the 1<sup>st</sup> appellant, an agent of the 2<sup>nd</sup> appellant visited the respondent's office at mara house in Narok with the intention to sell a professional indemnity cover.



3. The respondent alleged that following this encounter with the 1<sup>st</sup> appellant, she decided to take out a professional indemnity cover for the year 2018 for Kshs. 12,000,000/=.
4. The respondent alleged that the 1<sup>st</sup> appellant sent her a proposal form which she filled out and from which the 1<sup>st</sup> appellant had calculated the premiums payable in the sum of Kshs. 20,130 on 31<sup>st</sup> August 2017 which she paid via M-Pesa on 14<sup>TH</sup> December 2017.
5. The respondent alleges further that she subsequently applied for a two-year contract at Sagam Shepherds Medical center which required a professional indemnity cover of at least Kshs. 10 million. See offer letter dated 8.1.2018.
6. The respondent alleges that she received a policy document on 24/01/2018 which to her shock covered only Kshs. 2 million and not Kshs. 12 million.
7. The respondent then states that on 26/01/2018, the 1<sup>st</sup> appellant called her and informed her that she would be required to add an additional premium of Kshs. 100,000 if she wanted to get a professional indemnity cover of Kshs. 12 million.
8. Vide email dated 26/01/2018, the respondent wrote to the 1<sup>st</sup> appellant giving two options; i) that the appellant performs its part in good time and offer a policy covering Kshs. 12 million before the deadline for her to submit her bid for the contractual offer which was 30/01/2018 or ii) cancel the policy and refund the premiums.
9. Vide email dated 29/01/2018, the 1<sup>st</sup> appellant canceled the policy issued to the respondent and promised to refund the premiums paid by the respondent.
10. After the cancellation of the policy document, the respondent instituted a suit claiming she suffered special damages of Kshs. 6,720,000. The said amount the respondent claims is the amount she would have gotten had she been awarded the contract by Sagam Shepherds Medical Center.
11. The trial court analyzed the facts and arguments of the parties in Narok CMCC NO. 149 of 2018 entered judgment in favour of the respondent as against the appellants jointly and severally as follows;
  - a. Liability 100% in the plaintiff's favour against the defendants jointly and severally.
  - b. Specific damages of Kshs. 6,720,000.
  - c. Interest on (b) above from the date of filing suit till payment in full
  - d. cost
12. The appellants being aggrieved by the decision of the trial court, have appealed to this court seeking that the appeal be allowed, the judgment of the trial court be set aside and the same be substituted with an order dismissing the respondent's suit with costs.
13. The appellants pursuant to leave granted on 14/06/2022 filed an amended memorandum of appeal date 15<sup>th</sup> June 2022 raising 16 grounds which can be condensed into 5 grounds as follows;
  - i. The honourable magistrate erred in law and in fact in failing to analyze the purpose of the professional indemnity insurance cover arriving at an erroneous finding,



- ii. The honourable magistrate erred in law and in fact in drawing adverse findings on the 1<sup>st</sup> appellant's failure to call evidence contrary to the principle that an agent should not be sued where the principal is disclosed and known.
- iii. The honourable magistrate erred in law and fact in holding that the 2<sup>nd</sup> appellant was vicariously liable for the actions of the 1<sup>st</sup> appellant when the cause of action was not founded on negligence but contract.
- iv. The honourable magistrate erred in law and fact in holding that there was a breach of contract.
- v. The honourable magistrate erred in law and fact in misdiagnosing consequential damages for the loss of future earnings/ and or profits as special damages and awarding the same based on a hearsay document.

**Directions of the court.**

14. The appeal was canvassed by way of written submissions. Both parties have filed. The appellant has filed written submissions. the respondents have not filed.

**Appellant's submissions**

15. The appellants' submissions are considered in detail in the analysis. I record also that the appellants relied on the following authorities;
- i. Selle & Another Vs Associated Motor Boat Co. Ltd & Others [1968] EA 123
  - ii. Sahkar Limited & Another V African Hotels and Adventures (East Africa) Limited [2020] eKLR.
  - iii. William Owade Omari Vs Attorney General & Another [2012] eKLR.
  - iv. Paul Mutisya V Jubilee Insurance Col Ltd (2018) eKLR
  - v. Madison Insurance Company Limited V Solomon Kinara T/A Kisii Physiotherapy Clinic [2004] 1 KLR 709; [2005] 1 EA 241; (2004) eKLR.
  - vi. Kenneth Nyaga Mwige V Austin Kiguta & 2 Others [2015] eKLR.
  - vii. Victor Mabachi & Another V Nurtun Bates Limited [2013] eKLR.
  - viii. MacGillivray And Parkington on Insurance Law (8<sup>th</sup> Edition, Sweet and Maxwell, 1988)
  - ix. The Encyclopedia of Forms and Precedents, On Insurance (5<sup>th</sup> Edition, 1998 Reissue)

**Respondent's submissions**

16. The respondent's submissions are considered in detail in the analysis. I record also that the appellant relied on the following authorities;
- i. Selle & Another Vs Associated Motor Boat Co. Ltd & Others [1968] EA 123.
  - ii. Mwangi Vs Wambugu,[1984] KLR 453



- iii. Butt Vs Khan(1977) 1KAR
- iv. Kenya Breweries Ltd[1991] eKLR
- v. Halsbury’s Law of England Fourth Edition Vol. 16 Para 1609
- vi. Abok James Odera T/A A.J Odera & Associates V John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR
- vii. Joseph Oduor Anode Vs Kenya Red Cross Society, Nairobi High Court Civil Suit No. 66 Of 2009 [2012] eKLR.

## **Analysis and Determination**

### **Duty of court**

- 17. Under Section 78(2) of the *Civil Procedure Act*, the appellate court shall have the same powers and shall perform nearly the same duties as are conferred and imposed by the Act on courts of original jurisdiction in respect of suits instituted herein.
- 18. Accordingly, the first Appellate Court should re-evaluate the evidence and make its own conclusions, albeit it must bear in mind that it did not have the opportunity of seeing or hear the witnesses firsthand. See the case of *Selle & Anor –Vs- Associate Motor Boat Co. Ltd* 1968 EA 123.

### **Issues**

- 19. I have carefully considered the grounds of appeal, the evidence adduced before the learned trial magistrate as well as the parties’ rival written submissions. I find the issues for determination to be:
  - i. Whether the 1<sup>st</sup> appellant was rightfully joined in these proceedings
  - ii. Whether the document at page 143 and 144 is part of the record of appeal.
  - iii. Whether there was a contract of insurance for professional indemnity between the respondent and the appellants.
  - iv. Whether the respondent was entitled to an award of damages.
  - v. Who shall bear the costs of this appeal.

### **Whether the 1st appellant was rightfully joined in these proceedings.**

- 20. The appellant submitted that it is uncontested fact that the 1<sup>st</sup> appellant was an agent of the 2<sup>nd</sup> appellant which was disclosed even at the time the 1<sup>st</sup> appellant and the respondent were negotiating for the policy and all subsequent processes. There was no basis in law for the trial magistrate to draw adverse findings against the 1<sup>st</sup> appellant in the first place. The joinder of the 1<sup>st</sup> appellant by law was erroneous ab initio. Consequently, the trial court in holding the 2<sup>nd</sup> appellant vicariously liable for the actions of the 1<sup>st</sup> appellant which actions are founded on contract law in total neglect of the principles that where the principal has been disclosed. the agent is not supposed to be joined to the suit.
- 21. The respondent submitted that the joinder of the 1st appellant was never a matter for determination before the trial court. That despite the 1st and 2<sup>nd</sup> appellants being represented at all materials times and taking in the trial neither party challenged their joinder in the suit.



22. The court is of the considered view that, on the general liability of an agent for a wrongful act, Halsbury's Laws of England Vol. 1 (2017) at Paragraph 165 provides guidance as follows:

“Any agent, including a public agent, who commits a wrongful act in the course of his employment, is personally liable to any third person who suffers loss or damage thereby, notwithstanding that the act was expressly authorized or ratified by the principal, unless it was deprived of its wrongful character. It is immaterial that the agent did the act innocently and without knowledge that it was wrongful except in case where actual malice is essential to constitute the wrong.”

23. The court in *National Social Security Fund Board of Trustees v Ankhan Holdings Limited & 2 Others* [2006] eKLR cited with approval the decision of the House of Lords in *Williams and another v Natural Life Health Foods Ltd and another* [1998] 2 All ER 577 at 582 which held that:

“Whether the principal is a company or a natural person, someone acting on his behalf may incur personal liability in tort as well as imposing vicarious or attributed liability upon his principal.”

24. It follows therefore that an agent may be personally liable for tortious acts committed in the course of its employment. I find that the 1<sup>st</sup> appellant was rightfully joined in the proceedings.

#### **Whether the document at page 143 and 144 is part of the record of appeal.**

25. The respondent submitted that the document forming part of the record of appeal at page 143-144 is improperly before the court as per the ruling contained in page 47 and 48 of the record of appeal. That the said ruling has not been appealed against. She urged this court not to admit any new evidence/ issues raised by the appellants if such were not raised before the trial court.

26. The contested document is a proposal for professional indemnity dated 24/08/2017. The trial court delivered its ruling on 12/10/2021 stating that the said document is both printed and handwritten and has cancellations that purport to alter the limit of the indemnity cover. The trial court found that the document is contentious and should be produced by the maker. It was marked as DMFI.

27. On the issue of the exhibits under Order 11 Rule 7(1)(h), the parties may with the approval of the court agree on how the exhibits will be produced and, in absence of agreement thereof, then the ordinary practice on how such documents are produced as exhibits apply.

28. The document was merely marked for identification. It was not formally produced as exhibit by the appellants. It does not, therefore, form part of the record in the suit. .

#### **Whether there was a contract of insurance between the parties**

29. The appellant submitted that the learned trial magistrate erred in law when he held that the proposal formed the basis of the contract when in fact the proposal form was an offer from the respondent to the appellants. They argued that there was no contract of professional indemnity insurance cover between the parties herein since there was no unconditional acceptance of the proposal and offer of the respondent. According to them, by filing the proposal form the respondent had offered to pay a premium of Kshs. 20,130 in exchange for a cover of Kshs. 12,000,000. The appellants' policy was not accepted by the respondent and served as a counteroffer to the respondent.

30. The appellants further submitted that the counteroffer was never agreed to by the respondent. Vide an email dated 26/01/2018, the respondent expressly wrote to the 1st appellant. On 29/01/2018,



the appellant expressly canceled their counteroffer issued vide the policy document. The respondent expressly rejected the policy of the professional indemnity cover of Kshs. 2 million that was provided by the appellants because it was different in a material respect from the proposal sent to the insurer for policy cover of Shs. 12 million for consideration of Kshs. 20,130. In this event, there was no concluded contract between the appellants and the respondent.

31. The appellants argued that there was no contract between the parties herein and the respondent could not rely on the rejected and canceled policy to sustain a cause of action in the suit. In the plaint filed by the respondent, the particulars of breach of contract have not been pleaded. There was no basis for the learned magistrate to conclude that there was a breach of contract. The respondent did not prove on a balance of probabilities that there was a contractual breach. Therefore, the learned magistrate erred in law and fact in imputing particulars which were never pleaded.
32. The respondent submitted that the appellants made an offer to her and she accepted the same by paying the premiums. According to the respondent, the 2<sup>nd</sup> appellant indeed stated in his testimony that they provided a quotation of Kshs. 20,130 for a professional indemnity insurance policy whose limit of liability was at Kshs. 12,000,000. the appellant's witness admitted that the cover was not given as per the quotation. Therefore, the reduction of the amount covered was a clear breach of the contract as agreed by the parties. The respondent further contends that the appellants though they purport not to have accepted the offer by the respondent have not refunded the premiums paid to them and continue to hold it on unjustifiable terms. Thus, the appellant have not demonstrated any errors in liability.

#### **Nature and effect of proposal form**

33. The place, nature and effect of a proposal form in a contract of insurance is one of the matters which have been given prominence in the arguments by the parties. It calls for a determination by the court.
34. Whereas citing self is not glorious, I only wish to repeat what the court stated on the place, nature and effect of a proposal form, in the case of Halima Abdinoor Hassan and Others v Corporate Insurance Company Limited ML HCCC No. 96 of 2004[2015] eKLR as follows: -

The Proposal Form – In Insurance Law, the duty of utmost good faith and disclosure is placed on the Insured. This is based on the fact that the Insured is the one in possession of all information about the risk proposed for insurance. Such information cannot be imputed upon the Insurer because the Insurer relies on the Proposal Form. See the case of Newsholme Bros. v Road Transport and General Insurance Co. Ltd [1929] All ER, 442). The Insured takes the statements and answers in the proposal form to be truthful and accurate; the Proposal Form is the basis of, and forms part of the Contract between the parties and is deemed to be incorporated into the Policy; and the Insured accepts a Policy subject to the terms, conditions and exclusions prescribed therein.

35. The court still feels safe to state that, in making a contract of insurance, the first important step is the proposal or application for insurance. The proposal is the means by which the insured gives to the insurers particulars of the risk which he wishes them to undertake. Therefore, the information given in the proposal form is the basis of the risk that the insurance company accepts and makes a contract of insurance with the insured. Hence, absolute necessity to make full disclosure of all material facts by the insured. Similarly, the insurer is also bound by the principle of good faith in dealing with the insured.
36. Notably, a significant feature of an insurance contract is that it is founded on utmost good faith. It is often referred to as a contract uberrimae fidei. The requirement for each party to disclose material facts and not to misrepresent facts before and at the conclusion of the insurance contract.



37. But, does this case concern any error or misrepresentation in the completion of the proposal form itself, or disclosure of events which happened subsequently?
38. In this case, it was not disputed that the respondent signed a proposal form dated 24/8/2017. Clause 12 of the proposal form requires the insured to state the limits of indemnity required for any one incident and any one period of insurance; the proposal was filled in; any one incident- 12 million, any one period- 12 million. Further, clause 14 of the proposal form reads in part; insurance is to commence from; the insured indicated; 1/9/2017. And; period of insurance; the insured indicated; from 1<sup>st</sup> September 2017 to 31<sup>st</sup> August 2018.
39. The 1<sup>st</sup> appellant was involved in the process with full knowledge of what the respondent applied for.
40. The 1<sup>st</sup> appellant, through a text message on 31/08/2017 gave the respondent a quote on the premiums of Kshs. 20,130/=. On that basis the respondent made a payment of Kshs. 20,130/= on 14/12/2017 via m-pesa.
41. According to the evidence by the respondent, after the premium was received and accepted by the 2<sup>nd</sup> appellant, and being under the impression that she had successfully applied for a professional indemnity cover, the respondent applied for a two-year contract at Sagam Shepherds Medical Centre. According to the respondent, in the text message from the respondent to the 1<sup>st</sup> appellant and another on Jan 26, the respondent disclosed to the appellants the purpose of the indemnity cover; to apply for a practicing certificate and a tender for her main clients required a cover for over ten million.
42. The Conditional Offer for Legal Contract by Sagam Shepherds Medical Centre dated 8/01/2018 required among other requirements/ conditions: 6(iv) professional indemnity cover of not less than ten (10) million Kenya shillings.
43. On 9/02/2018, Sagam Shepherds Medical Centre revoked the offer for legal services on the ground of failure to have a professional indemnity cover of at least ten million as stipulated in the offer letter.
44. The foregoing facts establish the framework for the case. The correct proposal form was provided to the respondent by the 1<sup>st</sup> appellant, and was duly filled in by the respondent for a cover of Kshs.12million. The correct proposal form was submitted to the insurance company by the 1<sup>st</sup> appellant. The said proposal form was produced in court. There is no claim of misrepresentation or error in the said proposal form. Accordingly, it bears repeating that, this case did not concern any error or misrepresentation in the completion of the proposal form itself but the disclosure of events happening subsequently.
45. Good faith forbids any party from acting unilaterally or concealing any material information to the other (Carter v Boehm [1766] 3 Burr 1905 by Lord Mansfield)
46. Curiously, DW1 attempted to produce a proposal form which was marked as 'DMFI' but was never produced as directed by the trial court. Nevertheless, in light of the evidence by DW1, the matter before the court, and the nature of the claim, the following matter are discernible; i) the proposal form which was signed by the insured on 24/8/2017 was altered; ii) the alterations were on clause 12 reducing insured sum to 2 MILLION iii) the alterations were done by the 1<sup>st</sup> appellant.
47. DW1 confirmed that the proposal form (DMFI) is the same one the respondent produced save for the alterations.



48. Such actions by the 1<sup>st</sup> appellant are imputed upon the 2<sup>nd</sup> appellant as the principal. Similarly, all knowledge of the 1<sup>st</sup> appellant in the entire transaction is also imputed upon the principal- 2<sup>nd</sup> appellant.
49. Although DW1 stated that the insurance had communicated to the respondent that the premium paid is not commensurate with the amount insured and called for additional premium in December, 2017, there is absolutely no evidence to support that claim. It is deducible from his evidence that the reason for the alteration of the proposal form was to make it fit the premium paid.
50. I do not think an insurance company or its agents could justifiably or lawfully carry out alteration of the proposal form in the manner DW1 wants the court to believe. Similarly, the actions by the insurance company to issue a policy of insurance in the manner it did was not proper or properly grounded in a firm foundation- proposal form. Theirs was a unilateral act taken in total breach of all known and prescribed tenets of entering into an insurance contract. The policy they purported to issue the respondent had no legal basis.
51. If it be permitted that insurance companies may unilaterally alter a proposal form to suit their purpose or to determine the kind of policy to issue contrary to the proposal by the insured would be quite a dangerous path which could leave the insuring public vulnerable and exposed to danger.
52. The correct path would have been to explain the oversight on their part to the insured without any reasonable delay, and reject the proposal on that basis; and return the premium. This allows the parties to embark on negotiating a contract of insurance in a normal way, rather than attempt to keep the premium through such unlawful alteration of the proposal form.
53. It bears repeating once again, that, in the circumstances, this case did not concern any error or misrepresentation in the completion of the proposal form itself but with the disclosure and validity of events happening subsequently.
54. Contrary to the submission by the appellants, in law and the circumstances of the case, the great importance of a proposal form in contracting is that, it formed the basis of the insurance contract.
55. Accordingly, the proposal by the respondent was for a professional indemnity cover for a sum of 12 million shillings for the period from 23 Jan 2018 to 22 Jan 2019.

## **Premium**

56. Section 156 (1) of the *Insurance Act* (“the Act”) provides as follows;

“No insurer shall assume a risk in Kenya in respect of insurance business unless and until the premium payable thereon is received by him or is guaranteed to be paid by such person in such manner and within such time as may be prescribed, or unless and until a deposit of a prescribed amount, is made in advance in the prescribed manner.

Provided that in the case of motor vehicles or fire insurance business, the broker shall remit the amount of the premium to the insurer the same day he receives the premium from the policy holder, and the insurer shall assume risk upon receipt of such premium.”

57. Under Section 156 (1) an Insurer can only assume risks when:
  - a. Premium has been paid and received by him or
  - b. Where the premium has been guaranteed by such person or



- c. A deposit of a prescribed amount is made in advance.
58. Further, it is worth noting that MacGillivray & Parkington on Insurance Law, 7th Edition at paragraph 861 states the following on payment of premium:

“There is no rule of law to the effect that there cannot be a complete contract of insurance concluded until the premium is paid, and it has been held in several jurisdictions that the courts will not imply a condition that the insurance is not to attach until payment. It would seem to follow that, if credit has been given for the premium, the insurer is liable to pay in the event of a loss before payment, although, as has been held in a South African decision, the insurer would be entitled to deduct the amount of the premium from the loss payable, at least where the period of credit had expired by that time, since the assured could not insist on payment when in breach of any obligation assumed on his part under the contract.”

### **Concluding a contract**

59. The court is acutely aware the submission by the appellants that the learned trial magistrate erred in treating the proposal form as a contract when it was merely an offer and that the rejected policy documents as a counteroffer.
60. To this submission; the court finds and holds that; the respondent paid the premium demanded by the 2<sup>nd</sup> appellant. The quotation of the premium payable was pursuant to the proposal submitted by the respondent. In sum, upon filling in and submission of the proposal form, and by submitting a quote of the premium payable upon the proposal, and accepting the premium of KShs. 20,130 thereof from the respondent, the 2<sup>nd</sup> appellant accepted the proposal and made a contract of insurance with the respondent for a professional indemnity cover for a sum of 12 million for the period indicated in the proposal form by the respondent. The purported policy by the 2<sup>nd</sup> appellant was a nullity in law as it was not founded on anything lawful or recognized in law; note the proposal on which the policy was founded was made by the 1<sup>st</sup> appellant and not the respondent. The said offensive policy cannot and was not a counter-offer to or a rejection of the proposal by the respondent for a cover of professional indemnity for 12 million.

### **Legitimate expectation**

61. In light of the facts of this case, the respondent had a legitimate expectation that a policy was to be issued in accordance with the proposal submitted and premium paid thereto. It bears repeating that, the policy purportedly issued on the basis of an altered proposal form by the insurance was without any legal basis.

### **Circumstances of case determine a case**

62. Cases of this nature have never been easy. I am aware that, it almost became a belief- at least from earlier decided cases in many jurisdictions- that in some instances, judges reluctantly decided cases in favour of those who come to court with unclean hands- the insurer- merely because it was thought the law was squarely in their favour. But, today, I should think, circumstances of the case should say much against granting reprieve to a party where remedy fell on the other side.
63. The circumstances of this case clearly show that, the subsequent acts by the appellants were intended- albeit wrongly- to portray that there was no contract of insurance upon the proposal filled in by the respondent and submitted to the 2<sup>nd</sup> appellant by the 1<sup>st</sup> appellant, yet, the facts show otherwise; the contract was concluded upon payment of premium, but, the appellants acted in total breach of



good faith and primary obligation to issue to the respondent a cover as agreed. I so find and hold. I am not passing a generalized condemnation as the 2<sup>nd</sup> appellant is a responsible insurance company, nevertheless, in this case, the appellants are parties who have come to court with unclean hands; they failed the test of uberrimae fidei in respect of the transaction herein. Therefore, the axe of judgment fell upon them.

### **Damages for breach or failure to provide policy**

64. What damages is the respondent entitled to?
65. The evidence on record show that the insured asked for a refund of the premium paid. But, the appellants kept the premium in the pretext that they have issued a policy for 2 million. The ‘cancellation’ of the offensive policy was an act in vain for it attempted to cancel a policy that never was in law. These acts aggravate the breach.

### **Loss of opportunity**

66. I appreciate the appellants’ submissions that the primary purpose for a contract for professional indemnity is to compensate the clients of the insured in case of professional negligence and not to compensate the insured for failure to secure work or employment. They contest that the alleged loss of business does not fall within the intended scope under regulation 3 of the advocates’ (professional indemnity) regulations 2004 and therefore there is no breach on the part of the appellants for which they were entitled to indemnify the respondent.
67. The appellants submitted that the trial magistrate erred in awarding damages of Kshs. 6,720,000 when it was not within the contemplation of the parties that the professional indemnity policy would be used for the purpose of securing business opportunities or that the respondent would lose out on an opportunity with a third party as a result of the professional indemnity cover.
68. The appellants submitted that the trial magistrate should never rely on the offer letter from Sagam Shepherds medical centre to award damages because it did not even bear the name of the respondent maker. The respondent failed to prove special damages to the required standard with specificity.
69. The respondent submitted that the particulars of loss and damages were laid out in paragraph 10 of the plaint and the damages were specifically proved through documents contained in the record of appeal on pages 178-181. Thus, no demonstration that the findings by the trial court were against the evidence provided and therefore, this court has no reason to disturb the award granted.
70. The respondent submitted that the trial court rightfully held that in the absence of any contrary evidence, the respondent’s evidence is to be believed. She argued that to date the 1<sup>st</sup> appellant is represented and has never testified.
71. The respondent submitted that she was not seeking compensation under the insurance law or enforcement of a professional indemnity cover but instead damages for loss of business. The said amount is the equivalent of what would have been paid to the respondent had the appellants honoured their end of the bargain.
72. I wish to make a distinction here. The claim herein is that the respondent lost a contract as a result of failure by the 2<sup>nd</sup> appellant to provide her with an indemnity cover of Kshs. 12,000,000/= as applied and paid for.



73. Whereas the general rule is that, courts would ordinarily not award general damages for breach of contract, however, where there proof of actual or specific damage arising from the breach or conduct of the defendant, there is justification to award general damages based on circumstances of each case.
74. See the Court of Appeal in *Capital Fish Kenya Limited v Kenya Power & Lighting Company Limited* (2016) eKLR, that:
- “...whereas the general legal principle is that courts do not normally award damages for breach of contract, there are exceptions such as when the conduct of the respondent is shown to be oppressive, high handed, outrageous, insolent or vindictive.”
75. See also the Halsbury’s Laws of England, Third Edition vol. II, that: -
- “where a plaintiff whose rights have been infringed has not in fact sustained any actual damage therefrom, or fails to prove that he has; or although the plaintiff has sustained actual damage, the damage arises not from the defendant’s wrongful act, but from the conduct of the plaintiff himself; or the plaintiff is not concerned to raise the question of actual loss, but brings his action simply with the view of establishing his right, the damages which he is entitled to receive are called nominal---. Thus in actions for breach of contract nominal damages are recoverable although no actual damage can be proved.
76. See also *Kinakie Co-operative Society v Green Hotel* (1988) KLR 242, the Court of Appeal while taking the position that damages are indeed awardable for breach of contract in deserving cases held: -
- “Where damages are at large and cannot be quantified, the court may have to assess damages upon some conventional yardstick. But if a specific loss is to be compensated and the party was given a chance to prove the loss and did not, he cannot have more than nominal damages.”
77. In this case, the respondent had the legitimate expectation that she is covered for and will receive a professional indemnity policy as applied for in the proposal form and for which she paid premiums. As an advocate, she is statutorily required to take out professional indemnity cover. Therefore, the mere fact that she was not so covered despite applying and paying premiums for professional indemnity cover with the 2<sup>nd</sup> appellant, left her vulnerable and exposed to liability.
78. But, the specific claim by the respondent is that she failed to secure a contract with Sagma Shepherds Medical Centre for provision of legal services due to the breach of contract by the 2<sup>nd</sup> appellant. She therefore sought in her plaint, inter alia, for specific damage; the professional fee she could have earned from the said contract and all benefits appurtenant thereto.
79. This claim is in the nature of lost opportunity to gain a commercial earning and other benefits. In such claims, if the respondent proves that she has suffered a loss of some value due to the breach or conduct of the 2<sup>nd</sup> appellant, then the causal link is made out. And, the evaluation of the lost opportunity, is a matter for damages, not causation. Therefore, the loss is to be awarded within the realm of general damages for breach of contract on the basis of a specific loss or damage having been proved.
80. In the circumstances of this case, upon payment of the premium, she had legitimate expectations that she is covered for professional indemnity for 12 million shillings; thus, she was within her right to apply for a legal contract with Sagma Shepherds Medical Centre for provision of professional services. The offer was however cancelled for she did not provide a professional indemnity cover of at least 10 million shillings. She did not secure the contract for lack of professional indemnity cover. Note that the



contract for legal services was applied for after the premium was paid and accepted by the 2<sup>nd</sup> appellant for a professional indemnity cover of 12 million shillings. The later happenings; altering of the proposal form and purporting to issue a policy for 2 million shillings by the 1<sup>st</sup> and 2<sup>nd</sup> appellant, respectively, were not in rejection of or counter-offer to the proposal by the respondent, but pure deliberate breach and offensive conduct by the 2<sup>nd</sup> appellant.

81. The respondent has shown that she lost an opportunity to make a commercial gain or earning and other benefits because of failure by the 2<sup>nd</sup> appellant to provide her with a professional indemnity cover for which she had paid premiums. The loss is attributable to this failure. This is proof of specific loss of value suffered which be seen within the realm of general damages for breach of contract.
82. Therefore, in light of the specific damage proved, there is justification to move away from nominal damages to substantial damages for breach of contract or conduct of the appellants in the manner they handled the contract. I find that the facts here justify an award of substantial general damages over and above nominal damages.
83. Be that as it may, the loss in opportunity to earn in the sum of Kshs 6,720,000/= is reasonable in general damages for breach of contract herein. This is the global figure in damages which covers damages suffered including loss of other benefits which could have accrued under the contract for provision of legal services.
84. Regarding the claim for premium for the advance payment for the sum of Kshs 20,130/=; payment of this premium completed the contract. And she has obtained judgment in damages for breach and in failure by the 2<sup>nd</sup> appellant to provide her with the cover applied for. Therefore, I will not grant her the request for refund of the premium paid.

#### **Who should bear the costs of this appeal**

85. The respondent submitted that they should be awarded costs as the dispute was solely occasioned by the appellants. She further contends that the appellants have on several other occasions failed to honor orders to pay the respondent's cost. that on 15/12/2020 the trial court ordered a cost of Ksh. 5,000 be paid to the respondent by the appellants, the cost remains unpaid to date. Similarly, on 9/3/2021, the trial court ordered the appellants to pay Kshs. 5,000/= be paid to the respondent.
86. In the end, the respondent prayed that this appeal be dismissed in its entirety with costs to the respondent.
87. From the foregoing, I find that the respondent is entitled to the costs in the lower court case. The appeal fails and is dismissed with costs to the respondent.

#### **Conclusion and orders.**

88. In the upshot: -
  - i. The appeal is dismissed.
  - ii. The respondent is awarded a sum of Kshs. 6,720,000 in general damages.
  - iii. A refund of the Kshs. 20,130 paid as premiums is denied.
  - iv. Costs in the lower court and the award and interest thereon to the respondent.
  - v. The respondent shall have the costs of the appeal.



89. It is so ordered

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS  
16TH DAY OF FEBRUARY 2023.**

.....

**F. Gikonyo M.**

**Judge**

In the presence of: -

Kasaso C/A

John Ohaga, SC, leading for appellants

Masinde Advocate for appellants

M/s Nkurunah for respondent

