Resolution Insurance Co Ltd v Omondi (Civil Appeal 133 of 2018)
[2023] KEHC 2454 (KLR) (20 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2454 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 133 OF 2018

DKN MAGARE, J

MARCH 20, 2023

BETWEEN

RESOLUTION INSURANCE CO LTD ..... APPELLANT

AND

FREDRICK ODONGO OMONDI ..... RESPONDENT

JUDGMENT

1. The appeal is to is from the decision of Hon. F Kyambia, CM on 6/7/2018 where he found the Appellant liable for breach of contract and awarded special damages of Ksh 111,638/= and general damages for Ksh. 1,000,000/= a Declaration that the Appellant was to pay. Ksh 30,000/= to Richard A Shoshi.

Background to the case.

2. The suit was filed after the Appellant declined pay for medical expenses incurred by the Respondent in treatment at Pandya hospital. The Respondent had medical insurance, where the Appellant had undertaken, subject to payment of premiums, to meet medical expenses up to certain limits.

3. The limit is not in issue in this matter. However, the exclusion clauses were in issue since the Appellant declined to pay in view of the preliminary diagnosis on the nature of ailment the Respondent was being treated. A doctor diagnosed the Respondent with pancreatitis - possible alcoholic. As a result, the Appellant declined to pay the hospital bill incurred. The Appellant was informed on the 2nd day, that is 24/5/2014.

4. This resulted in the hospital prematurely discharging the Respondent on 26/5/2014. Upon discharge the Respondent was reportedly held from 9.00 am to 6pm of the same day. It forced the Respondent's employer to pay the Hospital bill.

5. The Respondent was released upon the bill being paid. Thereafter the Respondent had to write an agreement on refund of the money paid by the employer. The Respondent allegedly got embarrassed and suffered traumatic experience of being detained for hours to pay the debt. All these trails were blamed on the Appellant resulting in the impugned judgment.

6. The Appellant was aggrieved and appealed both on liability and quantum. The appeal has been pending till 25/6/2022, when a moratorium was declared against the Appellant. The Appellant filed in court a letter from the Managing Trustee, the policyholders' compensation fund, declaring a moratorium in exercise of Section 67(2) 10 of the *Insurance Act* for a period of 12 months from 14/6/2022.

7. The moratorium was as a sanctioned vide an order in Nairobi Milimani HCC No. E168 of 2022 issued by the high court. The order stayed all proceedings against the Appellant herein. However, the order did not stay proceedings by Resolution Health ltd. This is for a good reason. The company ought to recover money from its debtors in order to regain liquidity, if poor debt management was the Course of its woes. This appeal is filed by Resolution Health hence not subject to the moratorium.

8. On the date fixed for direction on hearing of the Appeal, only the Respondent attended court. On the request by the Respondent., I gave them a date for Judgment today since all parties had filed submissions as earlier directed. The dates for direction had been fixed on 26/10/22 by Hon. Lady Justice Njoki Mwangi.

9. I gave direction on 20/2/2023. I note that there was a note by the Deputy Registrar that all matters against the Appellant had been stayed. That is true. However, this appeal is not against the Appellant but by the Appellant. When reading the court orders that are restricting rights, they should be strictly construed so that whatever is not included is specifically excluded. Expressio unius est exclusio alterius. Only Cases against the Resolution Health are excluded.

10. In the case of Oduor & 3 others v Magistrates and Judges Vetting Board & another (Civil Appeal 457, 458, 466, & 475 (Consolidated) of 2018) [2021] KECA 92 (KLR) (22 October 2021) (Judgment) (with dissent - HM Okwengu, JA) held as doth regarding the canon: -

> " the old rule or canon of interpretation expressio unius est exclusio alterius (the expression of one thing implied the exclusion of others) was applicable to the appellant's case. The fact that section 23(1) of the Sixth Schedule to *the Constitution* talked of a legislation that was to establish mechanisms, procedures and a time frame for the vetting of all judges and magistrates who were in office at the effective date, but section 23(2) in creating the ouster or finality clause spoke only of a removal or a process leading to the removal of "a judge" not being subject to question or review, meant that all judges and magistrates were to be vetted, but only judges were excluded from questioning a consequential removal or a process leading to such removal.

11. When an order, a law or some other enactment lists things, it is deemed that those not listed are excluded. In Mary Wanjuhi Muigai v Attorney General & another [2015] eKLR Hon Lady justice Mumbi Ngugi J (as then she was stated as follows: -

> " This provision seems to lend itself to the rule of statutory interpretation that 'expressio unius est exclusio alterius' This rule is defined in Black's Law Dictionary as "A maxim of statutory interpretation meaning that the expression of one thing is the exclusion of another"; that mention of one thing implies exclusion of another, and further, that "When certain persons

or things are specified in a law, contract, or will, an intention to exclude all others from its operation may be inferred."

12. This rule of interpretation helps to be able to find a common sense way of looking at things. It gives guidance on what to include or exclude. in Mike Muli v Justus Mwandikwa Kilonzo & 4 others [2022] eKLR, the court observed: -

> " 56. Perhaps, for emphasis only, it may be important to take cognizance of the decision in the case of Kakutia Maimai Hamisi v Peris Pesi Tobiko & Others (2013) eKLR, where the Court of Appeal observed as hereunder;
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> A plain reading of that Rule without launching into any analytical discourse shows that the rule-maker intended for appeals to lie from final and conclusive determinations of election petitions, hence the use of the words 'judgment' and 'decision'. The basic interpretation tenet of expressio unius est exclusio alterius applies with the common sense conclusion that had the rule maker intended for appeals to lie from the other determinations that take the form of rulings and orders within the petition proceedings, nothing would have been easier than for the rule maker to say so.

13. The conclusion I get is that the Appeal is properly proceeding in this court. The Respondent may however not execute any judgment that may result in view of the moratorium.

The duty of the Appellate court

14. The duty of the 1st Appellate Court is truly settled. Justice Law JA as then he was, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123, stated as follows: -

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bond to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

15. This means that the court will take cognizance to the observations of the lower court in relation to the witnesses and bear in mind that it has not heard nor seen the witnesses. This does not however apply where the trial is concluded by affidavits evidence only. This is because the court is at the same position as the court of Appeal in interpreting the affidavits, as they are documents.

16. The rationale for the position above is that trials by way of tendering witness evidence, it is the trial court that has observed the demeanor and truthfulness of the witnesses and gotten nuances that hardly come out in the appellate court. The appellate could ends with only proceedings without those nuances. It does not however, mean that the court cannot get nuances of its own. It only warns itself that they have no seen nor heard the witnesses.

17. In Barnabas Biwott v Thomas Kipkorir Bundotich [2018] eKLR, Hon Lady justice OLGA Sewe had this to say on the duty of the fist appellate court.

> " This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded.

18. Several other decision address the issiue of the duty of the first appellate court. In Kenya Ports Authority vs. Kuston (Kenya) Limited [2009] 2 EA 212 where the Court of Appeal held that:-

> "On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"

19. On the other hand, documents will speak for themselves. The observation of documents is the same as the lower court. Parties cannot read into those documents matters extrinsic to them. This is in line with the Court of Appeal (Ouko as then he was), Kiage and Murgor JJA) who stated in Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017) eKLR as doth;-

> " So that where the intention of parties has in fact been reduced to writing, under the so called parol evidence rule, it is generally not permissible to adduce extrinsic evidence, whether oral or written, either to show the intention, or to contradict, vary or add to the terms of the document, including implied terms. Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.

20. I summarize the duty of the court in analyzing evidence as follows: -

    a. Where there is evidence tendered, the court will not differ with the court below unless it is not flowing from the generality of the evidence on record.

    b. The demeanor of witnesses is a province of the court that heard and saw the witnesses.

    c. The court will evaluate the totality of evidence and come into its independent conclusion bearing in mind it neither saw nor heard the witnesses.

    d. Even where further evidence is adduced at the Appeal level, it should not be given undue weigh from evidence already on record.

    e. It is only as regarding written documents that the court has same power as the lower court in interpreting the said documents. The cannons of interpretation, common sense, four corners of the documents and *evidence act* are used to interpret.

Background of the appeal.

21. The Respondent was the Appellant's customer since 2007. He was entitled to certain kind of medical benefits upon payment of premiums. The Respondent was admitted in General male ward. He went through various Doctors, ending with Dr. Rishad Ali Shoshi, who wanted a CT scan done. The results did not come till the following day when the Respondent was diagnosed with pancreatitis.

22. The dispute in this matter revolves around the cause of the ailment. The medical evidence on record is to the effect that the said condition can be caused by many things, that is, gallstones, alcoholism, certain medication, infection, injury, trauma pancreatic cancer among other causes,

23. On 24/5/2014, the Appellant's representative informed the Respondent that the Appellant had declined liability to settle his medical bill as the diagnosis was alcohol related. The diagnosis was a surmise by Dr. Rishad Ali Shoshi who did not justify the same.

24. The good doctor did not find it necessary nor prudent, for reasons only known to him, to carry other tests to confirm the preliminary observation or other causes. The Respondent was livid that had this been alcohol related, withdrawal symptoms could have been seen while in hospital.

25. On 26/5/2014, the Respondent was prematurely discharged by the hospital since the hospital reportedly indicated that he could not afford and the bill was escalating. He was detained by the hospital till 6 pm of the same day, when the Respondent's employer settled the bill.

26. As it usually happens in these cases, there was no dispute on premiums or terms of the contract of insurance. They had a standard insurance with terms and exclusions. The Respondent is under the duty to act in utmost good faith. The duty to act in uberrime fidei is a duty placed on the insured to disclose to the insurer factors that a party ought to know about himself.

27. It is real irrelevant that the Insured had no actual knowledge. Absolute honesty in all matters, whether material or not, is called for. However, this duty works in commonsensical way. You cannot disclose that which you have not been asked to disclose. It is the Appellant who have special knowledge on what needs to be disclosed. There should also be an opportunity to disclose.

28. The Respondent testified that he had sudden attack of abdominal pain and decided to seek treatment at Pandya Memorial Hospital. The pain was said to be excruciating. The Appellant approved investigations on the cause of pain. This was sought by Dr. Kaburu Shilla, after admission on 23/5/2014.

29. He narrated the story as above stated. He was of the view that he needed to be shown the report by Dr. Rishad Ali Shoshi and to be able to answer any questions. He was never given a chance to do so till when the matter came to court.

30. The Respondents called a doctor who ruled out alcoholism as the cause and gave evidence supported by medical reasoning. It is therefore an issue between two medical experts. I was argued to rely on the more senior of the two. I decline the invitation. I am of the view that seniority in practice of medicine has nothing to do with the exercise.

31. I will turn the words of the Court of Appeal regarding the judges on their head and apply the same to doctors. In the locus classicus case of Butt v Rent Restriction Tribunal [1979] eKLR, The Court of Appeal, (Madan, Miller and Potter JJA), when faced with a situation similar to the one this one stated as doth: -

> A judge is a judge whether he is newly appointed or an old fogy. The former has the benefit of his latest learning, the latter the advantage of experience. Both are men of honour and scholarly gentlemen. Both are conscientious and judicious individuals and imbued with reason. Both are dependable and do not make wild surmises. Both act upon consecrated principles. Both get a fair share of juristic spills. Both are jealously scrupulous and impartial. Both are 24 carat gold. Both act free from doubt, bias and prejudice. Both carry the conviction of correctness of their decision. Both speak no ill of any litigant. Both are torch bearers for stability of society. Both are strugglers for liberty. Neither should, however, become an advisor instead of an adjudicator. The litigants and their professional advisors are the best judges of their affairs.

32. The two doctors have both taken Hippocratic Oath and as such I cannot dismiss one over the other simply because of their level of expertise. I will not prefer one over the other. I will use the law to arrive at the proper finding.

33. The case will therefore turn on the doctrine of Uberrime fidei. The duty to act in utmost good faith is the key to settle the evidentially imbroglio brought about by the two doctors, each of whom is hired by the other party. Whereas it is true that whoever pays the piper, calls for the tune, I am of he considered view that most doctors could rise about partisanship and be the students of the truth. Therefore, it is not expected that this court will simply believe one doctor over another. This court's duty is to find out if the burden of proof placed on the parties was discharged.

34. The *Evidence Act* gives guidance in this matters. Sections 107, 108 and 109 of the *Evidence Act* are germane. The sections provide as doth:

> 107. Burden of proof
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> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
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> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
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> 108. Incidence of burden
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> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
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> 109. Proof of particular fact
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> The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

35. In this case, the initial burden lay with the Respondent to proof that he had a contract of insurance and also to proof that the same was breached and as a result he suffered damage. Both parties agree that there was a contract of insurance, the Appellant was informed of the occurrence of the insured event, that is falling sick of the Respondent.

36. It is also agreed that the Respondent paid Ksh. 111,638/= as treatment charges for the insurable event. To that extent the Respondent discharged, effectively his burden of proof. Without anything to the contrary, a court will have to find the Appellant liable.

37. The next question regards the assertion by the Appellant that it was not bound to pay since the insurable event occurred or resulted from the Respondent's alcoholism. The burden of proof is on the Appellant, under Section 108 of the *Evidence Act* to proof those particular facts, that is: -

a. The Respondent was an alcoholic

b. The insurable event resulted from alcoholism

c. The Respondent did not disclose the alcoholism

d. The Appellant is entitled to avoid the policy due to Alcoholism.

38. Under section 112, of the *Evidence Act* to the burden of proving or disproving special knowledge is on the person with such knowledge. The section provides: -

> " In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

39. Whether or not the Respondent is an alcoholic, is a fact within his knowledge. This means he is the best placed person to answer the question of alcoholism. However, in this case, the Respondent was not asked about alcoholism, he was not tested for alcoholism. He was not treated for alcoholism or even given a report on alcoholism.

40. Even in the garden of Eden, the Almighty, who was all knowing did not condemn the parties unheard. He heard even the snake. This right to be heard permeates all and sundry. It does not apply only in serious government multibillion tenders but even in a classroom situation. Before noise makers are punished, they are heard. It is ingrained in our common law. It is common sense.

41. In Republic v Public Procurement Complaints Review & Appeals Board Ex Parte Invesco Assurance Co. Ltd [2014] eKLR, Justice George Vincent Odunga, as then he was, quoted in extension a statemen Msagha vs. Chief Justice & 7 Others Nairobi HCMCA No. 1062 of 2004 [2006] 2 KLR 553 the High Court expressed itself as follows: -

> " The Court observes firstly that the rules of natural justice "audi alteram partem" hear the other party, and no man/woman may be condemned unheard are deeply rooted in the English common law and have been transplanted by reason of colonialization of the globe during the hey-days we of the British Empire. An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision.....The rules of natural justice are minimum standards of fair decision-making imposed by the common law on persons or bodies who are under a duty to "act judicially". They were applied originally to courts of justice and now extend to any person or body deciding issues affecting the right or interests of individuals where a reasonable citizen would have a legitimate expectation that the decision-making process would be subject to some rules of fair procedure. The content of natural justice is therefore flexible and variable. All that is fundamentally demanded of the decision maker is that his decision in its own context be made with due regard for the affected parties' interests and accordingly be reached without bias and after giving the party or parties a chance to put his or their case. Nevertheless some judges prefer to speak of a duty to act fairly rather than a duty to observe the rules of natural justice, often the terms are interchangeable. But it is perhaps now the case while a duty to act fairly is incumbent on every decision-maker within the administrative process whose decision will affect individual interests, the rules of natural justice apply only when some sort of definite code of procedure must be adopted, however flexible that code may be and however much the decision-maker is said to be master of his own procedure. The rules of natural justice are generally formulated as the rule against bias (nemojudex in sua causa) and in respect of] the right to a fair hearing [audi alteram partem]."

42. The duty to act fairly is even ingrained in the doctrine of Uberrime fidei. It is a doctrine that allows insurance companies to be informed of facts that could unduly affect their liability. Insurance related

to an occurrence of an uncertain event. If an event is certain, the insurance ends up being condemned to pay for an event that was to occur, anyway.

43. In British American Insurance Co. Limited & another v Isaac Njenga Ngugi [2019] eKLR, Hon Justice Richard Mwongo, was of the view that: -

> " It is not contested that the insurance contract is premised on "uberrimae fides", the principle of good faith and full disclosure, that the contract of insurance requires that the assured knows everything about the risk he wants to insure and he must disclose to the insurer every fact material to the risk. The Court of Appeal in Co-operative Insurance Company Ltd v David Wachira Wambugu [2010] 1 KLR 254 put it this way
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> "... a contract of insurance is one of uberrimae fidei. The insurer is entitled to be put in possession of all material information possessed by the insured. In policies of insurance, whether marine insurance or life insurance, there is an understanding that the contract is uberrimae fidei, if you know any circumstances at all that may influence the underwriter's opinion as to the risk he is incurring, and consequently as to whether he will take it, you will state what you know. There is an obligation there to disclose what you know, and the concealment of a material circumstance known to you, whether you thought it material or not, avoids the policy...Contracts of insurance are contracts of utmost good faith and this gives rise to a legal obligation upon the insured, prior to the contract being made, to disclose to the insurer all material facts and circumstances known to the insured which affect the risk being run. Insurance is a contract of speculation and the special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwriter trusts to his representation, and proceeds upon 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. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void; because the risqué run is really different from the risqué understood and intended to be run at the time of the agreement. The policy would be equally void against the underwriter if he concealed. The governing principle is applicable to all contracts and dealings. Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of the fact and his believing the contrary."

44. The burden of proof is on the person alleging it is entitled to decline or repudiate a policy. In this case the burden of proof was on the Appellant to show that it is entitled to repudiate the policy. In British American Insurance Co. Limited & another v Isaac Njenga Ngugi [2019] eKLR, (supra), the court stated as doth: -

> " 19. On this there are authorities to the effect that where the declination is by the insurer, he is bound to prove the basis of the repudiation. In J. V. N. Jaiswal, Law of Insurance, Eastern Book Company (2008), the learned writer at p. 495 states:
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> "If the claim is being repudiated by the Insurance Company on the ground that the insured had suppressed the material facts, the burden shall lie heavily on the Insurance Company, who pleads suppression, to prove it."

Likewise in Stebbing v Liverpool and London Globe Insurance Company Ltd [1916-17] All ER 248, the court held that: -

> "...the burden of proof is on the insurer to show that there was a misrepresentation or non-disclosure of material facts."

20. This is in tandem with Section 107(1) of the *Evidence Act* (Chapter 80 of the Laws of Kenya), which provides: "107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

45. In BMK v AIG Kenya Insurance Ltd [2020] eKLR , the court, lady Justice Maureen A. Odero had these to say: -

> " There can be no doubt that Insurance contracts are amongst the category of contract which are described as "uberrimae fidae" i.e of utmost good faith and require voluntary disclosure by the parties thereto. In Sita Steel Rolling Mills Limited –Vs- Jubilee Insurane Co. Ltd [2007] eKLR, Hon Justice David Maraga (as he then was) stated as follows:-
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> "The contract of insurance is perhaps the best illustration of a class of contracts described as uberrimae fidei, that is, of the utmost good faith. That being so the potential parties to such contract are bound to volunteer to each other, before the contract is concluded, information that is material. This principle imposes on the proposer or insured the duty to disclose to the insurer, prior to the conclusion of the contract, but only up to that point, all material facts within his knowledge that the latter does not or is not deemed to know."
>
> (36) There is therefore the expectation that the insurer will ask material questions necessary to enable it reach an informed decision on whether or not to offer insurance. It is also expected that the insured will honestly answer said questions. Given that no such questions were asked in the application form, the Plaintiff had no opportunity to reveal her past medical history and thus cannot be said to have deliberately withheld that information."

46. It follows that for the alcoholism to be used as a reason for not paying, the Respondent ought to have been asked about it and the answer be from the proposal form or answered it correctly, up to a certain point. Thereafter, he needed to disclose if there were changes in circumstances. From the evidence, the preliminary prognosis of 'possible alcoholism' was never tested. It remains a mere possibility.

47. My understanding is that a case of possible alcoholism is not the same as secondary to alcoholism. The Respondent was never given an opportunity first to be tested on alcoholism and, secondly to answer the question of alcoholism.

48. That is why, even why a person is caught in flagrante delicto, he is still given a chance to deny or accept. It the foundation of our constitutional order. I am firmly of the view that no one is so useless that it can be concluded in his favour that he does not need to be heard. To that extent it is doubtful that the aspect of alcoholism was proven.

49. All circumstances considered, I am of the opinion that the court below was right in finding the Appellant liable. Consequently, I hold and find that the Appellant had no reason to decline to settle the hospital and doctor's expenses. The Appeal on liability is consequently dismissed for being bereft of merit.

Damages

50. As regards to damages, there are two aspects. These are: -

    a. Special damages of Ksh. 111,638/=

    b. General damages of 1,000,000/=

Special damages

51. The Respondent pleaded special damages of Ksh. 111,638/=. These were supported by requisite evidence being invoices, receipts cheques and the undertaking to settle the employer's dues.

52. The issue of special damages was settled in the case of David Bagine Vs Martin Bundi [1997] eKLR, where the court of Appeal, Gicheru, Shah & Pall, JJ.A) held as doth: -

> " It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684: "....special damages in additon to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:

Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it"

53. Looking at the documents produced by the Respondent and admitted by the Appellant, the special damages were proved. The Respondent went for an overkill, producing every possible document. Special damages were thus well proved. The Appeal on special damages is thus unmeritorious and is consequently dismissed.

Contingent liability

54. The sums payable to Dr Richard A Shoshi are attributable to the Appellant. The Respondent, even where, I was to find that that the Appellant is not liable to settle the claim, still the Appellant was liable to pay their own doctor. He was in their instructions to investigate the claim. There is no basis for the Appellant not to pay. The court below was thus perfectly in order in so declaring. Therefore an appeal on that claim is dismissed as it is bereft of merit.

General Damages

55. The court awarded general damages for the breach of contract as seen from the events up to and including the time of discharge and release from hospital.

56. My understanding is that damages must flow from a certain breach which causes injury. Where there are damages caused but here is no legal liability, a party is not bound to settle the same.

57. This court as an appellate court has a specific duty as regards damages. By their very nature, general damages are discretionary. Setting the same aside, this court must as corollary meet standards for setting aside discretion. Discretion must be judicious and not capricious.

58. The Court of Appeal in Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

> " It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

59. The principle to take into consideration should thus flow from the nature of the injury or wrong and the kind of damages suffered. In the ordinary course of things, breach of contract attracts special damages. On the other hand, a tortious liability attracts general damages.

60. An example will be if one pays Ksh 100 as fare from Omokonge village to Ekerema, but the Matatu travels for one km and asks the passengers to alight, he should be able to take them back to the bus stage and refund fare together with any increase of fare, to enable parties to travel to the original destination.

61. In case fare increases to 120, the passengers should be able to claim that amount. They cannot claim for lost opportunity time and a date missed or a feast missed or expenses for a meal you missed in the wedding you were going.

62. On the other hand, if he we board and on reaching Kabeo and the vehicle is involved in have a road traffic accident, passengers are not t get a refund. Each of the injured passengers will be paid to the extent of the injuries and amounts used in treatment.

63. Those with slight injuries will get lesser than those with more serious injuries. however, in either case, if we meet peaceful demonstrators and they peacefully cause us injuries, the owner is not liable. The village names can be substituted for better understanding.)

64. That was the position in Woodruff vs. Dupont [1964] EA 404 where it was held by the East African Court of Appeal that:

> " The question as to quantum of damage is one of fact for the trial Judge and the principles of law enunciated in the decided cases are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them...
>
> The quantum of damages being a question of fact for the trial Judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damage claimed by the plaintiff, but whether the damages awarded are "such as may fairly and reasonably be considered as a rising according to the usual course of things, from the breach of the contract itself". The plaintiff is not

entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendant."

65. In Mbogo & Another v Shah [1968] EA 93, the Court, (Sir Newbold, P.) stated at page 96:

> " A Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and as a result there has been miscarriage of justice."

66. This court, being the first appellate court, stands in the same position as the court of appeal in relation to subordinate court. I cannot interfere with the award of damages if the same are not arbitrary and actually arise from the conduct of the Appellant.

67. In Kemfro Africa Ltd t/a "Meru Express Services (1976)" & Another v Lubia and Another (No.2) [1985] eKLR, the court restated the above test on the issue of damages as follows: -

> " The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages."

68. In this matter, we are faced with a claim for general damages arising from breach of contract. These damages, not only cover the breach by refusal to settle the hospital bill but the harassment and retention up to 6pm on 26/4/2015 when the bill was paid. As a result of the said traumatic events the Respondent was granted a calmly amount of damages amounting to Ksh 1,000,000=.

69. Sitting in this air-conditioned court chambers I may not know much. However, walking down to Nkurumah road, to a maskan where wananchi while away time discussing everything under the sun, is there a soul who can truly associate the events of 26/5/2014 to the events of 4pm on 24/5/2014, knowing everything and of average intelligence? I don't think so.

70. What kept the Respondent in hospital is an ailment he contracted. The Appellant's duty was to indemnify the Respondent for the hospital bill up to a maximum of Ksh. 2,500,000/=. Has the bill been over that amount, the Appellant was only bound to pay only the contractual amount. The amount to be paid were known.

71. Further, the Appellant did not participate in keeping the Respondent in hospital or after he was discharged. The hospital allegedly made a decision to discharge since the bill was not paid. No evidence of this was tendered. In any case any premature discharge and retention at the hospital is a matter purely between the hospital and the Respondent.

72. Assuming for argument purpose the hospital kept the Respondent falsely imprisoned over an unpaid bill on 26/45/2014, where does the Appellant come into the picture. The hospital is not an agent of the Appellant. The Appellant terminated engagements 2 days earlier. If the respondent thought that he could not pay the bill, that was also the point to disengage. He remained in hospital for two days, knowing the insurance is not paying and not arranging how to pay. If the Hospital was wrong in discharging him, it is the hospital that should answer for such.

73. False imprisonment was a tort, allegedly carried out by the hospital. The hospital is not party. Retaining someone against their will is illegal. A party cannot be held liable for a crime or illegality allegedly committed by another person. The embarrassment, anxiety and distress allegedly suffered are too remote. They do not arise from the contract of insurance but from actions of the hospital and Respondent. The only damage due are those pleaded as special damages. There were no damages at large.

74. In Kenya Women Microfinance Ltd v Martha Wangari Kamau [2021] eKLR, the court stated: -

> " In Dharamshi v Karsan [1974] EA 41, it was held that general damages are not awardable for breach of contract in addition to the quantified damages as it would amount to a duplication. And Securicor Courier (K) Ltd v Benson David Onyango & another [2008] eKLR, the Court of Appeal reiterated that general damages are not awardable for breach of contract. (See also Provincial Insurance Co. EA Ltd v Mordechai Mwanga Nandwa, (KSM Civil Appeal No 179 of 1995).

75. The reason general damages are not paid for breach of contract is because the amounts are known in advance. They are not at large. The risk assumed is known and there can be no injury outside he contractual terms.

76. There is an aspect the court overlooked and as a result fell into deep error. As the Respondent testified, the Agent of the Appellant gave him the information, rudely at 4pm on 24/5/2014. She refused to engage further saying it is not her business. The agent may have been discourteous but that is a moral and business issue, in terms of liability, that rude end marked the end of the engagement.

77. No liability will arise from actions of other people. There may be damage or injury suffered but it occurred independent of the Appellant. It is understood that when breach of contract occurs, it is annoying and emotional, especially, when personal safely and treatment is concerned. Parties tend to be bitter and seek revenge. Unfortunately, that is the nature of the law of contract. It is impersonal. It does not appeal to common decency or sense of care. It deals with the res, the thing.

78. The above decisions affirm the position that what is suffered or is believed to have been suffered, the damage that is to be compensated by way of damages, can only be known by the party and it is claimed in specific terms which has to be proved.

79. In BMK v AIG Kenya Insurance Ltd (supra) the court stated as doth–

> " The Plaintiffs have sought to be awarded general damages. As a general rule general damages are not recoverable for a breach of contract".

80. In Prof. James Ole Kiyapi, Permanent Secretary, Ministry of Medical Services & Attorney General v DOL International Ltd & Kenya Anti-Corruption Commission (2016) eKLR, the court of Appeal, (Visram, G. B. M. Kariuki & J. Mohammed, JJ.A), (had this to say: -

> " 48. In as much as the Respondent might have incurred loss during the period of suspension of the contract, we find that we cannot impute any wrongdoing on the part of the 1st Appellant who at all material times acted diligently and cautiously to preserve and protect public funds. This is a case of damnum sine injuria which is defined by Black's Law Dictionary 9th Ed. as 'loss or harm that is incurred from something other than a wrongful act and occasions no legal remedy". See also McGregor on Damages, 16th Ed at Para 7.

49. It is trite that before damages can be recovered there must be a wrong committed and in the absence of such wrong on the part of the 1st and 2nd Appellants we find that the Respondent failed to prove that the suspension in question was not justified and by extension its entitlement to the damages sought. Consequently, this brings the issue of damages to a close."

81. Justice Majanja J in Barclays Bank of Kenya Limited v Mema (Civil Appeal E011 of 2021) [2021] KEHC 333 (KLR) (Commercial and Tax) (3 December 2021) (Judgment) stated as follows regarding damages: -

> " 48. General Damages for breach of contract and punitive damages". Apart from the finding I have made that the general damages cannot be awarded for breach for contract."

82. Where special damages are not incurred, the only damages that ought paid are nominal damages. In the case of Peter Umbuku Muyaka v Henry Sitati Mmbasu [2018] eKLR, Justice J Njagi stated as doth: -

> 29. A claimant for general damages for breach of contract who does not prove that he suffered loss is all the same entitled to damages, though nominal. In the Anson's Law of Contract, 28th Edition at pg 589 and 590 the law is stated to be that:-
>
> " Every breach of a contract entitles the injured party to damages for the loss he or she has suffered. Damages for breach of contract are designed to compensate for the damage, loss or injury the claimant has suffered through that breach. A claimant who has not, in fact, suffered any loss by reason of that breach, is nevertheless entitled to a verdict but the damages recoverable will be purely nominal".

83. In this case, special damages have already been awarded. This then takes care of damages. No general damages can issue.

84. Flowing from the above principles of law, the Respondent was not entitled to damages for breach of contractual obligations, having raised a specific claim for special damages. The trial court applied wrong principles, and misapprehended the evidence, thus fell into error in awarding general damages of Ksh 1,000,000/= to the Respondent. This award must be set aside in entirety.

Costs

85. The Appellant was the insurer of the Respondent. Had they been keen on completing necessary forms and paying a due claim this case could have been totally unnecessary. They did not act in their best interest. Though they are partly successful, their conduct does not please a court of equity. They will be disentitled to cost.

86. In case of Prof. James Ole Kiyapi, Permanent Secretary, Ministry of Medical Services & Attorney General v DOL International Ltd & Kenya Anti-Corruption Commission, the court of Appeal, (VISRAM, G. B. M. KARIUKI & J. MOHAMMED, JJ.A) , (Supra), the court of appeal stated as doth regarding costs: -

> " It is also a well settled principle that costs should follow the event and should not be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case. See the Supreme Court's decision in Jasbir

Singh Rai & 3 Others -vs- Tariochan Singh Rai & Others (2014) eKLR. Halsbury"s Law of England, 4th Ed. (2010) Vol. 10 at para 16 states,

"The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice."

87. The end result is that the appeal partly succeeds.

Determination

88. I therefore make the following determination: -

a. The appeal on liability is totally unmeritorious and is thus dismissed.

b. The Appeal against special damages fails and is accordingly dismissed

c. The award of Ksh 1,000,000/= general damages was made in error. The award of general damages is therefore set aside in its entirety and in lieu therefore, an order is issued dismissing the entire claim for general damages.

d. Given the circumstance of the case, judgment is entitled for the special damages of Ksh 111., 638/= as awarded by the court below together with costs on the lower court based on the claim for special damages. The same to attract interest from the date of filing in the lower court.

e. The appeal against the declaration that the Appellant I bound to pay DR Richard A Shoshi's medical expenses is dismissed.

f. Each party to bear their costs in the lower court.

g. Given that there is a moratorium on the Appellant, execution in the lower court do await the termination of the moratorium.

h. This file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 20TH DAY OF MARCH, 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

HON. MR. JUSTICE DENNIS KIZITO MAGARE

JUDGE OF THE HIGH COURT, MOMBASA

In the presence of:

No appearance for the Appellant

No Appearance for the Respondent

Court Assistant – Firdaus Ndalu