



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 402 OF 2007

JOSEPH NGUKU.....PLAINTIFF

-VERSUS-

AON MINET INSURANCE BROKERS LTD.....1ST DEFENDANT

FIDELITY SHIELD INSURANCE CO. LTD.....2ND DEFENDANT

J U D G M E N T

1. **JOSEPH NGUKU** is the Plaintiff in this case. By this action the Plaintiff has sued the 1st Defendant, namely **AON MINET INSURANCE BROKERS LTD.** (hereinafter **AON**), and the 2nd Defendant, namely **FIDELITY SHIELD INSURANCE CO. LTD.** (herein after **Fidelity**).
2. The Plaintiff was the owner of Motor Vehicle registration No. KAV 220G, Mercedes Benz Truck (herein after the subject vehicle).
3. The Plaintiff by his Plaintiff has claimed that the subject vehicle had an insurance cover of **Fidelity**, when on 19th October 2006 it was destroyed by fire when in Sudan.
4. It is the Plaintiff's claim that by custom and usage his placement of insurance occurred when he placed insurance premium, with the **AON**; and that **AON** acted as the Plaintiff's and **Fidelity**'s agent.
5. The Plaintiff also pleaded that **AON** owed him a duty of care which duty it breached. The particulars of the alleged **AON**'s breach of duty were stated in the Plaintiff to be, **AON**'s allegation that the Plaintiff made the premium payment for the subject vehicle on 19th October 2006 rather than on 17th October 2006; **AON**'s failure to protect the Plaintiff's interests; failure of **AON** to impress on **Fidelity** to compensate the Plaintiff for his loss; and for **AON**'s failure to place insurance with **Fidelity**. The Plaintiff further pleaded that both **AON** and **Fidelity** conspired, jointly, and failed or neglected to settle the Plaintiff's claim for the loss of the subject vehicle.
6. The Plaintiff further claimed that **Fidelity** defamed him by writing a letter dated 13th March 2007 when **Fidelity** cancelled the Plaintiff's Insurance policies.
7. The Plaintiff by this action seeks the following prayers:
 - a. *General damages;*
 - b. *Special damages for loss of user and loss of profit in the sum of Kshs. 250,00 per month from 19th October 2006 until payment in full;*
 - c. *Kshs. 3.2;*
 - d. *Costs of the suit; and*
 - e. *Interest on (a), (b) and (c).*
8. Although **AON** filed a defence to the Plaintiff's claim, it did not support that defence by evidence. It did not adduce evidence and it follows that its defence was mere allegation. This is what Justice G. V. Odunga stated in the case **SHANEEBAL LIMITED V COUNTY**

GOVERNMENT OF MACHAKOS (2018) eKLR as follows:

*“What are the consequences of a party failing to adduce evidence? In the case of **Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002**, Lesiit, J citing the case of **Autar Singh Bahra And Another vs. Raju Govindji, HCCC No. 548 of 1998** appreciated that:*

“Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st Plaintiff’s case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail”.

9. It follows that the defence of AON will not be considered in this judgment.

10. Fidelity, by its defence, denied the Plaintiff’s claim. It pleaded that the subject vehicle was insured by it under the policy MC03512487 against any loss or damage to the vehicle by accidental means, theft, fire, malicious damage and against third party liabilities occurring within Kenya. Fidelity denied that the subject vehicle, when it caught fire, it was within the scope of the insurance cover granted under the aforesaid policy. That the fire occurred in Sudan, which was not covered by the policy. That the changes to the insurance cover did not take effect until after the request for cover was communicated and agreed by Fidelity. That the Plaintiff’s placing of insurance premium with AON was not effective to create or change any insurance cover.

11. In respect to the Plaintiff’s claim in defamation, Fidelity pleaded and admitted having written to the Plaintiff, and copied to AON, the letter dated 13th March 2007, cancelling all the Plaintiff’s insurance policies.

ANALYSIS AND DETERMINATION

12. There are four issues for determination in this matter; and they are:

- a. *Did Fidelity insurance policy cover the subject vehicle damaged within Sudan on 19th October 2006?*
- b. *If the answer to (a) is in the affirmative has the Plaintiff proved his claim in damages?*
- c. *Has the Plaintiff proved his claim in defamation?*
- d. *Who will bear the costs?*

BACKGROUND

13. The Plaintiff had, previous to filing of this case, insured various vehicles with Fidelity. One such vehicle was the subject vehicle. It is not denied that the Plaintiff had insurance cover, with Fidelity, for the subject vehicle, that policy however only covered for loss and damage to the subject vehicle within Kenya.

14. The Plaintiff’s case is that on 17th October 2006 it paid for an enhanced premium, for the subject vehicle, for purpose of obtaining extension insurance cover for loss and damage to the subject vehicle in Sudan.

15. Fidelity’s case is that on 19th October 2006 the Plaintiff through his broker, AON, requested for extension of insurance cover of the subject vehicle for Sudan. The said broker was requested by Fidelity to put that request in writing. Fidelity’s case is that the letter of AON making that request was received by it on 23rd October 2006, a date after the subject vehicle while in Sudan was destroyed by fire.

16. The Plaintiff reported to AON that the subject motor vehicle was destroyed by fire on 19th October 2006 in Sudan.

17. Fidelity accepted to extend the insurance cover, of the subject vehicle, to cover loss and damage in Sudan, but only 100 kilometers in Sudan from Kenyan border, amongst other countries, which insurance cover commenced on 23rd October 2006. That extension was subject to no known losses as at the commencement of the extended cover.

ISSUE (a) DID FIDELITY INSURANCE POLICY OVER THE SUBJECT VEHICLE COVER LOSS AND DAMAGE WITHIN SUDAN ON 19TH OCTOBER 2006

18. As stated above the Plaintiff’s claim is that the Fidelity insurance cover, over loss and damage in Sudan over the subject vehicle, was effective by 19th October 2006 when the subject vehicle was destroyed by fire.

19. The Plaintiff through his evidence stated that on 17th October 2006 he issued written instructions to Fidelity through AON seeking to cover three of his vehicles, one of them being the subject vehicle, for loss and damage in Uganda, Tanzania and Sudan.

20. The said letter of the Plaintiff, dated 17th October 2006, was addressed to AON and is in the following terms:

“AON MINET INSURANCE BROKERS LTD

MIDDLE MARKETS DIVISION

P.O. BOX 45817-00100

NAIROBI

ATTN: CHARITY WANGOMBE

Dear Madam

RE: EXTENSION OF INSURANCE COVER FOR KAV 200G, KAR 708V, KAU 154A AND ZA 9725

We would like to extend our insurance to cover to Uganda, Tanzania and Sudan except Dafur for the following vehicles KAV 220G, KAR 708V, KAU 154A AND ZA 9725 with effect (sic)

Attached please find a cheque for 25% the premium paid for the above vehicle. Let me know if there is any discrepancy in the calculation of the amount to be added.

Yours faithfully

Credible Services

(SIGNED)

Joseph Nguku

Proprietor”

21. The Plaintiff produced in evidence a copy of a cheque written by him in favour of AON dated 17th October 2006 for the amount of Kshs. 154,165. On that photocopied cheque is handwritten note to the effect:

“Extension of policy to Ug, Tz & Sudan except Darfur for KAV 220G

KAV 154A

KAR 708V

ZA 9725

Please note KAQ 133U cover remains the same (Kenya only).”

22. The Plaintiff's case is that the insurance policy for the subject vehicle was extended to cover loss and damage in Sudan on 17th October 2006 when he instructed AON to so extend that policy and when he issued the aforesate cheque to AON for the loaded premium for that extension.

23. The Plaintiff testified that on 19th October between 7 and 7.30pm he received a telephone call from the driver of the subject vehicle and he was informed that the subject vehicle was destroyed by fire, when it was between Narus and Kapoeta in Sudan – about 80 kilometers from the Kenyan border.

The Plaintiff reported the matter to Fidelity on 23rd October 2006 where upon he filled in the claim form.

24. The Plaintiff when he was cross examined by the learned advocate for the 1st Defendant stated that he presented his cheque to AON for the loaded premium on 17th October 2006. The amount of that cheque was the amount that had been negotiated between him with AON earlier on. That on leaving AON's offices, on 7th October 2006, he was informed (although not in writing) that the extended insurance cover was in place. That the cover was confirmed after Charity Wangombe, of AON, telephoned Fidelity.

25. The Plaintiff on being cross-examined by the learned advocate for Fidelity confirmed that AON was a broker. He further stated that it was Charity Wangombe who spoke to Fidelity about his request to extend the insurance cover. The Plaintiff could not, however, state specifically to whom Charity Wangombe spoke to in Fidelity.

26. The Plaintiff, further while being cross examined stated that Mr. Kibicho of AON admitted liability to the Plaintiff's claim but the Plaintiff later confirmed that the said Mr. Kibicho was not involved in the negotiations, with Fidelity, on the extension of the cover. Finally

the Plaintiff confirmed that he had not produced before Court evidence of when the subject vehicle crossed the Kenya/Sudan boarder.

27. The evidence of Fidelity was adduced by two witnesses, namely Ann Kina Njiru and Andrew Kiprotich Kimeli.

28. Ann Kina Njiru (hereinafter Ann) was Fidelity's assistant manager – Marketing. She confirmed that Fidelity issued an insurance policy over the subject motor vehicle, with effect from 27th April 2006. That insurance policy was limited to operate in Kenya. On 19th October 2006 Ann received a telephone call from Charity Wangombe of AON. Charity Wangombe enquired whether the Plaintiff could extend the insurance cover, in respect to the subject vehicle, to include Sudan. Ann responded by saying that the cover could be extended, and Ann quoted 25% loading on the premium for that extension. Ann stated in evidence that she requested Charity Wangombe to put into writing the request on extension of the cover. Ann in evidence stated:

“During this telephone conversation on 19th October, 2006 Charity Wangombe did not request me to extend the cover and I did not agree to any extension of the cover to Sudan.”

29. The first time Ann saw AON's letter dated 19th October 2006 was on 23rd October 2006. That letter was in the following terms:

“Fidelity Shield Insurance Co. Ltd.

Nairobi

Att Anne Njiru

Dear Madam

RE: MOTOR COMMERCIAL VEHICLES – GENERAL CARTAGE INSURED – JOSEPH NGUKU/CREDIBLE SERVICES

Our telephone discussion refers.

The above client has a number of vehicles (comprehensive) extended to East Africa and Sudan (except) Jumba (sic).

He is ready to pay an additional premium for this.

Kindly confirm that this is acceptable to you and also confirm the additional premium to be charged.

Yours faithfully

AON MINET INS. BROKERS LTD.

CHARITY WANGOMBE

FOR MIDDLE MARKET DIVISION – PLD”

30. Ann further stated that she was called by Christine Mwangi, of AON, who requested that the Plaintiff's cover be extended to cover other countries, that is Rwanda and Burundi in addition to Sudan. Ann requested that that too be put in writing. This was done by AON by their letter dated 26th October 2006. It was thereafter by letter of 1st November 2006 that Fidelity confirm the extended cover had commenced on 23rd October 2006.

31. On being cross examined by the learned counsel, of AON, Ann repeated that Charity Wangombe had telephone her on 19th October requesting for extension of Plaintiff's insurance cover to cover beyond the boundary of Kenya. Ann stated that the policy provided, and it was normal operations between the broker and Fidelity, that insurance cover commenced when the broker remitted the premium to Fidelity.

32. Ann when under cross examination also confirmed that the offer made by AON's letter of 19th October 2006 was subject to approval by Fidelity. Further that an agreement between AON and Fidelity needed to be put in writing for it to have contractual effect.

33. Andrew Kiprotich Kimeli in evidence in chief stated that Fidelity by its letter dated 27th November 2006, addressed to AON repudiated liability over the Plaintiff's claim.

34. I have considered the parties evidence, submissions and authorities. The burden of proof on issue (a) rests with the Plaintiff. This burden was discussed in the case **EUNICE WAYUA MUNYAO V MUTILU BEATRICE & 3 OTHERS (2017) eKLR** where it was stated

“The issue has been dealt with and settled by the Court of Appeal and was applied in one of the fairly recent authorities of EAST PRODUCE (K) LIMITED -VS- CHRISTOPHER ASTIADO OSIRO IN CIVIL APPEAL NO. 43 OF 2001 where it was held that:-

“It is trite law that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid in the case of Kiema Mutuku –Vs- Kenya Cargo Hauling Services Ltd 1991 where it was held that “there is as yet no liability without fault in the legal system in Kenya, and a Plaintiff must prove some negligence against the Defendant where the claim is based on negligence.”

35. The burden of proof on issue (a) is borne by the Plaintiff. The Plaintiff has to show sufficient evidence on a balance of probability that Fidelity insurance policy covered the subject vehicle, on 19th October 2006, over loss and damage within Sudan. This is what is provided under section 107 of the Evidence Act, Cap 80. That section states:

“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.”

36. The Plaintiff contends that he obtained insurance cover for the subject vehicles for loss or damage in Sudan, on 17th October 2006. To prove this the Plaintiff relied on his letter dated 17th October 2006 addressed to AON. That letter is reproduced above in this judgment. That letter is shown to be for the attention of Charity Wangombe of AON.

37. There is no evidence that the said letter was received by AON or Charity Wangombe on 17th October 2006.

38. The Plaintiff also relied on the cheque he issued for loading insurance premium dated also 17th October 2006. That cheque was in favour of AON.

39. Since Fidelity denied that the Plaintiff’s insurance cover, for the subject vehicle in Sudan, commenced on 17th October 2006, the Plaintiff had a burden to prove that indeed his letter and his cheque had the effect, leading to the insurance cover being effective as at 17th October 2006. The Plaintiff, as stated before, did not prove his letter and his cheque, both of 17th October were received by AON. Plaintiff’s contention is not even supported by AON’s letter to Fidelity dated 19th October 2006. That letter shows, clearly in my view, that AON was on that date, 19th October 2006, requesting Fidelity to extend the Plaintiff’s insurance cover over the subject vehicle to include Sudan. AON did not confirm cover. The last paragraph of that letter clarifies that, what AON requested for is confirmations that Fidelity would extend the insurance cover. This is what was stated by AON in that paragraph:

“Kindly confirm that this is acceptable to you and also confirm the addition premium to be charged.”

40. That paragraph in AON’s letter of 19th October 2006 could not have been there if indeed Fidelity had agreed, as Plaintiff contends, to extend insurance cover on 17th October.

41. The Plaintiff in order to prove his letter of 17th October 2006 was received by AON on that date, ought to have shown to the Court AON’s acknowledgment on that letter. There is no such acknowledgment. Further if the Plaintiff was to be believed that he issued the cheque for loading premium, in respect to the extension of insurance cover on 17th October 2006, he should have exhibited before Court a receipt for that cheque and/or his bank statement showing when the cheque was banked by AON. He did neither.

42. Even if the Plaintiff proved that he delivered his letter and cheque both dated 17th October 2006 to AON such proof would not have satisfied the burden of proof in issue (a). This is because the Plaintiff’s insurance policy, which he was seeking geographical cover extension, provides that insurance cover of Fidelity would only be effective once Fidelity received full premium payment. The relevant part of the policy, in that regard, provides:

“Notwithstanding anything contained herein to the contrary it is hereby understood and agreed that the indemnity provided by this policy will only apply on payment of full premium to the company in accordance with the provisions of section 156 of the Insurance Act Cap 487 failure to which cover lapses.”

43. It follows from the above that, even if the Plaintiff proved payment for the loaded premium was paid by him to AON on 17th October 2006; although in my view he did not prove the same; there is no proof before Court that Fidelity was paid on 17th October 2006, by the Plaintiff, the loaded premium for the extension of insurance cover. It follows that the condition of insurance cover, in the policy, was not complied with. Fidelity was therefore not obligated to give the extension, which the Plaintiff alleges was given.

44. Further, even if AON did receive the Plaintiff’s letter and cheque, both dated 17th October 2006, the Plaintiff filed to prove that AON were agents of Fidelity. The Plaintiff by his evidence in chief acknowledged that AON were his broker. He stated that he had, for four years previous to the incident hereof, insured his personal car and from February 2005 had insured his other vehicles with Fidelity through AON. He also confirmed that the said insurance were negotiated with Fidelity through AON.

45. AON was the insurance broker whom the Plaintiff approached, in this case. The Black’s Law Dictionary Tenth Edition defines an insurance broker as:

“Someone who, for compensation brings about or negotiates contracts of insurance as an agent for someone else, but not as an officer, salaried employee, or licensed agent of an insurance company. The broker is an agent for the buyer of the insurance policy and has certain fiduciary responsibilities as long as the relationship continues.”

46. The above is what was stated by the learned author, Robert Merkin, in the book entitled ‘*Colinvaux’s Law of Insurance*’. He set out the role of brokers, in that book to be:

“Brokers are independent agents appointed by the assured to carry out various functions, including advise and placement, post-contractual assistance and claims handling services.

... It is generally accepted that a broker, being the appointee of the assured, acts as the agent of the assured in giving advice to the assured and in dealing with the insurer.”

47. The Plaintiff, in this case, is the assured. It is the Plaintiff, therefore, who appointed AON to act for him in the matter of extension of insurance cover. The aforesaid learned author also stated in that book, that:

“...any error made by the broker while acting on the assured’s behalf and within the scope of his actual or ostensible authority bind the assured, any information received by the broker from the assured is not deemed to have been received by the insurers.”

48. It is clear from the above that the information which the Plaintiff alleged he gave AON on 17th October 2006 cannot be deemed to have been received by Fidelity on that day. Indeed the only evidence before Court of that communication being relayed to Fidelity is through the letter of AON to Fidelity dated 19th October 2006. But even through that letter, AON was seeking Fidelity’s confirmation of acceptance of Plaintiff’s request to extend the geographical insurance cover, to cover Sudan in addition to the Kenyan cover.

49. The evidence before Court of Fidelity acceptance to extend the Plaintiff’s insurance cover is through its letter dated 1st November 2006 which provided that the extension of insurance cover commenced on 23rd October 2006. Since the subject vehicle was destroyed by fire on 19th October 2006, even though there was no evidence before Court that the damage occurred on that date, the extension of insurance cover had not commenced on 19th October 2006.

50. The finding of this Court in that issue (a) is in the negative. Fidelity insurance policy did not extend to cover the subject vehicle in Sudan on 19th October 2006.

ISSUE (b) IS IF THE ANSWER TO (a) IS AFFIRMATIVE DID THE PLAINTIFF PROVE HIS CLAIM

51. The Plaintiff claimed for special damages for loss of user and loss profit in the sum of Kshs. 250,000 per month from 19th October 2006 until payment in full. The Plaintiff also claimed for Kshs. 3.2million for the value of the subject vehicle.

52. Those two claims were not supported by any documentation, at all. The Plaintiff did not prove the income generated by the subject vehicle. Nor did the Plaintiff provide to the Court evidence of the value of the subject vehicle.

53. The Plaintiff ought to have strictly proved his claim for loss of user and profit and loss of the value of the motor vehicle. He did not. The jurisprudence on such claim make it clear the need to specifically claim and strictly prove such a claim. This is what was stated in the case **NDUGU TRANSPORT COMPANY LIMITED V DANIEL MWANGI WAITHAKA LETEIPA [2018] eKLR** as follows:

“Like the trial Judge in Ryce Motors Ltd and Anor – vs – Muroki (1995-1998) 2 EA 363, the learned trial Magistrate was given a booklet to support the claim for Kshs.3,000/- per day which she rejected. The Court of Appeal said this when the matter came before it on Appeal;

“The Learned Judge had before him by way of Plaintiff’s evidence exhibits 2 and 3 as proof of alleged loss of profits. Exhibit 2 consisted of figures jotted down on pieces of papers showing dates and figures. Nothing about these pieces of paper can be accepted as correct accounting practice to enable the Court to say these are the accounts upon which the Court can act.....”

The said pieces of paper in our view, do not go to prove special damages. There are umpteen authorities of this Court to say that special damages must not only be specifically pleaded but must be strictly proved. Such authorities are now legion. The Plaintiff simply gave evidence to the effect that his matatu was bringing him income of Kshs.4,500/- per day. He did not support such claim by any acceptable evidence and we set aside the award in its entirety.....

In Civil Appeal No. 283/1996, David Bagine vs Martin Bundi as cited in Jackson Kiprotich Kipngeno & Another vs Daniel Kiplimo Kimetto [2008] eKLR it was held that:

“We must and ought to make it clear that damages under the title “loss of user” can only be special damages. That loss is what the claimant suffers specifically. It can in no circumstances be equated to general damages to be assessed in the standard phrase, “doing the best I can “These damages as pointed out earlier by us must be strictly proved...”

54. Had the Plaintiff succeeded in issue (a) he would not have succeeded on issue (b) because of lack of specific proof of loss of user and profit and loss of value of the subject vehicle.

ISSUE (c) HAS THE PLAINTIFF PROVED HIS CLAIM IN DEFAMATION

55. This issue stems from the letter written by Fidelity to the Plaintiff, which letter was copied to AON. It is important to consider the content of that letter as follows.

“FIDELITY SHIELD

INSURANCE COMPANY LIMITED

Our Ref: BJN/pt/2007/NM 25860

Date: 13th March, 2007

Mr. Joseph Gaitho Nguku

P.O. Box 756-00208

NGONG HILLS

REGISTERED

Dear Sir,

RE: NOTICE OF POLICY CANCELLATION

MOTOR COMMERCIAL POLICY NO. – MCO35124587

-MC035124581

Please note that due to bad claims experience in respect of your policies with us, we are giving you seven (7) days cancellation notice from the date of this letter after which we shall proceed to cancel all your policies without any further reference to yourself.

Please arrange to send back to us all the motor certificates issued to your vehicles the soonest possible for cancellation.

Please be guided accordingly.

Yours faithfully

(SIGNED)

B. J. NDEGWA

SENIOR UNDERWRITING MANAGER

CC: AON Minet Insurance Brokers

Middle Markets Division

NAIROBI”

56. It needs to be stated that apart from that letter, reproduced above, there is no other evidence supporting the Plaintiff’s claim for defamation. The Plaintiff did not adduce any evidence to the effect that the above letter defamed him, if at all. In the case **MUSIKARI KOMBO V ROYAL MEDIA SERVICES LIMITED [2018] eKLR** the Court of Appeal referring to the book *Gatley on Libel and Slander 10th Edition* at page 8 stated:

“There is no wholly satisfactory definition of defamatory imputation. Three formulae have been particularly influential: (1) would the imputation tend to ‘lower the Plaintiff in the estimation of right-thinking members of society generally? (2) would the imputation tend to cause others to shun or avoid the claimant? (3) would the words tend to expose the claimant to ‘hatred’ contempt or ridicule? The question what is defamation relates to the nature of the statement made by the Defendant: words may be defamatory even if they are believed by no one and even if they are true, though in the letter case they are not, of course, actionable.”

57. The Plaintiff should have adduced evidence, which he did not, showing that his reputation was lowered in the estimation of right-thinking people; that the words in the letter, by Fidelity, caused others to shun him; and that the words in that letter exposed the Plaintiff to hatred. The Plaintiff did not show any of the above by evidence.

58. The defence of Fidelity on this issue (c) was that the communication, by that letter, which was copied to AON, was procted by privilege. Fidelity submitted that the communication of the letter to AON was privileged because AON was the Plaintiff's insurance broker. The Supreme Court of South Australia which I find persuasive in the case **DUFFY V GOOGLE INC [2015] SAS 176 (27 October 2015)** had occasion to discuss this defence and stated thus:

*“In **Howe & McColough v Lees**, the Defendants belonged to an association of stock agents at Bendigo whose rules required members to report defaulting purchasers via the secretary to other members. The Defendants reported the Plaintiff as a defaulting purchaser. The High Court (Isaacs J dissenting) held that members of the association had a sufficient mutual interest to amount to an occasion of qualified privilege. Griffiths CJ (with whom Barton J agreed) said:*

“With regard to the privilege founded upon what is called interest it is contended that the person who makes the communication and the person to whom it is made must have a common interest. “Community of interest” is, I think, a more accurate term...”

O'Connor J said:

“The interest relied on as the foundation of privilege must be definite. It may be direct or indirect, but it must not be vague or unsubstantial. So long as the interest is of so tangible a nature that for the common convenience and welfare of society it is expedient to protect it, it will come within the rule. The credit of intending buyers must always be a matter of supreme importance to agents conducting business under the circumstances proved in this case.”

*“In **Papaconstuntinos v Holmes à Court**, French CJ, Crennan, Kiefel and Bell JJ said:*

“The defence of qualified privilege at common law has been held to require that both the maker and the recipient of a defamatory statement have an interest in what is conveyed. This is often referred to as a reciprocity of interest, although “community of interest” has been considered a more accurate term because it does not suggest as necessary a perfect correspondence of interest. The interest spoken of may also be founded in a duty to speak and to listen to what is conveyed.”

59. The Kenyan Court of appeal in the case **MUSIKARI KOMBO Case (Supra)** also considered this defence, as follows:

*“In **Reynolds vs. Times Newspapers [1999] 4 ALL ER 609** the House of Lords went on further to set out a criteria for determining whether a publication is subject to qualified privileged as herein under:*

“Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only. (1) The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. (2) The nature of the information, and the extent to which the subject matter is a matter of public concern. (3) The source of the information. Some informants have direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. (4) The steps taken to verify the information. (5) The status of the information. The allegation may already have been the subject of an investigation which commands respect. (6) The urgency of the matter. News is often a perishable commodity. (7) Whether comment was sought from the Plaintiff. He may have information others do not possess or have not disclosed..(8) Whether the article contained the gist of the Plaintiff's side of the story. (9) The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. (10) The circumstances of the publication including the timing.”

60. AON had an interest in the information contained in the letter. They were the brokers of the Plaintiff and they used to arrange insurance for the Plaintiff through Fidelity. It was important for AON to know that Fidelity was no longer willing to provide insurance for the Plaintiff. It is because of that that the defence of Fidelity of qualified privilege succeeds. And it is because of that finding and also because the Plaintiff did adduce evidence on deflation that the Plaintiff's claim in defamation fails.

COSTS

61. The Defendants, that is AON and Fidelity having wholly prevailed in this case are entitled to the costs of the suit.

CONCLUSION

62. In the end the judgment of this Court is that the Plaintiff's case fails and is dismissed with costs to both Defendants.

DATED, SIGNED and DELIVERED at NAIROBI this 13TH day of JUNE, 2019.

MARY KASANGO

JUDGE

Judgment Read and Delivered in Open Court in the presence of:

Sophie..... COURT ASSISTANT

..... FOR THE PLAINTIFF

..... FOR THE 1ST DEFENDANT

..... FOR THE 2ND DEFENDANT