ICEA Lion General Insurance Company Limited v Noble Merchants Shipping Limited & another (Civil Appeal 133 of 2019) [2023] KECA 1061 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KECA 1061 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 133 OF 2019

P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA

SEPTEMBER 22, 2023

BETWEEN

ICEA LION GENERAL INSURANCE COMPANY LIMITED .... APPELLANT

AND

NOBLE MERCHANTS SHIPPING LIMITED .... 1ST RESPONDENT

AON MINET INSURANCE BROKERS LIMITED .... 2ND RESPONDENT

((Being an appeal from the judgment of the High Court of Kenya at Mombasa (Hon. Justice P.J.O Otieno) dated 31st July, 2019 in High Court Commercial Case No. 90 of 2006)

JUDGMENT

1. By an amended dated 6th July, 2004, the 1st Respondent sued the Appellant and the 2nd Respondent claiming as against the Appellant:

    a) A declaration that the Appellant was liable to the 1st Appellant for damages arising from an insurance policy which was taken by the 1st Respondent with the Appellant through the 2nd Respondent, an insurance broker

    b) Kshs. 49,000,000/=

    c) Interest thereon at prevailing bank lending rates from the date of loss till payment in full.

    d) Any other further relief as the nature of the case may require and the court may deem fit.

    e) Costs of the suit.

2. As against the 2nd Respondent and in the alternative to the claim against Appellant, the 1st Respondent sought:

    a) Kshs. 49,000,000/=

b) General damages

c) Any other or further relief as the nature of the case require

d) Interest on the above at court rates from the date of destruction till payment in full.

e) Costs of and incidental to these proceedings.

3. According to the plaint, the 1st Respondent took an insurance contract with the Appellant through the brokerage of the 2nd Respondent in respect of the 1st Respondent's goods/items/machineries, spares and other fittings against risks of fire and all allied perils including floods, windstorms, impact, explosion, bush fire for the said sum of Kshs 49,000,000.00. Pursuant to the foregoing, the 1st Respondent completed and submitted to the Appellant the proposal form on 7th January, 2002 and was issued with "Risk Note/Debit Note" No. xxxx dated 14th January, 2002 and the endorsement advice No. 030/040/40/00230/2002 on 13th February, 2002 by the 2nd Respondent confirming that the Appellant by its policy No. 030/040/1/005724/2001 dated 21st February, 2002 and stamped on 7th March, 2002, though not yet issued to the 1st Respondent, did insure the 1st Respondent's said property for a period of 27th December, 2001 to 27th December, 2002 for an annual premium inclusive of brokerage charges of Kshs 51,807/-. According to the 1st Respondent, the said premium was duly paid.

4. According to the plaint, the said cover of Kshs 49,000,000.00 was in respect of various electrical and hydraulic equipment and other contents in the sum of Kshs 21,000,000/- and various equipment including computers for reverse osmosis plant for purification and de-ionising of water and other contents in the sum of Kshs 28,000,000.00 all of which were, at the material time the 1st Respondent was the owner interested (*sic*) therein.

5. It was pleaded that on the 12th February, 2002 the premises and contents were destroyed and or damaged by fire, the particulars of which were itemised in the plaint as all electrical and hydraulic equipment plus equipment and computers and a reverse osmosis plant for purification of and de-ionising water all valued at Kshs 49,000,000/-. Upon being notified of the loss, the Appellant purported to repudiate liability on the grounds that the 1st Respondent was unable to prove the exact description, quantity and cost prices of the items destroyed by fire and that the proximate cause of the loss or damage was burning bushes which was excluded from the cover.

6. The Appellant filed its defence dated 16th December, 2004, in which it denied the 1st Respondent's claim. We have elsewhere in this judgement summarised the gist of the said defence.

7. On behalf of the 2nd Respondent, the existence of the insurance cover was admitted as well as the part played by the 2nd Respondent in procuring the policy but any wrongdoing was denied. Instead, the 2nd Respondent pleaded that it duly acted and carried out instructions as given by the 1st Respondent in taking out the policy and that the policy documents were duly issued to the 1st Respondent before and not after the incident of fire. According to the 2nd Respondent, even if the 1st Respondent had suffered any loss it had failed to furnish the requisite documents in terms of the policy document.

8. The parties having by consent admitted into evidence four bundles of documents, two by the 1st Respondent and the other two by each of the defendants, the hearing commenced.

9. The 1st Respondent's case as narrated by the 1st Respondent's only witness, PW1, Melvin Charo Bandari, was that in the year 2000 while at Ganjoni area, he purchased a reverse osmosis water purification plant together with its hardware from one Arturro Cerutti for a sum of USD 615,000/

= which payment was acknowledged on 19th February, 2001 after which PW1 took possession of the same and kept it at his premises situate at Plot No. MN/III/3160 before transferring his interests in the equipment to the 1st Respondent, a family business whose shares were held by him and his mother.

10. According to PW1, purchase price was paid to the vendor in Switzerland. Referred to his witness statement PW1 clarified that the money was not withdrawn by him from the bank but was availed by a brother-in-law. As at the time of the transfer of the said goods, they were insured by Liberty Assurance Co. Ltd.

11. According to PW1, the 1st Respondent entered into an agreement with the 2nd Respondent, an Insurance Broker, to facilitate the insurance cover of the goods and pursuant thereto, on 21st January, 2003, one Bakari Mwakambirwa on behalf of the 2nd Respondent inspected the premises and satisfied himself regarding the documentation in respect of the items to be covered as well as the premises. On that day that the said Bakari solicited for the inclusion of the reverse osmosis plant which was already at the premises and urged PW1 to transfer the business from Liberty Assurance on the promise that PW1 would get a good quote on premiums. An agreement was reached following consultation with a Mr. Onyango of the Appellant and on the 14th January, 2002 Bakari wrote to the Appellant informing it of the addendum to the property covered. A debit note was handed to the 1st Respondent though the policy document was not handed over. However, while the policy was in force, on the 12th February, 2002 fire broke out and burnt the entire equipment and the 2nd Respondent was duly notified the next day. All the while the Appellant did not issue the policy till the 9th April, 2002 when the same was transmitted by post to the 1st Respondent by the 2nd Respondent under cover of a letter dated 22nd March, 2002.

12. Following that report, the 1st Respondent's premises were then visited by a Mr. Wanjohi of Cunningham Lindsay who obtained from PW1 copies of the documents of title and insurance as well as pictures of the reverse osmosis plant while under assembly and requested for importation documents for the equipment which PW1 did not have. The said Mr. Wanjohi came up with a preliminary report stating that the 1st Respondent failed to produce evidence of title.

13. PW1 further testified that another loss adjuster, Ms. Wiseman Ltd was also commissioned to assess the loss but their instructions were withdrawn. The third investigator to be commissioned was Protectors Ltd who the 1st Respondent faulted for having engaged in loss adjustment which was not within their mandate and terms of appointment. The witness said that a gentleman called Robert spoke to him and confided in him that he had been instructed to skew the report as to impede the settlement of the claim. He said Mr. Robert specifically told him that Protectors' mandate was to investigate the proximate cause but not to adjust the claim and for that reason he did not ask for any documents.

14. According to PW1, he provided all the documents asked for and that the Appellant's reasons for declining liability, based on the exclusion clause contained in the policy document issued after the event, on loss occasioned by bush fire, were only designed to defeat the claim in bad faith and was deliberately inserted to defeat the claim. He then blamed the 2nd Respondent for failure to protect the 1st Respondent's interests as was expected.

15. PW1 testified that on the date of the incident, he had instructed his Shamba boy to clear the compound by burning the cut bushes but could not confirm if the fire came from the bush burning since the heaps of burnt leaves were about 1-2 meters away from the Godown. On the quotation for premium and the property insured, the witness said that the amount of Kshs. 43,324/= was in respect of electrical and hydraulic equipment only and that 28,000/= was in respect being in respect of insurance cover

of the reverse osmosis plant the other amount being in respect of the cover for Electric and hydraulic equipment.

16. PW1 further stated that he had given an Affidavit of ownership to Cummingham and Lindsey and that none of the investigations ever asked if the seller had been paid the purchase price adding that when the investigators visited the burnt items remained in Situ.

17. The case for the Appellant was presented by two witness, Samuel Maina Nganga and Nicholas Wanjohi. The evidence by the two sought to put up the Appellant's case that there was no valid policy and in the alternative that if there ever existed one then the same had an exception clause which entitled the Appellant to repudiate. It was also contended that there was never an insurable interest vested upon the 1st Respondent in the goods. According to DW1, the said the policy issued had a bush fire exclusion clause which the Appellant invoked to avoid the policy.

18. The witness however disclosed that he played no role in issuing that policy, investigation over the loss or the decision to decline liability but admitted that from the endorsement issued by the Appellant their standard policy terms were never captured in the endorsement issued which was the only document that had been issued to the 1st Respondent as at the time the incident occurred and was issued after they knew that the incident had occurred

19. The witness further confirmed the fact that the first investigators were Coast Accident whose report stated that they had received the original invoices, letter/note confirming transaction stating the items on sale and their prices. He denied having asserted in his statement that any documents were not received and stated that lack of documents was not the basis for rejection of the policy as the rejection was purely on account of bush fire. Save for that he conceded that there was a valid cover to run from 27th December, 2001 to 27th December, 2002.

20. According to DW1, none of the experts was commissioned to adjust the loss and that none of them established that the fire to have been caused by bush fire as the two reports submitted by Protectors stated the cause of fire was electrical or unknown.

21. DW2, Nicholas Wanjohi, an employee of Cunningham Lindsey who visited the premises of loss and compiled the preliminary report stated that on the date of inspection the reverse osmosis plant appeared intact and that he requested PW1 to avail the documents of title to enable him confirm ownership, quality and value of the goods and formed the opinion that the fire spread from the burning bushes. He however disclosed that his mandate was never to adjust the loss but admitted that he made two contradictory statements starting with a finding that the reverse osmosis plant had been damaged and concluding that it was intact. He also found that due to how the store was constructed burning embers could not enter the store and admitted that he did not make a conclusion on the cause of fire. To him a policy could not be avoided in the absence of conclusive finding of the cause of loss.

22. DW3, Jefferson Mwakio, for the 2nd Respondent confirmed that the 1st Respondent indeed took out a policy from the Appellant brokered by the 2nd Respondent for an insured sum of Kshs. 49,000,000/= which was to cover the disclosed goods against fire and allied perils including bush fire. According to him, the 2nd Respondent did its duty to the 1st Respondent diligently and in fact informed the 1st Respondent that it was the 1st Respondent's duly to prove the loss by providing documents of ownership. He admitted that their Mr. Bakari visited the site at the inception and verified the items and that the policy issued was intended to cover bush fire save for burning by or on behalf of the insured.

23. That was the state of the evidence when eventually judgement was handed down by the trial court on 31st July, 2019. In that judgement the Learned Trial Judge (P. J. Otieno, J.) found that even though the period of insurance was agreed to have been between 27th December, 2001 to 27th December, 2002,

the policy document itself was issued only on the 7th March, 2002 and received by the 1st Respondent sometimes after the March 2002. The Learned Judge found that in this case where parties agree that the contract of insurance took effect before the final document was issued and signed, a resort must be made to the series of documents made between the parties beginning with the proposal form, then the correspondence between the three parties including the risk notes and endorsements. The Learned Judge held that in the insurance industry and practice the proposal form is generally accepted and treated as the offer and that when the underwriter gives a quote for premiums and bills the prospective insured and payment for premium is made and accepted, a contract is at juncture clinched. He therefore treated the quote as the basis of the contract between the parties capable of disclosing what the terms of the contract yet to be reduced into writing, were to be.

24. Since by the time the loss occurred on 12th February, 2002, the said policy had in fact not been issued, the Learned Judge held that it could only be fair to find that its terms had not been brought to the attention of the 1st Respondent so as to give him a chance to exercise the contractual right of challenge given to it in the Risk Note. Though denied in the statement defence,the Court found based on the letter by the Appellant dated 22nd March, 2002 enclosing and forwarding the policy document, date stamped 7th March, 2002, to the 1st Respondent, that at the time of the occurrence of fire the exclusion clause sought to be relied upon by the Appellant had not been brought to the 1st Respondent's attention so as to incorporate its terms, particularly the exclusion clauses, as terms of the contract between the parties to be used against the 1st Respondent.

25. On the authority of *Macgillivray & Parkington, on Insurance Law, 6th Edition*, the Learned Judge held that a term of contract not brought to the attention of an insured beforehand but later introduced in the policy document after the contract of insurance takes effect need to be in consonance with the preliminary contract and not in contradiction thereto. It was his finding that in this case the exclusion of bush fire as a whole or bush fire initiated by the insured or his agent was not a term the 1st Respondent bargain for and committed to by the time the policy was initiated and could not be made to bind it to its disadvantage. This finding, he further stated, applied to the requirement of evidence of title and to all the terms in the policy that went against the grain of the proposal form, the debit/Risk notes and endorsements.

26. He however, found that the evidence of sale between the 1st Respondent and PW1 was sufficient proof of title to the goods having passed to the 1st Respondent based on Section 19 and 20, *Sale of Goods Act*, and it mattered not that the purchase price was made payable at a later date. The Learned Judge therefore found no merit in the contention that the 1st Respondent lacked title and insurable interest over the goods, and found that the evidence tendered proved on a balance of probabilities that the goods did belong to the 1st Respondent who then had a right to insure same.

27. In this matter, he found that the Appellant undertook to insure the 1st Respondent's goods for a specific sum of money and indeed quoted the due consideration in the name of premiums and issued an endorsement detailing the particulars of the good insured and the sum assured after the goods had been inspected and verified before the business was underwritten. Without an adjustment by a professional assessor/loss adjuster, it was his holding that the parties were left to contend with the contract to insure at the sum agreed.

28. On the authority in the case of *Nizar Virani v Phoenix of East Africa Ass Co Ltd* [2004] eKLR and *MacGillivray & Parkington on Insurance Law, 6th Edition*, the Learned Judge found that the sum assured being contractual and the loss having occurred, the 1st Respondent was entitled to the relief sought with interest on the said sum from the date the suit was filed till payment in full. He however,

dismissed the suit against the 2nd Respondent but with no orders as to costs but awarded the costs of the suit against the Appellant.

29. It was this decision that aggrieved the Appellant who invoked this Court's jurisdiction in this appeal. There is also a Notice of Cross-Appeal by the 1st Respondent dated 17th February, 2021, in which the 1st Respondent asserts that the Learned judge failed to specify the rate of calculation of interest contending that it ought to have been awarded at 16.3% per annum being the average Annual Bank borrowing rate or at court rates of 14% per annum.

30. We heard this appeal on the court's virtual platform on 20th March, 2023 on which day Mr Kevin Mcourt, SC appeared for the Appellant, Mr. Sanjeev Khagram appeared for the 1st Respondent while Mr Waweru appeared for the 2nd Respondent.

Appellant's Submissions

31. According to the Appellant, the 1st Respondent had no insurable interest in the goods in question when the fire occurred on 12th February 2002, since it did not have legal or equitable ownership over the same. It was submitted that Based on *Black's Law Dictionary, 8th Edition, (Thomson West), Bryan A. Garner*, *Chitty on Contract, 26th Edition, Volume II, Specific Contracts, (London & Maxwell), 1989*, it was submitted that an insured must have an interest in the subject-matter of the insurance other than that created by the contract itself.

32. In this regard, it was submitted that the Learned Trial Judge erred in law and in fact when he failed to question the validity of the Sale Agreement between the Arturro Cerutti and Melvin Bandari, and failed to appreciate and consider the contradictions that were highlighted by the Appellant in its submissions and accord them due weight, as they proved that there was in fact no valid agreement between Arturro Cerutti and PW-1. It was further submitted in light of the unfulfilled conditions in the Memorandum of Sale, the inconsistencies in PW1's evidence and as the full purchase price had not been paid, the 1st Respondent had no insurable interest as a sale had not occurred at the time of the fire. The Learned Judge was faulted for not finding that there was material non-disclosure of this fact.

33. It was in addition noted that the 1st Respondent's was unable at the time of the fire to produce to the Appellant any evidence or record of the quantity and value of the insured goods but only provided by the 1st Respondent in its own commissioned assessment report of 19th December, 2002 which is after the filing of the Plaint.

34. We were therefore invited to find that the Respondent was in breach of the insurance contract for non-disclosure of material facts and for misrepresentation.

35. According to the Appellant, the Learned Trial Judge erred in law when he held that there was no basis of considering any Judgment against the 2nd Respondent since the same was pleaded in the alternative. In so doing, it was contended, the Learned Trial Judge ignored the further prayer in the Amended Plaint, which sought Judgment against both the Appellant and the 2nd Respondent jointly and severally. Consequently, the learned Judge found that the 1st Respondent had a valid claim against the 2nd Respondent and he would have considered it, if not for finding against the Appellant.

36. According to the Appellant, since the 2nd Respondent was, in law, the 1st Respondent's agent, the knowledge, actions and omissions by the 2nd Respondent ought to be construed as those of the 1st Respondent including the knowledge of the exclusion clause. The failure by the 2nd Respondent to exercise due diligence in negotiating cover and inform the 1st Respondent of the same should therefore

be blamed on the 2nd Respondent. In this regard reference was made to the case of *Insurance Company of East Africa Limited v Ndambuki Kisau* [2004] eKLR.

37. On whether the value of the goods damaged by fire was proved, it was submitted that the Learned Trial Judge erred in law when he held that not all specific liquidated claims must demand the proof of special damages and that the 1st Respondent was entitled to be indemnified to the insured sum, since he insured his property for a specific sum against an agreed peril, which did occur. According to the Appellant, the 1st Respondent had a duty and a burden to prove the extent of the loss and failed to discharge this burden. This submission was based on *Madison Insurance Company Limited v Solomon Kinara t/a Kisii Physiotherapy Clinic* [2004] KLR, *Kenindia Assurance Co. Ltd. v Monica Moraa* [2016] eKLR and *Kenya Alliance Insurance Company Limited v Pizzaro Kaungania & another* [2018] eKLR.

38. On the issue whether the occurrence of the fire was covered under the policy, it was submitted that the fire was started by or on behalf of PW-1 as a bush fire, which had causation to the fire that destroyed the alleged goods and on the authority of *Slattery v Mance* [1962] 1 All ER 525, at pg 526, it was contended that the 1st Respondent could not benefit from the acts of its servant.

39. On the award of interest, it was submitted that interest was claimed at Bank Rates from the date of the fire but in awarding the interest the Learned Trial Judge failed to state the interest rate applicable and that no evidence was led by the 1st Respondent on the issue of Bank Rates other than a document allegedly of Kenya Bank Lending Rate.

40. It was therefore sought that the appeal be allowed.

41. As regards the cross-appeal, it was submitted that the Learned Judge erred in awarding interest at all from date of filing suit, having already pronounced that the suit did not fit a special damages claim. Therefore, any award should have only attracted interest from the date of judgment based on *George Gichana Karanja & another v Mwangi Nderitu Ngatia* [2019] eKLR. According to the Appellant interest ought not to have been imposed on the unproved sum assured but only on the actual value of the goods damaged or lost. See *Kenindia Assurance Companv Ltd v Monica Moraa* [2016] eKLR and *Jane Wanjiku Wambu v Anthony Kiamba Hato and 3 other* [2018] eKLR.

42. Furthermore, it was submitted, the silence of the Learned Judge on the issue of interest is still within the discretion of the Court and it is established that where the Court is silent on the issue of interest, the court rate of 12% per annum shall apply.

1ST Respondent's Submissions

43. According to the 1st Respondent, the Learned Judge, correctly held that the Appellant improperly took the point as to the validity of the sale to the 1st Respondent as relates to title to the goods given this was neither pleaded nor in issue and the evidence adduced did not support such contention. According to the 1st Respondent there was sufficient evidence as well as the law to support the 1st Respondent's interest in the goods insured, a fact confirmed by DWI. Reliance was placed on *Haul Mart Kenya Limited v Africa Holdings (Kenya) Limited* [2017] eKLR, *Lion of Kenya Insurance Company Limited v Edwin Kibuba Kihonge* [2018] eKLR and *Insurance Company of East Africa v Wellington Omodho* [2005] eKLR and *Mwita Masisi v Insurance Limited* [2018] eKLR.

44. Regarding the alleged material non-disclosure based on alleged inconsistencies with respect to ownership, consideration and possession of the goods, it was submitted that the evidence of the 1st Respondent's witness as well as that the 2nd Respondent's witness confirmed and verified the items in question and this was confirmed by the Appellant's Witness, Samuel Maina Nganga. In light of the foregoing, the 1st Respondent submitted that there was no evidence adduced to support the allegation

of material non- disclosure or that the Appellant was induced into entering the contract. It was the 1st Respondent's case that where non-disclosure is alleged, the onus is on the insurer to prove that the part not disclosed was material, it was within the insured's knowledge and was not communicated to it.

45. Regarding the issue of Agency and/or Brokerage Relationship, it was submitted that given the findings made against the Appellant, the Learned Judge was correct in his findings that he could only enter Judgment against the 2nd Respondent if he found that the Policy did not properly cover the risk and the claim against the Appellant failed. It was submitted that there was no controversy regarding the fact that the exclusion clause was not in the original document and the final policy document was not available at the time of the fire. In support of its submissions, the 1st Respondent relied on *Macgillivräy and Parkington on Insurance Law 6th Edition* and *Sita Steel Rolling Mills Ltd v Jubilee Insurance Company Limited* [2007] eKLR and submitted that the Appellant was obliged to issue a Policy in the standard terms usually attached to Fire policies without any additional conditions which were inconsistent with the express terms of the Preliminary Endorsement Note and which constituted the contract of Insurance.

46. On the issue of the failure to prove the total value of the goods, it was submitted that there was sufficient proof adduced at trial as regards the value of the property lost in the fire. In addition to this, and in the absence of the Appellant refusing or neglecting to undertake an adjustment of the loss, the 1st Respondent went ahead and had its own Assessor, Fair Lane Assessors, attend to the adjustment of the loss filed by the 1st Respondent which assessed the loss using the very documents supplied to the Appellant's investigators right from the outset. Accordingly, the Learned Judge was justified in awarding the sum insured since the assessed loss exceeded the sum insured. In support of this position, the 1st Respondent relied on this Court's decision in *Nkuene Dairy Farmers Co-Op Society Ltd & Anor v Ngächä Ndeiya* [2010] eKLR.

47. On the bushfire exclusion clause, it was submitted that even if the Appellant was able to rely upon this Exclusion Clause, the Appellant failed to adduce any or any sufficient evidence to show it was entitled to avail itself of a defence under this Clause. It was contended that the Appellant's first witness, in his testimony, confirmed that all their appointed investigators were unable to conclusively state what the cause of the fire was and, in fact, confirmed that none of the four investigators appointed by them, including Protectors Limited, conclusively pointed to bushfire as the cause of fire. The Appellant's 2nd witness further confirmed multiple Investigators were appointed to investigate the incident but none of them was able to conclusively state what the cause of the fire was or that it was one that fell within the exemption the Appellant sought to rely upon. Based on Sections 107 to 109 of the *Evidence Act*, the 1st Respondent submitted that the burden of proof lay on the Appellant to conclusively prove that the cause of the fire was bushfire in order to avail itself if the defence which it failed to discharge and, the 1st Respondent relied on *Real Insurance Company Limited v Board of Governors Victonell Academy* [2007] eKLR; *Hesbon Onyuro (suing as the Administrator of Alice Akoth Okong'o (Deceased) v First Assurance Company Limited* [2017] eKLR, Slattery v Mance [1962] 1 ER 525; *Johnson M Mburugu v Fidelity Shield Insurance Company Limited* [2006] eKLR, *Ukwala Supermarket (Kisumu) Limited v Kenindiä Assurance Company Limited* [2017] eKLR and *Nizär Viräni T/A. Kisumu Beach Resort v Phoenix East Africa Assurance Company Limited* [2004] eKLR.

48. It was submitted that whilst the Appellant has embarked and engaged on a conspiracy theory and speculative exercise, no tangible evidence has been adduced by it with regard to the allegation now made, for the first time on appeal, that the 1st Respondent deliberately and fraudulently caused the bush fire and it ought not to be allowed to recover under the policy. The 1st Respondent relied on *Stallion Insurance Company Limited v Ignäzio Messina & Company* [2007] eKLR and *Thuweibä Maka & 3 others v Vaisha Juma & another* [2016] eKLR.

49. As for the award of interest, it was submitted that this is a matter within the Judge's discretion pursuant to the provisions of section 26(1) of the *Civil Procedure Act* and that in cases of breach of contract, as in the instant case, the Court has discretion to award interest and fix the rate for: the period before the suit; period from date of filing suit to date of Judgement; and from date of Judgement to date of payment of the sum adjudicated to be due. On this, the First Respondent relied on *Total (Kenya) Limited Forœrly Caltex Oil (Oil) Kenya Limited v Janeväms Limited* [2015] eKLR; *Ajay Shah v Deposit Protection Fund Board as liquidator of Trust Bank Limited (in liquidation)* [2016] eKLR, *Apollo Insurance Company Limited v East African Development Bank & anor* [2016] eKLR. In this case the award was justified on the ground that the Appellant failed to discharge its obligation to the 1st Respondent hence the 1st Respondent was deprived of the use of the sum due to it which it could have invested.

50. However, the Learned Judge was faulted for not specifying the rate of interest. We were urged to award interest at 16% per annum based on the principle that had prompt recompense been made at the date the wrong was committed, the Appellant would have invested the same and earned income therefrom. In the alternative, we were urged to apply the court interest rates of 14% per annum based on Highway Furniture Mart Limited v Permanent Secretary Office of the President & another [2006] eKLR.

51. In the premises, the 1st Respondent prayed that the appeal be dismissed and its Cross-Appeal be allowed.

2 nd Respondent's Submissions

52. On the part of the 2nd Respondent, it was submitted that the only grounds that relate to the 2nd Respondent are whether the Learned Judge erred when he failed to find that the 2nd Respondent was an agent of the 1st Respondent and therefore the 2nd Second Respondent's knowledge of the exclusions under the bush fire clause in the policy ought to have been deemed to be the knowledge of the 1st Respondent. In the alternative, the Learned Judge erred in fact and in law when he failed to find that the 2nd Respondent bore liability for failing to ensure that the information on the policy document marched the information on the risk note, particularly in regard to the exclusions under the bush fire clause in the policy.

53. In its submission, the 2nd Respondent relied on the definition of an Insurance Broker in the *Black's Law Dictionary, 8th Edition* and averred that it was appointed by the 1st Respondent as a broker and placed the policy with the Appellant on the express instructions of the 1st Respondent. Based on the case of *AON Uganda Limited v Uganda Revenue Authority* [2012] EA 11 and Section 2 of the *Insurance Act*, Cap 487, the 2nd Respondent submitted that acted as an intermediary between the 1st Respondent, as insured, and the Appellant, as the insurer. The 2nd Respondent negotiated the contract of insurance for and on behalf of the 1st Respondent and by reasons of its efforts the Appellant issued to the 1st Respondent the Fire Policy No. 030/040/1/005724/2001. Immediately after the Fire incident was reported, the 2nd Respondent took all appropriate steps, as the First Respondent's broker, to report and submit the First Respondent's claim to the Appellant. According to the 2nd Respondent, the Learned Judge was right in dismissing the suit against the 2nd Respondent.

Analysis And Determination

54. This being the first appeal, in *Selle v Associated Motor Boat Co.* [1968] EA 123, this Court has held that:

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must 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 this respect. In particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

55. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties. The Court's mandate as re-affirmed in *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR is:

> "…to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

56. However, this Court (Apaloo, JA, as he then was) in *Kiruga vs Kiruga & another* [1988] KLR 348, while dealing with what amounts to proof, cited *Watt v Thomas* [1947] AC 484; *Peters v Sunday Post Ltd* [1958] EA 424 and expressed itself as hereunder:

> "An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the Judge can be said to be plainly wrong. It is a strong thing for an appellate court to differ, from the finding, on question of facts, of the Judge who tried the case and who had the advantage of seeing and hearing the witnesses. An appellate court has indeed the jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon evidence should stand. But this is jurisdiction, which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."

57. This Court (per Hancox, JA, as he then was), in *Mohammed Mahmoud Jabane vs Highstone Butty Tongoi Olenja* [1986] KLR 661; [1986-1989] EA 183, held that:

> "The appellate Court only interferes with the trial Court's findings of fact if it is shown that he took into account facts or factors which he should have not taken into account, or that he failed to take into account matters of which he should have taken into account, that he misapprehended the effect of the evidence or that he demonstrably acted on wrong principles in reaching the findings he did."

58. We have set out briefly, the respective pleadings of the parties in the Court below. Order 2 rule 4(1) of the *Civil Procedure Rules* provides that:

1. A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—

    a. which he alleges makes any claim or defence of the opposite party not maintainable;

    b. which, if not specifically pleaded, might take the opposite party by surprise; or

    c. which raises issues of fact not arising out of the preceding pleading.

59. The importance of pleadings cannot be overemphasised. This Court in case of *North Kisii Central Farmers Limited vs Jeremiah Mayaka Ombui & 4 others* [2014] eKLR where it was held as follows:

> " ...in the case of *Abdul Shakoor Sheikh v Abdul Najeid Sheikh* Civil Appeal No. 161 of 1991 (ur)...the court cited a quote from the authors Bullen and Leake (12th edition) page 3 under the rubric Nature of Pleadings:-
>
> > " The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which the parties can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial."
>
> It was held in the case of *Galaxy Paints Co. Limited v Falcon Guards Limited* [2000] 2EA 385 that the issues for determination in a suit generally flowed from the pleadings and a trial court could only pronounce judgement on the issues arising from the pleadings or such issues as the parties framed for determination. It was further held that unless pleadings were amended parties were confined to their pleadings. This position had been taken in the earlier case of *Gandy v Caspair* [1956] EACA 139 where it was held that unless pleadings were amended parties must be confined to those pleadings. It was further held that to decide against a party on matters which do not come within the issues arising from the dispute as pleaded clearly amounts to an error on the face of the record.
>
> In a judgement delivered recently by this Court on 14th February, 2014 in *Romanus Joseph Ongombe & others v Cardinal Raphael Ochieng Otieno & others* (Kisumu) Civil Appeal No. 20 of 2011 (ur) it was held that a judgement whose basis was on issues not founded on the pleadings was a nullity. This Court proceeded in that case to remit the matter to the High Court for retrial. The position flowing from all the previous judgements we have considered herein is that a judgement must be based on issues arising from the pleadings and the trial judge is not at liberty, as the trial judge in the case leading to this appeal did, to depart from the pleadings or the case before the court to write and deliver a judgement on issues that are not before the court. The difference would of course be where the parties introduce an unpleaded issue in the course of the trial and leave that issue for the court to decide. The court would in that event be entitled to make a necessary finding - *See Odd Jobs Mubia [1970] EA 476* where it was held that a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for a decision."

60. The position was restated by the Supreme Court in in *Raila Amolo Odinga & Another vs. IEBC & 2 others* (2017) eKLR as hereunder-

> " In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the

court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings…"

61. In its amended defence, the Appellant admitted that there existed a policy of insurance between itself and the 1st Respondent but averred that the 1st Respondent was in breach of the same. It also denied the value and/or estimated quantity of the equipment as claimed by the 1st Respondent and further denied that the policy was not made available to the 1st Respondent till after the fire. It was its case that the 1st Respondent did not suffer any loss or damage as particularised in the plaint. These were the express denials made in the defence. We have found it necessary to set out the law on pleadings and the Appellant's defence in light of the position adopted by the 1st Respondent that some of the issues being raised were not pleaded.

62. It is contended in this appeal that the 1st Respondent had no insurable interest in the goods in question when the fire occurred on 12th February 2002, since it did not have legal or equitable ownership over the same. This submission was based on the alleged contradictions in the evidence of PW1 concerning the agreement for sale between PW1 and Arturro Cerutti. This point was taken to show that there was material non-disclosure by the 1st Respondent at the time the cover was taken. From our reproduction of the defence, it is clear that this issue was not expressly pleaded in the defence. There was however a document that purported to have been an acknowledgement from Arturro Cerutti which was not controverted. As regards the issue of where the goods were there was evidence that the 2nd Respondent's representative, Mr. Bakari, visited the premises and confirmed and verified the items were there and were intact. Similarly, the Appellant's Witness, Samuel Maina Nganga, PW1 confirmed in his testimony that Messrs Cunningham and Lindsay saw the damaged items and from the report, the Osmosis Plant and the electrical hardware items were totally destroyed by the fire and that there were 30 crates containing the various damages items specified therein. In any case, as rightly submitted on behalf of the 1st Respondent, lack of documentation of title was not the basis upon which the claim was repudiated.

63. The law in Sections 19 and 20(a) of the *Sale of Goods Act* is that property in goods passes at the time the contract was made which in this case was 7th December 2001. If the full purchase price was not paid, then the recourse available to unpaid seller is provided under Sections 39 and 40 of the *Sale of Goods Act*. In our view the mere fact that the seller has not received the full purchase price does not bar the owner from taking an insurance policy cover over the said property and in the event of loss claiming in respect thereof. We associate ourselves with the opinion of *E R Hardy Ivamy in General Principles of Insurance Law* that:

> " In case of goods, or other property, insurable interest may be based on ownership and this ownership may be either sole or joint; absolute or limited; legal or equitable. Ownership is not, however, necessary; insurable interest may be founded on contract…The fact that the interest of the insured is precarious, and that other persons are entitled at any moment to call on him to hand over the object insured to them, does not, therefore prevent his interest from being sufficient to support a contract od insurance."

64. The next ground of appeal was that the Learned Trial Judge ignored the further prayer in the Amended Plaint, which sought judgment against both the Appellant and the 2nd Respondent jointly and severally and particularly in light of his finding that the 1st Respondent had a valid claim against the 2nd Respondent and he would have considered it, if not for finding against the Appellant. The Appellant's

case is that the 2nd Respondent ought to have been found liable since, being the agent for the 1st Respondent is deemed to have been aware of the exclusion clause regarding the bush fire.

65. From the evidence on record particularly from DW1, and contrary to the pleadings, there is no doubt that the 1st Respondent received the policy document after the fire incident. Before then, the only document that was delivered to the 1st Respondent was the Fire Coverage Summary Endorsement. This document, it was agreed, did not have the contentious bush fire exclusion clause. We do not see how a clause which was not brought to the attention of the 1st Respondent could be a basis for repudiating liability. However, assuming that the 2nd Respondent was aware of that clause but failed to bring it to the attention of the 2nd Respondent, the evidence adduced by the Appellant regarding the cause of the fire was itself inconclusive since none of the reports produced stated with certainty that the damage resulted from bush fire in order for the said exclusion clause to apply. To the contrary, the evidence of the Appellant's witnesses was that the cause of fire was inconclusive.

66. We are persuaded with the opinion in *Globe Trawlers Pte Ltd v National Employers Mutual General Insurance Association Ltd & anor* [1989] 1 MLJ 463 that:

> " Once it is shown that the loss has been caused by fire, the plaintiff has made out a prima facie case and the onus is upon the defendant to show on a balance of probabilities that the fire was caused or connived at by the plaintiff. Accordingly, if at the end of the day the jury come to the conclusion that the loss is equally consistent with arson as it is with an accidental fire, the onus being on the defendant, the plaintiff would win on that issue."

67. In our view, and based on *Macgillivräy and Parkington on Insurance Law 6th Edition*, the Appellant ought to have issued the policy based on the Contract of Insurance whose terms were contained in the Preliminary Endorsement Note. If there were to be new terms, the same ought to have been brought to the attention of the 1st Respondent so that it could decide to continue with the cover based on those terms or not. In this case the documents containing the terms introducing the said exclusion was not brought to the attention of the 1st Respondent till after the incident. In our view, it could not validly be the basis upon which liability under the policy could be successfully denied. At paragraph 279 of page 116 of *Macgillivräy and Parkington on Insurance Law* (*supra*) it is stated that:

> " Once a cover note in the usual form has been issued, it creates a binding insurance for the period of time specified in it, but subject to determination by notice at any time within that period. The temporary cover invariably takes effect at once since its object is to give immediate protection pending the direction of the directors and the issue of the policy."

68. The issue of non-disclosure of ownership, if there was such non-disclosure and insurable interest ought to be determined in light of the opinion of Lord Lloyd in *Pan Atlantic Insurance Co. Ltd v Pine Top Insurance Co. Ltd* [1993] 3 All ER 581 where it was held that:

> " Whenever an Insurer seeks to avoid a contract of insurance on the ground of misrepresentation or non- disclosure, there will be two separate closely related questions
>
> 1. Did the misrepresentation or non-disclosure induce the actual Insurer to enter into contract on those terms.
>
> 2. Would the prudent Insurer have entered into the contract on the same terms if he had known of the misrepresentation or non- disclosure immediately before

the contract was concluded. If both questions are answered in favour of the Insurer, he will be entitled to avoid the contract but not otherwise."

69. In this appeal, the issue of who the owner of the insured goods was, as well as how the goods changed hands from Arturro Cerutti to PW1 and eventually to the 1st Respondent, was sufficiently addressed by the 1st Respondent. The issue of whether the purchase price was paid or whether the sale was conditional was, in light of the above decisions immaterial to the contract of insurance entered into between the Appellant and the 2nd Respondent. We find no merit in this ground of appeal.

70. The next ground of appeal was that the Learned Trial Judge erred in law when he held that not all specific liquidated claims must demand the proof of special damages and that the 1st Respondent was entitled to be indemnified to the insured sum, since he insured his property for a specific sum against an agreed peril, which did occur. We agree that the principle of indemnity requires an insurer to compensate an insured for the actual loss which has to be established and the object of insurance should not be for the insured to make a profit or be unjustly enriched from the loss or the mere occurrence of the risk.

71. In this case the 1st Respondent had its own Assessor, Fair Lane Assessors, attend to the adjustment of the loss suffered by the 1st Respondent which was to the effect that the total loss sustained, was Kshs. 34,440,200. for the Electrical and Pneumatic spare parts components and Kshs .23,557,240.00 for the Reverse Osmosis Plant making the aggregate loss sustained at Kshs. 57,997,440.00. The Appellant however failed to have the loss adjusted since it was relying on the breach of the policy terms. In those circumstances, the only evidence on record regarding the value of the loss was the 1st Respondent's evidence and the learned judge cannot be faulted from relying thereon since the Appellant did not adduce any evidence on the basis of which the 1st Respondent's loss could be adjusted. We associate ourselves with this Court's decision in *Nkuene Dairy Farmers Co-op Society Ltd & another v Ngacha Ndeiya* [2010] eKLR in which the Court cited Bowen, LJ in *Ratcliffe v. Evans* [1892] 2QB 524 that:

> "The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

72. However, as was held in *Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Company Ltd* [2004] eKLR:

> "What amounts to strict proof must of course depend on the circumstances as was stated in Ratcliffe's case, that is to say, the character of the acts producing damage, and the circumstances under which those acts were done. It is not lost to us that insurance is in the nature of an indemnity contract. The sum insured in this matter was upto Shs.3,080,000/=. That figure would not simply be paid without verification by the Insurer, both on liability and quantum. In point of fact the insurer here instructed loss assessors to verify the claim and the circumstances surrounding it."

73. In the matter before us the Insurer did not bother to verify the value 1st Respondent's claim. In so doing it took a calculated risk that in the event that it was found liable, the evidence as regards the value

of the loss would be that presented by the 1st Respondent. It has itself to blame for that in light of the evidence that the goods were completely destroyed.

74. It was contended before us that the fire in question was started by the 1st Respondent's servant. This issue was, however, not litigated before the trial court and in our view the matter cannot be raised for the first time at this stage. This Court in *Stallion Insurance Company Limited v Ignazzio Messina & C S.P.A* [2007] eKLR expressed itself on the raising issues the first time on an appeal as follows:

> "It is common ground in this appeal that the issue intended to be raised did not form any ground stated in the memorandum of appeal and did not arise before the superior court. Indeed for a period of eight years it did not form part of the appellant's case. There are good reasons for the existence of the rule and some of them appear in the authorities cited before us by Mr. Karori. Apart from considerations of fairness, delay and prejudice that may be occasioned, the predecessor of this Court in the Alwi A. Saggaf Case (Supra) agreed with Lord Birkenhead L.C. in *North Staffordshire Railways Co. v. Edge* [1920] AC. 254 at p. 263, on the guiding principle, when he stated:
>
> > "The appellate system in this country is conducted in relation to certain well-known principles and by familiar methods. The issues of fact and law are orally presented by counsel. In the course of the arguments it is the invariable practice of appellate tribunals to require that the judgments of the judges in the courts below shall be read. The efficiency and the authority of a Court of Appeal, and especially of a final court of Appeal, are increased and strengthened by the opinions of learned judges who have considered these matters below. To acquiesce in such an attempt as the appellants have made in this case, is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the courts below."
>
> The Privy Council also, in an appeal emanating from the supreme court of Kenya, The United Marketing Company Case (supra), held: -
>
> > "(ii) their Lordships would not depart from their practice of refusing to allow a point not taken in the courts below to be argued unless they were satisfied that the evidence upon which they were asked to decide established beyond doubt that the facts, if fully investigated, would support the new plea; even if the facts were beyond dispute and no further investigation of facts were required, their Lordships would not readily allow a fresh point of law to be argued without the benefit of the judgments of the judges in the courts below, accordingly;
> >
> > (iii) their Lordships would not, even if the question were a bare question of law, entertain the submission that the respondent's claim was to be defeated by reason of his breach of a condition in his contract of insurance. *North Staffordshire Railway Company v. Edge, [1920] A.C. 254*, applied."

75. The Court proceeded:

> "We are of the further view that the appellant's case as put and argued before the superior court was specific. The intention to alter it at this appellate stage would be grossly prejudicial to the respondent and it ought not to be allowed. The persuasive speech of Sir Raymond Evershed M.R. in *United Dominion Trust Case* (*supra*) may illustrate the point: -
>
> > "I rest my conclusion perhaps most strongly on this consideration, that the judgment, extracts from which I have read, seems to me to be in no way whatever related to it. Indeed, it seems to me to have proceeded on a basis which was absolutely inconsistent with the way in which counsel for the plaintiff now puts his case. As a matter of principle the Court of Appeal has always been strict in applying the rule that an appellant from a county court, unless the other party consents, cannot be allowed in this court to raise a new point of law not raised below. After all, the county court is intended to serve litigants of relatively small means. It is not in accordance with the public interest that a party who has fought a case in a county court and been defeated should then raise in this court a new point and put his case in an entirely different way as a matter of law and so make the other party, hitherto successful, litigate the matter again at the risk of having to pay the costs not only below, but in this court."
>
> The same approach appears to obtain in India where, in a case where the new issue of law was raised for the first time on appeal eighteen months after the lower court's decision, the court stated: -
>
> > "Unless upon very strong grounds, and under very special circumstances, we should hesitate to permit a party at such a stage of his suit, as the present suit now is, to set up a case which was not set up for him in the Court of first instance or of primary appeal, where his professional representative must have been perfectly well aware whether such a case as this alleged special custom could be legitimately set up, and abstained from any attempt to set it up. To yield to such an application as the present, would be to make an evil precedent, and to hold out a premium to perjury and interminable litigation."
>
> We have said enough, we think, to underscore our reluctance to accede to the arguments sought to be put forth by the appellant in this matter and we reject that attempt."

76. In this case there was no evidence that the fire was caused by the 1st Respondent's employee and therefore there was no basis upon which the learned trial judge could make a finding to that effect.

77. Both on procedure and on merit we find the issue of the cause of fire by the 1st Respondent's servant of no substance.

78. It was the Appellant's case that though interest was claimed at Bank Rates from the date of the fire but in awarding the interest the Learned Trial Judge failed to state the interest rate applicable. In the Appellant's view, interest ought not to have been claimed at Bank Rate without any evidence and based

only on a document allegedly of Kenya Bank Lending Rate. We agree with the principle in *Prem Lata v Peter Musa Mbiyu* [1965] EA 592 that:

> "It is clearly right that in cases where the successful party was deprived of the use of goods or money by reason of a wrongful act on the part of the defendant, the party who has been deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest."

79. In this case the learned judge failed to specify the rate of judgement in its decision. There was no proper basis laid for awarding Bank Interest in this matter. Without such basis being laid, it is our view and we hold that the proper rate of interest ought to have been the court interest rate which this Court in Highway Furniture Mart Limited v The Permanent Secretary Office of the President & another Civil Appeal No. 52 of 2005 determined to be 14% p.a.

80. It is trite that interest on general damages accrue from the date of judgement which is the date when the award is determined while for special damages, interest accrue from the date of filing suit. The Appellant argues that in this case what was awarded was general damages and therefore interest ought to accrue from the date of judgement. A perusal of the plaint clearly shows that the 1st Respondent sought a specific amount. In our view the interest ought to accrue from the date of filing suit till payment in full.

81. Having considered the issues placed before us in this case, we find no merit in the appeal. We however find merit in the cross-appeal to the extent that the Learned Trial Judge erred in failing to specify the rate of interest. While we dismiss the appeal, we hereby direct that the interest on the sum awarded will accrue at the rate of 14% from the date of filing the suit.

82. We award the costs of this appeal to the Respondents but direct that each party bears own costs of the cross appeal, as the failure to specify the interest rate cannot be blamed on the parties.

83. Judgement accordingly.

DATED AND DELIVERED AT MOMBASA THIS 22ND DAY OF SEPTEMBER 2023.

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

....

JUDGE OF APPEAL

G. V. ODUNGA

....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR