



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)**

**CIVIL APPEAL NO. 318 OF 2013**

**BETWEEN**

**UCHUMI SUPERMARKET LTD ..... APPELLANT**

**VERSUS**

**TOIGOI INVESTMENT LIMITED ..... RESPONDENT**

*(An appeal from the Judgment and Decree of the High Court of Kenya at Eldoret, (Hon. Justice M. K. Ibrahim, J.) dated 21<sup>st</sup> August, 2012 and delivered on 31<sup>st</sup> October, 2012*

**in**

**HCCC NO. 164 OF 2000)**

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**JUDGMENT OF THE COURT**

1. This is an appeal from the Judgment of the High Court (M. K. Ibrahim, J. (as he then was)) holding the appellant liable in negligence for a fire that damaged the respondent's building and awarding the respondent special damages of Kshs. 37, 251,960.00, interest and costs.

**Background**

2. At all times material to this appeal, the respondent was the owner of a property situated in Eldoret town, within Uasin Gishu County known as Title Number Eldoret Municipality Block 3/46 on which was constructed a multipurpose building, comprising of shops and offices, known as Eldo Centre ("the building").

3. Under a tenancy agreement, the appellant had leased a part of the building from the respondent from where the appellant conducted the business of a supermarket. We will refer to the leased premises as the supermarket.

4. During the currency of the tenancy, a fire broke out within the supermarket on 11<sup>th</sup> December 1998. By the time that fire was put off, a substantial portion of the building had been burnt down. Although there was controversy as to the extent of damage caused by the fire, it is not in doubt that the building was damaged and some of the respondent's other tenants in the building were displaced.

5. At the time the fire broke out on 11<sup>th</sup> December 1998, the respondent had afoot a policy of insurance with Kenindia Assurance Co. Ltd (Kenindia) that insured the building against risk of fire. Under that policy, Kenindia indemnified the appellant for loss sustained as a result of the fire that occurred on 11/12/1998 to the extent of Kshs. 12,369,052.

6. In its suit before the High Court (further amended plaint dated 12<sup>th</sup> September 2005) the respondent claimed against the appellant Kshs. 87,850,000.00 as the cost of reconstruction of the building; loss of rent at the rate of Kshs. 372,000.00 per month from January 1999 until completion of reconstruction; professional fees of Kshs. 2,938,739.00; costs of clearing debris of Kshs. 1,500,000.00; general damages; interest and costs. The respondent's suit was founded on the tort of negligence; the assertion being that the appellant or its servants or agents wrongfully and unlawfully and through carelessness and negligence started the fire within the supermarket.

7. In its defence, the appellant asserted that the fire occurred accidentally. It denied that it, or its servants or agents were negligent; and contended that, pursuant to The Fires Prevention (Metropolis) Act, 1774, an English statute of general application to Kenya, no liability attached to it for the accidental outbreak of the fire.

8. The trial was conducted before three successive judges. The last of the three, Ibrahim, J. (as he then was) had the task of concluding the trial and writing the judgment that was eventually delivered on his behalf by Azangalala, J. (as he then was) on 31<sup>st</sup> October 2012.

9. Having reviewed the evidence, the learned Judge identified five main issues, namely:

*"1. Whether the Plaintiff has established that the fire outbreak was due to negligence of the Defendant.*

*2. Whether the plea of res ipsa loquitur applies.*

*3. Whether the circumstances of the case fit the rule in Rylands v. Fletcher.*

*4. Whether the Defendant can rely on Fires Prevention (Metropolis) Act 1774 as a statute of general application in Kenya.*

*5. Whether the Plaintiff entitled to the relief sought.*

*6. Who should bear costs of the suit.."*

10. On the questions whether the respondent had established that the fire outbreak was due to the negligence of the appellant, and whether the plea of *res ipsa loquitur* applied, the Judge held that the evidence *"established on a balance of probability that the fire was started due to the negligence of the [appellant]."* In the Judge's view, that evidence consisted of a stove that *"was found at the back of the store with merchandise that led to inference that employees of the [appellant] had been cooking lunch"* and that the employees *"must have used the stove so negligently as to cause the fire."*

11. The Judge went on to say that in his view, the matter was *res ipsa loquitur* as the circumstances of the fire raised the presumption of negligence on the part of the appellant; that it was incumbent upon the appellant to rebut the presumption of negligence; and that the appellant failed to do so. In that regard the Judge concluded:

*"In the absence of explanation from the Defendant, it is more likely than not that the effective cause of fire whatever it may have been, was some act or omission of the Defendant or of someone for whom the Defendant was responsible. The Defendant would thus be liable under vicarious liability."*

12. The Judge rejected the respondent's invitation to invoke the rule in *Rylands vs Fletcher*.

13. The Judge also rejected the defence advanced by the appellant that liability for the fire could not attach by dint of protection accorded by The Fires Prevention (Metropolis) Act, 1774, an English statute of general application to Kenya. Section 3 of that Act on which the appellant relied provides that:

*“And no action, suit or process whatever shall be had, maintained or prosecuted against any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall ... accidentally begin, nor shall any recompence be made by such person for any damage suffered thereby, any law, usage or custom to the contrary notwithstanding;...”*

14. The Judge held that the appellant could not rely on that provision, as it did not apply to the circumstances of this case, where *“a fire begins or is spread by negligence.”*

15. As for reliefs, the court awarded a total of Kshs. 37,251,960.00. The Judge took the value of the building as established at Kshs. 90,000,000.00 and that *“evidence on record was that the building was 30-40% destroyed”* and that *“taking the conservative value of 35% it gives a loss of Kshs. 31,500,000.”* He also awarded Kshs. 4,251,960.00 for loss of rent for 12 months at the rate of Kshs. 354,330 per month; Kshs. 1,500,000.00 incurred for removal of debris from the site. The total award, as indicated, amounted to Kshs. 37,251,960.00. Of that amount, the court directed the appellant to pay Kshs. 12,369,952.00 to Kenindia in settlement of its subrogation claim and the balance of Kshs. 24,882,008.00 to be paid by the appellant to the respondent with interest from date of filing suit until payment in full.

### **The appeal and submissions by counsel**

16. Aggrieved, the appellant lodged the present appeal. When the appeal came up for hearing before this Court, learned counsel Mr. P. Wekesa for the appellant, and Mr. A. G. N. Kamau appearing with Mr. K. Nyaundi for the respondents informed us that parties had agreed to dispose of the appeal by written submissions. The appellant filed its written submissions on 11/1/2016 while the respondent filed its written submissions on 8/2/2016.

17. In its submissions, counsel for the appellant referred to the grounds set out in the memorandum of appeal and submitted that the delivery of the judgment by the trial court was delayed beyond the permitted period; that the Judge erred in making reference to, and relying upon evidence of a previous fire incident that occurred at the supermarket in March 1998 in determining the likely cause of fire on 11<sup>th</sup> December 1998; that the evidence of the fire incident in March 1998 did not support the respondent’s case as pleaded and should have been disregarded. In that regard counsel relied on the case of **Dakianga Distributors (K) Ltd vs. Kenya Seed Company Ltd [2015] eKLR**.

18. Relying on **Muthuku vs. Kenya Cargo Services Ltd [1991] KLR 464**, counsel submitted that it was incumbent on the respondent to prove one of the forms of negligence alleged in the plaint; and that the Judge erred in holding the appellant liable when there was no evidence of negligence on the part of the appellant. According to counsel, the evidence established negligence on the respondent’s part in that the respondent’s caretaker was absent from the building at a critical time to provide easy access for firefighters; the respondent had not installed hose reels, smoke detectors, sprinkler systems, emergency instructions, emergency keys within the building and that fire extinguishers available were locked up.

19. In those circumstances, the appellant submitted that efforts to put out the fire were hampered by the respondent’s own negligence and the Judge should have apportioned liability as between the parties. Citing **W. K (Minor suing through next friend and mother L.K) vs. Ghalib Khan & Another [2011] eKLR**, counsel argued that where it is proved by evidence that both parties are to blame and there is no means of making a reasonable distribution between them, the blame can be apportioned equally on each party.

20. It was the appellant’s case that the fire occurred accidentally and without negligence on its part. Accordingly, the doctrine of *res ipsa loquitur* could not apply and liability could not attach to the appellant by reason of Section 3 of The Fires Prevention (Metropolis) Act, 1774. According to the appellant, the Judge was therefore wrong to hold that the doctrine of *res ipsa loquitur* was applicable and

that Section 3 of The Fires Prevention (Metropolis) Act, 1774 did not afford the appellant protection. In that regard counsel referred to the English decision in **Sochacki vs. Sas and Another [1947] All E R 343.**

21. On the reliefs awarded to the respondent, the appellant complained that damages for cost of reconstruction should not have been based on the alleged value of the building; that there was varying evidence of the cost of construction; that the amount awarded is excessive and not supported by evidence; that special damages should have not only been pleaded but should have been specifically proved; that having regard to the respondent's duty to mitigate its loss, the award for loss of rent should not have been made for 12 months.

22. In summary, the appellant argued that the decision of the High Court was wrong on both liability and quantum and that it should be set-aside in its entirety.

23. On its part, the respondent defended the judgment of the High Court saying that this Court should not interfere with it. On the delay in the delivery of the judgment, counsel argued that this was an administrative matter that did not affect the validity of the judgment. In any case, counsel argued, the appellant substantially contributed to the delay in the conclusion of the matter before the High Court on account of many adjournments granted at its request.

24. As regards the cause of fire, counsel cited the English Court of Appeal decisions in **Lloyde vs. West Midlands Gas Board [1971] 2All E R 1240** and **Bennett vs. Chemical Construction (GB) Ltd [1971] 3All E R 822** and urged that this is clearly a case of res ipsa loquitur; that there was no reasonable explanation offered by the appellant showing that the fire that gutted the respondent's building was not caused by the appellant's negligence; that the duty to install the necessary firefighting equipment in the supermarket lay with the appellant as the exclusive occupier of the premises and also because it had a lot of combustible material in its premises. In that regard counsel referred to the English decision in **H & N Emanuel Ltd vs. Greater London Council and another [1971] 2All E R 835** urging that an occupier is liable for the escape of fire caused by the negligence of anyone in its premises with his permission.

25. According to counsel, the trial Judge properly evaluated the evidence before coming to the conclusion that the respondent had established, on a balance of probability, that the fire was caused by the negligence of the appellant. Having found there was negligence, counsel went on to say, that the provisions of Section 3 of The Fires Prevention (Metropolis) Act, 1774 could not aid the appellant as that provision covers fires that are accidental and not those caused by negligence.

26. On the award of damages, counsel submitted that the court award was justified, as the respondent had amended its pleading to claim special damages which was considered by the court, with the result that there was no basis for interfering with that award.

### **Analysis and determination**

27. We have considered the appeal and the submissions by learned counsel. The issues that require determination are whether the defendant established that the fire was caused by the negligence of the appellant; whether the respondent contributed to the damage caused to the building; whether the doctrine of res ipsa loquitur is applicable in the circumstance of the case; whether the appellant was exempted from liability under Section 3 of The Fires Prevention (Metropolis) Act, 1774; and whether the awards for damages awarded to the respondent are sustainable.

28. In addressing those issues we have to draw our own conclusions based on the evidence that was placed before the trial court. [See **Selle vs. Associated Motor Boat Company [1968] E A 123**].

29. We begin with the question whether the cause of fire was attributable to the negligence of the appellant. As a corollary to that is the question whether the doctrine of res ipsa loquitur applied; whether the respondent contributed to the cause of the fire and consequent damage; and whether the Judge erred in holding the appellant liable despite section 3 of The Fires Prevention (Metropolis) Act, 1774.

30. The trial Judge's conclusion upon reviewing the evidence was that:

*"I am persuaded after looking at the evidence as a whole that the plaintiff has established on a balance of probability that the fire was started due to the negligence of the Defendant."*

31. Elsewhere in the judgment the Judge said:

*"There was proof that combustible merchandise had been exposed and ignited a fire. The stove was found at back (sic) of the store with merchandise that led to inference that employees of Defendant had been cooking lunch. Failing to install firefighting equipment hampered efforts to contain the fire. Failing to employ persons with firefighting skills could not have caused the fire but maybe would have assisted in containing the fire. Failing to provide protective clothing also hampered firefighting. Looking [sic] all doors, failing to summon professional help, failing to remove combustible substances like gas cylinders after fire broke out, failing to contain the fire so as not to escape are all factors that contributed to the spread of the fire. As pointed out earlier PW 12 provided a probable explanation of cause of fire. It was human error. Employees of the Defendant were cooking using a stove. They must have used the stove so negligently as to cause a fire. The Defendant did not call employees who were in that section to rebut the cause of fire explanation provided by PW12. My finding is that on a balance of probability the fire was caused due to the negligence of the Defendant's employees."*

32. In the judge's view, the principle of *res ipsa loquitur* applied; the circumstances of the fire raised a presumption of negligence on the part of the appellant; and there was no explanation by the appellant that the fire could have started without negligence; that in the absence of explanation from the appellant, *"it is more likely than not that the effective cause of fire whatever it may have been, was some act or omission of the [appellant] or of someone for whom the [appellant] was responsible. The [appellant] would thus be liable under vicarious liability."*

33. Being of the view that the cause of the fire was negligence on the part of the appellant, the Judge held that section 3 of The Fires Prevention (Metropolis) Act, 1774 could not apply. In his view that provision applied where the cause of the fire was accidental and not where, as here, it is established that the cause of the fire was negligence.

34. As an appellate court, we can only interfere with the trial court's findings on those issues if we are satisfied that those findings are perverse as not being supported by evidence or that they are not supportable on the evidence on record. What then was the evidence before the trial court on the cause of the fire?

35. Although twelve witnesses testified on behalf of the respondent, the witnesses whose testimony is relevant on the question of the cause of fire are Joseph Ouma Olweny (PW1), Kamal Mansukhlal Manek (PW2), Robert Ochieng Odiwouri (PW4), Keith Ormand (PW12), and Henry Kiprono Kosgei (PW10).

36. The testimony of Joseph Ouma Olweny, (PW1), the Chief Fire Officer at the then Eldoret Municipal Council, related to two fire incidents at the supermarket. The first incident, unrelated to the incident the subject of this appeal, was in March 1998 when he said a fire had started within a store at the supermarket where foam mattresses were kept. It was established, he said, that a foam mattress had come into contact with florescent tubes which broke starting off the fire. As he put it, *"there was contact between a foam mattress and electric bulb."* The learned Judge however appears to have misapprehended that part of the testimony when he stated in his judgment that *"there was proof that combustible merchandise had been exposed and ignited a fire."*

37. The second fire incident at the supermarket, according to PW1's testimony, was on 11<sup>th</sup> December 1998. On that date he was part of the fire brigade of about 12 fire fighters that responded to a fire distress call from the supermarket. They got to the supermarket at about 1.44 pm with two fire engines. They had difficulties gaining access to the supermarket as the front door was closed. The rear exit grilled door was also closed. They had to break in by which time the fire continued burning. They called for assistance

from fire brigades from the Airport, Bullet factory and from Rai Plywood. They fought the fire until about 2.00 am the following morning. As to what caused the fire, he stated *“it was not possible to determine the cause of fire as we reached the scene after it had engulfed the supermarket”* though the fire started from the store from *“where thick smoke was coming out”*

38. Kamal Mansukhlal Manek, (PW2), a tenant at the building, was running a photography laboratory next to the supermarket. At about 1.00pm on 11<sup>th</sup> December 1998 he was in his laboratory when he heard commotion outside. He saw many people running out of the supermarket and heard somebody shout *“Fire! Fire!”* He rushed to the supermarket with a member of his staff armed with a fire extinguisher. A member of staff at the supermarket got hold of the fire extinguisher, rushed to a corner of the supermarket where mattresses were stored, returned the fire extinguisher after which PW1 returned to the laboratory. Thereafter he said he saw *“big smoke coming out of the Uchumi supermarket”* and that the building was destroyed. In his words, he was *“not in a position to say what caused it [the fire].”*

39. Robert Ochieng Odiwouri, (PW4), a loss adjuster employed by Protectors Limited, was engaged by Kenindia following the fire incident at the supermarket on 11<sup>th</sup> December 1998 to assess the damage caused by the fire. He in turn engaged Keith Ormond, (PW 12) a forensic expert; Nick Evans to assess extent of structural damage; and Fred Ikiringa, a Quantity Surveyor, to provide the cost of rehabilitating the building. On the cause of the fire, he stated;

*“Yes we could not rule out the possibility that fire could have started accidentally. Things at the scene suggested that cooking was taking place none of the witnesses said so. The lighting material should have been matchboxes. I didn't see them. Keith did. No, he didn't notice any remains of food at the scene, there was no food remains at the scene, may be somebody was starting to cook. There were many possibilities. It could have been either way.”*

40. And later in his testimony he stated that he blamed *“the Municipality for lack of firefighting equipment”* and that *“the insured is to blame for lack of fire fighting and many (sic) systems.”*

41. Keith Ormand (PW12) a holder of a bachelor's degree in industrial chemistry and a doctorate degree in organic chemistry, a master's degree in forensic science, confirmed having been engaged by Protectors Limited, loss adjusters, to try and identify the cause of the fire. His testimony was that:

*“In my opinion, the cause of fire was cause (sic) of a small cooker which was being used then and I think it might have gone out of control and caused the fire...”*

*...I attribute the possible cause of the fire to the stove which was found in that area.”*

42. When pressed under cross-examination he said that:

*“In my opinion, it is possible that they were carrying out cooking activities during the lunch hour. I cannot say whether it is [in] fact the cooking caused the fire. It is possible that it was caused by something different.”*

And that:

*“Yes the fire could have started accidentally.”*

43. He went on to say that had fire extinguishers been available for use, there would have been a greater chance of extinguishing the fire.

44. PW10, Henry Kiprono Kosgei, a director of the respondent was not at the supermarket when the fire broke out. Based on the investigations that were carried out he stated that *“I established that there had been cooking going on at the back of the defendant company by its staff and this could have been the cause of the fire.”*

45. The respondent's case as pleaded was that the fire was caused by the negligence of the appellant. It was therefore incumbent upon the respondent, and the respondent had the burden under Section 107 of the Evidence Act to prove, on a balance of probabilities, that the fire was caused by the negligence of the appellant.

46. Based on our own review of the evidence, we think the Judge was right in taking the view that the respondent had discharged its burden of proof. Based on the testimony of Joseph Ouma Olweny (PW1), Kamal Mansukhlal Manek (PW2), Robert Ochieng Odiwouri (PW4), Keith Ormand (PW12), and Henry Kiprono Kosgei (PW10) "**we think it more probable than not**", to borrow the words of Lord Denning in **Miller vs. Minister of Pensions, [1947] 2All ER 372** that the cause of the fire was attributable to the cooking stove found in the store area where the fire extinguisher belonging to Kamal Mansukhlal Manek, (PW2), had initially been used to extinguish a fire that, as it turned out, was not in fact extinguished.

47. We cannot therefore say that the finding by the Judge as to the cause of fire is perverse as not being supported by evidence. In our judgment therefore, the finding on liability for negligence on the part of the appellant is well founded as there was sufficient evidence, on a balance of probabilities, to support the conclusion reached regarding the cause of the fire.

48. Having come to that conclusion, we will address the issue of res ipsa loquitur only for purposes of completeness. We do not think that the principle is applicable in the circumstances of this case. All the witnesses who addressed the question of the cause of fire accepted that a fire can occur "accidentally" without negligence. Lord Goddard, CJ, refused to apply the principle of res ipsa loquitur in the case of **Sochacki vs. Sas and Another** (supra) on the basis that "**everybody knows fires occur through accidents which happen without negligence on anybody's part.**"

49. Cases of spontaneous combustion without negligence as alluded to by Lord Denning in **H & N Emanuel Ltd vs. Greater London Council and another** (supra) are known to occur. It cannot therefore be said that the occurrence of a fire must invariably lead to the inference of negligence.

50. In **Geoffrey Mureithi Juma vs. Robert Kariuki and 5 others Civil Appeal No. 83 of 2004**, this Court cited with approval a passage from *Winfield and Jolowicz on Tort 11<sup>th</sup> Edition S & M, 1979 at page 99* where it is stated that:

***"In order to discharge the burden of proof placed upon him, it is usually necessary for the plaintiff to prove specific acts or omissions on the part of the defendant which qualify as negligent conduct. Sometimes, however, the circumstances are such that the court will be prepared to draw an inference of negligence against the defendant without hearing detailed evidence of what he did or did not do."***

51. We are not satisfied that the circumstances in the present case were such that an inference of negligence on the part of the appellant could be drawn. We are, however, satisfied, as already indicated that the respondent discharged its burden of proof to establish that the fire was on a balance of probabilities caused by the negligence of the appellant.

52. We turn now to the question whether the appellant was exempted from liability under Section 3 of The Fires Prevention (Metropolis) Act, 1774. We do not think so. We have reproduced that provision above.

53. In our view, the Judge was right that the protection accorded by that provision is not available where it is established that the cause of fire was negligence. We think the persuasive English authority **H & N Emanuel Ltd vs. Greater London Council and another** (supra) relied upon by the Judge is founded on sound principle. That authority stands for the proposition that Section 3 of The Fires Prevention (Metropolis) Act, 1774 "*covers all cases where fire begins or spreads by accident without negligence.*"

54. Regarding the damages awarded, it is necessary to reproduce at length what the learned Judge said:

*“The Plaintiff has established negligence against the Defendant and it also established that it suffered loss due to the accident. The Plaintiff is claiming the sum of Kshs.49 million as damages suffered due to outbreak of the fire. The evidence on record shows that the building was not completely destroyed. PW8 gave testimony that the cost of reinstatement would be around 21 million. PW 10 obtained quotations from contractors based on original designs. According to PW9 the value of the building was Kshs.90,000,000. Evidence on record was that the building was 30 – 40% destroyed. Taking the conservative value of 35% it gives a loss of Kshs.31,500,000. The period of repair ranged from seven months to one year. The loss of rental income was a direct loss flowing from the fire accident. Were it not for the fire accident the Plaintiff would not have lost rental income. I award the Plaintiff loss of rental income of Kshs.354,330/= from the period running from date of fire 11/12/1998 for twelve months to give a sum of Kshs.4,251,960. The Plaintiff also proved a special damage loss of Kshs.1,500,000/= that was paid to remove debris. I allow this claim of Kshs.1,500,000/=. The total damages due to the Plaintiff is Kshs.37,251,960. Out of the Judgement amount of Kshs.37,251,960, the sum of Kshs.12,369,952/= together with interest at court rate from the date of filing of filing suit will be paid by the Defendant to Kenindia Assurance Company Limited in settlement of subrogation claim. The balance of the decretal amount being Kshs.24,882,008/= together with interest as court rates from date of filing suit until payment in full will be paid by Defendant to the Plaintiff. The Plaintiff will have costs of this suit. It is so ordered.”*

55. We think there is merit in the complaint that the learned Judge erred in principle in awarding the respondent 35% of *“the value of the building”*. No such relief had been sought. The respondent sought special damages for *“costs of reconstruction”* of Kshs. 87,850,000.00 to reinstate the building; *“loss of rent”*; *“professional fees”* and *“cost of clearing debris”*. There was no claim for the value of the building.

56. According to Kamal Mansukhlal Manek, (PW2) *“the whole building housing Uchumi Supermarket was destroyed.”* PW7, John Obara Odindo of Harold Fenwick & Associates chartered Quantity surveyors opined *“the replacement cost of the building...was estimated at Kshs. 87,850,000.00 which includes professional fees and VAT.”*

57. PW8, Fredrick Mwenda Ikiunga, of Fredmar Quantity Surveyors and a holder of bachelor of arts degree in building economics carried out measurements of the portion of the building which had been burnt down and produced a report (exhibit 33) in which he concluded that in his *“assessment, the costs of replacing the burnt out building was Kshs. 21,708,396.60”* Having inspected the building and building plans, he was of the view that it was not necessary to pull down the whole building but what was required was only replacement or reinstatement of only burnt out portions.”

58. PW9, Joseph Andati, a claims officer of Kenindia Assurance Co. Ltd was appointed by Protectors Limited as well as McLaren's Toplis loss adjusters to come up with a report of the loss and recommendation for settlement under a policy of insurance. Upon the loss adjusters' recommendation, the respondent accepted settlement of Kshs. 10,930,313.00 as indemnity under the policy. He was clear that the loss was not a full loss, that the whole building was not written off and that the portion to be reinstated was only for half of the building damaged. The insurance cover was for Kshs. 49,000,000.00 which according to him was under insured, a factor taken into account in settling the respondent's claim under the policy at Kshs. 10,930,313.00.

59. PW10, Henry Kiprono Kosgei, a director of the respondent obtained two quotations for the reconstruction of the building. Seyani Brothers & Company Ltd quoted an amount of Kshs. 44,198,000.00 for restoration of the building within a period of 45 weeks. Vishva Builders quoted Kshs. 38,000,000 to restore the building within a period of 35 weeks. PW 10 estimated that *“slightly over 30% of the entire building had been gutted down.”*

60. Joseph Kiprotich Andati, a claims officer at Kenindia mentioned that 50% of the building was burnt. He later agreed with the suggestion that *“only about 1/3 of the building was burnt”* and that *“the rest of the building which is 2/3 of it is still in use.”*

61. PW 10, Mahesh Marji, an insurance loss adjuster with McLarens Toplis, testified that “the replacement cost for the burnt area was placed at Kshs. 17,500,000.00 inclusive of VAT but excluding professional fees” and that when they finally received the estimate “*it was in the sum of Shs. 18,500,000.00*” and that had the respondent insured the building fully, he would have been entitled to Kshs. 18,900,000.00. In his words:

*“When we on (sic) finally received that estimate it was in the sum of 18,500,000/= . QS had taken a contingency figure of 12% of total cost. While we felt that having reviewed the estimates, the scope of works was correctly assessed and the contingency factor was higher at 12% than it should have been we reduced it by 50% to 6% instead of 12%. Including professional fees, we arrived at a figure of Shs. 18,900,000/=, the QS’s report in the burnt up area is dated 19/6/1999.”*

62. The parties recorded a consent before the trial court on 12<sup>th</sup> September 2005 that the respondent “was partly compensated by Kenindia Assurance Company Limited under the terms of a policy...and the sum of...Kshs. 12,369,052 of special damages...is to be recovered in exercise of the insurer’s right of subrogation.”

63. The appellant’s only witness, John David Miners of Cunningham Lindsay Kenya Ltd, a loss adjuster, was engaged by the appellant’s advocates to analyze the loss adjustment reports from Protectors Limited and from McLarens Toplis with a view to giving an opinion as to whether they represented a fair and reasonable assessment of the fire damage to the building and the loss of rental income. In his view, the report by Protectors Limited contained more details and the findings were reasonable, but Protectors should however have made allowance for depreciation, wear and tear.

64. That then was the evidence on the basis of which the Judge was called upon to determine the cost of reconstruction.

65. There can be no doubt that respondent’s pleaded claim for the costs of reconstruction of Kshs.87,850,000.00 was based on an estimate contained in Harold Fenwick & Associates, Quantity Surveyors letter dated 21<sup>st</sup> June 1999 (Exhibit 32a). However, that estimate related to “*the cost estimate of the whole of the above building including the part unaffected by the fire...*” [Emphasis added]

66. Harold Fenwick & Associates, Quantity Surveyors’ earlier estimate dated 19<sup>th</sup> June 1999 [exhibit 32b] however related to reinstatement of “*the fire damage to Eldo Centre Building*” and placed the total estimated construction cost of the reinstatement works to Kshs. 17,500,000.00. it is instructive to note that that estimate was based on “*priced Bills of Quantities prepared by Architectural drawings...and detailed site survey.*”

67. In our view, of all the estimates that were provided to the court for the restoration of the building, the estimate of Kshs. 17,500,000.00, based as it was on price bills of quantities represents a more accurate assessment of the cost of reinstatement. We consider that that is the amount to which the respondent was entitled.

68. We therefore set aside the award of Kshs. 31,500,000.00 made by the trial Judge and substitute the same with an award for Kshs. 17,500,000.00.

69. The award for the loss of rental income at the rate of Kshs. 354,330.00 per month was, in our view, well supported by the evidence of respondent’s audit manager, Madhav Bandari (PW3). What is questionable, in our view, is the period of twelve months for which that award was made. The Judge correctly observed, that the period of repair was estimated at between 7 and 12 months. The Judge was persuaded that 12 months represented a fair amount of time. The two building contractors who quoted for the works at the instance of the respondent provided for completion of the reinstatement works at 35 and 45 weeks respectively. We think, having regard to the two estimates a period of 40 weeks or 10 months would have been sufficient. We therefore allow an award of Kshs. 354,330.00 per month for 10 months and award Kshs. 3,543,330.00 for loss of rent. We accordingly substitute the award of Kshs. 4,251,960.00 with that amount.

70. The claim for Kshs. 1,500,000.00 for removal of debris was, in our view, proved and we have no basis for interfering with it.

71. In effect, we substitute the total award for special damages of Kshs. 37,251,960.00 with an award for Kshs. 22,543,330.00.

72. We decline the late invitation by counsel for the appellant to apportion the loss on the basis of the principle of contributory negligence. The appellant took up the matter for the first time in its submissions before us. The matter of contributory negligence was not addressed in the pleadings and neither was it canvassed before the High Court.

73. Finally, there is the complaint that delivery of the Judgment by the High Court was delayed for more than 4 years. Considering the delay in delivery of Judgment, and appreciating that ordinarily interest on special damages is awarded from the date of filing suit, we think the Judge erred in ordering payment of interest from the date of filing suit. In those circumstances for which the parties were not responsible, interest should, in our view, accrue at the court rates from the date of delivery of Judgment on 31<sup>st</sup> October 2012 until payment in full.

74. The respondent shall have the costs of the suit in the High Court. Considering however that the appellant has partially succeeded in the appeal, we award it half costs of the appeal.

75. In conclusion, the Judgment of the High Court awarding the respondent Kshs.37,251,960/= is hereby set aside and substituted with Judgment in favour of the respondent against the appellant for Kshs.22,543,330/= only. Interest on that amount will accrue at 12% p.a from the date of delivery of the Judgment in the High Court on 31/10/2012 until payment in full. Out of the judgment amount, Kshs. 12,369,952.00 together with interest at 12% p.a from the date of delivery of the Judgment in the High Court on 31/10/2012 until payment in full will be paid to Kenindia Assurance Company Ltd in settlement of subrogation claim as ordered by the High Court. The appellant shall pay the respondent's costs of the suit in the High Court. Half costs of the appeal are awarded to the appellant.

Orders accordingly.

**Dated and delivered at Kisumu this 29<sup>th</sup> day of July, 2016**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

**I. K. MURGOR**

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**JUDGE OF APPEAL**

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

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**DEPUTY REGISTRAR**