IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, NAMBUYE & MWERA, JJ.A)

CIVIL APPEAL NO.147 OF 2005

BETWEEN

TRINITYPRIMEINVESTMENTLIMITED…….APPELLANT

AND

LION OF KENYA INSURANCE COMPANY LIMITED…….RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Ringera, J.) dated 4th May, 2005

in

H.C.C.C. No.867 of 2001)

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JUDGMENT OF THE COURT

The appeal we are about to determine followed the judgment of the High Court (***Ringera, J***., as he then was) delivered on 4th May, 2004.

By the plaint dated 27th August, 1997, the appellant company prayed that the court do order the respondent insurance company to pay it Sh.6,776,471/= being a balance due on a domestic package insurance policy No.HH02/960022, running from 1st August, 1996 and 31st August, 1997, which the appellant had with the respondent over its property known as ***No.1884/111/M.N Jumba Ruins, Mtwapa, Kilifi***, hereinafter the suit property. That property was burnt down on 21st August, 1996, during the period of insurance. The appellant pleaded that even as the loss suffered was assessed at Sh.12,800,000/= by the respondent, it only paid out Sh.6,023,529/= on 21st March, 1997 as due under the insurance policy and neglected or refused to pay the balance. Also claimed, but eventually abandoned, was a sum of Sh.2,400,000/= described as loss of rent when the property was burnt down.

The defence dated 22nd September, 1997, was filed. It was later amended on 3rd October, 1997 and re-amended on 29th October, 1997. By the last pleading the respondent's position was essentially that on 4th July, 1996 the appellant entered into a contract to purchase the suit property from Standard Chartered Bank Ltd, hereinafter Standard, under its power as the chargee, the premises having been owned by Stone

Crest Ltd. But there was no transfer of ownership to the appellant by 21st August, 1996 which therefore meant that it was not the owner of the property at the time of the fire. That the appellant took out the stated domestic package insurance policy which contained an express term that if at the time of any loss or damage happening to the insured property, there be another subsisting insurance or insurances whether effected by the insured or any other person or persons, covering the same property, the respondent should not be liable to pay or contribute more than its rateable proportion of such loss or damage. It was further averred that the respondent paid its rateable share of Sh.6,023,529/= to the appellant, who acknowledged by signing the discharge voucher, in full and final settlement of the claim on an indemnity basis. That the respondent did that on the understanding that there was a subsisting insurance policy issued on the same property by Madison Insurance Company, hereinafter Madison, which was still subsisting on 21st August, 1996. It was further averred that Madison paid Standard Chartered Bank (Standard) Sh.6.8m being the rateable proportion of the liability payable by Madison. There was a paragraph about insurance to cover loss of rent which claim was abandoned by the appellant.

The appellant then filed a reply to the re-amended defence dated 12th November, 2002 in which it was denied that Madison paid Sh.6.8m to Standard on the basis of rateable proportion of the liability payable by the company. That closed the pleadings.

The hearing opened before ***Mbaluto, J***. on 23rd January, 2002. He partly-heard ***Mr. Eric Ananda*** (PW1), the co-shareholder in the appellant company in which his wife holds the other shares. Then ***Ringera, J.*** took over the proceedings from 19th November, 2003 to the end of the whole trial. Only ***Mr. Ananda*** (PW1) testified on behalf of the appellant company while three witnesses, ***Timothy Wagiti*** (DW1), the legal officer with Madison, and ***Mr. James Ndegwa*** (DW2), the non-executive director with the respondent who had earlier worked for it as the Assistant General Manager testified for the defence. The other witness was ***Mr. James David Miners*** (DW3) of M/S Cummingham Lindsey, insurance, loss adjusters and marine surveyors.

Both sides produced bundles of documents, then submitted and ***Ringera, J***. proceeded to draft and deliver the judgment under review. The learned judge extracted four issues for determination, namely, whether the discharge voucher signed by the appellant, and the payment of Sh.6,023,529/= made by the respondent, constituted a compromise and surrender of the appellant's rights in the matter; if in the light of the rateable apportionment clauses in the insurance policies of the respondent and Madison, the respondent had a greater obligation to the appellant over and above the sum paid; the rate of interest payable if the claimed sum is ordered and, lastly, the issue of costs.

After considering the evidence of the witness and the letters exchanged particularly as between ***Mr. Ananda*** (PW1), ***Mr. James Ndegwa*** (DW2) and ***Mr. Miners*** (DW3), the learned judge concluded that the liability was formalized on the respondent's independent liability, taking in regard the assessment ***Mr. Miners*** submitted of Sh.12.8m. The respondent was entitled to invoke the contribution clause in its policy with the appellant. That resulted in the figure of Sh.6,023,529, which it paid to the appellant. The appellant accepted it and signed the discharge voucher. ***Mr. Ananda*** (PW1) accepted that payment well aware that Madison, under whose policy the appellant could not benefit, had disclaimed liability. So PW1 executed the discharge voucher with full knowledge and acceptance that the damage was settled on the agreed rateable proportion basis and accordingly the appellant could not expect further payment from the respondent. ***Ringera, J.*** proceeded to find that the signed discharge voucher constituted a contract couched in clear and unambiguous terms with no room for misunderstanding it, as to expect further payment in future from the respondents. Thus the discharge voucher did not contain a promise that Madison would honour its part of the claim so as to form a condition on which the discharge voucher was executed. Accordingly, **Ringera, J.** found that the appellant's claim against the respondent had been fully compromised by the discharge and no further liability remained. It was further noted that after the payment by the respondent, the appellant (through ***Mr. Ananda***) decided to pursue Standard in respect of reinstatement of the premises.

The next point Ringera, J. proceeded to decide was whether the rateable clauses in the insurance policies of the respondent and Madison formed a basis of the claim that accepting the payment from the

respondent, there remained a greater obligation to the appellant by the respondent. The learned judge found that such a state of things did not obtain and in any event the appellant's own lawyers had advised it that having not been a party to the Madison policy, the appellant could not expect any benefit by way of contribution from the Madison policy.

And turning to the provisions of the Transfer of Property Act and the Registration of Titles Act, it was the judge's view that because Standard had not yet transferred the suit property to the appellant, due to failure to complete the payment of the purchase price, Standard still had an insurable interest in the property through its policy with Madison which was still subsisting as at the time of the fire. The learned judge then emphatically stated that:

> ***"In the premises, I do find that the Madison's policy was still subsisting at the time of the accident on 21st August, 1996."***

Having found that there were two insurance policies over the same property at the time of the fire, ***Ringera, J.*** proceeded to consider the rateable proportion clauses of each. The importance of each of those clauses, we shall endeavour to address afterwards, because it was the basis of the notice of cross-appeal. However, for now we can only say that the learned judge found that the respondent could not decline to pay the full sum of Sh.12.8m under its rateable proportion clause. The judge arrived at that conclusion by construction of the respondent's clause to mean that the insured appellant had taken cover for the same property and risk but with different insurers.

Turning to the Madison rateable proportion clause the learned judge construed it to mean that it contemplated a situation whereby there was in existence another policy or policies by the insured or by any other person respecting the insured property. In such a circumstance, there could be contribution which in the present case would limit Madison's liability to Sh.6,776,471/= in favour of Standard and Stone Crest Ltd only. As such the appellant was in error to believe that it could expect payment from Madison or Madison could pay any sums to the respondent.

As regards ***section 49 of the Transfer of Property Act***, which was reproduced, the judge stated that had the appellant completed the sale and had in addition opted to reinstate the damaged property, it might have benefited from any money Standard may have received under the Madison policy. In the circumstances, the court just stated that not having been taken, and that ***Timothy Wagiti*** (DW1) had told the court that Madison paid Sh.6.8 million to Standard on *ex gratia* basis to secure future business, the payment thus made was not paid to Standard under the policy and therefore available to the appellant.

From all the foregoing, the learned judge concluded that:

> ***"In summary, I am of the persuasion that the rateable proportion clause in the Madison's and the defendant's policies did not apply so as to disentitle the plaintiff from a greater payment than the sum of Kshs.6,023,529/= made on 21st March, 1997. Accordingly, if it were not for the conclusions I have reached with respect to the effect of the instrument of discharge executed by the plaintiff, I would have found that the defendant was obligated to pay to the plaintiff the sum of Khs.6,776,471/= being the balance of the admitted loss suffered by it."***

Accordingly, the appellant's claim was dismissed on account of the compromise and discharge of 12th March, 1997. Had the appellant succeeded costs would have been given at 12% p.a. – not 25% as claimed because the appellant had not proved the basis for that.

Being dissatisfied with that decision the appellant lodged the present appeal based on nine (9) grounds. Basically the appellant's contentions, in paraphrase came to seven grounds in that:

> (i) ***Ringera, J.*** *was in error to find that it had compromised its claim by signing the discharge voucher which, to it, was conditional on the assumption that the appellant would recover the balance from Madison upon the application of the rateable proportion clause;*

(ii) *if the judge found that the appellant could not recover from Madison, he could not at the same time find that there was a compromise in signing the acceptance;*

(iii) *the acceptance letter was conditional and not absolute;*

(iv) *all documents read together, it could be found that the appellant signed the discharge voucher in expectation and understanding that its loss could be shared between the respondent and Madison;*

(v) *the appellant did not know well the position of Madison before signing the voucher and it acted on the assurance and opinion of the respondent and its lawyers;*

(vi) *there was an error in rejecting the interest rate of 25% p.a. and the award of costs to the respondent on the abandoned claim of loss of rent; and*

(vii) *the parties submissions were not evaluated.*

The appellant urged us to allow the appeal.

On receipt of the memorandum of appeal, the respondent filed a notice of cross-appeal with five grounds, also paraphrased, that the learned judge erred in holding that:

(a) *the rateable proportion clause in the respondent's policy applied only where the appellant had taken out another insurance;*

(b) *the scope of the operation of the respondent's policy on rateable proportion clause was limited by the sentence relating to notice;*

(c) *with the Madison policy subsisting, the rateable clause in the respondent's policy was operative and the appellant was not entitled to further indemnity;*

(d) *failure to complete the sale entitled the appellant to a larger indemnity than if the sale had been completed; and*

(e) ***"…absence of evidence in support of the quantification of the claim the appellant failed to prove its case under the policy…"***

The respondent desired that we dismiss the appeal but allow the cross-appeal with costs, thereby upholding the High Court decision.

Both sides filed written submissions along with authorities and had opportunity for brief highlights. While ***Mr. R. N. Munyalo***, learned counsel for the appellant presented the appeal, ***Mr. K. A. Fraser***, learned Senior Counsel, opposed it. Each side adopted its written submissions.

Mr. Munyalo proposed to argue grounds 1, 2, 3, 4, 5, 6 and 9 together while grounds 7 and 8 stood on their own, condensing the grounds into three while ***Mr. Fraser's*** position was basically on one ground. Counsel argued across each others points, though.

Beginning with whether the rateable proportion clause was applicable or not ***Mr. Munyalo*** had the answer in the negative, firstly that such did not feature in the pleading or the evidence and also that ***Ringera, J***. found so. Quoting from various parts of the judgment

Mr. Munyalo argued that in that case the appellant's claim ought to have succeeded because the rateable proportion clause did not apply where the risk clauses were not applicable in either policies and yet the respondent relied on them. This, we were told, was based on the finding that the respondent's rateable proportion clause did not apply where the risk was covered the way it was in the present case, and also

that the appellant having not been a party to the Madison's policy, could not benefit under the contract thereunder. Focus then shifted to section 49 of the Transfer of Property Act under which the appellant could only benefit if it had completed the purchase transaction and the property had been transferred to it. In the circumstances, the High Court should have found for the appellant and awarded it Sh.6,776,671/= as claimed. We were told that lawyers, ***M/S Muthoga Gaturu & Company Advocates,*** had written to Madison that the subject clause was not applicable because the interest it had insured had ceased and on that basis, Madison eventually disclaimed liability. In any case, Sh.6.8m it paid to Standard was on *ex gratia* basis and not under the policy. Therefore in the circumstances the appellant was entitled to the sum claimed.

The next ground ***Mr. Munyalo*** argued was that the learned judge erred in finding that the appellant compromised the claim by executing the discharge voucher and receiving the sum of Sh.6,023,529/=. That the voucher did not state that that, was the respondent's sum based on its independent liability. The compromise could only be if the rateable proportion clause applied which did not. We heard that the appellant executed the discharge voucher on understanding that it would pay the balance which fact turned out to be false, yet all the time the appellant was not aware that Madison would disclaim liability and that the rateable clause was applicable. And in any event it was contradictory for the judge to find that the rateable proportion was not applicable and at the same time hold that the appellant had compromised its claim against the respondent when it accepted payment of Sh.6,023,529/=. It was argued that that would not be so because all the time both parties were unsure of the position of Madison in the whole matter and, in fact, the sum Madison paid Standard -Sh.6.8 on ex gratia basis, was not the same as the sum claimed – Sh.6,776,471/=. After further extensive analysis of the High Court judgment we were urged to find that ***Mr. Ananda*** signed the discharge voucher on behalf of the respondent, with the understanding and on condition that the appellant would recover the claimed balance from Madison and pay it over to the appellant.

The next point addressed was that the respondent gave the sum of Sh.12.8m as the assessed loss caused by the fire which could be indemnified but not on account of replacement or repairs to the house. Without referring to HCCC 1722/2000 in which Standard sued Madison for reinstatement of property, which suit was settled out of court without parties agreeing to a sum of Sh.12.8m, ***Mr. Munyalo*** told us to take note that the quotations for refurbishment of between Sh.17.5m and 20.5m had been received by Standard. That Sh.12.8m was confined to the loss actually suffered and therefore falling to be indemnified.

The fourth ground argued was that the respondent could not take refuge behind Madison's policy or *ex gratia* payment of Sh.6.8m. It had to pay the balance of Sh.6,776,471/= in any event. And so the learned judge fell into an error when he found that the payment made by the respondent was in full and final settlement of the claim under the policy. It was repeated that the words of the discharge voucher were not clear and unambiguous. There was always the implication, understanding and expectation that on accepting the payment as per the discharge voucher, a further rSh.6,776,471/= would be forthcoming to add to the paid sum and make a total of Sh.12.8m. Referring to the case of

Bank of Credit and Commerce International S.A vs Ali & Others [2001] 1 AC 259. ***Mr. Munyalo*** exhorted us to "*look to the intention and knowledge of the parties*." That the letters exchanged, discussions held and all that transpired between the parties ought to persuade us that, indeed, the signing of the discharge voucher and accepting the payment thereunder, was conditional on expectation of further payment.

Concluding with the interest rate applicable, counsel said that this stood at 25% p.a. as per the evidence of ***Mr. Ananda***, which we noted was not based on data, for instance, from the Central Bank. The judge gave the court rate of 12% p.a in the event the claimed sum was paid. He was also faulted for ordering costs to be paid on account of the rent loss claim of Kshs.2.4m which was all along part of the claim, until it was orally abandoned on 19th November, 2003.

When Mr. Fraser rose to reply in opposition of the appeal, he too, put forth some four points for our determination:

(i) ***whether the signed discharge voucher and the payment made of Sh.6,023,529/= constituted a compromise and surrender of the appellant's right herein;***

(ii) ***if the discharge issue and the rateable apportionment issue are decided in favour of the appellant, then the rate of interest payable on Sh.6,776,471/= to be determined.***

(iii) ***the order of costs on the abandoned claim of rent loss;***

and if the appeal succeeds:

(iv) ***the need to consider the question of the rateable clause policies issued by the respondent and Madison to see if the respondent had a greater obligation to the appellant beyond the sum of Sh.6,023,529 paid***.

Mr. Fraser gave a short history of the case and going straight to the judgment, pointed out that ***Ringera, J.*** had found that at the time of the fire incident, the Madison policy over the subject property, executed with effect from 18th June, 1992 was still subsisting. And that the appellant took out its policy with the respondent after the purchase of the property to cover the period of 1st August, 1996 to 31st July, 1997 meant that the two policies were in force when the fire took place on 21st August, 1996. That its proposal form contained a clause requiring the appellant to state if it had other policies covering the same risks over the suit property. The appellant had answered that in the affirmative, meaning that the appellant's officer completing the proposal was aware of the importance and existence of another or other insurances.

After setting out the rateable proportion clauses in both policies it was stated that the appellant did not complete the purchase deal with Standard even after extension of time, resulting in its deposit paid at the auction being forfeited and Standard transferring the property to a 3rd party on 20th June, 2001. Accordingly, Standard continued to have an insurable interest in the property so long as the property remained untransferred. (See section 54 of the Transfer of Titles Act). So in essence all the three entities: Standard, Stone Crest Ltd and the appellant retained an insurable interest in the property at the time of the fire and that the learned judge found that to be so. And when the fire incident occurred, the appellant first approached Standard. And by a letter of 30th August, 1996 the appellant admitted that it was fully briefed on the Standard – Madison policy by which Madison started to investigate the fire. That ***Mr. Ananda*** (PW1) took that communication as a disclaimer of liability and so he consulted their lawyers and later also consulted ***Mr. Macdougall*** who was appointed by Madison to adjust the loss. The submission continued that later the respondent agreed to look into the appellant's claim by appointing Mr. Miners, its loss adjuster.

Following the contacts and with advice from Hamilton Harrison & Mathews Advocates to the effect that both the appellant and Standard had insurable interests in the suit property, the respondent changed positions and moved to consider on rateable proportion basis, the claim between Madison and itself. Meetings were held among the parties and at a particular one evidenced by the respondent's letter dated 12th February, 1997 ***Mr. Ananda*** proposed that the appellant would pursue its claim for the respondent's proportion of the loss and leave Standard to pursue Madison for their proportion in lieu of the purchase. As at this point, we were told that had the position been that the respondent make full payment and then pursue Madison, the respondent would have insisted on such a commitment before paying the appellant. But that that was not the position, ***Mr. Ananda*** signed the voucher on behalf of the appellant in full and final settlement of its liability under the policy. Having been in constant touch with their lawyers, (***Marende & Company Advocates, Salim Dhanji & Company Advocates***), and Madison's loss adjuster, ***Mr. Ananda*** on behalf of the appellant, had full knowledge of the nature of settlement he was reaching. The payment made was on indemnity basis and ***Mr. Ananda*** made an amendment to that effect which the respondent accepted and duly made payments. We heard that the only reservation stipulated in the discharge was that there was a subsisting insurance policy issued on the same buildings by Madison. There was no stipulation that Madison would make any payment. So there was nothing in the discharge voucher making the settlement conditional. The discharge was a complete answer to the appellant's claim.

Further, that the respondent saw nothing inconsistent with the learned judge's findings that the discharge was valid and that the rateable proposition clause did not apply. In any case, the vendor and the purchaser had insurable interests in the property between the date of sale and the date of completion and in that regard the respondent cited the authority of

Raul Colinvaux. ***The Law of Insurance (5 th edition) and the case of Catellain Preston & Others (1883) 11 QBD – 380***.

Mr. Fraser continued that the execution of the discharge was pleaded in the plaint and also in the defence. It was not claimed by the appellant that the execution of that discharge was tainted by misrepresentation or other impropriety and for that, it constituted a contract that should be interpreted accordingly. That it was a valid satisfaction, release and accord as stated in ***Halisbury's Laws of England 4th Edition, Vol.9(1) paragraphs 1043, 1044, 1045, 1052*** and ***1053*** also citing the ***Bank of Commerce and Credit*** (supra), counsel was stressed that the court was obliged to look at the intention and knowledge of the parties in the case of this type. The appellant had full knowledge of the position and the benefit of advice from its advocates before executing the discharge, which wording was clear. When i was executed the discharge became a binding and valid contract which compromised the appellant's claim against the respondent.

Addressing the issue of interest, the respondent's position was that it was not in the business of lending money on mortgages in order to be bound by 25% p.a. claimed by the appellant. The respondent dealt in bank deposits, treasury bills and property and at the time in question the rates of interest were below 15% p.a. Accordingly, the High Court was correct to order that interest, if payable, could stand at 12% p.a. as per the court rates.

And as to the costs ordered, we heard that the claim of loss of rent remained until ***Mr. Ananda*** dropped it verbally during cross-examination and in any case the court makes an order as to costs in its own discretion as provided for in ***section 26 of the Civil Procedure Act***. So the appeal was for dismissal.

Turning to its cross-appeal ***Mr. Fraser's*** position was that the rateable proportion clauses in the policies of his client and Madison meant substantially the same thing. Taking the first sentence in the respondent's clause to be the operative part while the second sentence applied to giving notice to any other insurance company which may have taken out a policy over the subject property, as not limiting the operation of the substantive rateable proportion clause. Thus, in the end both policies were intended to indemnify the insured party against fire.

We heard that the payment of Sh.6.8m made to Standard by Madison followed the suit (HCCC 1722/2000) which the parties settled out of court. Madison paid the settled sum of Sh.6.8m, and whether to call that an ex gratia payment or other, was irrelevant. The payment was made in respect of the same claim as the one the appellant raised against the respondent. Such a claim should not be granted because that would mean the paid sums going over and above the claimed loss. The principle of contribution in such circumstances did not admit to double recovery and in that context the cases of ***North British and Mercantile Insurance Company vs London, Liverpool*** and ***Globe Insurance Company***

(1877) 5 5Ch.D 569 and ***Renard vs Arnold (1875) 9 Ch.App.366*** were cited. But that where two insurance policies were taken out on a given property covering the same risk, whether the respective insureds knew it or not, the purchaser who had completed the purchase could benefit from the monies paid to the vendor. We heard that that principle is found in ***section 49 of Transfer of Property Act***. But because the appellant had not completed the purchase, then it cannot benefit from any money paid by Madison by insisting that Standard reinstate the property with that money.

After citing several other relevant authorities in this regard, the overall view held by ***Mr. Fraser*** was that, in such circumstances, courts do give effect to the clear words of the policies regarding the rateable proportion clauses. The position should not depend on any general principle of law but on the construction or interpretation of the policies. We heard that the doctrine of contribution where more than one insurer insured a risk, was an equitable one which could, nonetheless, be varied or excluded by

contract and that the rateable proportion clauses operate with such effect – namely to avoid double-recovery and or unjust enrichment.

And with that we were urged to dismiss the appeal with costs on the basis of the compromise and discharge voucher executed on 12th March, 1997 or that the respondent was only liable to meet and pay the sum based on the rateable proportion clause. It made due payments in that connection. Regarding of the rate of interest put at 12% p.a., if payable, was correct, while the costs ordered in respect of the claim for loss of rent should remain.

In dealing with an appeal as this, we are enjoined to take the course outlined in ***Selle & Another vs Associated Motor Boat Company Ltd & Others [1968] EA 123,*** where it was

held that:

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

And with that, we begin by acquainting ourselves, albeit in a precise manner, with the evidence as recorded by ***Ringera, J.*** Obviously, we did not have the chance to see and hear the witnesses so as to gauge their demeanour, but suffice it to say that as much as possible we will do that by comparing and contrasting aspects of each testimony in the context of the evidence generally. In essence, we are conducting a re-trial.

As stated earlier, one ***Erick Ananda*** (PW1), a shareholder and, seemingly, a director with the appellant company, gave evidence on its behalf. He also held meetings, wrote letters and executed documents on behalf of the appellant company. In that regard, we will endeavour to concentrate on the aspects of evidence, and like that of other witnesses, directly connected to the case. Like the defence witnesses, ***Mr. Ananda*** produced a bundle of documents as an exhibit.

On 4th July, 1996 ***Mr. Ananda*** bought the subject property at an auction for and on behalf of the appellant company, for a sum of Sh.9.2m. The property, consisting of five beach cottages, was being sold by Standard Chartered Bank Ltd under the chargee's powers. The chargor was a company known as Stone Crest Ltd. The deposit of Sh.2.3m was paid and the balance of Sh.6.9m was owing by the time fire destroyed the property on 21st August, 1996. As it will appear, the appellant never completed the purchase. The deposit was forfeited and the property sold and transferred to a 3rd party early January, 2001. Just on the day the appellant concluded the domestic package policy with the respondent to cover fire risk, the fire occurred. Prior to that, the appellant had started renovations on the property. Then PW1 learnt from one ***Pius Omondi*** of Standard Bank, that the bank had an insurance cover from Madison over the suit property, which PW1 did not know of. But then he approached Standard to reinstate the property. The respondent, to whom the fire had been reported, advised PW1 to continue contacts with Standard and Madison regarding the fire loss. However, the appellant's lawyers advised PW1 that the appellant could not benefit under the Madison policy with Standard and so a claim was lodged with the respondent. On 27th December, 1996, ***Mr. Mac Dougall***, the loss assessor instructed by Madison, informed PW1 that Madison would not pay for the loss. On 6th January, 1997 ***Mr. John Miners***, also a loss adjuster was appointed by Madison to investigate the fire loss. PW1 pressed **Miners** for a quick settlement but o 28th February, 1997 ***Miners*** informed him that because the appellant had not completed purchasing the property, only the indemnity for loss incurred, could be considered for payment – by way of loss on repairs and renovations. ***Miners*** assessed the loss at Sh.12.8m. Madison had not accepted liability. PW1 accepted that sum on behalf of the appellant as proposed. An acceptance form (Exh.P1) presented to PW1 was accepted by him. He added to it:

"…on an indemnity settlement basis,"

an addition the respondent did not object to. PW1 signed the document and returned it and on 21st March, 1997 the respondent paid Sh.6,023,471/= to the appellant. PW1 added in his evidence:

> ***"My understanding of the form is that the settlement that Lion of Kenya was making to me of Ksh.6,023,529/= was clearly on the understanding that there was a subsisting policy issued by Madison in respect of the same property."***

PW1 knew that the Madison policy was not taken out on the appellant's behalf, and that it was not for their benefit but he still was of the mind that:

> ***"… the loss was to be shared on a pro rata basis between Madison and Lion of Kenya and that Lion of Kenya and Mr. Miners were pursuing Madison for their part of the loss."***

Therefore on that basis, PW1 was of the view that:

> ***"The acceptance letter was conditional and subject to the balance being paid by Madison Insurance policy."***

However, when PW1 was informed by ***Mac Dougall*** that Madison was not prepared to accept liability, he filed the suit in the High Court to recover the balance of Sh.6,776,471/=. At about that time, Standard sued Madison (HCCC 1722/2000) for the latter to reinstate the suit property at Sh.19.6m. However, the two settled the suit out of court and Sh.6.8m was paid *ex gratia* to Standard. The appellant's time to complete the purchase was extended 31 December, 1998. It failed to complete the sale. Its deposit was forfeited and the property re-advertised for sale on 30th January, 1999. At this point, the witness dropped the claim for loss of rent due to inadequate documentation and remained to pursue the balance of Sh.6,776,471/= only. PW1 later learnt that Madison paid Sh.6.8m to Standard on *ex gratia* basis.

In cross-examination, PW1 admitted that the appellant took out a domestic package of insurance on a commercial property. But even as he completed section E of the proposal form that there was a pre-existing policy, he did not know of the Standard-Madison policy. Accordingly, he expected Standard to reinstate the property because the appellant had not completed the purchase transaction at all. At the time PW1 proposed to the respondent to pay it, he was not aware that the respondent would invoke the rateable proportion clause in the matter. PW1 further denied that in by February 1987 ***Mr. Ndegwa*** (DW2) had informed him of this. But on being shown a letter from ***Hamilton Harrison*** **and** ***Mathews*** Advocates to the respondent, PW1 agreed that the legal opinion given was that the respondent would only be liable to a rateable proportion of the loss. PW1 signed the acceptance letter before he knew that the respondent would only settle the matter under the rateable proportion clause, a position he came to know of this on 12th March 1997.

In a short re-examination, PW1 told the court that he knew that the appellant was the owner of the property as at the time the insurance proposal form was filled. When the fire occurred, he was hoping that the respondent and the Madison would share the loss so that he could get the balance of sh.6,776,471/=. That closed the appellant's case.

The defence opened with ***Timothy Waigiti***, the legal officer at Madison whose brief evidence was that his employer issued a policy of insurance to Stone Crest Ltd. and Standard over the suit property. Clause 16 provided for rateable proportion in case of another company having covered the same risks. The fire incident occurred. Madison declined to accept liability on the basis that the insurable interest had ceased. Standard sued it in HCCC 1722/2000 but the parties settled the matter out of court. Madison paid Standard sh.6.8m on *ex gratia* basis. ***G & B Robins (K) Ltd***, (***Mr. Mc Dougall)***, had assessed the loss at sh.12.8m while reinstatement of the property had been estimated at Sh.18.7m. The *ex gratia* payment was made in respect of the fire at the premises.

On his part ***James Ndegwa*** (DW2), previously the Assistant General Manager with the respondent, told the court that the appellant took out a domestic package policy over the suit property. Its proposal form

reached the respondent and was accepted on 21st August 1996. On the same day fire burnt down the insured property. The policy was issued on 28th

August 1996 to run between 1st August 1996 and 31st July 1997. The respondent did not know of the Madison cover of Sh.27m. Meetings were held and letters were exchanged. Initially the respondent's view was that it was not liable because by the time the fire occurred the property had not yet been transferred to the appellant. By the letter of 16th December 1996, the appellant desired the respondent to actively engage Standard more in pursuing the former's claim Loss. Assessors, ***G & B Robins*** for ***Madison and Gunningham G.M.*** for the respondent got involved. As a result the respondent changed its earlier position and considered to shoulder part of the appellant's loss in accordance with the contribution clause in its policy. After further meetings between the loss assessors, Madison began to shift its position on the matter. So ***Ananda,*** on behalf of the appellant proposed that the respondent settle its portion of the loss while Standard pursued Madison for the balance. Accordingly, Miners recommended in a report a sum of Sh.6,023,529/= for payment. The appellant accepted; the respondent approved it and the payment was made with only the rent claim outstanding. The court heard that all the time both sides kept engaged until PW1 signed the discharge voucher. At that time when the respondent paid its rateable proportion, it did not know how Madison wished to go about its portion. The appellant had not completed the purchase and the Madison policy was not for its benefit. And even as at November 1996, DW2's understanding was that the appellant wanted Standard to reinstate the property. DW2 then produced evidence of rates of interest applicable in its area of business, Government Paper - not mortgages (Exh. D1) as fluctuating between 22.1% and 22.5% p.a.

In cross-examination DW2 answered that the respondent delayed in apportioning the loss adjusted because the appellant had not completed the purchase. There was no joint report by the two loss adjustors, but its loss was adjusted at Sh.12.8m and the claim was paid on indemnity basis because the property was not being reinstated and the settlement was not conditional on completion of the purchase. DW2 then gave the court the meaning of rateable proportion clause and how it was applied:

> ***"Claims are paid proportionately by insurers providing cover in proportion to the sums insured. The insured in both policies in this case were not the same – there was Standard Bank – Crest Stone and the plaintiff company."***

The court further heard that the discharge form was not signed in expectation of anything from Madison. It was believed that Madison would pay its ratable proportion but not on a condition. DW2 repeated that on 12th February 1997 (Exh. D4) the appellant proposed that the respondent settle its portion of the claim while Standard pursued its portion from Madison.

On his part ***John David Miners*** (DW3), a loss adjuster (***Cunningham Lindsey***), was on 2nd March 1997 instructed by the respondent to ascertain the extent of its liability under the fire policy with the appellant. The witness was aware of the Madison policy. He met PW1. By a letter (Exh. D1-51-60), ***Miners*** wrote to Madison on the insurable interests of both parties whereby rateable contribution would apply to the loss. He met ***Mac Daugall*** (for Madison) and in their discussions, they arrived at sh.12.8m representing the loss which could be shared between the two companies on a rateable basis. Miners sent the proposal to ***Ananda*** together with the legal opinion from Hamilton, Harrison and Mathews (the respondent's lawyers). PW1 amended and accepted the discharge documents, as referred to in his evidence, which he signed – on 12th March 1997 and returned. DW3 was not certain of Madison's position but on 4th April 1997 that firm declined liability in the claim. The discharge voucher was not framed on the understanding that Madison would admit liability. And that the repudiation of liability by Madison, did not have any impact on the claim. That closed the trial. Both sides filed submissions citing authorities and the learned judge proceeded to pen the decision, subject of this appeal.

From the grounds of appeal and those raised in the notice of cross-appeal, we are minded to deal with them in a manner that will dispose of them at one and the same time. To begin with, we agree with the appellant's position that:

"The main issue in dispute even at the trial in the High Court was therefore whether the rateable proportion clause in the policy was applicable in the circumstances of the case."

As regards the rateable proportion clauses in both the policies, we find as the learned judge did, that there were two policies covering the property at the time of the fire – the Madison-Standard policy and the one the respondent issued to the appellant. The learned judge found that:

"In the premises, I do find that the Madison policy was subsisting at the time of the accident on 21st August, 1996."

That position is not in dispute. What is in dispute is whether the rateable proportion clauses in the two policies applied or not.

In that regard we reproduce the 2 clauses beginning with the respondent's:

"3. If at the time of any happening giving rise to any loss, damage, expense or liability for which indemnity is provided under this policy there shall be any other insurance in force the insurer shall not be liable for more than its rateable proportion. Upon the happening of any such loss, damage, expense or liability, the insured shall forthwith give notice to the insurer in writing of all the other insurances effected by him or on his behalf covering the property or any part of the property or liability insured under this policy and no claim under this policy shall be payable by the insurer until such notice shall have been received by them." (underlining supplied).

And in the Madison policy there is the following:

"***16. If at the time of any loss or damage happening to any property hereby insured, there be any other subsisting insurance or insurances, whether effected by the insured or by any other person or persons covering the same property , this Company shall not be liable to pay or contribute more than its rateable proportion of such loss or damage."*** (underlining supplied).

The two insurance policies were subsisting side by side as at the time of the fire. To see whether they were applicable and therefore impacting or affecting each other, it is necessary that we interpret them together. From the start although both speak of there being other insurance covers in force and that whoever is the insurer will only pay the rateable proportion of the loss or damage, we agree with the learned trial judge that the wording of the two policy clauses were different. Without having to stop at the full stop in the respondent's clause 3, but reading both sentences therein conjunctively the sense that comes to the fore is this:

"3. If at the time of any happening giving rise to any loss, damage, expense or liability for which indemnity is provided under this policy there shall be any other insurance in force the insurer shall not be liable for more than its rateable proportion thereof --- (but first) the insured shall forthwith give notice to the insurer --- of all other insurances effected by him or on his behalf covering the property ----"

The clear meaning is that the insured here, the appellant would not receive from the respondent more than the rateable proportion of the loss *vis a vis* what would come from the other insurances the very appellant will have effected with other companies over the same property. So the clause covers the insured (the appellant) with the respondent and its (appellant's) other insurers. This clause does not admit to another insurance company having given a cover to another party altogether. In the present case we are being asked to find that clause 3 of the respondent covered other insurances like the one of Madison. The construction of that clause does not admit to such an application. It only contemplates where the insured appellant took insurance from the respondent and also from other companies to cover the same property.

As for clause 16 (Madison), we are of the view that it contemplated a case where an insured took cover from a given company for the property and other parties also took out insurances from other companies or

it could be from the same company, over the same property. The operative word is that the insureds are different but have taken out covers over the same property and risk whereupon the claimant insured would not be liable to pay or contribute more than its rateable proportion.

The learned judge found clause 3 of the respondent to mean that:

> ***"In other words the same insured had to have taken cover for the same property and risk but with different insurers."***

Therefore, the judge, continued:

"In that regard, the policy taken out by Stone Crest Ltd and/or Standard Chartered Bank with Madison was obviously not another policy by the plaintiff and it was not taken out on its behalf nor had it been assigned to

the plaintiff."

And in adding that the appellant was not even aware of the existence of the Madison policy when it took out its own with the respondent, the learned judge found that the Madison policy did not bring into application the rateable clause in the respondents' policy. We agree with that conclusion, save to add that in fact the two policies could not be brought to apply to the same claim as the one the appellant presented. We may also add at this point that had clause 3 in the respondent's policy, been found to be applicable, which we do not so find, there is the question of non-completion of the purchase transaction by the appellant in terms of ***section 49 of the Transfer of Property Act***. By that failure both the appellant and Standard remained with insurable interests in the property as at the time of the fire. If the purchase had been completed and the appellant reinstated the property, it could justifiably require to have benefit of the sums Madison paid Standard. Or if the purchase had been completed, the appellant would have succeeded in its initial proposal to Standard to reinstate the property. With the incomplete transaction, none of those avenues were open to the appellant, even if later Madison made an *ex gratia* payment to Standard. There was no way the appellant could directly benefit under the Madison policy. It was neither a party to that contract nor a beneficiary thereof. But even with all that, the appellant brought the present suit to recover what is called the balance of the loss sum from the respondent. That leads to the next issue raised here – the discharge voucher.

While the appellant insisted that the payment under that voucher of Sh.6,023,529/= was on condition or understanding that the balance could be forthcoming from Madison via Standard, if not from the respondent, the respondent maintained that the signed voucher constituted a full and final settlement which compromised the appellant's claim against the respondent in respect of the fire loss. The sum that the appellant claimed from the respondent after the payment under the voucher, was sh.6,776,471/=. To the appellant, the balance was due because the loss incurred was assessed by Miners for the respondent, to be Sh.12.8m.

We agree with the learned judge, that since the rateable proportion clause of the respondent was not applicable in the circumstances, then the respondent was liable to pay Sh.12.8m, constituting the full loss. We so find because there was no other insurance cover taken out by the same insured (the appellant) over the damaged property. So it is logical to conclude that the respondent would be liable to pay for the full loss with no other insurance contributing. But then after consultations, meetings, correspondences back and forth, the appellant signed for the proposed Sh.6,023,529/= in full and final settlement of its claim. After PW1 amended the voucher as proposed by the respondent, the final copy on which payment was made read thus:

> ***"Subject to the approval of the Lion of Kenya Insurance Company Limited, we agree to accept the sum of Kenya Shillings Six Million and Twenty Three Thousand Five Hundred and Twenty Nine only (Kshs.6,023,529) being full and final settlement of our claim on an indemnity settlement basis, under policy No. HH 02/960022, arising out of the fire which occurred on Wednesday 21st August 1996.***

The above figure represents our insurers rateable share of a total loss amount of Shs.12,800,000 on the understanding that there is a subsisting insurance policy issued on the same buildings by Madison Insurance Company Limited.

We further agree that any valuation used in assisting insurers liability was for the purpose of this claim only and is not to be taken as a valuation of the property for any other purposes or for any future loss adjustment.

This offer to settle relates only to our claim in respect of damage to the building. A Further Claim in respect of loss of rent is under consideration.

Signed Eric Ananda

Trinity – Prime Investments Ltd.

P.O. Box 19799

NAIROBI

Dated – 12th/03/1997" (Underlining supplied.)

In our view, ***Eric Ananda*** (PW1) received and signed for Sh.6,023,529/= in full and final settlement as a rateable share of the loss sum of Sh.12.8m, on behalf of the appellant. There was no misunderstanding or a condition on this voucher about what it represented. All along ***Mr. Ananda*** had been in consultation with the respondent or its agents. He had legal opinions and advice from his lawyers and those of the respondent. He even had contact with Madison's assessors. He wanted a quick settlement of the portion due from the respondent. The only feature that there was a subsisting policy by Madison. It was not a condition or a promise regarding that policy for any benefit under it. It is not clear as to how, with all the above, ***Mr. Ananda*** read a condition subject to which he signed the voucher and received payment. He knew the extent of the loss - Sh.12.8m. Despite that knowledge, he decided to take Sh.6.023,529/= as proposed. Whether at that time he knew that Madison would decline liability was irrelevant. That was not his policy. He was only dealing with the respondent, the appellant's insurer and no other. He took the money even before the completion date of the purchase from Standard was due. He should have completed the sale and then expect to benefit from whatever sum Madison paid Standard. But all that was all his own choice, even as the completion date was extended and with no action from the appellant, its deposit was forfeited and the property sold to a 3rd party.

The execution of the discharge voucher, we agree with the learned judge, constituted a complete contract. Even if payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation, fraud or other. The appellant was thus fully discharged. ***Ananda*** took that money ***"on an indemnity basis"*** (a phrase he himself added) as a rateable share of the total loss of Sh.12.8m. Had he used that money to finalize the purchase from Standard by operation of section 49 of the Transfer Act, the appellant could have benefitted. Madison did pay Standard at last, whether as ex gratia or not, but still because of the fire.

In the end, we take it that the appellant's case falls under the principle stated in ***Halisbury's Laws of England (4th Edition) Vol. 9(1) paragraph 1043***

"1043. In general accord and satisfaction is the purchase of a release from an obligation, whether, arising under contract or tort, by means of any valuable consideration, not being in performance of the obligation itself. The accord is the agreement by which the obligation is prima facie discharged: it no longer needs to be in any particular form. The satisfaction is the consideration which makes the agreement operative ---."

In this matter, the appellant through ***Ananda*** (PW1), reached an accord and by signing the discharge voucher, contracted that it was receiving the paid sum in lieu of the whole total of the loss Sh.12.8m. The

appellant did not want to wait to know the final position of Madison in the matter or even use the payment to complete the purchase and expect benefit from Standard. By accepting Sh.6,023,529/= in full and final settlement of the loss, the respondent was released from its obligation, even as we have found that because its rateable proportion clause was not applicable, it was liable to pay the full sh.12.8m We therefore find that the execution of the discharge voucher by the appellant and the receipt of the sums therein stated, no more liability by way of any balance of the loss remained with the respondent. And because we are told that Madison made an *ex gratia* payment to Standard on a claim arising out of this policy we are unable to find that, had the appellant not discharged the respondent from the liability and therefore entitled to receive Sh.6,776,471/= from it, that could have constituted double recovery and unfair enrichment. In the result we dismiss this ground.

As for the interest, had we found that the appellant ought to be paid sh.6,776,471/= by the respondent, we could have upheld the interest rate of 12% p.a. stated by the learned judge because we are not satisfied that, other than a mere claim, ***Mr. Ananda*** did lay evidence before the court to support his claim to 25% p.a.

And lastly, on the issue of costs, the learned judge awarded it taking into account the sum of sh.2.4m which had been part of the claim until it was orally abandoned before him.

In accordance with ***section 27 of the Civil Procedure Act,*** this issue lies in the discretion of the court. It has not been demonstrated to us that that discretion was improperly exercised.

All in all we dismiss this appeal with costs. As the cross-appeal is dependant on the success or partial success of the appeal, the dismissal of the appeal results in the dismissal of the cross-appeal. Thus the cross-appeal is dismissed with no orders as to costs. In arriving at this ending, we are obliged to acknowledge the many authorities placed before us by either side for perusal and consideration.

Dated and delivered at Nairobi this 24th day of April, 2015.

E. M. GITHINJI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

J. W. MWERA

…….....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR

/jkc