



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: OMOLO & TUNOI, J.J.A. & RINGERA, AG. JA)**

**CIVIL APPEAL NO. 263 OF 2003**

**BETWEEN**

**MADISON INSURANCE COMPANY LIMITED ..... APPELLANT**

**AND**

**SOLOMON KINARA T/A KISII PHYSIOTHERAPY CLINIC ..... RESPONDENTS**

**(An appeal from a judgment of the High Court of Kenya at Kisii (Birech C/A) dated 22nd January, 2003**

**in**

**H.C.C.C. NO. 33 OF 2001)**

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**JUDGMENT OF THE COURT**

The appeal before us raises a straightforward question: can a party to a contract of insurance be given special damages arising from loss of profits or loss of income?

The question arises in this way. Solomon Kinara who does business in the name of Kisii Physiotherapy Clinic, the respondent herein, held a “burglary policy” with Madison Insurance Company Ltd, the appellant. The respondent described himself in his plaint dated 16th March, 2001 and filed in the High Court of Kenya at Kisii on 20th March, 2001 as a duly qualified physiotherapist and that he practised his art at New Sansora Complex in Kisii town. He had in his clinic certain articles of his trade which he listed as:

Traction Machine	KShs 540,000/-
Ultrasonic Machine	KShs 300,000/-
Rehabilitator	KShs 10,000/-
Radio Cassette	KShs 9,000/-
Pulley System	KShs 10,000/-

Universal Adaptor      KShs 2,000/-

**TOTAL**                      **KShs 871,000/-**

His contention was that he had insured those items, together with others, against burglary and that the appellant had issued him with an insurance policy covering the period 29th April, 1997 to 28th April, 1998 and that he had paid to the appellant KShs 15,599/- as premium in respect of the said policy.

On 7th September, 1997 while that policy was in force, thieves broke into his premises and stole the listed items. He asked the appellant to indemnify him in respect of the loss; the appellant refused to indemnify him and in his plaint the respondent claimed not only the Shs 871,000/- as the value of his stolen items but also a further sum of Shs 2,211,704/- as special damages at the rate of Shs 53,944/- per month as lost income from 7<sup>th</sup> September, 1997 for a period of 41 months.

The appellant denied liability to the claim of the respondent but after the trial a Commissioner of Assize (Mr Birech) found the appellant liable. He held that the respondent had insured his goods against burglary and he awarded to him Shs 871,000/- as the value of those goods. He also held that the respondent's loss of income was Shs 45,705/- per month but that the respondent was bound to mitigate his damages and that the respondent should have been able to restart his business within one year. He accordingly awarded to the respondent a further sum of Shs 548,460/- as constituting the respondent's "losses", arising from the appellant's failure to indemnify the respondent within a reasonable time.

The appellant appealed against liability (grounds 1 & 2) and against the award of Shs 548,460/- (grounds 3 & 4). The respondent also crossappealed on four grounds complaining that he ought to have been given damages for the full 41 months claimed by him, that interest should have been awarded to him at the rate of 30% per annum, that the Commissioner, in assessing loss of income had failed to take into account the loans he had been repaying to some bank(s) and that the Commissioner erred in law in holding that he (respondent) should have mitigated his loss.

When the hearing of the appeal opened before us, Mr Tuiyot for the appellant, abandoned grounds 1 and 2 in the Memorandum of Appeal. That being so, the issue of the appellant's liability to indemnify the respondent in respect of the lost items is no longer a live one. The appellant must accordingly pay to the respondent the sum of Shs 871,000/- representing the value of the goods which the respondent had insured with the appellant and which were stolen from the respondent's clinic.

That leaves us only with the issue of whether the appellant was under a duty to pay to the respondent special damages in the form of lost earning. The answer which we give to this issue will largely determine the outcome of the cross-appeal by the respondent.

The starting point in answering that issue must be the contract of insurance itself. A copy of the policy was produced before the Commissioner as defence Exh 5. We have meticulously gone through that document and none of its provisions state that the respondent would be entitled to any other payment apart from the value of the insured goods. In the document, the appellant agreed to indemnify the respondent against:

"1. Loss of or damage to the property insured or any part thereof whilst within the premises by theft following upon actual forcible and violent entry into or exit from the premises.

2. Damage to the premises falling to be borne by the insured [respondent] arising out of such entry or exit or any attempt thereat ..... and the Company [appellant] will pay the value of the loss or damage to the property so lost or damaged including the value of damage to the premises to an amount not exceeding in total the sum insured in the Schedule."

That was the extent of the appellant's undertaking to the respondent and there was no question of any sort of damages being provided for in the contract.

But Mr Ombachi for the respondent told us that since the policy did not exclude payment of any damages as was the case in *Corporate Insurance Company Ltd v Loise Wanjiru Wachira*, Civil Appeal No 151 of 1995 (unreported) where consequential loss was expressly excluded under the terms of the policy, there was nothing in law to prevent them from claiming damages which naturally followed from the breach of the terms of the policy by the appellant. That argument looks attractive, but in our view it ignores the basic principles underlying a contract of insurance. The argument comes very close to saying that what is not excluded by the terms of the policy is claimable under the ordinary principles governing the breach of any contract. We do not think there is any support for that contention. In their book "*The Law of Insurance*", 2nd Edition, under the heading "The Contract of Insurance" and sub-heading "Indemnity" at page 4, Preston and Colivaux state as follows:

"Indemnity, it has been said, is the controlling principle in insurance law, and by reference to that principle a great many difficulties arising on insurance contracts can be settled. Except in insurance on life and against accident the insurer contracts to indemnify the assured for what he may actually lose by the happening of the events upon which the insurer's liability is to arise, and in no circumstances, is the assured in theory entitled to make a profit of his loss. That rule might be inferred as being the intention of the parties, having regard to the aim of a contract of insurance, but there are further powerful reasons for its application. Were it not so, the two parties to the contract would not have a common interest in the preservation of the thing insured and the contract would create a desire for the happening of the event insured against. Where in fact the assured has a prospect of profit, there and there only can arise the temptation to crime, fraud or such carelessness as may bring about the destruction of the thing insured."

That is very powerful language, but the passage nevertheless brings out the basic concept underlying a contract of insurance, namely that the party whose property is being insured pays premium not with the intention of making any profit out of the transaction but rather with the intention that were the items assured to be destroyed, stolen or damaged, the other party offering the policy would replace the stolen or destroyed item or pay the reasonable charges for its repair.

Of course, there is nothing to stop the parties agreeing in their contract of insurance that consequential loss would be compensated. *MacGilvary and Parkington on Insurance Law*, 8th Edition put it thus under the heading "Insurance against Pecuniary Loss" at pg 961:

"1. Consequential Loss Insurance:

2140: Loss of Profits: Many businesses wish to insure against the possibility of a fire or other catastrophe giving rise to a loss of profits or additional expense during the period after the occurrence of the peril insured against. It is accepted law that an ordinary insurance policy against, for example, fire does not cover loss of profits and it has even been held that a loss of market caused by delay arising from a peril insured against is not covered by a standard form policy. Any type of consequential loss can be insured, but loss of profits or additional expenditure are the most usual subjects of insurance and for this reason the insurance discussed in this chapter is often referred to as loss of profits insurance . . .

It follows that loss of profits and other forms of consequential loss must be described in the policy and insured as such. The purpose of the insurance is to put the insured into the position he would be in if the profits had been earned. . . ."

One thing is clear from this text; ordinary or standard form policies or contracts of insurance do not cover consequential loss unless the parties specifically contract that such loss would be covered. The 4th Edition of Denis Riley's book "*Consequential Loss Insurances and Claims*" specifically deals with such policies, namely consequential loss policies.

The policy of insurance between the appellant and respondent was an ordinary or standard form contract and as such there was nothing to import into that policy the element of consequential loss. The respondent's claim was that the loss was occasioned by the appellant's wrongful repudiation or refusal to pay for the loss of the items the policy covered, but we do not think this takes the matter any further. The parties could have covered such an eventuality in their policy of insurance and in the absence of such a

provision, the respondent was not entitled to claim consequential loss of profits. That was what this Court rejected in the case of *Corporate Ins Co Ltd v Loise Wanjiru Wachira* to which we have already referred.

It follows that the appellant's appeal must succeed on grounds 3 and 4 in the Memorandum of Appeal. grounds 1 and 2, as we have said, were abandoned. Accordingly we allow the appellant's appeal to the extent that the Commissioner of Assize's order awarding to the respondent Shs 548,460/- as loss of income for one year is set aside and the total sum of Shs 1,419,460/- awarded to the respondent by the Commissioner is reduced by the said Shs 548,460/- leaving a balance of Shs 871,000/-. It follows that the respondent's cross-appeal must fail since we have held that the respondent was not entitled to loss of income under the policy. The claim for interest at the rate of 30% was on the basis that the respondent was not entitled to loss of income under the policy. The claim of interest at the rate of 30% was on the basis that the respondent was repaying some loans to a bank or banks which had financed the purchase of the lost items and that the rate of interest on those loans was at 30%. There was no provision for such rate of interest in the policy of insurance. Accordingly, we order that interest at court rates shall be paid by the appellant to the respondent on the sum of Shs 871,000/- with effect from the date of filing the suit until payment in full. Our final orders shall be that the appeal of the appellant is allowed to the extent already indicated herein. The crossappeal is dismissed in its entirety. On costs, the appellant shall have half the costs of its appeal since it has succeeded on two grounds and abandoned the other two grounds. We, however, make no order as to the costs of the cross-appeal.

**Dated and delivered at Kisumu this 9th day of July, 2004.**

**R. S. C. OMOLO**

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**JUDGE OF APPEAL**

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**A. G. RINGERA**

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**AG. JUDGE OF APPEAL**

I certify that this is a true copy

of the original.

**DEPUTY REGISTRAR**