

REPUBLIC OF UGANDA

IN THE HIGH COURT KAMPALA

COMMERCIAL DIVISION

CIVIL SUIT NO 652 OF 2013

NAKISENYI HANIFAH

NABATANZI

SHADIA;.....

..... PLIANTIFF

;;

VERSUS

**INSURANCE COMPANY OF EAST
AFRICA _____ (U)**

LIMITED;.....

..... DEFENDANT

BEFORE HON LADY JUSTICE

ELIZABETH JANE ALIVIDZA

JUDGEMENT

Nakisenyi Hanifah and Nabatanzi Shadiya herein after referred to as plaintiffs are beneficiaries under life policy number 120/EAW/ 006069 issued by Insurance Company of East Africa (U) ltd herein after referred to as defendant. The plaintiffs sued the defendant for refusal to honour the insurance claim citing fraud on part of the deceased Assured Zabali Hadija.

The facts that were not disputed by both parties are that between February and

March 2013, Zabali Hadija (Assured) and the defendant entered into an insurance agreement (policy) where the agreed assured sum was UG SH. 37,233,355/= . The beneficiaries were both plaintiffs, who were mother and sister of the assured respectively. The Assured died on 27th April 2013 at Mityana hospital. The death certificate issued by the hospital showed that she died of respiratory failure due to Pneumocystis jirovecii Pneumonia (PCP) and immunosuppression (ISS). The defendant was informed and a claim made which has not been honored to date due to alleged fraud and misrepresentation the part of the Assured.

The agreed issues were;

1. Whether the Assured and the Plaintiffs committed fraud and misrepresentation
2. Whether the defendant rightfully declined to honour the plaintiffs claim
3. What remedies are available to the parties.

I will consider each issue separately. The evidence adduced was by way of witness statements and cross examination in court. Each side produced four witnesses each. Namely; PW1 Nakisenyi Hanifah, PW2 Kaleebu Gordon, insurance agent of the defendant's company, PW3 Paul Mubabya, Senior medical clinical Officer and PW4, Dr Babua Christopher, medical

doctor for the Plaintiff. The defence had; DW1 Kennedy Gichuhi Manager Life and pensions, DW2; Sebuwufu Erisa Handwriting expert, DW3, Nicholas Mwasame, Counsel for firm representing the defendant and DW4, Dr. Zac Sseribidde, medical doctor. The plaintiffs were presented by Counsel Absalom Mubangizi while the defendant was represented by Counsel Rebecca Nakiranda. Both Counsel made oral closing arguments and submitted authorities which court found very useful. I see no need to reproduce the summary of evidence since it is clearly transcribed in court record and will only highlight parts of it as I consider each issue.

Issue number one: Whether the Assured and the Plaintiffs committed fraud and misrepresentation

What amounts to fraud was clearly emphasized in the Supreme Court of **Fredrick Zaabwe Vs Orient Bank and ors SC 04 of 2006**. I will reproduce parts of this judgment by Justice Katureebe for guidance.

“...I find the definition of fraud in BLACK’S LAW DICTIONARY 6TH Edition page 660, very illustrative.’

“An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal

right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Anything

calculated to deceive, whether by a single act or combination, or by suppression of truth, or suggestion of what is false, whether it is by direct falsehood or innuendo by speech or silence, word of mouth, or look or gesture A generic term, embracing all multifarious, means which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth, and includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated, dissembling, and any unfair way by which another is cheated. “Bad faith” and “fraud” are synonymous, and also synonymous of dishonesty, infidelity, faithlessness, perfidy, unfairness, etc
As distinguished from negligence, it is always positive, intentional. It comprises all acts, omissions and concealments involving a breach of a legal or equitable duty and resulting in damage to another. And includes anything calculated to deceive, whether it be a single act or combination of circumstances, whether the suppression of truth or the suggestion of what is false whether it be by direct falsehood or by innuendo, by speech or by silence, by word of mouth, or by look or gesture ”

In the written statement of defence, the defendant pleaded the following particulars of fraud;

- that the Assured concealed her health conditions well knowing that it would form the basis of the life insurance cover.
- refusal to undergo personal medical examination well knowing that it was a precondition for the life insurance policy.
- using and causing another person to undergo medical examination necessary to support her proposal.
- using and presenting to the defendant medical results of another person who held out as the Assured to support the assured’s life insurance policy.

Court also had to determine; What amounts to misrepresentation?

McGillivray on Insurance Law 10th Edition published by Sweet & Maxwell at page 383 states that;

In order to constitute an actionable fraudulent misrepresentation, the statement of which complaint is made must be;

- 1. False**
- 2. Made dishonestly**
- 3. Acted upon by the recipient in the sense that it induces him to make the proposed contract**

Halsbury Laws of England 4th Reissue (2002) published by Butterworth at page 462 provides that; the burden of proof of falsity states that the burden of alleging and proving that degree of

falsity which is required for the representation to be a misrepresentation rests in every case on the party who sets it up;

Furthermore the particulars of misrepresentation in the written statement of defence were;

- The Assured's representation to the defendant that her health was in very good condition well knowing that such representation was not true.
- The Assured's representation to the defendant that she had undergone medical examination well knowing that she had not.
- The Assured's representation to the defendant that the medical results in the names of Zabali Hadija from Louis Memorial medical center were hers well knowing that they were for a different person purporting to be the Assured.

The burden of proof of fraud and misrepresentation rests on the party that sets it up. Therefore, what cogent evidence was adduced by the defendant to prove fraud and misrepresentation, bearing in mind that the standard of proof in civil cases is a "preponderance of probabilities.

Imposter fraud is what this case is about. Impostor fraud occurs during the life insurance application process when someone other than the named insured appears for the medical examination that is a prerequisite for obtaining the policy. Insurance policies are like any other contract where there should be a meeting of minds on every term of the contract. Courts, especially in the United States (US), have noted that it is often difficult to detect such fraud through reasonable and ordinary business procedures. Once imposter fraud is proved to any court's satisfaction, the insurance contract become void ab initio since there was no contract formation in the first place due to lack of good faith.

The gist of the allegation of imposter fraud in this case is that Assured died from HIV related sickness and that logically would not have been the same person whose insurance medical records indicated no HIV or AIDs during the application process and was in good health. This was the basis of issuing the life insurance policy on the terms agreed upon.

This raises issues of whether it was proved that the Assured died of HIV/AIDS related illnesses, less than three months after entering into a life insurance policy contract with the defendants and thus could not have been the same person who underwent the medical examination by the insurers' medical team and was found to be HIV/AIDs negative. What happened during the application process and in particular the medical examination to ascertain the state of health is very relevant to determining the elements of fraud and misrepresentation? This is the gist of the truth, the court has to establish as a fact finder.

DW1. Kennedy Gichuhi is the manager of life and pensions in Defendant Company. He explained the whole process of getting a life policy. He emphasized that the assured is expected to exercise good faith and go for medical

examination. That the policy was issued on 25th March 2013, almost one month after the medical examination. That the defendant believed the Assured when she stated that she was in good health. He identified Dx3, photocopy the medical examination form.

Evidence of what transpired during medical examination was adduced by DW2, Dr Zac Serubidde. He was doctor with Louise Memorial medical clinic. However, he did not know the Assured Zabali nor the plaintiffs. He never examined the deceased but signed the medical examination form on 6th February 2013. That He identified Dx3, the medical examination form that was brought by one of the defendant's client. That the defendants usually send another letter with photograph of the person to be examined. That he was informed later that; when the deceased came for examination, the other letter had not come. That client came with her copy of letter, the receptionist called the defendant (ICEA) to confirm or cross check kind of tests. That it was normal for examination and tests to be carried out without waiting for other confidential letter. That confirmation by phone from ICEA was enough. That it was one Doctor Gilbert who examined the patient. That he (DW2) signed the form as head of the unit as medical director. He complies report based on the findings of the medical assessment by the doctor and findings from the laboratory.

From the above evidence, it is not clear what really transpired during medical examination. None of the witnesses produced by the defence interacted with the Assured or even the alleged imposter. The doctor who carried out the medical examination and the receptionist who informed DW2 that the person who came was different from the photograph of the Assured never testified in court. Infact, DW2's evidence amounts to hearsay evidence which may be useful as part of re gestae since these facts may form part of the same transaction. However, since it was not direct evidence, it thus carries little weigh and relevancy. The law on hearsay is very clear and I should not labour on this point. A witness who interacted with the Assured was PW2.

PW2 Kalebu Gordon was employed as a commission agent for the defendant. He stated that he was approached by the Assured Zabali Hadija, who claimed that she had attended one of the seminars where he was "preaching insurance". That the Assured filled the insurance proposal form on 4th February 2013 and made the first premium the next day. That on 5th February 2013, he accompanied the deceased to Louis Memorial medical clinic for medical examination. Later the clinic sent the results to the defendant who issued the insurance policy two months later on 25th March 2013. In April, the Assured through her brother paid premiums and few days later he was informed that the Zabali had died. He outlined the procedure involved that ensures checks during medical examination. That the agent accompanied the intended Assured for the medical examination. There is a medical form where the photograph of the Assured is attached and the person has to identify themselves before any examination is done. That he was present at the clinic when Zabali was medically examined and he waited for her in the reception. That two letters are sent to the clinic that day. One was with the Assured and another sealed letter with a

photograph is confidential and is handed over to the doctors in the clinic. That he took the second letter himself. The Assured did not look sick and that is why the insurance policy was issued. Court was inclined to believe his evidence especially since he was consistent during cross examination.

Therefore, the defendant has failed to adduce satisfactory direct evidence to prove their version of what transpired during the medical examination of the deceased on 5th February 2013 at Louise Memorial Medical Clinic. More especially the fact that it was an impostor who was examined instead of the Assured. This has not been proved to the satisfaction of court. PW2 who told court that he was involved in the application process on behalf of the defendant discredits the evidence of DW1 and DW2 on what transpired during medical examination of the clinic.

What other evidence was adduced in the absence of direct evidence, to prove insurance impostor fraud. According to counsel for the defendant, the fact that cause of death appeared to be related to HIV/AIDs, which was inconsistent with the medical examination results that formed the basis of the insurance policy and the only logical explanation is that it was fraud and misrepresentation. Court will go ahead to examine the different pieces of evidence adduced.

PW2 Paul Mubabya of Mityana hospital stated that he is a qualified senior medical officer and has practiced for over 19 years. That on 27th April 2013, the deceased Zabali was brought to the hospital at 4.30am with difficulty breathing and that she had been sick for three weeks. He informed court that no medical tests were conducted on the deceased Zabali. That when she passed away, he went and confirmed death and wrote the death certificate. That she came to the outpatient clinic being supported by two people and had difficulty breathing. She had had cough for three weeks. He sent her to the ward to be admitted. That he wrote medical report dated 27th April 2013, where he concluded that the deceased had ISS which led to PCP hence led to death due to respiratory failure. That the patient had oral thrush.

It was contended that the defendant believed the medical report of death of the Assured. That they looked at cause of death which indicated respiratory failure due to PCP and ISS. DW1 stated that

....'it was about 2 months after issuing policy, so the question we asked ourselves was this person, how could they died from such illness only two months down the line when they were in perfect health as at the time of

examination. So that is what raised our doubt.....that she died of PCP due to

ISS "our doctor confirmed that to be meaning -full blown AIDS"...

This was supported by the evidence of DW2, the doctor who signed the medical examination form. He stated that his professional view was that "...

“If you are a good clinician, can look at someone and draw a conclusion that the person has HIV/AIDS. No one can get infected today and die two months”.....In case someone let’s say is on treatment for cancer and they are put on cancer drugs, their immune system can be suppressed. So they can have suppression of

their immunity but when you say immune suppression syndrome, it refers to HIV/AIDs. Actually it refers to full blown AIDs. ISS in any medical book refers to HIV/AIDs. It is not HIV but AIDs because there is a difference between HIV and AIDs....

However, on the other hand; PW1 Nakiseyi Hanifah stated that the Assured was buying produce and selling it in South Sudan. That she used to stay with her and she had no knowledge that she had any chronic sickness. That in April, the Assured left home in good health. However, the deceased called her while in Mityana, saying she was not feeling well. She advised her to go to hospital. That she died five days after giving her money to pay for the insurance premiums of March and April. That she died from lose of breath. That she was surprised to learn that the Assured died of AIDs since they had all been tested in 2012 and found negative. That all her documents had been destroyed in a fire.

Court also notes that contrary scientific evidence was adduced by PW4, Doctor Christopher Babua. He is a qualified medical doctor with masters in internal medicine. He examined medical examination report from Louise Memorial center dated 06/02/2013 and the Laboratory test results dated 05/02/2013 belonging to the Assured Zabali Hadija which showed that she tested HIV negative. He also examined the said medical certificate of death which stated that the deceased died of respiratory failure due to PCP and ISS. He informed court that it was not possible to diagnose PCP and ISS without laboratory tests. That the Assured may have died of other causes. He stated in paragraph 15 of his witness statement that;

That there are other ailments which manifest symptoms similar to PCP or ISS such as clot, heart failure from various causes and community acquired pneumonia among others..."

DW4 further stated that in practice, PCP arises in patients during advanced stages of HIV/AIDs when the immunity has greatly deteriorated. He concluded that the death certificate was not conclusive on the cause of death especially since no post mortem examination was carried out.

Therefore, what weight should court attach to all these contradictory evidence of opinion? What would amount to legal proof? Does the fact that the Assured is said to have had PCP and ISS and even oral thrush amount to legal proof of HIV/AIDs is an issue that this court has to resolve. In the absence of a post mortem report as legal proof of cause of death of the Assured, can the court rely on the conflicting opinions of the experts?

The evidence of these medical professionals amount to expert opinion which is admissible under Section 43 of the Uganda Evidence Act. I am also guided to some extent by a scientific Article by

Sheldon Krinsky, PhD, published in the American Journal for Public Health Supplement 1. 2006, Vol 95, No SI, titled the “Weight of Scientific Evidence in policy and law. He states and I quote for emphasis.

“Weight of scientific evidence in law and police, three standards of evidence are generally recognized. Preponderance, clear and convincing and beyond reasonable doubt. By preponderance of evidence, it is usually meant that a hypothesis under consideration need only be proven trustworthy (more probable) than its negation. Most civil proceedings use a preponderance of evidence as a standard of proof. A higher standard is found in the phrase “clear and convincing evidence”. The supporting evidence under this standard has to have a more than a marginal edge over the alternative hypothesis. It has been described as evidentiary support “sufficiently strong to command the unhesitating assent of every reasonable mind” finally evidentiary criterion that meets the standard “beyond reasonable doubt” is the highest burden and the one used in criminal trials to minimize false positives (convicting an innocent person)...”

Since this is a fraud related matter, the best standard to evaluate the experts’ opinion is the “clear and convincing “standard and this failing, preponderance standard can also prevail. I will evaluate the medical opinions collectively rather than severally.

Looking at DW2, evidence. He stated that...

” immune suppression syndrome, it refers to HIV/AIDs. Actually it refers to full blown AIDs. ISS in any medical book refers to HIV/AIDs....”

Unfortunately he did not back it with documentary evidence especially in light of the conflicting opinion adduced by PW4 who stated that ISS can be a result of other causes and not only HIV/AIDs. PW4 also did not back this hypothesis with any clear and convincing studies that can be trusted by any reasonable person. Proof of studies and research carried out to prove the alternative hypothesis would have greatly assisted the court to determine the reliability and relevancy of each experts’ testimony and thus how much weight or evidential value to attach to each conflicting opinion.

Furthermore, how reliable was the diagnosis made by PW3, the Mityana clinical officer? He physically examined the patient at 4.00am and based on her history concluded that she had ISS and PCP. He confirmed that he never conducted any clinical tests to confirm his diagnosis. He did not have any clinical notes to back up his claim. Therefore how reliable is his conclusion on the cause of death. Does respiratory failure automatically imply that the patient has ISS and PCP? All these unanswered questions create doubt in the court’s mind as to the actual cause of the death of the Assured.

Some doubt was also raised in court’s mind as to the relevancy of the death certificate (PX 10) signed by PW3. PW3 told court that he was not responsible for any medical records and lack of documents in

Mityana hospital is not surprising since most times they lack stationary. He examined the deceased on the hospital bed and confirmed that she was dead and then went to theater to get death certificate forms and stamp and that was where they were kept. That the people who had brought the deceased wanted to take her and wanted proof of cause of death.

What exactly happened in Mityana hospital was not clearly proved from PW3 testimony. The evidence of DW3 clearly reveals this further. DW3. Nicholas Mwasame, an Advocate for the firm representing the defendant, informed court that he was instructed to verify the authenticity of a death certificate of Zabali Hadija. He wrote to Mityana hospital medical superintendent who wrote back stating that there were no records in their possession concerning a patient with the same names. Court took note of the fact that the letter from Mityana hospital marked Dx 8 is clear on the above issue of no records concerning the Assured but the hospital did not indicate that the deceased never died at their hospital. Nor do they state that the death certificate was not issued by the hospital.

The defendant argued that it was an imposter who signed the medical form and adduced evidence to prove that this signature was different from the one on DX1 the insurance proposal. Different signatures on documents also became an issue for court to inquire into. DW4. Sebuufu Erisa, hand writing expert compared the two questioned signatures and concluded that signatures on the two documents were different. However it was noted that “control sample” from which to make comparisons was rather limited since there were no samples of writings made by the Assured. He concluded in his report marked DX6 that

"in my opinion, it is most likely that the writer of a signature of the life to be assured marked xxx on exhibit A and a proposed insured signature marked xxxx on exhibit B is not the same person.

Therefore, though court found DW4's expert opinion reliable, it was not conclusive as to the fact that it was an impostor and not the Assured, who signed the medical examination form. More so, the chain of evidence as regards the said questioned document also leaves some reservations in the mind of the court. The document was in possession of the defendant. Court also notes that the signature on DX3 page marked 17b of Plaintiffs trial bundle, the word; “Zab” is

signed interestingly, alongside the date of 25/02/2013 and not on 5th February 2013 (which is the date the examination is said to have taken place). Court also notes that the medical examiner who signed and did not indicate the name did so on 6/2/2013. It was not possible for the imposter to have signed the said document on 25/02/2013. This corroborates PW2 testimony that he went with the deceased to clinic on 5th February. It is also not clear how the dates and signatures are totally different and how this could have escaped the attention of the defendant's due diligence team. It adds fuel to my belief that the level of negligence both in the management of the application process and medical examination is very high, making it more of a case of negligence rather than fraud.

Furthermore, DW2, the doctor who signed the medical examination form insisted that the letter from ICEA came after tests had been done. It is not clear how the Patient who was examined on 5th February signed on a date of 25th February 2013. Unfortunately that special letter that contains the Assured's photograph and indicates tests to be conducted were never adduced the court as proof of its existence. It would have helped the Defendant's prove their case better and clear up the doubts in court's mind especially as to when it was

received at the medical clinic.

Therefore, it should be noted that the burden of proof in civil cases, mostly rests on the plaintiff. However, in some cases such as this one where the gravity of the matter warrants, the burden of proof is weightier. See Lord Denning L.J in **Baxter v Baxter (1948) AC. 274**, where the guiding principle was set that **“In cases where something akin to a crime is alleged by the plaintiff, such as fraud or the forceful taking of property, something more than the mere balance of probabilities will be required.** Furthermore, in the case of **Robert Mugisha Vs Chartis (Uganda) (Formerly AIG (Uganda ltd) CS 190 of 2009** where the learned Judge reemphasized the Supreme Court decision in **J. W. R Kazzora Vs Ml S Rukuba SCCA No 13 of 1992 that the standard of proof relating to fraud is lighter than proof beyond reasonable doubt but heavier than a mere balance of probabilities.**

Bearing the above standard of proof in mind. As regards the first issue, I make the following conclusions.

1. There is no sufficient evidence adduced by the defendant to disprove the fact that it was the Assured who went for medical examination.

2. There is no clear and convincing medical evidence to prove the fact that the Assured died as a result of ISS and PCP
3. Impostor fraud has not been proved on a balance of preponderance to the satisfaction of the court.
4. There was no sufficient proof to convince the court that the Assured misrepresented and thus committed fraud.

For the above reasons, I find that defendant had failed to prove fraud and misrepresentation on part of the Assured and the plaintiffs who are beneficiaries of insurance policy and find in favour of the plaintiffs on the first issue.

Issue number two: Whether the defendant rightfully declined to honour the plaintiffs claim

DW1 also identified DX1, the proposal form that was signed on 4th February 2013. That the defendant have measures in place to ensure that the actual insurance proposer goes for the medical examination. That the proposer's passport photograph was on record. That the Assured signed DX1 proposal for life assurance. However court noted the fact that apart of PW2, the insurance commissioned agent, no one from the defendant's company ever met the Assured.

DW1 also informed court that the confidential letter to the doctor is taken by messenger service. The doctor before examining should confirm that the person being examined is the one to be insured and is the same as photo attached. It is

unfortunate that this letter was not produced as part of the defence documentary evidence.

As for justification for denying the claim, DW1 stated that;

- That person who went for medical examination and the one who died may not been the same person.
- That it was an imposter that signed the medical examination form
- That the two signatures, the one of proposal and medical examination form are different.
- That they looked at the signatures on proposal and medical examination form and saw they were different but went ahead to issue the policy.

However court also took note of the following facts

- That the Assured did not get copy of medical examination form.
- DW1 did not explain clearly how the assured came to sign the form on 25 February 2013 after going for medical examination on 5th February 2013
- None of the reports from Mityana hospital mention HIV/AIDs
- Defendant received claim in May 2013. However, there is no evidence of any investigation conducted by the Defendants then. Court also took note of the fact that it took over two years for the defendant through their

lawyers to verify records from Mityana hospital in 2015.

- The insurance policy was valid by time of the death of Assured

Furthermore, on why he did not pay the claim, DW1, stated that;

“We decided to consult the clinic where Zabali is purported to have gone for medical examination. A report from the clinic confirms that it was not possible for someone who was in perfectly good health to die of the above illness within three months. The attendants also confirmed that the person on the picture we had supplied them was different from the person who had undergone the medical examination. That process was very rushed and the letter to the clinic must have reached after the medical examination was carried out. ”

DW1 also identified letter from Mityana dated 24th April 2015, which indicate that Zabali may not have died from that hospital since no records existed. Court notes that the defendant waited for over two years to verify the death certificate, though DW1 informed court that they usually start investigations immediately. This contradiction, court also found peculiar.

The issue of inconsistency as to the age of the Assured and what happened at her death and even what happened to any written document made by the Assured was also an issue court had to consider. PW1 said it was her brother, who collected the body? In her witness statement, she said that the vehicle which took the

deceased to hospital came with the body but during cross examination said it was her brother. This was discredited by PW3, the Mityana hospital doctor who said that he hurriedly wrote death certificate because the vehicle that had brought patient was waiting to take body. Court noted that these were important inconsistencies which also do not help the plaintiffs case but these inconsistencies are not very major as to go to the root of the case. The root of the case is fraud and mistreatment in relation to the state of health of the Assured at the time of medical examination before the policy was issued. What happened before and after the death is relevant but not key particulars that establish elements of alleged fraud and misrepresentation during the contract formulation.

On a balance of probabilities, I find the following facts relevant in resolving this issue;

1. The fact that the Assured medical records indicated that she was in very good health in early February 2013.
2. In April 2013, her health status changed very rapidly and she died within hours of being admitted in Mityana hospital.
3. The Assured paid the premiums five days before she died and the insurance policy was valid and enforceable.
4. The assumed cause of death of the Assured was related to ISS and PCP which is sufficient to cause some degree of doubt as to her rightful health status three months ago,

prior to her death.

5. Lack of any medical records both in possession of the plaintiffs and the Mityana hospital where there is no evidence that the Assured was ever treated there. Court relied on the evidence of PW3, the doctor who treated the deceased there.
6. Only evidence linking the Assured to the hospital was the death certificate whose carbon copies are not traceable from the hospital or even any witness who saw or interacted with the Assured before she died.
7. Even the people who escorted her to hospital and even obtained the death certificate never testified in court.
8. The fact that due diligence was not carried out during the application process. The defendant admitted that effective measures were not strictly followed during medical examination.
9. Discrepancies in signatures of the Assured in the application documents.

I am also aware of the fact that a Judicial Officer only makes fair and just decisions based on law and evidence. A judicial officer is prohibited from making judicial decision based on fanciful theories, rumors, speculations and conjuncture (refer to Court of Appeal case **Mbabazi Rovence Natukunda and Louce Kahunda Vs Uganda. (Criminal Application Number 47 of 2012)**); where this trite law was re-emphasized.

Looking at all the relevant facts and bearing in mind that court should not involve itself in mental gymnastics. I find that to some extent, the defendants were justified to decline to honor the plaintiffs' claim however I am also convinced that there was negligence; on the part of the Louise Memorial medical clinic for not ascertaining the correct identity of the Assured before conducting medical tests and the apparent failure of the Mityana hospital medical team to confirm cause of death and produce proper records. This case proves the need for postmortem reports to ascertain correct cause of death especially for life insurance claims.

Evidence of cause of death of the Assured as argued by the defendant was that the deceased had ISS and PCP and thus had HIV/AIDS can only amount to speculation in the absence of clear and convincing scientific evidence.

The Defendant's right to investigate the claim is enforced by the insurance policy contract term (no 11) of "Indisputability Clause" which states that this policy is indisputable after having been in force for two years from the date of commencement of the assurance as stated in the schedule except on the grounds of fraud. This policy commenced on 5th February 2013 and claim was made on 2nd May 2013. Therefore the defendants were justified in deny claim for purposes of investigation. However failure to find fraud and misrepresentation conclusively, the defendants should have honored their obligations under the

contract.

Therefore I find in favour of the defendants on the second issue to the most extent.

Issue number three: What remedies are available to the parties.

The plaintiff prayed for the following remedies;

1. A declaration that the plaintiffs are entitled to immediate payment of the life insurance policy and payment of assured amount of 37, 233,355 Ug sh.
2. General and aggravated damages for breach of the insurance contract
3. Costs of the suit.

Though during the hearing and in submissions, the 1st plaintiff asked for special damages to cover expenses incurred in pursuit of this claim. However since the pleadings are silent on this, court will not consider the issue of special damages 'especially in light of the resolution of the second issue where this court has found that to some extent the defendant was justified in declining to honour the insurance claim.

Specific performance of the insurance contract was the first remedy prayed for. Based on the findings on issue one. The defendant have failed to prove fraud and misrepresentation on part of the assured and thus have to honour the insurance contract. Therefore court makes a declaration that the plaintiffs

are entitled to immediate payment on the assured amount to the tune of 37,233,355 Ug sh. This sum is to incurred interest of 8% per annum from the May 2013 when claim was made until payment in full.

Whether the plaintiffs are entitled to general and aggravated damages. In Hall brothers SC Co ltd Vs Young (1939) 1 KB 748, principles of awarding damages was outlines. The court held that... “General damages are awarded so as to put the plaintiff in the same or as near as possible a position he would have otherwise be in if the wrong complained had not been done”.

Court is also guided by the common law doctrine of restituo in integrum. Court must award damages for breach of contract with the object of compensating the plaintiff for his or her loss. Refer to cases of Dharamshi Vs Karan. (1974) EA 41 and Uganda Telecom vs Tanzanite Corporation (2005) EA 351.

The plaintiff has not proved how they suffered loss that cannot be compensated by enforcement of the insurance contract with even a provision for interest. Therefore this court makes no orders for general damages.

Court also orders that costs incurred in seeking legal redress be awarded to the plaintiffs.

Therefore I find in favour of the plaintiffs and make the following orders.

1. Order that the defendant pays the claim of Ug Sh 37,233,355 with interest rate of 8 % from May 2013 until payment in full.
2. The defendant pays the plaintiff costs at interest rate of 7 % from date of judgment until payment in full

Parties informed of their right of appeal within 30 days.

So ordered

Elizabeth Jane Alividza

16th march 2016

Plaintiff absent

Counsel for Plaintiff Absalom Mubangizi in Court

Defendant representatives in Court

Counsel for Defendant Rebecca Nakiranda in Court

Court Clerk: Mabel Kirabo

Court: Judgement read in open court

Lady Justice Elizabeth Jane Alividza

16th March 2016