



Doa Doa Tented Camps and Lodges Limited v Jubilee Insurance Company Kenya Limited (Civil Suit 14 of 2020) [2023] KEHC 18622 (KLR) (24 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18622 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL SUIT 14 OF 2020
SM GITHINJI, J
MAY 24, 2023**

BETWEEN

DOA DOA TENTED CAMPS AND LODGES LIMITED PLAINTIFF

AND

JUBILEE INSURANCE COMPANY KENYA LIMITED DEFENDANT

JUDGMENT

- 1 The plaintiff instituted this suit *vide* a plaint dated August 19, 2020 supported by the witness statements of Mr Philemon Mwakilulu Mwavala a director of the plaintiff's company, Mr Michael Mbuu Chege and Danson Mwandango Kaba. The plaintiff seeks the following orders inter alia;
- a. A declaration that the defendant has breached the insurance policy cover P/MSA/1010/2014/14578 and the defendant is contractually entitled to indemnify the plaintiff against all the loses and damages which occurred on April 14, 2018 and April 24, 2018 to the plaintiff's insured business.
 - b. Damages for breach of contract.
 - c. An order compelling the defendant to indemnify the plaintiff a sum of Kshs 35,243,145/- with regard to the plaintiff's claim No C/MSA 1010/2018/10266 on the loss which occurred on the April 24, 2018 at the plaintiff's insured business.
 - d. An order compelling the defendant to indemnify the plaintiff a sum of Kshs 378,600 with regard to the plaintiff's claim No C/MSA/1010/2018/10235 on the loss which occurred on April 14, 2018 at the plaintiff's insured business.
 - e. Costs of this suit and interests thereon at court rates.
 - f. Any other just and equitable relief as this court may deem appropriate.



- 2 The defendant was served with summons to enter appearance and all accompanying pleadings but they did not enter appearance and file a statement of defence. The plaintiff requested that interlocutory judgment be endorsed after the defendant failed to enter appearance. Vide a court order dated November 17, 2020, interlocutory judgment was entered against the defendant. The matter proceeded by way of formal proof on December 14, 2020 with the plaintiff calling three witnesses to testify. Upon the close of the plaintiff's case, the plaintiff filed written submissions. Judgment was delivered in favour of the plaintiff on May 17, 2021.
- 3 On June 7, 2021, the defendant filed a notice of motion seeking among other prayers, setting aside the *ex parte* judgment delivered on May 17, 2021. On August 19, 2021, the court delivered its ruling in respect of the notice of motion dated June 7, 2021 and issued orders that the *ex parte* judgment be set aside and the matter be re-opened for hearing afresh and determination on merit. Consequently, the defendant filed its defence and counter claim dated September 3, 2021.

The Plaintiff's Case

- 4 The plaintiff, a hotelier was operating a business in the name of Doa Doa tented Camp and lodges situated off Tsavo East Road within Galana Ranch Ecosystem Malindi in Kilifi county. On or about the year 2014, the plaintiff entered into an agreement with the defendant for insurance of the business *vide* insurance policy No 1010/2014/14578 for various policy covers including Fires and Allied Perils for a sum of Kshs 53,400,000/= through its appointed Insurance Broker Liaison Insurance (I.B) Limited. The plaintiff had been taking insurance policies and/or covers from the defendant since the year 2014 to 2016 when the plaintiff took a deliberate break on the insurance cover due to the low tourism business which facts were well explained to the defendant.
- 5 On April 9, 2018 after full and material disclosure to the defendant with regard to the risks of the insured premises, the plaintiff reinstated its said insurance policy cover under policy No P/MSA/1010/14578. The plaintiff fulfilled his part of the bargain by paying premiums and the said policy was to run up to around April 9, 2019.
- 6 On or about April 14, 2018 while the plaintiff's camp was validly covered under the said policy by the defendant, and the camp occupied by guests, there were strong winds at around 3.28 am which collapsed a tree occasioning damages to the plaintiff's two tents, guest houses and furniture. Particulars of the alleged damage are set out under paragraph 7 of the plaint.
- 7 The defendant was notified of the said loss by the plaintiff under claim No C/MSA 1010/2018/10235. The defendant then instructed General Loss Adjusters Kenya Limited to carry out a loss assessment leading to two reports dated June 29, 2018 referred to as the final report and July 16, 2018 referred to as the addendum report. The addendum report assessed the loss of April 14, 2018 at Kshs 378,600 which the insurance, that is the defendant was obligated to pay. Vide a letter dated September 14, 2018 by the defendant to the plaintiff's insurance brokers, the defendant committed to pay the said amount of Kshs 378,600. The plaintiff then signed a discharge voucher on March 29, 2019 accepting the compensation of Kshs 378,600 in respect of the loss that occurred on April 14, 2018.
- 8 Further on April 24, 2018 while the camp was still validly insured by the defendant and while still operational, it was wholly extensively destroyed by floods occasioned by heavy rainfalls which were being experienced in the month of April 2018. As particularized under paragraph 10 of the plaint, the following damages were occasioned.
 - i. 16 units of canvas tents covered with makuti, 14 staff quarters of makuti decoration, 2 bungalows of makuti decoration and the restaurant block.



- ii. Damage to machinery.
 - iii. Damage to furniture, fixtures and fittings.
 - iv. Damage to fridges and kitchen equipment.
- 9 The plaintiff *vide* claim No C/MSA/1010/2018/10266 notified the defendant of the loss suffered on April 24, 2018. The defendant instructed general adjusters Kenya limited to carry out a loss assessment. They did and prepared a report dated August 20, 2018 quantifying the loss at Kshs 35,243,905/= which amount the defendant was obligated to pay as the insurer.
- 10 The defendant failed to compensate the plaintiff of its losses which led to the plaintiff writing to the Insurance Regulatory Authority seeking the authority to compel the defendant to make good the plaintiff's claim. The authority initiated an arbitration between the plaintiff and the defendant with regard to the plaintiff's claim.
- 11 The plaintiff contends that despite having written to the insurance through its insurance brokers and attempted arbitration by the Insurance Regulatory Authority, the defendant has not made good the plaintiff's claim necessitating these current proceedings.

The Defendant's Case

- 12 The defendant filed a defence and counterclaim stating that the defendant issued the plaintiff with policy No P/MSA/1010/2014/14578 against fire and allied perils which conditions and terms are as per the policy and further as per paragraph 3 of the defence and counterclaim.
- 13 It was further averred that the plaintiff renewed the policy for the years 2015 and 2016 but did not renew the policy for the year 2016 to 2018.
- 14 The defendant stated that on April 9, 2018 the plaintiff through their appointed insurance broker gave renewal instructions on existing basis. However, the plaintiff did not give full and material disclosure with regard to the risks of the insured premises and or amenities. Further, the defendant denies that the plaintiff fulfilled its obligations under the insurance cover by paying the insurance premiums to the defendant. Additionally, the defendant states that it informed the plaintiff's insurance brokers that the policy liability could not attach because the plaintiff had breached the policy of utmost good faith in that it was guilty of non -disclosure as set out in paragraph 7 of the defence and counterclaim.
- 15 In the counterclaim, the defendant seeks the following;
- a. A declaration that the plaintiff breached the terms and conditions of the insurance policy with the defendant.
 - b. A declaration that the defendant is not liable to compensate and/or indemnify the plaintiff against the losses and damages that occurred on 14th and April 24, 2018 because the plaintiff breached the terms and conditions of the insurance policy.
 - c. A declaration that the defendant is entitled to avoid liability under the insurance policy with the plaintiff on the ground that the plaintiff breached the terms of the insurance policy.
 - d. Costs of the suit and interest at court rates.
- 16 At the hearing, four witnesses testified in support of the plaintiff's case while one witness testified for the defendant.



- 17 PW-1 Philemon Mwakilulu Mwavala the owner of the plaintiff company adopted his witness statement dated August 19, 2020 as his evidence in chief. He adopted as Pex 1 to 27 a bundle of documents as per the list of documents dated August 19, 2020 and Pex 28 to 32, a bundle of documents as per the further list of documents filed on March 14, 2022.
- 18 He testified that prior to April 9, 2018 the camp was operational. That since 2014 it was under the cover by the defendant which was renewed on April 9, 2018 and on both April 14, 2018 and on April 23, 2018 it was still covered. He told the court that the defendant had not compensated the plaintiff following the perils and sought that the court order the plaintiff be compensated to mitigate its losses.
- 19 On cross examination by Mr Mugambi for the defendant, he told the court that the first loss was incurred on October 14, 2018 which was after 5 days of the reinstatement of the cover. He stated that on April 24, 2018 he reported that the camp had been swept by floods. He also told the court that he pays for the premiums of the cover through Liaison Insurance Brokers by way of cheques. Further, that he is obliged to do some activities to mitigate losses and the area was assessed and they were compliant but no measures were taken concerning floods as there was no recommendations.
- 20 PW-2 Danson Mwandogo Kaba the Regional Manager coastal region for Liaison Insurance Broker adopted his witness statement dated August 19, 2020 as his evidence in chief and relied on the documents produced by PW1. He told the court on cross examination that the plaintiff paid for premiums by way of cheques which the brokers paid to the defendant on April 10, 2018.
- 21 PW -3 Michael Chege Mbuu Customer Service Officer for Liaison Insurance Company adopted his witness statement dated August 19, 2020 as his evidence in chief and relied on the documents produced by PW1. He added that a claim was lodged and not paid which issue was arbitrated by the Insurance Regulatory Authority and still was not paid. He told the court that he participated in the arbitration proceedings and the findings were that there was no reason for the policy to be declined by the defendant and they were to pay but did not pay.
- 22 On cross examination by Mr Mugambi counsel for the defendant, he stated that conditions and clauses No 10049 states that there must be full payment for the policy to which the plaintiff paid to them and they forwarded the payment to the defendant.
- 23 PW -4 Allan Otieno Otura a loss adjuster employed by General adjusters Kenya Limited told the court that he made a report dated June 29, 2018 and two other reports upon appointment by the defendant. He stated that on April 11, 2018 they received a case of wind damage at Doa Doa Camp to which they attended on April 18, 2018. Their findings were that some trees had fallen down out of strong winds falling on two or three tented rooms to which two rooms were damaged. He added that the camp was operational then. They then quantified the loss and made an initial report dated April 23, 2018 and advised that a reserve of Kshs 1,500,000 be maintained in relation to the incident. He added that in the final report dated June 29, 2018, they adjusted the amount to Kshs 1,373,600 and they were to find out whether there was a breach and there wasn't a breach in terms of the insured. Further, he did an addendum report dated July 16, 2018 in relation to the wind incident and made an adjustment to the sum of Kshs 378,600 and recommended settlement of that amount to discharge the claim which report was not contested by either party.
- 24 As regarding the floods, his testimony was that on August 20, 2018 they did a final report. He testified that he had visited the camp on May 2, 2019 which was inaccessible by road due to the floods and had to use a helicopter from Voi airstrip. He told the court that the structures were flooded and some had been fallen by water pressure. He added that the claim adjustment was from 64,815,207 to Kshs 35,000,000 and they recommended a payment of Kshs 35,263,311 and that there was no



breach of the policy. Additionally, he indicated in the report that such a flood was experienced last in 1957 which information was provided by the meteorological department and the history of rainfall in Kenya. Further, that the flooding was abnormal. He added that the figures were not contested by the defendants.

- 25 Dw-1 Linus Pius Omondi the non motor claims manager for the defendant adopted his witness statement dated November 2, 2021 as his evidence in chief. He produced as Dex 1-4 a bundle of documents as per the list of documents dated October 28, 2021. He told the court that the defendant did not compensate the plaintiff due to policy breach by the plaintiff and one such breach was none payment of premiums by the time of the loss. He told the court that Pex 23 is an endorsement note dated April 23, 2018 issued by the defendant effective from April 9, 2018 to April 19, 2019. He added that the endorsement note is subject to payment of premiums. Further, they have debit notes which are a demand for payment and once payment is made, an official receipt is issued to confirm payment of premiums.
- 26 He told the court that when the claim was made they accepted to meet the first loss but declined to cover the second loss. He further stated that the plaintiff did not act in good faith because by the time they were taking the cover there were floods in other parts of the country and the plaintiff did not take any measures to mitigate the effects of the floods.
- 27 On cross examination by Mr Mbura counsel for the plaintiff, he told the court that it was not in contention that the plaintiff was insured by the defendant. He stated that *vide* policy number 1010/2014/14578 the cover was for fire and other perils which policy was effective from 2014 to 2016. Additionally, that floods, fire, wind and other cause of damage (Natural) had been covered. It was his testimony that the policy was renewed by the defendants on April 9, 2018 subject to terms and conditions existing in 2016 through Liaison Insurance Brokers and *vide* debit M017592. He confirmed that payments were made through the broker and Pex 3 indicates that it takes effect upon payment of premiums. He confirmed that no demand was ever issued to the plaintiff for payment of premiums. He also confirmed that they had instructed a loss adjuster to visit the camp following the loss. Further, that as per Pex 2 there was a discharge voucher for payment of Kshs 378,600 and the defendant had not raised an issue of non-payment of premiums.
- 28 It is also his testimony that on April 24, 2018 there was a loss occasioned by floods which is a peril covered under the policy and a loss adjuster was sent to the camp and made a report which is Pex9 and the defendant never raised an issue for non-payment of premiums.

Submissions by the Parties

The plaintiff's submissions

- 29 The plaintiff frames the following issues for determination;
1. Whether there was a valid insurance cover, whether the claim arose during the period of the cover, whether the defendant breached the insurance cover policy and whether the plaintiff is entitled to compensation.
 2. Whether the plaintiff is entitled to damages for loss of business due to the defendant's breach.
 3. Who is to pay the costs of the suit.
- 30 The plaintiff submits that on whether there was a valid cover and consequent breach, that is not in doubt as the plaintiff was insured by the defendant and had been paying its premiums from the year 2014 to 2016. That thereafter the plaintiff had taken a deliberate break before resuming its renewal



of policy on April 9, 2018. The said renewal was in line with the principal of uberrima fides. The plaintiff referred to the authority by this court *Imara Steel Mills Ltd v Heritage Insurance Co Kenya Ltd & 38 others* [2016] eKLR.

- 31 The plaintiff submits that at the time the two losses occurred, the policy cover was in force and valid. That upon the losses the defendant was informed and appointed a loss adjuster to assess the losses.
- 32 The plaintiff submitted that the plaintiff's claims were encompassed under section 2 clause 1 of the policy and that there was privity of contract between the plaintiff and the defendant with regard to the subject of the insurance policy.
- 33 The defendant failed to compensate the plaintiff of its losses despite several reminders from the plaintiff and the attempted arbitration by the Authority.
- 34 On whether the plaintiff is entitled to damages for loss of business due to the defendant's breach, the plaintiff submitted that the camp was operational at the time when the subject losses occurred. The plaintiff also produced exhibit No 19 the staff payroll and exhibit 24 being suppliers invoice as proof that the camp was operational. The camp ceased operating after the two losses thus losing business. In assessing general damages and loss of business, the plaintiff relied on the authority of *Samuel Kariuki Nyangoti v Johaan Distelberger* [2017] eKLR where the learned judges cited the case of *Jebrook Sugarcane Growers Ltd v Jackson Chege* Busi civil appeal No 10 of 1991 (Kisumu)(unreported).
- 35 On who is to pay for the costs of suit the plaintiff submitted that they do recognize that an award of costs is discretionary in nature and urged the court to exercise it judiciously. They relied on the authority of *Peter Gichibi Njuguna v Jubilee Insurance Co Ltd* [2016] eKLR.

The defendant on their part submitted that the single most issue for determination is whether the defendant is entitled to repudiate the insurance policy with the plaintiff on grounds that the plaintiff breached the terms of the insurance policy. It was submitted that the plaintiff did not give full and material disclosure regarding the risks of the insured premises which is not in line with the conventional principles of full disclosure of all material facts and good faith. They referred the court to the authority of *Co-operative Insurance Company Ltd v David Wachira Wambugu* [2010] eKLR.

- 36 Counsel for the defendant submitted that the principle of good faith was overreached by the plaintiff as it is suspicious that the plaintiff took a break of about one and half years and when the cover was renewed it reported a minor loss five days later and then a major loss 15 days later. Further, that on a balance of probabilities, the plaintiff was aware of the impending floods but deliberately failed to disclose this fact to the defendants so as to hoodwink the defendant to issuing a cover for an event the plaintiff had foreseen.
- 37 It was further submitted that the plaintiff did not fulfill its obligation of paying premiums as there was no evidence provided by the plaintiff in the form of a receipt acknowledging such payment. They referred the court to the authorities of *Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Company Ltd* [2004] eKLR, *Liki River Farm Limited v Tausi Assurance Co Ltd* [2018] eKLR and *Insurance Company of East Africa v Marwa Distributors Limited* [2015] eKLR. They urged the court to find that the plaintiff had not fulfilled its obligations of paying premiums.

Analysis and Determination

- 38 I have evaluated the pleadings before me, the evidence and the in depth submissions by the parties. I will combine the issues for determination framed by the parties and address them as hereunder;



1. Whether there was a valid insurance cover.
2. Whether the claim arose during the existence of the cover,
3. Whether the plaintiff breached the insurance cover policy and the same should repudiate.
4. Whether the plaintiff is entitled to compensation.

39 The plaintiff took out an insurance cover with the defendant first in the year 2014 for cover including fires and allied perils for a sum of Kshs 53,400,000 under policy No 1010/2014/14578. The plaintiff fulfilled its obligations by paying its premiums up to the year 2016 when it took a deliberate break owing to slow business that rocked the tourism sector, a fact which was well made known to the defendant.

40 On or about April 9, 2018, the plaintiff resumed its cover which was expected to run for one year up to around April 9, 2019 under policy No 1010/2014/145758.

41 The defendant does not deny that it issued the said cover to the plaintiff on April 9, 2018 through their appointed insurance broker. On this limb, it is my finding that there was a valid insurance cover. In addition, it is also not disputed that the two losses occurred during the existence of the cover and thus I find no reason to depart from the same.

42 The issue however in contest is that there was no full and material disclosure before the issuance of the policy. The defendant further seeks to repudiate the cover on grounds that premiums were not paid. The defendant further accuses the plaintiff of overreaching the principle of good faith on grounds that the losses occurred five and fifteen days after the cover had been take out. The defendant has also alleged that on a balance of probabilities, the plaintiff was aware of the impending floods but failed to disclose this to the defendant. PW1 on cross examination told the court that he is obliged to put in measures to mitigate losses but they had not put any measure to mitigate floods as there was no recommendation. PW4 on cross examination stated that in the report dated August 20, 2018 they had indicated that the last time such floods were experienced was in the year 1957, which information was obtained from the meteorological department and the history of rainfall in Kenya. On the available evidence I disagree with the defendant that the plaintiff on a balance of probabilities was aware of the impending floods.

43 Moreover, the defendant had covered the plaintiff before, and was well aware of the existing risks. In my view, I would term the unfortunate occurrences as natural and unusual; an act of God.

44 [Black's Law Dictionary](#) defines act of God as:

“An overwhelming, unpreventable event caused exclusively by forces of nature, such as earthquake, flood or tornado. The definition has been statutorily broadened to include all natural phenomena that are exceptional, inevitable and irresistible, the effects of which could not be prevented or avoided by the exercise of due care or foresight.”

45 In Jill M. Fraley in his article, “[Re-examining Acts of God](#)”, (2010) Pace Environmental Law Review, Vol 27, in replying on the definition by congress in several statutes in the United States of America propounds that:

“[A] Act of God is “an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight.” This definition includes multiple elements: (1) “natural” causation; (2) a lack of foreseeability; (3) that “nature” must be the exclusive or sole cause; and (4) the effects must not have been preventable by



reasonable due care or foresight of the defendant. While the concept of acts of God cannot be reduced to simply the idea of “forces of nature,” acts of God are understood to be a subset of these, thereby immediately raising the question of which acts are natural and which are human.”

46 My view is guided by the finding in *Ryde v Bushell & another* (1967) EA 817 the East African Court of Appeal held as follows: -

- i. “The plea of Act of God is available to relieve a defendant from liability for damages suffered following the performance of part of his obligation and not merely to absolve the person from the performance of an obligation;
- ii. Nothing can be said to be an act of God unless it is proved by the person setting up the plea to be due exclusively to natural causes of so extraordinary a nature that it could not reasonably have been foreseen and the results of which occurrence could not have been avoided by any action which should reasonably have been taken by the person who seeks to avoid liability by reason of the occurrence.”

47 Furthermore the plaintiff did give full material disclosure in good faith of the risks with regards to the premises under the principle of uberrima fides which is stated in the case of *Imara Steel Mills Ltd v Heritage Insurance Co Ltd* (supra).

48 On the issue of unpaid premiums, the defendant has maintained that the plaintiff did not pay any premiums. PW1 in his testimony testified that he paid all his premiums dutifully to the insurance broker through both current and post-dated cheques. His testimony was corroborated by PW2 and PW3 who testified that they had received cheques from the plaintiff for payment of the premiums which were forwarded to the defendant on April 10, 2018. Dw2 also conceded that there was no demand issued to the plaintiff for payment of the premiums. From the evidence, notable is that the issue of non-payment of premiums was never raised when the claims were laid against the defendant. Thus, my finding is that the plaintiff did pay the premiums as was obligated and was not in any breach so as to warrant repudiation of the cover.

49 The plaintiff tendered evidence before this court showing that the defendant was notified of the two incidences when they happened. The defendant on both occasions appointed a loss adjuster (General Adjusters Kenya Limited) to carry out a loss assessment and quantify the losses. The adjuster prepared reports in both cases which were presented to the defendant.

50 In regards to the loss of April 14, 2018, the defendant through the insurance broker, wrote to the plaintiff committing to pay a sum of Kshs 378,600 as had been assessed. However, this did not materialize despite the defendant having had the plaintiff sign a discharge voucher for the same. The plaintiff then wrote to the Insurance regulatory authority who arbitrated the matter and held that the defendant should compensate the plaintiff. This position was solidified by PW3 who testified that he was in attendance in the arbitration proceedings

51 The twin issues arising herein are that the fact that the defendant had a loss adjuster assess the two losses, shows that the defendant must have ascertained that there was a contract existing at the time of the subject losses. Secondly this matter was arbitrated by the Insurance Regulatory Authority, a body best placed to arbitrate such claims. Further, the defendant did not at any point dispute the said losses at both instances. The defendant even committed itself to paying the first loss and even issued a discharge voucher to the plaintiff which remains unfulfilled.



52 Flowing from the foregoing, It's vivid that the plaintiff was validly covered by the defendant and the same was liable for compensation of the loss suffered as guided by the loss adjustment reports. Indemnity and a right to recover must be commensurate with the loss actually sustained by the insured. In this regard, I am guided by the case of *Crisp v Security Nat'l Ins Co*, 369 SW 2d 326 (1963), where the court stated that

“Indemnity is the basis and foundation of insurance coverage not to exceed the amount of the policy, the objective being that the insured should neither reap economic gain or incur a loss that is adequately insured.

...The measure of damage that should be applied in case of destruction of this kind of property is the actual worth of value of the articles to the owner for use in the condition in which they were at the time of the fire excluding any fanciful or sentimental considerations”

53 The plaintiff claims for damages for breach of contract. This was extensively discussed in their submissions that following the closure of the camp, the plaintiff lost business. These damages fall under the ambit of general damages. The plaintiff demonstrated to the court that the camp was operational at the time of the two losses. PW4 confirmed as much in his testimony stating that during the first loss assessment, he took lunch there and there were tourists present as well. After the floods, the camp ceased its operation. The plaintiff projected a total loss of Kshs 104,664,208 for the year 2018, 2019 and 2020. The claim for General damages is a rather delicate one which one ought to approach with caution. It may present the notion of double compensation having awarded loss herein. That notwithstanding, I am of the view that this was a business and its closure must have led to damages. Would it have been operational; probably would have raked profits. The plaintiff proposes the sum of Kshs 104, 664, 208. The defendant has not addressed me on this issue. The sum projected by the plaintiff has not been backed by previous financial statement of what the hotel made. Taking this into account and the fact that there was a pandemic in the year 2020, one would not be sure of how much the plaintiff would have realized as profit. Nonetheless, as earlier on stated, the business would have been functional had it not closed. I however find the claimed sum of Kshs 104, 664, 208 to be on the higher side considering the unpredictability of the economic times. As such, I award as general damages Kshs 50,000,000/=. In so determining, I have considered the finding in *Samuel Kariuki Nyangoti v Jobaan Distelberger* (supra) where the judges in the court of appeal cited the case of *Jebrook Sugarcane Growers Co Limited v Jackson Chege Busi*, civil appeal No 10 of 1991 (Kisumu) (unreported) the court in allowing the claim for general damages and loss of user of a lorry relied on p226 para 394 of *Halsbury's Laws of England* Vol 11 3rd Edition which stated;

“the fact that damages are difficult to estimate and cannot be assessed with certainty or precision does not relieve a wrong doer of the necessity of paying damages for his breach of duty and is no ground for awarding only normal damages... where it is established, however, that damage has been incurred for which a defendant should be held liable, the plaintiff may be accorded the benefit of every reasonable presumption as to the loss suffered. Thus, the court or a jury doing the best that can be done with insufficient material may have to form conclusions on matters on which there is no evidence and to make allowance for contingencies even to the extent of making a pure guess...”

54 Accordingly, judgment is entered in favour of the plaintiff in the following terms;

- a. A declaration that the defendant has breached the insurance policy cover P/MA/1010/2014/14578 and the defendant is entitled to indemnify the plaintiff against all the



losses and damage which occurred on April 14, 2018 and April 24, 2018 to the plaintiffs insured business as stipulated in the terms of the policy.

- b. An order is hereby issued compelling the defendant to indemnify the plaintiff in the sum of Kshs 35,243,145.00 with regard to plaintiff's claim No C/MSA/1010/2018/10266 on the loss which occurred on April 24, 2018 at the plaintiffs insured business.
- c. An order is hereby issued compelling the defendant to indemnify the plaintiff a sum of Ksh 378,600 with regard to plaintiffs claim No C/MSA/1010/2018/10235 on the loss which occurred on April 14, 2018 at the plaintiffs insured business.
- d. General damages for loss of business in the sum of Kshs. 50,000,000/= be paid to the plaintiff by the defendant.
- e. The defendant's counter-claim fails and is hereby dismissed.
- f. The defendant shall bear the costs of the suit and interest.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 24TH DAY OF MAY, 2023

S.M. GITHINJI

JUDGE

In the Presence of; -

Miss Mulwa holding brief for Mr Kilonzo for the Plaintiff

Ms Lelu for the Defendant

Ms Lelu; -We pray for 30 days Stay of Execution to seek instructions from the client.

Ms Mulwa; -We request for a copy of judgement. We oppose the 30 days stay. They can file a formal application and give security for the stay.

Court; - 30 days stay of execution is granted.

