



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL CASE NO. 16 OF 2011**

FUAD MOHAMOUD MOHAMED.....PLAINTIFF

VERSUS

DIAMOND TRUST BANK KENYA LIMITED.....DEFENDANT

CONSOLIDATED WITH MOMBASA HCCC NO. 72 OF 2012

FAUD MOHAMOUD MOHAMED.....PLAINTIFF

VERSUS

DIAMOND TRUST BANK KENYA LIMITED.....1<sup>ST</sup> DEFENDANT

DIAMOND TRUST INSURANCE AGENCY LIMITED ....2<sup>ND</sup> DEFENDANT

**JUDGMENT**

**Introduction**

1. The two suits above were ordered consolidated on the 5/7/2012 and upon such consolidate the plaint in HCC 72 of 2012, the subsequent suit, amended to have a single set of pleadings and prayer. To the amended plaint the 1<sup>st</sup> defendant did file an amended statement of defense and defense to counter claim which I also deem to have subsumed the defense filed in the earlier suit. The consequence is that I will apply the evidence tendered and give a single judgment, without having to consider the pleadings in the two separate suits.

**The pleadings filed**

2. The plaint as amended seeks to challenge the legal charges created over property known as **Plot No. 3470/Sec 1/MN and Kwale/Tiwi/2394** to secure the borrowing of the plaintiff from the defendant in the sum of Kshs. 35,000,000 and proposed to help his further development of plot No. 3420/Section 1/MN. The plaintiff contends and pleads that having complied with the terms of borrowing prescribed and imposed by the 1<sup>st</sup> defendant he was comforted and legitimately expected, upon the facility being disbursed, that all the terms had been fulfilled including procurement of an insurance policy for Contractors All Risk Policy during the period of construction.

3. The complaint is that when the building collapsed while under construction, the defendants then said and contended, while declining to compensate the plaintiff that the insurance cover taken did not cover contractor's risk. The plaintiff contends that in doing so the first defendants had visited harm, damage and loss upon him by misrepresentation that a valid insurance had been procured. In addition, and alternatively the plaintiff contends that both defendants had handled his insurance claim negligently. There were then pleaded the particulars of both misrepresentation and negligence all underscoring the fact that the property insured was and would have been a cover regarding construction and was known to both defendants.

4. As a result of the loss resulting from failure by the defendants to compensate the plaintiff, the plaintiff makes a claim for recovery of the sum of Kshs. 103,000,000 as the loss suffered, Kshs. 2,317,500 being general damages for lost income from rentals, a declaration that the notification of sale dated 23/5/2011 was invalid and unlawful and that the right to realize the security had not accrued together with a permanent injunction to stop the sale of LR. NO. 3420, Section 1 MN.

5. The amended plaint was grounded on the witness statement by the plaintiff dated 14/8/2004 the list of documents filed earlier and a further list of documents and a consolidated list of witnesses.

**Pleadings by 1<sup>st</sup> defendants.**

6. The first defendant initially filed a statement of defense and counterclaim dated 6/6/2012 but amended on the 27/01/2016. There was also filed a list of witnesses and witness statement of one Lwanga Mwangi dated 27/1/2016 which made reference to and annexed some 19 documents contained in its bundle of documents in opposing the claim by the plaintiff and grounding the counter-claim by the first defendant. There was also supplementary list of witness containing the statement of one Amaan Kassam filed on 28/02/2019.

7. The position taken in the said documents is that whereas the plaintiff and the defendant had in fact contracted as a banker and a customer and executed several security documents culminating in the further charge dated the 25/01/2011, the plaintiff did not meet its obligation under the said lending contract and ran into arrears of paying the covenanted installments thus entitling the 1<sup>st</sup> defendant to recall the facility by serving the requisite statutory notices upon the plaintiff and a notification of sale being served upon the plaintiff's son, one Mr. Kassim Faud as the plaintiff was said to have been outside the country. Further notification was served upon the plaintiff by way of registered post upon a postal address known to the defendant. In essence the 1<sup>st</sup> defendant say the plaintiff was always in default and it is untrue that the relationship was smooth till the building collapsed.

8. For the 2<sup>nd</sup> defendant, a statement of defense was filed in which the plaintiff was described as vague and contradictory, failing to make a concise claim against the 2<sup>nd</sup> defendant as thus reveals no cause of action. The allegation by the plaintiff at paragraphs 2 – 22, 25 – 29 were termed strange deserving no comment but strict proof being invited. That the 2<sup>nd</sup> defendant is a subsidiary of the 1<sup>st</sup> defendant was admitted and it was emphasized that both have separate and distinct legal personalities and that the relationship between it and the plaintiff was that of an insurance agent and an insured for purposes of procuring for the plaintiff an insurance cover from Jubilee insurance company of Kenya Ltd and that through it the plaintiff obtained an insurance cover from that underwriter.

9. The 2<sup>nd</sup> defendant asserts that before settling on the cover to be procured it did, forward to the plaintiff two quotations being Fire and Allied Perils as well as Contractors' All Risk but the plaintiff opted for the former over the later having failed to exercise good faith by deciding that he was undertaking construction on the property and that the maximum sum assured was kshs. 30,800,000.

10. In response to paragraph 28, 29 and 30 of a plaintiff the 2<sup>nd</sup> defendant denied the particulars of misrepresentation and negligence and termed same baseless in law, frivolous and vexatious in that the cover was procured by the plaintiff and not the defendant and states that the claim was grounded upon misunderstanding of the law and that the 2<sup>nd</sup> defendant did not owe to the plaintiff any duty of care in that it was not privy to lending terms of the 1<sup>st</sup> defendant and was not notified of the state of construction on the property and that its instructions from the bank and the plaintiff were captured with leading to the plaintiff executing the policy provided and thus the plaintiff estopped from saying it otherwise. It was then added and admitted that the building indeed collapsed on the 18/4/2011 and that the fact was duly communicated to the insurer and the 1<sup>st</sup> defendant. In the same vein, the defendant pleaded that after the collapse of the building, the plaintiff completely demolished the remnants with the purpose and intent to obstruct investigations with respect to the collapse so as to maintain a false claim under *contractors all risks* cover which it did not have.

11. The loss as calculated and made by the plaintiff was denied it being asserted that the claim by the loss adjuster was no more than 82,129,963 which was recommended as not payable because the peril was never insured. The plaintiff claim was further denied in total it being pleaded on one hand that the 2<sup>nd</sup> defendant was an agent of disclosed principal and on the other hand, and very ominously, that it was never an agent of the plaintiff. The 2<sup>nd</sup> defendant thus prayed that the plaintiff suit against it be dismissed with costs.

12. Further to the said defense, the defendant filed a list of documents containing some 8(eight) documents including the insurance premium finance agreement endorsement in the name of the plaintiff, correspondence between the parties as well as the report from **General Adjuster Kenya Ltd** dated 12/9/2011. Two witness statements were filed by Benard Kiarie, the principal officer of the defendant and his successor one Tazim Vassani the Principal Officer at the time the matter proceeded in court. That statement was proposed to substitute that by the former Principal Officer who was said to have left employment. The evidence was led by the latter who joined the 2<sup>nd</sup> defendant in the year 2018.

13. The gist of that statement, as was adopted as evidence in chief, was that the involvement by the 2<sup>nd</sup> defendant was merely for purposes of procuring the insurance cover being an insurance agent but it was never involved in the day to day activities of the 1<sup>st</sup> defendant; that the approach was by the plaintiff and that the 2<sup>nd</sup> defendant indeed gave to the plaintiff two quotations as pleaded in the defense and the plaintiff on own discretion chose fire and allied perils policy and a sum assured of Kshs. 30,800,000.

14. It was asserted that the 2<sup>nd</sup> defendant was never updated on the state of construction on the property for which reason no liability ought to attach upon it. When the building collapsed, the 2<sup>nd</sup> defendant averred, a claim was lodged with the insurer and was registered which resulted in investigations by general adjuster Kenya Ltd, who assessed the loss at kshs. 82,129,963, which it however recommended as unpayable and the claim was repudiated.

15. At the conference with counsel, it was directed that only witnesses who had filed and served witness statements would attend court to give evidence by adopting the statements filed as evidence in chief and producing the document related therewith and thereafter being cross examined. It was also agreed by consent that HCC No. 72 of 211 which had been dismissed be reinstated and that all documents be produced by consent. Pursuant to those directions, the plaintiff testified as the only witness on his side while the defendant each called a witness.

#### **The plaintiff case:**

16. The foundation of the plaintiff's case was that being a customer to the first defendant, it sought and was granted a financial accommodation in the sum of Kshs. 30,800,000 to be secured by a further legal charge over two properties but upon conditions precedent which included the fact that the security, if under construction, was to be insured against Constructors' All Risk policy during the period of construction.

17. The case was that every time he, the plaintiff, sought and was offered the financial accommodation, he had to obtain bank assurance provided by the bank within the same banking hall and that the last borrowing was no exception. He gave evidence that he was merely asked to sign paper provided by the defendants.

18. He cited clause 7(1) and (2) of the lending agreement to have made it mandatory that an All Risk Constructors risk policy be in place before disbursement and that it was well known to the 1<sup>st</sup> defendant that the property was under construction as evidenced by the photographs taken by the defendant's credit officer, named Mr Rafiq. It was the plaintiff's case that when the funds were released he was not in doubt that there was in place a contractors' All Risk Insurance Policy and therefore when the building collapsed, he did lodge a claim with the insurer but was shocked to be told that there had not been an insurance policy as anticipated and construed. He added that on the claim being lodged, the 2<sup>nd</sup> defendant contracted a loss adjuster who investigated the loss and adjusted same at Kshs 103, 192,500 and that the loss adjuster report confirmed that the bank was given two options but opted for a Fire and Allied Risks Policy as opposed to Contractors All Risk Policy. The plaintiffs concluded by urging that he be compensated for the loss and that any sums due to the bank be deducted for such compensation. He denied having been responsible for arranging the insurance it being pointed out that under the lending terms of contract it was the 1<sup>st</sup> defendant's obligation to arrange the insurance towards which duty the bank forwarded the premium and debited the plaintiff's account. He made the observation that the policy had run for two years during which period the bank did not seek to revalue the property.

19. When cross-examined by Ms Kisinga, he accepted having obtained previous facilities pursuant to various letters of offer prior to the letter of offer of 30/9/2016 whose purpose was to reschedule the earlier facilities. He however confirmed that there was indeed a policy for FIRE & ALLIED PERILS and that he did execute the security documents and was indeed in arrears of Kshs. 2,258,016 and 3,329,355 on different dates. In effect the plaintiff admitted to having received and sent correspondence to the bank.

20. When asked questions by the 2<sup>nd</sup> defendant's counsel the witnesses accepted that the 2<sup>nd</sup> defendant was an agent but did not approach it directly but through the bank. He admitted that upon the collapse of the building he lodged a claim with Jubilee Insurance Company Ltd but did not sue the said insurer in this suit because he was pursuing a claim under the policy issued.

21. In re-examination the witness connected the letter of offer dated 30/9/2010 to his letter of 15/9/2010 which adverted ongoing work at the property and that even the valuation report acknowledged construction as ongoing. The witness emphasized the fact that the letter of offer and lending terms and conditions made it mandatory for the borrower to produce an insurance policy to cover all risks including contractors all risks.

22. On his relationship with the 2<sup>nd</sup> defendant, the witness stressed the fact that he never dealt with the defendant directly but through the 1<sup>st</sup> defendant and that when the building collapsed, he made a report to the bank and was given a form to complete and sign by the bank for purposes of pursuing the claim and that it was only after reading the loss adjusters report that he learnt that the policy procured by the 2<sup>nd</sup> defendant was one for Fire and Allied Perils only. He denied having been given the opportunity to make a choice because he was not even given a proposal form to sign. He said that the bank treated his reported loss as if there had been the appropriate insurance cover in place. He denied having seen the policy document and could not confirm if one was ever issued. He then denied having appointed Kassim Faud as an agent for receipt of notices. On suing the insurer, he stated that he could not do that because the cover procured by the defendants did not cover its loss. He concluded that had he been given a freehand, he would have gone for Contractor All Risks Policy.

23. For the 1<sup>st</sup> defendant, Mr. Aman Kassam, DW1 the 1<sup>st</sup> defendant's legal manager, gave evidence based on his witness statement dated 26/2/2019 and produced the three bundles of documents filed as exhibit DI 2-20. He gave the sequential history of the advances to the plaintiff to have ran from 2008 to 2010 and initiated by various letters of offer duly signed by the plaintiff and that none of the letters of offer related to construction. On clause 7(1) of the lending terms and conditions he said that the clause only applied when the bank gave a construction loan which was not the case here and that the only insurance expected was Fire and Allied Perils. He said that in the event of a construction facility the terms demanded at clauses 8 and 9 that the borrower provided additional documents including building plans and approvals and would approve the engineer, quantity surveyor and bills of quantities. He then referred to correspondence from the plaintiff, identifying the cover as fire and related perils policy as well as a debit note from the insurer showing what policy was provided. On the sum claimed, the witness said that the sum of 103,000,000 was not recoverable even if there had been a valid policy in place as the sum recoverable would be limited to the sum assured.

24. He then referred to the valuation report commissioned by the bank which was affirmative that the building was incomplete and that the bank was indeed aware of that status but the purpose of the facility was not construction and that the plaintiff had indicated intention to proceed with construction works but did not communicate the commencement of the construction works. He averred that the bank had no business to advise the plaintiff on the type of insurance to procure as it does not engage in the business of insurance. He then referred to the report by the loss adjuster and stressed the fact that the collapse of the building was due to poor workmanship and failure to comply with the by law even though there were plans which were apparently signed. He urged that the suit be dismissed with costs.

25. Upon cross-examination by Mr Mwakisha for the plaintiff, the witness then acknowledged that the plaintiff did write to the bank on 30/4/2011 and the bank received the letter same day. He asserted that and thus the report of the building collapsing prior to which date no statutory notice had been issued and sent by registered post. He then referred to his statement and admitted that as at that date the plaintiff was indeed outside Kenya. He confirmed that the 2<sup>nd</sup> defendant have a desk within the 1<sup>st</sup> defendant's premises in Nairobi but was unsure if it did operate the same way in Mombasa. He described the said defendants as a broker for many insurers and offer bank assurance. He denied any knowledge of the part played by the 1<sup>st</sup> defendant on insuring the suit property. He denied knowledge that it is the bank which advised the plaintiff to pick a claim form from the 2<sup>nd</sup> defendant, completed same and submit to the insurer. He denied knowledge of the where about of the policy document.

26. When cross-examined by Mr. Gikandi, the said that he was a duly admitted advocate, had studied insurance in South Africa, heard about the term bank assurance but did not know what it means and how it operates. He then owned up and said that the people who dealt with the plaintiff at the time were better placed to answer the questions. He confirmed the photos of the building when showed to him but denied

knowledge of the photographer named by the plaintiff as Mohammed Rafiq but admitted being availed nothing to controvert the plaintiff's position.

27. He was not aware if any officer of the bank visited the property before the loan was disbursed and did not inquire from Mombasa office. He admitted having joined the bank in 2018 and that his statement was just uplifted from that by previous prospective witnesses.

28. When asked question by Ms Asli for the 2<sup>nd</sup> defendant, witness denied that the 1<sup>st</sup> defendant ever instructed the 2<sup>nd</sup> on what type of policy to issue and that it was the plaintiff who chose what insurance policy to procure and that it was the 2<sup>nd</sup> defendant who was best suit to answer questions on bank assurance.

29. On re-examination, the witness pointed out that the statutory notice issued on 27/01/2011 and clause 7(1) of the charge on the service of the statutory notices included service by registered post. When referred to LTC he said that the insurance was to be procured by the borrower but at the sole discretion of the bank. He asserted that the policy was issued and handed over to the plaintiff. On being questioned by the court the witness denied knowledge of the plaintiff's business and that he was not aware who keeps the policy document in practice.

### **2<sup>nd</sup> defendants case.**

30. For this defendant the evidence was tendered by no other than the chief executive officer, one Tazi Versaji who filed a witness statement and whose evidence was grounded on such witness statement as evidence in chief as buttressed by the documents filed in a bundle. She confirmed the 2<sup>nd</sup> defendant as a subsidiary of the 1<sup>st</sup> defendant but regulated under a different statute from the 1<sup>st</sup> defendant and with a different board of directors as evidence that it has its own legal personality different and distinct from the 1<sup>st</sup> defendant. He set out the four letters of offer and their purposes and reiterated that none was for purposes of construction. He said that there were indeed two quotations for Fire and Allied Risks as well as Constructors All Risk but they opted for fire and related risks policy as they were not aware that the property was under constructions and would have recommended Constructors All perils cover whose premium was by Insurance Premium Finance pursuant to an agreement between the two defendants. She contended that the collapse of the building was never notified to them because the claim was lodged directly with the insurer even though there was a letters copied to them stating that the collapse was due to tenant renovation.

31. On cross examination by the advocate for the 1<sup>st</sup> defendant the witness said that the 2<sup>nd</sup> defendant was an agent for Jubilee Insurance Company Ltd who did two quotations for the plaintiff but could not dictate on the type of policy to be procured and that the policy issued was disclosed in the invoice and debit note.

32. On cross examination by Mr. Gikandi, the witness said that he joined the 2<sup>nd</sup> defendant in the year 2018 and that he held certificate of proficiency and a Diploma in Administration and confirmed having not joined the 2<sup>nd</sup> defendant in the year 2011 and was thus unable to confirm if the plaintiff ever had any direct dealing with any staff of the 2<sup>nd</sup> defendant and could not confirm if the quotations were ever sent to the plaintiff and by whom. He was also affirmative that he had nothing to show the plaintiff made a choice for Fire and Allied Perils over contractors all risks. He confirmed that the plaintiff dealt with staff at Mombasa office who were still alive and could not say why they had not attended court to give evidence. He confirmed the loss adjusters report assertion that it was the defendant who chose the police to be issue.

33. On what bank assurance means the witness said that it was a channel by which banks sold insurance and that he did not know who spoke to the plaintiff in the matter of insurance in this case.

34. On shareholding of the 2<sup>nd</sup> defendant, she said that the 1<sup>st</sup> defendant holds 99% while its former claimer holds 1%. Witness was unable to say who completed the proposal form and confirmed that the building was incomplete and that the loss as adjusted by the loss adjuster was calculated at Kshs. 82,129,963.

35. On re-examination the witness told her counsel and the court that the 2<sup>nd</sup> defendant was an agent for Jubilee Insurance Company Ltd and that he spoke from the records maintained by the 2<sup>nd</sup> defendant and not from personal knowledge having not been there when the transactions took place.

36. In answering questions by the court the witness said that bank employees are trained to sell insurance and thus able to give explanations and transact insurance and that the 1<sup>st</sup> defendant and Jubilee Insurance Company Ltd are sister companies.

37. With the evidence of the three witnesses, the respective cases were closed and parties then sought to file and exchange written submissions.

### **Submissions by plaintiff**

38. In the written submissions dated 18/2/2020 the plaintiff, identifies only three issues for determination of the court as follows-;

- (i) Whether the defendants were negligent in procuring the insurance cover?
- (ii) Whether the defendant was liable to compensate the plaintiff for the losses suffered as a consequence of the building collapsing?
- (iii) Whether the intended statutory power of sale by the 1<sup>st</sup> defendant was in compliance with the law?

39. In answering the first issue the plaintiff cited the decision in **Brite Print (K) Ltd Vs Barclays Bank (K) Ltd (2014) Eklr** for the proposition that the plaintiff has a duty to show that the defendant owed it a duty of care; that the duty owed was breached and that as a consequence of the breach the plaintiff suffered harm or loss. Applying that decision to the facts of the case, it was submitted that the letter of offer dated 30/9/2010 consolidated all the previous letters of offer and the facilities when existing into one and incorporated the provisions of the bank's lending terms of contract by dint of clause 8(1) of the letter of offer. The effect was, as submitted by the plaintiff, that it was a mandatory and a condition precedent that before drawdown or disbursement of the facility there ought to have been in place an appropriate insurance policy as deemed appropriate by the bank in its sole discretion and at the plaintiff's own costs with the liberty to the 1<sup>st</sup> defendant to debit the plaintiff account to meet the costs of such insurance. There was an additional requirement that there be an endorsement on the policy to reserve the interest of the bank as joint insured.

40. The submissions go on to emphasize the fact that the 2<sup>nd</sup> defendant as a subsidiary of the 1<sup>st</sup> defendant, had a representative seated at the 1<sup>st</sup> defendant banking hall for purposes of ease of reference of those in need of insurance. Owing to the mandatory nature of the condition on insurance, the plaintiff contends that he was convinced there was the appropriate insurance in place when the funds were disbursed.

41. The position taken by the plaintiff is that the defendants were skilled in their areas of business and thus had a duty of care to the plaintiff to ensure that the appropriate and effective insurance was in place as anticipated by the 1<sup>st</sup> defendant's letters of offer. The plaintiff cited to court the English decision in **Karak Brothers Co. Ltd Vs Burden (1973) ALLER 121** and **Selangor United rubber estate Ltd Vs Cradoek (No. 3) 1968) 1WLR 1555** for the proposition of the law that a bank has a duty to its customers to exercise reasonable care and skill.

42. Applying the principles in the decisions to the plaintiff case, the plaintiff submits that there having been a revelation by the valuer that the property housed an incomplete building, the 1<sup>st</sup> defendant had a duty to source and procure a cover to cover construction risks.

43. That the plaintiff did not deal with the insurance negotiations was stressed it being underscored that there was no evidence that the proposal form was ever sent to the plaintiff nor signed by it. The court was invited to infer that failure to produce evidence of the proposal form be inferred adversely against the defendants. For that proposition the decision in **Tim sales Ltd Vs Harun Njugu (2010) Eklr** was cited. It was urged that the court finds the defendant to have been less candid on how the insurance was procured it been stressed that the loss adjuster report concluded that the correspondence from the 2<sup>nd</sup> defendant was to the effect that it was the 1<sup>st</sup> defendant who preferred the policy issued by the insurer.

44. On whether the plaintiff was entitled to be compensated for the loss, the submissions were offered, while relying on the decision in **Peter Ngigi Kuria Vs Thomas Ondili Oduol (2019) Eklr** that even without production of receipts the courts have found innovative ways to award compensation even when the claimants did not capture records of income. On the prayer to declare the intended exercise of statutory power of sale, the plaintiff took the position that that process was propelled and accentuated by bad faith in that it closely followed the collapse of the building. It was submitted that before the notification of sale by the auctioneer was served, no statutory notices had been served hence it was viewed as premature to purport to exercise the power of sale. The decision in **Stephen Boro Gitiba Vs Nicholas Ruthiru Gatoto (2017 Eklr)** was cited for the proposition that the duty to prove service of statutory notices is upon the chargee and never on the chargor. The submission was that there was never discharge of the onus upon the 1<sup>st</sup> defendant that it did service the mandatory statutory notices and therefore the right to exercise the power of sale was yet to accrue and thus the notification of sale was to that extent null and void.

45. Those submissions were reiterated and highlighted orally by both Mr. Mankisha and Mr. Gikandi for the plaintiff. In the highlight, there was emphasis that service of the notification upon the plaintiff's son did not meet the legal requirements and that the lending terms of contract were affirmative that where the property was under construction then there was a mandatory need to take out a contractors' All Risk Policy which the defendants failed to do. There was then the stress on the fact that the plaintiff was never given the liberty to choose the insurer and that the evidence in in the availed correspondence show that the matter was between the insurer and the two defendants and not the plaintiff.

#### **Submissions by the 1<sup>st</sup> Defendant**

46. In its submissions, the 1<sup>st</sup> defendant takes the view that the plaint dated the 12.4.2012 and amended on the 10/12/2015 captures the entire claim and was resisted by the amended defense and counter claim dated 27/01/2016.

47. On the plaintiff's case it was submitted that there was admission by the plaintiff that none of the facilities offered by various letters of offer was construction loans and that the plaintiff conceded to having executed all the contractual deeds between the parties. To the contrary, the evidence by DW1 and the documents produced pointed to the fact that there was no construction work to merit acquisition of contractors all Risk Policy that the duty to insure was the plaintiff's that the contract of insurance was negotiated and concluded between the plaintiff and 2<sup>nd</sup> defendant without its participation and therefore that there was no basis to hold it liable in negligence and the resultant loss.

48. On the challenge on its power of sale, it was asserted that all the requisite notices were issue in accordance with the law and not capable of challenge.

49. Based on the pleadings filed and evidence led, the defendant saw four issues to isolate themselves for determination as follows-;

- i. whether the plaintiff and the defendant entered into a valid loan agreement and what were the terms thereof?
- ii. Whether the plaintiff defaulted in repaying the financial facilities advanced, and if so, if the defendant was entitled to exercise its statutory power of sale?

iii. Whether the 1<sup>st</sup> defendant is liable to compensate the plaintiff for the loss occasioned by the collapse of the building?

iv. Whether the plaintiff is entitled to the prayers sought in the amended plaint?

50. On whether the contract was valid between plaintiff and 1<sup>st</sup> defendant there was reliance in the decision on **National Bank of Kenya Ltd Vs pipe plastics saw kolit (K) ltd (2011) Eklr** for the proposition that it is not upon to court to rewrite a contract between two parties. It was submitted that the contract between the parties was never to finance construction but for definite purposes. Various clauses in the said letters of offer were cited to court to underline the obligations and rights of the parties including the duty to determine the type insurance to be procured.

51. On whether there had been a default, the 1<sup>st</sup> defendant submitted that defendant had not been denied but admitted default to pay in the sum of Kshs. 35,940,514.49 being term loan and Kshs. 877,753.68 being the overdrawn position. The said sums were evidenced by bank statements which had not been controverted nor challenged as well as the insurance finance agreement.

52. On the right to exercise the power of sale, the 1<sup>st</sup> defendant took a position that it fully complied with the terms of the charge and the then applicable law under section 69 A(1) of the Transfer of Property Act, 1882. Resort was equally placed on clause 7(1) of the charge that allowed service by registered post to the charges address or delivered to its business place or upon the subject property and therefore that there had been full compliance with the law and the right to sell had indeed accrued.

53. On whether the 1<sup>st</sup> defendant was bound to compensate the plaintiff for the loss due to the building collapsing, it was submitted that there was no basis for such a claim as the loan advanced was not intended for construction and that the only insurance contemplated was fire and allied Perils. It was then maintained and submitted that the contract between parties having been reduced into writing it was not open for the plaintiff to introduced parole evidence so as to alter the negotiated and covenanted terms. **Bid Insurance Broker Ltd vs British insurance provident fund (2016) eKLR** was cited for the proposition that parties are not at liberty to adduce Parole evidence to contradict or qualify a complete contract.

54. On whose agent the 2<sup>nd</sup> defendant was, it was submitted with heavy reliance of the provisions of Insurance Act that there was no agency between the 1<sup>st</sup> defendant and the 2<sup>nd</sup> one.

55. On whether there was bank assurance business transacted by the 1<sup>st</sup> defendant, it was submitted that such was not pleaded and could not be the basis of a determination as parties are bound by pleadings filed. **Amarco company Vs Investment and mortgages bank Ltd (2005) eKLR** and **Mumo Matemu Vs trusted society for Human rights (2013) eKLR** were cited to score the point that parties are bound by their own pleadings.

56. On whether the plaintiff is entitled to the remedies sought in the amended plaint, the position was taken that the report by General Adjuster Kenya Ltd dated 12/9/2011 was not capable of supporting the claim because its author was never called to produce it. The report was also said to be unsigned and contradictory and being an expert report it was merely persuasive and not binding upon the court.

57. On the claim for loss of business in the sum of Kshs. 2,317,500, it was submitted that there was no sufficient proof of the same and the report by the loss adjustor was not enough. The decision in **Amos Gikonyo vs Duncan Maingi (2016) EKLR** was cited for the proposition that loss of business is a special damage claim and not general damages and must be specifically pleaded and strictly proved.

58. Lastly, it was submitted that there having been a cover to a maximum of Kshs. 30,800,000 the basic tenets of insurance law demanded that one cannot recover more than that sum and therefore the plaintiff's claim was untenable even if made against the insurance company which it was not.

#### **Submissions by the 2<sup>nd</sup> defendant**

59. The clear and succinct position taken by the 2<sup>nd</sup> defendant is that it did procure an insurance cover as preferred by the plaintiff being fire and Allied Perils cover Limited to a sum of Kshs. 30,800,000 and that the plaintiff can only seek indemnity and not to enrich himself.

The submissions then isolate five (5) issues for determination as follows:-

- i. If the plaintiff acted in good faith and made material disclosure of facts?
- ii. Whether fire and allied perils cover was the most appropriate in the circumstances?
- iii. Whose obligation it was to procure insurance?
- iv. Did the 2<sup>nd</sup> defendant bear any obligation in the detection of the insurance cover? If so, to what extent and was there any negligence on its part?
- v. Is the plaintiff entitled to any compensation for the insurer?

60. On the first issue, it was underscored and stressed that the contract of insurance is one grounded upon utmost good faith and the decision in **Joel Vs Law Union & crown Insurance company (2) 1908 2KB at 883** cited for the proposition that the insurer is entitled to be put in possession of all material information by the insured. **Cooperative insurance co. Ltd vs David Wachira NYR CACA No. 66 of 2008** and

**carter vs Boelm (1766) Burr 1905** were equally cited for the same principle of law that the facts of the risk being at the disposal of the insured, it was his burden to avail same to the insurer.

61. Applying the said principle to the fact of the case, the 2<sup>nd</sup> defendant submitted that the plaintiff had failed to discharge his duty of disclosure and could not succeed against the defendant.

62. On the most appropriate cover for the plaintiff's purposes, it was submitted that fire and allied perils fits the bill in terms of the letters of offer in that a Contractors' All risk cover would only be required under clause 7 of the LTC if the lender was financing construction in which even the sum assured would not be less than the property's market value.

63. On the obligation to insure, the 2<sup>nd</sup> defendant submitted that it was always upon the plaintiff to procure insurance as a precondition to get financed. It is then contended that it was in appreciation of such obligation that the plaintiff approached the 2<sup>nd</sup> defendant for the appropriate cover. Counsel then cited to curtail the decisions in **Osteria Ice cream Ltd Vs Junction Ltd (2011) Eklr** and **Gtobu Karatho vs Christopher Muriithi Kubai (2014) EKLr** to buttress and reiterate the position that only parties can rewrite their contract and that no evidence can be adduced to vary the terms of a contract save for evidence of coercion fraud or undue influence and only when so pleaded.

64. On the role played by the 2<sup>nd</sup> defendant in selection of the cover, it was submitted that the defendant was not privy to the pre-contract and contract negotiations and that it was only approached by the plaintiff to enable him comply with the conditions of the letter of offer pursuant to which approach, it obtained two quotations from the insurer from where the plaintiff chose the cover that was ultimately underwritten. The defendant took the very firm position that his duty and obligation was limited to sourcing for the cover and that he remained an agent for a disclosed principle.

65. While admitting having acted for the plaintiff in sourcing the insurance cover, the 2<sup>nd</sup> defendant then submitted that it did its work diligently and cannot be faulted in negligence and cited the decision in **Blyth vs Birmingham Co. (1856) 11 784** on the definition of the tort of negligence. The defendant contended that it reasonably took instructions and marched it with the cover it considered as appropriate. It was added that the defendant did not know and could not have known that the plaintiff would desire to construct on the property insured.

66. On the liability of an agent for a disclosed principle, it was submitted, while citing the decision in **Friendship Contrainer Vs Mitchel Coffs (K) Ltd (2001) EA 338**, **O'conner Vs OBB Kirbly & co. (1971) 2 ER 1415** as well as **Karanja vs Phoenix of EA assurance Co. Ltd (1991) KR 277** that an agent of a disclosed principle is not liable in place of its principal. To the 2<sup>nd</sup> defendant the plaintiff lost it when it opted to sue the 2<sup>nd</sup> defendant in place of the insurer.

67. There was then the issue raised and concerning the liability of the insurer to the plaintiff which I consider not available for my consideration for the simple reason that the rule of natural justice bars the court from considering to determine the rights and obligations of parties other than parties before it. Here, the insurer, Jubilee of Kenya insurance Co. Ltd, is not a party to these proceedings and it would be moot if not untenable in law to seek to address any issue concerning it.

68. On such submissions the 2<sup>nd</sup> defendant joined the 1<sup>st</sup> defendant to pray that the plaintiff's suit be dismissed with costs.

#### **Issues for determination**

69. Prior to the case conference with the parties, the two defendants had on 20/11/2013 filed what they called list of agreed issues, isolating some 19 items but I note that subsequent to such filing several development including consolidation and amendment of pleadings did take place thus changing the character of the dispute. I therefore consider that the two defendants in crafting the issues they have done in their submissions did abandon the documents filed in 2013. It is also of note that the two defendant availed witnesses who could not know as of own knowledge what actually transpired at the time having joined the two defendants years after the events. I note that both admitted not being knowledgeable on the happening while owning up that there were staff of the defendants who dealt with the transaction at the time who could have given evidence but were never called for that purpose. Even this early I must observe that the evidence offered by the defendants must be limited to what the documents say and no more.

70. On my own accord, however, having considered the three sets of issues crafted by the parties in respective submissions and upon perusal of the pleadings and evidence on record, I consider the following to be the issues for consideration.

- i. What were the terms of agreement between the parties regarding insurance cover for the security?
- ii. Whose duty was it to determine the type/class of insurance to be procured?
- iii. Was that duty discharged?
- iv. What damage, if any, was occasioned to the plaintiff? If in the affirmative, what is the quantum of such loss?
- v. who is to blame for the loss?
- vi. Is the plaintiff bound to pay the debt due to the 1<sup>st</sup> defendant?
- vii. What order should be made as to costs?

71. In coming up with those issues I have given regard to the fact that the dispute is well documented and that both plaintiff and first defendant agree that they indeed entered into a lending contract and none of them contest the validity of the contract. Accordingly, the validity of the contract is a non-issue and not available for court's determination. Equally, the property to be used as security and thus be insured is common to all parties even the fact that it collapsed is not in dispute. Lastly, any question as to liability of the insurer cannot be investigated here when that insurer is not a party before the court.

72. In seeking to determine the isolated issues, this judgment may not determine all seriatim because there are interrelations that would make a definition of one affect the other. I consider the entire dispute to center around what insurance was envisaged for the security and whose mandate it was to determine the class of insurance hence that becomes my starting point.

### **Terms of the contract regarding insurance**

73. It is common ground that whereas there are some four letters of offer and thus in same number of facilities, the last letter of offer was intended to consolidate the previous facilities and therefore it would incorporate and perpetual the prior terms of engagement between the parties. This comes out from clause 2 (purpose) and clause 6 (security) of the letter of offer dated 30/9/2010. On documentation establishing the aggregate terms the document at clause 7 and 8 reveals that all legal documents would be prepared by the banks approved lawyers and would augment the letter of offer to include all the banks standard loan conditions as set out in documents including the **Lending Terms And Conditions (LTC) as was in existence then and as would be amended from time to time** whose terms the plaintiff was deemed to have read, taken advice upon and fully understood the contents and obligations. The letter then provided that the execution of the letter of offer and observance of its terms and the terms of the LTC would not lead to an interference of a conflict with any previously vested obligation under the law or under any other instrument which bound the plaintiff. Clause 8(ii) thus effectively revived and sustained every obligation upon the plaintiff asserted under any previous instruments prior to signing the letter of offer of 30/9/2010.

74. Specifically, on insurance, the letter of offer at clause 8 (iii) in particular mandated that disbursement would only be effected once all the related security documents would have been perfected and full compliance made by the plaintiff with the banks LTC. That then begs the question, what does the LTC say about insurance.

75. I consider the operative clause and which may help answer the question to be clause 7 (1) (ii) of the LTC

### **7. Insurance**

**(a) the borrower shall provide the bank with the under-mentioned insurance policies as applicable, from an acceptable insurance company.**

**i. In respect of any construction financed by the "Bank over any immoveable property, contractor's all risks insurance police during the period of construction to be replaced by insurance covering damage resulting from fire, burglary and all the related special perils e.g flood, earthquake, civil commotion riots, strikes etc upon completion of the construction. Minimum sum insured should not be less than the open market value of the property or the insurance value, whichever is higher.**

**ii) In respect of any immoveable property to be charged to the Bank Insurance covering but not limited to damages resulting from fire , burglary and all the related special perils e.g floods, earthquake, civil commotion, riots, strikes etc or such other insurance cover as the Bank may at its sole discretion require including but not limited to a contractors all risk insurance police to be maintained during the construction period where the said property is subject to construction at present or in future. Minimum sum insured should not be less than the open market value of the immoveable property or the insurance value, whoever is higher.**

76. While the defendants were adamant that they owed no duty to the plaintiff to advice on the type of insurance to be appropriate, I construe the letter of offer to mandate that there would be no disbursement unless and until the security documentation were perfected to the 1<sup>st</sup> defendant's satisfaction and that the type of insurance to be availed by the plaintiff would be at the sole discretion of the 1<sup>st</sup> defendant. That to me was critical a term and condition in that the purpose for insurance was to cushion the 1<sup>st</sup> defendant in the event that the security would be destroyed or lost howsoever. To that extent the bank cannot be believed to say and maintain that it was free to accept any cover provided by the plaintiff. I find the documents produced by consent of the parties say that it was the bank to determine the type of insurance to be provided by the plaintiff. I also do find that the ultimate decision on the type of insurance to be provided resided with the 1<sup>st</sup> defendant and that it did have a hand in the choice and procurement of fire and allied Perils cover after the insurer made two quotations.

77. In coming to this conclusion I do take notice that the banks daily business is the negotiation and grant of facilities involving documentation, all purposed to secure its best interests. That places upon the bank an expectation that it is equipped with skills in all area of securitization and security perfection.

78. In the words of the court in *Selangor United Rubber Estates case (supra)*, the 1<sup>st</sup> defendant had a duty under its contract with the plaintiff to exercise reasonable care and skill in carrying out its part with regard to operations within its contract with the plaintiff and in particular in deciding what type of security would be most appropriate to safeguard its interests and interests of the plaintiff.

79. In this case, the 1<sup>st</sup> defendant takes the very firm and adamant position that the purpose of finance was to not construction. In deed that cannot be challenged or challengeable on the basis of the documents on record. However, the purpose of insurance was to safeguard both parties in the event of a loss to the security on diminution in its value. That can be ascertained from the terms of the letter of offer at clause 6 (iii). The clause reads-;

**‘First legal charge over plot No. 3420, section 1/MN located in Nyali, Mombasa, registered in the name of Fuad Mohmoud Mohammed together with all present and future developments thereon, valued by our approved valuer Dato Kithikii Limited on September 2,2009 at kshs. 32,000,000/= (market value) and charged to us for kshs. 21,000,000/= to secure all banking facilities, funded and non-funded to be made available by DTBK to you from time to time’.** (emphasis provided)

80. This clause leaves no doubt that the security given and which needed to be secured as such security for the tenure and life of the loan was the property with its then existing development and any future developments. In deed that is the state or status a lender would seek to establish by commissioning a value to help it ascertain the efficacy of a property as security. In the documents filed, there is a valuation by **Dato Kithikii Ltd** which gives the description of the property as housing an incomplete building.

81. I do find that at the point of negotiating the loan advanced pursuant to the letter of offer of 30/9/2011 the two parties, plaintiff and 1<sup>st</sup> defendant, were appraised of the status of the building as incomplete and that the 1<sup>st</sup> defendant was entitled to have the value and such status maintained and not diminished.

82. I do find that it was expected of the 1<sup>st</sup> defendant that in so far as the property offered as security included current and future development, reasonableness demanded that a cover to take, care among other risks, of any construction works was the most appropriate one. With that finding, it follows that in failing to exercise its reserved discretion to decide on the most appropriate cover as constructors all Risks cover, the 1<sup>st</sup> defendant was negligent and that negligence resulted in the damage and loss being occasioned to the plaintiff when the property collapsed while being constructed towards completion.

83. I do find the 1<sup>st</sup> defendant liable for the plaintiff’s loss and hold him liable for compensation for such loss.

#### **What damage or loss, if any, has been suffered by the plaintiff?**

84. That the building collapsed is common ground. The question is the monetary value thereby lost. Both side rely on the reports by the loss adjuster to take positions on possible loss occasioned. While the plaintiff takes the position that his loss is in the sum of Kshs 103,192,500, the defendants say that any compensation, if found due, should be limited to the value of the sum assured under the Fire and allied perils policy.

85. In my view the sum assured would only be relevant if the claim was based upon the insurance cover given. Here the plaintiff is not insisting on the policy. In fact, the plaintiff says that even though he paid the premiums no police as ever issued to him. At trial no policy document was produced nor was a proposal form availed to help determine what policy was proposed, who proposed it and what type of policy was issued. The two documents, even copies, are expected to be in the possession of the insurer, or at least its agent. In this suit, it was the defendants’ case that a policy for Fire and Allied perils and not a Contractors’ All Risks, was proposed and issued. It was the duty of the person alleging to prove the type of policy by availing the documents. It was never done here and I thus draw the inference that if produced, it would have been adverse to their cases. I therefore find that the sum alleged to have been insured is of no relevance here and that it is the sum revealed by the loss adjuster appointed by the insurer that is of help to this court.

86. While it is true that in law the report being an expert opinion, is not binding upon the court, it is however persuasive in the absence of a rebuttal. Here the report was introduced in evidence by 2<sup>nd</sup> defendant without objection by any of the parties. In addition, both defendants relied on the same documents as evidence in chief and by extracting evidence from the witnesses on it by cross examination. That to me leads me to inference that all believed in its evidentiary value and put reliance upon it. Having so acted and led the court to record and admit the evidence of the documents’ contents, it cannot now come from the defendants to assert that the documents is inadmissible. I hold that by operation of the principle estopped by record, the defendants are precluded from taking such a position.

87. Looking at that document, it gives a plausible explanation why the loss cannot be Kshs 103,192,500. I find that the sums discounted by the loss adjuster are indeed justifiably done and I do find the report and its verdict to be a credible one which I adopt as the reasonable assessment of the loss.

88. Having said so, the sum of loss was adjusted by the expert at Kshs. 82, 129,963. That is the sum I find to have been lost by the plaintiff. For that sum I do enter judgment for plaintiff together with interests at the rate in the contract of lending between the parties being 16.25% per annum. I find no merit on the claim for loss of business because I consider that the damages I have awarded for loss consequent to the collapse of the building takes care to compensate for any other losses connected therewith.

#### **How about the 1<sup>st</sup> defendants counter claim?**

89. The counter claim is a straight forward claim for sums owed on account of the leading contract with the contractual interest thereon from the date 2/8/2011 till payment in full. To that claim the plaintiff filed a Reply to Defense and Defense to Counter-Claim dated 29/2/2016.

90. In that pleading the plaintiff does not answer the paragraph of 28 of the counter claim but only seeks to deny the rate of interest at 25.75% per annum as being unconscionable and unjust, then denies owing the sum due upon The Insurance Premium Finance Agreement on the basis that the said sum was debited from his account. In the evidence, there was material availed to show that the interest rate was covenanted at a maximum rate of 16.5% p.a. That is all glaring from the letter of offer at clause 4 and the legal charge at clause 1a as read with the Second Schedule to the charge. I find no contract for the interest claimed at 27.75% In all, the claim for the term loan balance has not been challenged and in terms of Order 2 Rule 11 the same is deemed admitted by the plaintiff. For it I do enter judgment for the 1<sup>st</sup> defendant in the sum of Kshs 35,940,514.49 with interests thereon at 16.5% per annum from 2.08.2011.

91. On the defense that the sum for insurance was not due, I find that there was sufficient evidence that the same was in deed offered, accepted and disbursed into the plaintiff’s account. However, I have found that there was no evidence of consideration having been

furnished. I have said that there was no evidence by way of a proposal form that the plaintiff sought any insurance and none was led to show that there was ever issued any policy. For that reason, I do find for the plaintiff that the sum is not recoverable on account of failed consideration. The claim of Kshs 280,823.43 with interest at 16%pa is not merited and the same is thus dismissed

92. On the other hand, the sum due on the overdrawn position was indeed contractual sums covered by the letter of offer dated 30/9/2010. In deed bank statements were filed and produced by consent to show the sum outstanding.

93. I entertain no doubt that the plaintiff enjoyed credit facilities on which he claims only be excused from paying if he avails evidence of having paid back. He opted to lead no evidence of payment but was equivocal to assert in evidence that when he gets judgment against the 1<sup>st</sup> defendant, any sums found due from him to that defendant be recovered from his award. There being no evidence to controvert the position that the overdraft was never settled, I do enter judgment for the 1<sup>st</sup> defendant on that claim in the sum of Kshs 877,753.49.

94. On question of interest on the overdraft facility charged and claimed at 25.75 %, I do find, as I have on the term loan, that contracted interest rate was 16.25% and no more unless, in terms of clause 4 of the letter of offer, 'the same is varied by the 1<sup>st</sup> defendant and published in the daily newspapers'. The 1<sup>st</sup> defendant like the court is in law bound not to interfere with the parties bargain. For the judgment in the sum of Kshs 877,753.49 I award interest at 16.25%, as pleaded, from 2.8.2011 till payment in full.

95. In conclusion on the counter-claim, I do enter judgment for the 1<sup>st</sup> defendant on the counter claim as follows-;

- i. Kshs. 35,940,514.49 with interest thereon at 16.25 % p.a from the 2/8/2011 and subject to section 44 D,' of the banking Act, till payment in full.
- ii. Kshs. 877,753.68 with interest thereto at 16.25% p.a from 2/8/2011 and subject section 44d of the banking Act, till payment in full.

**Is the plaintiff entitled to an injunction against the 1<sup>st</sup> defendant's statutory power of sale?**

96. I have found that no evidence was led to show that the plaintiff met and satisfied his obligation to pay the facilities as covenanted. The evidence led is that there was a default and indeed statutory notices were issued on 21/6/2010 and 23/9/2010 before the restructuring letter of offer was issued. That to this court is enough evidence that there was compliance with the requirement of the transfer of property Act, then in force. There was also on the face of the letter dated 23/09/2010 a stamp showing that the letter was indeed posted. I do find that there was, indeed, notices issued and that the 1<sup>st</sup> defendant cannot be faulted for serving the notification of sale as it did.

97. In any event by the provisions of the charge at clause 7(l) allowed the notices to be left at the mortgaged property. That is what I find the auctioneer to have done when he left the notice with the plaintiff's son at the premises. I do find that the prayer for declaration that the notification of sale was illegal as well as that for permanent injunction have not been proved to be merited and the same are thus not granted but dismissed.

**Rendition**

98. In summary I do enter judgment as follows-;

- i) For the plaintiff against the 1<sup>st</sup> defendant **kshs. 82,129,963.** With interest thereon at 16.25%, p.a being the benefit the 1st defendant would derive from the contract between the parties, from the date of the suit till payment in full.
- ii) The suit against the 2<sup>nd</sup> defendant is dismissed for lack of proof with no orders as to costs.
- iii) for the 1<sup>st</sup> defendant against the plaintiff in terms of the counter claim-;
  - (a) **Kshs. 35,940,514.49** with interest thereon at 16.25 % p.a, from the 2/8/2011, and subject to section 44 D of the banking Act, till payment in full.
  - (b) **Kshs. 877,753.68** with interest thereon at 16.25% p.a from 2/8/2011 and subject section 44d of the banking Act, till payment in full.
  - (c) On costs between the plaintiff and the 1<sup>st</sup> defendants, and because each has succeeded in equal measure, I direct that each shall bear own costs.

Dated, signed and delivered, Via MICROSOFT TEAM, this 25<sup>th</sup> day of January 2021.

P.J O.OTIENO

JUDGE