



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 90 OF 2006**

**NOBLE MERCHANT SHIPPING LIMITED.....PLAINTIFF**

**VERSUS**

**1. ICEA LION GENERAL INSURANCE CO. LIMITED.....1<sup>ST</sup> DEFENDANT**

**2. AON MINET INSURANCE BROKERS LIMITED.....2<sup>ND</sup> DEFENDANT**

**J U D G M E N T**

**Outline of Pleadings by the parties**

1. The suit was instituted by the plaintiff pursuant to the plaint dated 21/11/2002 and later amended on the 6/7/2004 claiming the recovery of Kshs.49,000,000.00 being the insured sum and said to have become due and payable when the risk insured occurred to the insured goods on account of destruction by fire. The suit was initially filed against the 1<sup>st</sup> defendant only but the amendment was introduced to join the 2<sup>nd</sup> defendant as the insurance broker who concluded the contract between the plaintiff and 1<sup>st</sup> defendant.

2. The facts as pleaded by the plaintiff were that at all material times the 1<sup>st</sup> defendant insured the plaintiffs machinery referred to as “reverse osmosis plant and its electrical and hydraulic equipment” against fire and all related perils. The said insurance was brokered and procured by the 2<sup>nd</sup> defendant as a broker and agent whose brokerage charges were payable by the plaintiff and inbuilt in the premium charged. On account of the brokerage charges and upon reliance on the 2<sup>nd</sup> defendants expertise, there was expectation as a duty of the 2<sup>nd</sup> defendant that all the usual and customary clauses were incorporated in the cover to be issued so that plaintiff would be adequately covered and that it was the 2<sup>nd</sup> defendants duty to advise the plaintiff on best available ways to avoid any risks and that in the event of any loss, to handle the claim up to its settlement.

3. Pursuant to the agreement between the plaintiff and 2<sup>nd</sup> defendant, there was on the 7/01/2002 completed by the plaintiff, the 1<sup>st</sup> defendants proposal for the policy upon which the 2<sup>nd</sup> defendant issued a Risk Note/Debit Note dated 14/01/2002 and an endorsement advice dated 13/2/2002 confirming that the 1<sup>st</sup> defendant had issued its policy No. 030/040/1/005724/2001 dated 21/2/2002 which policy was to cover damage by fire and all allied risks including bush fire for a period between 27/12/2001 to 27/12/2002 and made renewal from year to year on an annual premium of Kshs.51,807/=. The said policy, it was pleaded to have covered the plaintiffs goods, as property of the plaintiff or goods held by him on trust or commission while contained in a building situate upon plot No. MN/III/3160 – MOMBASA.

4. It was then pleaded that on the 12/2/2002 while the policy of insurance was in force, the insured goods were destroyed by fire on which account the plaintiff alleges to have suffered loss and damage and sought to be compensated pursuant the policy of insurance but the defendants refused to pay the sum due with the 1<sup>st</sup> defendant purporting to repudiate the liability on the basis that the plaintiff was unable to prove the description, quantity and cost prices and on the further grounds that the proximate cause of fire was burning bushes.

5. As against the 1<sup>st</sup> defendant the plaintiff maintained that it was bound to pay because the policy did cover all fire related perils including bush fire and that the 1<sup>st</sup> defendant knew at the inception of the policy the description, quality and cost of the goods.

6. As agents, the 2<sup>nd</sup> defendant was impleaded in the alternative that it was liable to the plaintiff on account of breach of the pleaded terms of the agreement and duty to the plaintiff or on account of negligence of performance of its duty to the plaintiff. Particulars of negligence were then set out to include, failure to ensure that the plaintiff was adequately covered in accordance with its risk note and failing to exclude the exceptions not notified to the plaintiff, issuing a risk note in breach of warranty to the plaintiff and generally failing to act in the best interest of the plaintiff as expected of an insurance broker by making representations and assurance to the plaintiff that he was fully covered when it knew or ought to have known that to be inaccurate.

7. On the basis of the said pleaded facts the plaintiff sought from the two defendants a several and alternative judgment as follows:

**Against the 1<sup>st</sup> defendant**

- a) A declaration that it is liable to the plaintiff for the damages as aforesaid
- b) Kshs.49,000,000/=
- c) Interest thereon at prevailing bank lending rates from the date of loss till payment in full.
- d) My other further relief as the nature of the case may require and the court may deem fit.
- e) Costs of the suit.

**Against the 2<sup>nd</sup> defendant, in the alternative to the suit against 1<sup>st</sup> defendant**

- a) Kshs.49,000,000/=
- b) General damages
- c) Any other or further relief as the nature of the case require
- d) Interest on the above at court rates from the date of destruction till payment in full.
- e) Costs of and incidental to these proceedings.

8. For the 1<sup>st</sup> defendant a statement of defence was filed dated 16/12/2002 and later amended on 27<sup>th</sup> August 2004 in which the defendant admitted the existence of an insurance policy between the parties but contended that the plaintiff did breach the said policy and that the value claimed by the plaintiff was not acceptable and denied.

9. The defendant then denied all the allegation in the plaintiff including the incidence of fire as well as loss and allegations that the policy document was not availed to the plaintiff till after the incident of fire and prayed that the suit be dismissed with costs.

10. For the 2<sup>nd</sup> defendant, a defence dated 27/7/2004 was filed in which the part played by the 2<sup>nd</sup> defendant in procuring the policy was admitted but not any wrongdoing with an ascertain that it duly acted and carried out instructions as given by the plaintiff in taking out the policy and that the policy documents were duly issued to the plaintiff before and not after the incident of fire. The 2<sup>nd</sup> defendant then denied all else in the plaint including the particulars of negligence as well as breach of contract and duty care together with the alleged loss with a further plea that even if the plaintiff had suffered any loss it had failed to furnish the 1<sup>st</sup> defendant with requisite documents in terms of the policy document. Even the service of demand was denied but the jurisdiction of the court was admitted with the 2<sup>nd</sup> defendant thus praying that the suit dismissed with costs.

**Evidence led by the parties**

11. In support of their pleadings parties filed witness statement and bundles of document and on the date of hearing a consent was recorded by which the four bundles, two by the plaintiff and the other two by each of the defendants, were produced by consent and marked **EXP. P1 & 2, 1<sup>st</sup> D EXH 1 & 2<sup>nd</sup> DEXH 1**.

12. For the plaintiff two witness were called and their evidence was as follows in summary:-

PW 1 MELVIN CHARO BANDARI adopted his witness statement 26/6/2018 as evidence in chief then was put to cross examination by the advocates for two defendants. The evidence in the witness statement was to the effect that the witness purchased a reverse osmosis water purification plant together with its hardware from one Artur Ceruti for a sum of USD 615,000/= and the payment was acknowledged on 19/2/20001. The witness then took possession and preceded to store the property at his premises situate at Plot No. MN/III/3160.

Later the witness decided to and did transfer his interests in the equipment to the plaintiff, a family business whose shares were held by him and the mother. On the basis of that sale to the plaintiff, the 1<sup>st</sup> defendant gave its quote to insure the electric and hydraulic equipment in favour of the plaintiff because the reverse osmosis plant was then insured by Liberty Assurance Co. Ltd.

13. On 21/01/2003, the debit note was handed to the plaintiff when the 2<sup>nd</sup> defendant went to the premises to inspect the property at Mtwapa but no policy document was handed over. It was on that day that one Bakari Mwakambirwa solicited for the inclusion of the reverse osmosis plant which was already at the premises. Mr. Bakari urged him to move the business from Liberty Assurance on the promise to get a good quote on premiums. An agreement was reached after Bakari spoke to a Mr. Onyango of the 1<sup>st</sup> defendant On the 14/01/2002 he, Mr. Bakari wrote to the 1<sup>st</sup> defendant informing the 1<sup>st</sup> defendant of the addendum to the property covered. While the policy was in force, on the 12/02/2002 fire broke out and burnt the entire equipment and the 2<sup>nd</sup> defendant was duly notified the next day.

14. The plaintiffs premises was then visited by a Mr. Wanjoi of Cunningham Lindsay who is said to have obtained from PW 1 copies of the document of title and insurance as well as pictures of the reverse osmosis plant while under assembly and requested for importation documents for the equipment but the witnesses said he did not have. All the while the 1<sup>st</sup> defendant did not issue the policy till the 7/3/2002 and the same was transmitted to the plaintiff by the 2<sup>nd</sup> defendant under cover of a letter dated 22/03/2002. Mr. Wanjoi then came up with a preliminary report which said the plaintiff failed to produce evidence of title.

15. Another loss adjuster, Ms. Wiseman Ltd was also commissioned to assess the loss but their instructions were withdrawn. The third investigator to be commissioned was protectors Ltd who the plaintiff fault for having engaged in loss adjustment which was not within their mandate and terms of appointment. The witness said that a gentleman called Robert spoke to him and confided in him that he had been instructed to skew the report as to impede the settlement of the claim. He said Mr. Robert specifically told him that protectors' mandate was to investigate the proximate cause but not to adjust the claim and for that reason he did not ask for any documents.

16. The witness took the position that he provided all the documents asked for and that the 1<sup>st</sup> defendants reason for declining liability are only designed to defeat the claim in bad faith and that the policy document issued after the event had exception clauses deliberately inserted to defeat the claim. He then blamed the 2<sup>nd</sup> defendant for failure to protect the plaintiff's interests as was expected.

17. When cross examined by the 1<sup>st</sup> defendant's advocate, the witness said that he bought the goods in the year 2000 while the goods were in Ganjoni area inside a container mounted upon a truck. He said that he negotiated the price from the initial Kshs.700,000USD to 615,000 which was paid to the vendor in Switzerland.

18. When referred to his statement dated 23/4/2002, the witness said that the money was not withdrawn by him from the bank but was availed by a brother-in-law. He however insisted that the seller acknowledge receipt. He then referred the court to page 13 of EXH 1 being the agreement by which he transferred the goods to the plaintiff on 7/12/2002 while the same had been insured. When showed pages 80 of the 1<sup>st</sup> defendant's exhibit, the witness admitted there having been an exclusion clause on loss occasioned by bush fire.

19. When cross-examined by Mr. Waweru for the 2<sup>nd</sup> defendant, the witness said that the sale agreement at page 6 of his exhibit P1 was signed by the vendor only and not him and that the date on it at the bottom was put the day the document was being fixed with a revenue stamp. He asserted that the document at page 6 was the acknowledgment of payment.

20. He said that on the date of fire he had instructed his Shamba boy to clear the compound by burning the cut bushes but could not confirm if the fire came from the bush burning. On the quotation for premium and the property insured, the witness said that the quotation for annual premium of Kshs.43,324/= was in respect of electrical and hydraulic equipment only and that he went for it because it was a better deal compared to what liberty had quoted.

21. In re-examination, the witness told the court that the document at page 6 was made earlier than the date on it and that even though heeded agreement for sale, it was essentially an acknowledgment for payment signed after the purchase price was paid.

22. He clarified that there was two sets of sum assured for two sets of items. At page 10 & 32 of PEXH1 is evidence of insurance over the reverse osmosis plant for Kshs.28,000/= while at page 11 & 15 the property insured was Electric and hydraulic equipment. He added that when Mr. Bakari first inspected the good he was given the invoice at page 1 – 5 was satisfied before issuing the documents at page 22, 23 & 24 of Exhibits P1. He added that before the contract of Insurance was concluded Mr. Bakari visited the premises to confirm the existence of the property and carry out an inspection of the insured good. He said that the policy document was received by him on 9/4/2002 by post and that he had given an Affidavit of ownership to Cunningham and Lindsey and that none of the investigations ever asked if the seller had been paid the purchase price adding that when the investigators visited the burnt items remained in Situ.

23. On being asked questions by the court, the witness said that the heaps of burnt leaves were about 1-2 meters away from the Godown. With that one witness, the plaintiff closed its case contrary to the trial directions in which the plaintiff had hinted it would call all the three persons who had filed witness statements. Maybe that decision was informed by the development of having all the bundles admitted as exhibits by consent.

#### **Evidence by the 1<sup>st</sup> defendant**

24. Having filed two witness statements and had the documents filed produced as 1<sup>ST</sup> DF EXH D1, the 1<sup>st</sup> defendant called two witness, SAMUEL MAINA NGANGA and NICHOLAS WANJOI. The evidence by the two sought to put up the defendants case that there was no valid policy and in the alternative that if there ever existed one then the same had an exception clause which entitled the 1<sup>st</sup> defendant to repudiate. It was also contended that there was never an insurable interest vested upon the plaintiff in the goods.

25. For the DW 1, he adopted his witness statement dated 7/6/2018 as his evidence in chief. In that statement the witness took the position that the 1<sup>st</sup> defendant was at all material time the insurer of the plaintiff. He said the policy issued had a bush fire exclusion Clause which the 1<sup>st</sup> defendant lead invoked to avoid the policy.

26. In cross examination, the witness said that the plaintiff was indeed insured by the 1<sup>st</sup> defendant under a policy called fire and special perils, but that as a person, he played no role in issuing that policy, investigation over the loss or the decision to decline liability. When shown the endorsement issued by the 1<sup>st</sup> defendant and exhibited at page 31 of the EXH P1 he said their standard policy terms of the policy were never captured in the endorsement issued. He said the policy document was issued on 21/2/2002 after they knew that the incident had occurred and that as at the time the incident occurred the only document which had been issued to the plaintiff was the endorsement. He confirmed the fact that the first investigations were Coast Accident whose report says they had received the original invoices, letter/note confirming transaction stating the items on sale and their prices. He denied having asserted in his statement that any documents were not

received and that lack of documents was not the basis for rejection of the policy and that the rejection was purely on account of bush fire.

27. He confirmed that an investigator not ask to adjust the loss has no mandate to attempt to adjust the loss. He said that the two reports submitted by protectors said the cause of fire was electrical or unknown.

28. On further cross examination by the 2<sup>nd</sup> defendant advocate, the witness said that the brother; 2<sup>nd</sup> defendant was an agent of the plaintiff. He confirmed that there was a valid cover to run from 27/12/2001 to 27/12/2002. On re-examination he said that none of the experts was commissioned to adjust the loss and that none of them established the fire to have been caused by bush fire.

29. DW 2 NICHOLAS WANJOHI was an employee of Cunningham Lindsey who visited the premises of loss and compiled the preliminary report at pages 9 to 20 of the EXH D1. He said that on the date of inspection the reverse osmosis plant appeared intact and that he requested PW 1 to avail the documents of title to enable him confirm ownership, quality and value of the goods and that he found the opinion that the fire spread from the burning bushes.

30. On cross-examination the witness said he visited the site on either 14<sup>th</sup> or 15<sup>th</sup> and that his mandate was never to adjust the loss.

31. On his report he said he made two contradictory statements starting with a finding that the reverse osmosis plant had been damaged and concluding that it was intact. He also found that due to construction of the store burning embers could not enter the store but that he did not make a conclusion on the cause of fire. To him a policy could not be avoided in the absence of conclusive finding of the cause of loss.

32. While answering questions from Mr. Waweru, the witness said that fire embers could not enter the store and that he was unable to adjust the loss due to lack of documents particularly the documents confirming purchase of the items.

33. In re-examination, the witness said there ought to be conclusive evidence before declining policy and that where there is doubt the duty rests with the court to resolve the dispute. Answering questions from the court the witness said that he did not achieve the mandate of adjusting the loss.

34. DW 3, JEFFERSON MWAKIO, for the 2<sup>nd</sup> defendant also adopted his written witness statement as evidence in chief and confirmed that the plaintiff indeed took out a policy from the 1<sup>st</sup> defendant brokered by the 2<sup>nd</sup> defendant for an insured sum of Kshs.49,000,000/= which was to cover the disclosed goods against fire and allied perils including bush fire. He then said that the said defendant did its duty to the plaintiff diligently and in fact informed the plaintiff that it was the 2<sup>nd</sup> defendant's duty to prove the loss by providing documents of ownership.

35. On cross examination by the plaintiff's counsel the witness said that their Mr. Bakari visited the site at the inception and verified the items and that the policy issued was intended to cover bush fire and that at page 67 of the 2<sup>nd</sup> defendant's exhibit, there was a disagreement on bush fire being covered.

36. On cross examination by Mr. Mcourt, the witness said that bush fire was covered except for burning by or on behalf of the insured.

37. The foregoing summary was the total evidence tendered by the parties upon which parties then filed respective written submission citing various decided cases.

#### **Submissions by the parties**

38. The three parties to the dispute filed respective submissions on different date and supported same with decided cases.

39. For the plaintiff premium was put on the common evidence that all witnesses agreed that there was indeed concluded a contract of insurance between the plaintiff and 1<sup>st</sup> defendant brokered by the 2<sup>nd</sup> defendant which ran from the 27/12/2001 to 27/12/2002 and its terms were captured in the correspondence exchanged including a debit note at pages 22 – 26 of EXH P1 and was summarized in the endorsement at page 32 of EXHP1, all showing an insurance policy against the peril of fire and allied risks including bush fire and disclosed the sum assured to be Kshs.49,000,000/=. Emphasis was laid on the fact that the endorsement was issued a day after the fire and long before the policy of insurance was issued. On account of the document evidencing the contract and evidence offered, particularly the Evidence by DW 1 & 2, the plaintiff contended that there was indeed a loss that was insured and the 1<sup>st</sup> defendant is duty bound to indemnify the plaintiff to the full extent.

40. On the applicable law, the plaintiff cited the court an excerpt from MAC GILLIVRAY & PARKINGTON, ON INSURANCE LAW, 6<sup>th</sup> Edition in which the author asserts that a fire coverage summary or slip may constitute a binding contract for the whole term and that when the policy document is issued after the cover kicks off, it is expected that such cover be issued with the terms usually attaching to such policy and not to depart from the parties negotiated and accepted terms in the preliminary contract.

41. In the submissions of the plaintiff, DW 1 told the court that BUSH FIRE CLAUSE was not part of the 1<sup>st</sup> defendant's standard clauses but was an additional clause added to the subject policy which was issued well after the loss. The decision in **SITASTEEL ROLLING MILLS LTD VS JUBILEE INSURANCE CO. LTD [2007]eKLR** was cited for the proposing of the law that a term or condition in a contract of insurance contained in a document issued after the contract was concluded do not apply against the insured as to entitle the insured to decline the liability.

42. On the burden and standard of proof the plaintiff sought reliance in the decisions in **REAL INSURANCE CO. LTD VS BOARD OF**

**GOVERNORS VICTONELL ACADEMY [2017] eKLR, HEBSON ONYORO VS FIRST ASSURANCE CO. LTD [2017] eKLR, Johnson Mburugu vs Fidelity Shield Insurance Co. Ltd [2006], UKWALA SUPERMARKET (KSM) LTD VS KENINDIA ASSURANCE CO. LTD [2017] eKLR** for the proposition that proof on a balance of probabilities means a win however narrow and that it is the burden of the insurer to prove and establish reasons for avoiding the policy. When those decisions are applied to the case at hand, the plaintiff submitted that the 1<sup>st</sup> defendant had failed to prove his grounds for seeking to repudiate liability with a further reliance on the decision in **JASON NGUMBA KAGU VS INTRA AFRICA ASSURANCE CO. LTD [2014] eKLR** for the recognizing that a cover-note itself is a contract of insurance.

43. A revisit was made on the treatise by **MAC GILLVARY & PARKINGTON ON THE LAW OF INSURANCE and the Court of Appeal decision in NIZAR VIRANI VS PHOENTX OF EAST AFRICA ASSURANCE CO. LTD [2004] eKLR** to the effect that an insurer was obligated to instruct a loss adjuster and assessor to verify the insured's losses.

44. On those submissions the plaintiff proposed to court five substantive issues for determination which it prayed and urged to be resolved in its favour.

45. For the 1<sup>st</sup> defendant, in its submissions dated 13/12/2018, the existence of the contract of insurance over the plaintiff's goods for a sum assured of Kshs.49, 000, 000 together with the destruction of the insured goods by fire on 12/02/2002 were all admitted. For this defendant, there are only four (4) substantive issues for the courts determination and the issue concern the validity of the contract of sale of the goods, the existence of insurable interest vested in the plaintiff, whether the occurrence of fire causing damage was covered by the policy and whether the 1<sup>st</sup> defendant was entitled to avoid the policy.

46. The 1<sup>st</sup> defendants submissions are aligned to the said proposed issues and decided cases are cited to bolster the submissions. On the validity of the contract, the 1<sup>st</sup> defendant submits that there was never a valid sale to the plaintiff as to vest the title to the goods upon it and cited to court the provisions of sections 3 & 6 of The Sale of Goods Act. To the defendant, the evidence tendered to prove the sale was contradictory and incredible. The decision in **Granata Ernesto Vs A.G (2015)Eklr** was cited for the position of the law that a contract of insurance is in the nature of indemnity and there should be no expectation on the insurer to pay without verification. Same submissions, based on the review of the evidence tendered, were reiterated for the submissions that there was never an insurable interest vested upon the plaintiff as to entitle it to indemnity. The decision in **Mwita Masisi Vs APA Insurance Co Ltd (2018)** was cited for the considerations a court takes into account where an insurer seeks to avoid a policy on account of misrepresentation. For this submission, I take the view and hold that the point is improperly taken and is of no help to the defendant and the court because the point was never pleaded just as much as there was no contention that the policy had been procured by misrepresentation.

47. On whether the fire leading to loss was covered under the policy and if the 1<sup>st</sup> defendant was entitled to avoid the policy, the defendant while relying on the provisions of sections 107, 108 and 109 of the Evidence Act to hold the position that the plaintiff had failed to discharge its burden of proof. The decision in **Silverstar automobile Ltd v fidelity shield** was cited to court for the proposition that where an insurer failed to keep books of accounts showing purchaser of stock and manufactured article, such an insured was in breach of **Safe and Books Clause** and the insurer was entitled to repudiate.

48. On costs the defendant submitted that costs do follow the events and that there is as yet no prescribed definition of what constitutes a court reason to justify the law that costs follow the events.

49. Even though so truncated, the question of the validity of the sale of the goods between PW 1 and the plaintiff and the existence of any insurable interest ought to be seen and view as one for it is the validity of the sale that determines, title and therefore insurable interest. Section 3(i) of the sale of Goods Act to define a contract for sale of goods to be one by which a seller transfers or agrees to transfer the property in the goods to the buyer from money consideration called the price. To the 1<sup>st</sup> defendant the evidence by PW 1 disclosed contradiction that make his evidence not credible. However the contradiction highlighted relates to the sale between PW 1 and one Arturo Ceruti and not between him and the plaintiff.

50. Section 6 of the sale of goods Act cited to court for the submissions that for a sale of good worth more than 200 to be enforceable by action the buyer must accept part of the goods or gives something in earnest or a memorandum of sale is signed by the party to be charged.

51. This provision is difficult to understand how it assists the 1<sup>st</sup> defendant it being evident that there was indeed a memorandum of sale signed and part payment acknowledged. Even the decision of the **Granata Ernesto vs Invesco Assurance Co. Ltd [2015] eKLR** cited to court for the proposition that insurance contract being indemnity contracts the sum assured is not just payable without verification by the insurer, both on Liability and quantum is of no assistance to the defendant it being common ground that the defendant never mandated any loss adjuster to assess and adjust the loss just as there was never a concrete conclusion on the cause of the fire and thus had none to sell to the plaintiff.

52. On whether the occurrence of fire was covered under the policy, the 1<sup>st</sup> defendants' counsel made submissions to the effect that the policy issued by it had a bush fire exclusion clause and that the fire was caused by burning of bushes by the plaintiff's employee. However the submissions drift to say that the fire was occasioned by embers of the burning rubbish came into contact with leaking gas and that there were no firefighting equipment in the premises.

53. On whether the 1<sup>st</sup> defendant was entitled to decline the policy issued to the plaintiff as the insured, the 1<sup>st</sup> defendant took the position that it was entitled to avoid the policy and reference made to the book **MACGILLIVRAY and PARKINGTON, On Insurance Law** for proposition of law that a breach of warranty even if immaterial to the risk, discharges the insurer from liability. On such submissions the 1<sup>st</sup> defendant urged the court to discuss the plaintiff suit with costs.

54. For the 2<sup>nd</sup> defendant equally, the existence of the policy and the items covered as well as the sum assured were confirmed including the

fact that there was loss during the life of the policy. The defendant then sought to clarify the role of a broker as an insured's agent to be that of an intermediary who solicits and negotiates business on behalf of the insured with a view to entering a contract. It was then submitted that having negotiated the business when the loss occurred it did its part by communicating with the 1<sup>st</sup> defendant towards pursuit of claim settlement.

55. The submissions then pointed to the fact that there was indeed a bush fire exclusion clause from which reference was made to clauses 11 and 7 of the policy. In the submissions, the two clauses were properly invoked to decline the policy.

56. On the sum assured, the 2<sup>nd</sup> defendant confirmed the sum to be 49,000,000/= being the same purchase price of sale between the plaintiff and PW 1 with a highlight that only Kshs.1,000,000/= had been paid and acknowledged. The essence of those submissions was that the plaintiff had failed to prove the claim against the 2<sup>nd</sup> defendant and that the suit against that defendant deserves being dismissed with costs.

### **Issues for determination**

57. The totality of the pleadings and evidence led agree on some crucial aspects of the case. The agreed aspects are that there as indeed an insurance contract between the parties for the period 27/12/2001 to 27/12/2002 over disclosed property and for the sum assured of Kshs.49,000,000/=. It was equally a common position that there was indeed a loss due to fire on the 12/2/2002 by which the insured property was damaged. What appears to be disputed is what was the cause of fire and if the said cause was the subject of an exclusion clause.

58. Accordingly in my view and without rubbishing the proposed issues by the plaintiff and the 1<sup>st</sup> defendant, I consider that the main issue for determination as between the plaintiff and the 1<sup>st</sup> defendant is whether the 1<sup>st</sup> defendant, was under the contract entitled to repudiate liability while the claim against the 2<sup>nd</sup> defendant, must remain where it is pleaded to be, an attendance prayer, to the claim against the 1<sup>st</sup> defendant. As against the 2<sup>nd</sup> defendant the issue would be whether or not, it acted to the expected standards or was in breach of duty to the plaintiff being its insurance broker.

59. I would this craft the issues as follows:-

### **BETWEEN PLANT & 1<sup>ST</sup> DEFENDANT**

- i. Was the exclusion clause validly introduced into the contract between the parties?
- ii. Was the 1<sup>st</sup> defendant entitled to repudiate the liability?
- iii. What was the loss suffered by the fire?

### **BETWEEN THE PLAINTIFF & 2<sup>ND</sup> DEFENDANT**

60. The dispute between plaintiff and 2<sup>nd</sup> defendant will only arise for determination if the claim against the 1<sup>st</sup> defendant fails. In that event the only issue would be:-

Did the 2<sup>nd</sup> defendant perform its duties as expected of a diligent and prudent insurance broker?

### **Analysis of facts, evidence, law and determination upon such analysis**

61. I have observed hereinabove that the existence of the contract, the sum assured and loss by fire are not disputed. On the issues for determination being largely centered on the reasons advanced by the 1<sup>st</sup> defendant for repudiation, the determination therefore would largely be a matter of determining the terms of the contract between the parties concerning the exclusion clauses. In determining the said issues, it will be important to have regard of the undisputed fact that even though the period of insurance was agreed to have been between 27/12/2001 to 27/12/2002, the endorsement for the full contract was never issued until a day after the fire occurrence yet the policy document itself was issued only on the 7/3/2002 and received by the plaintiff sometimes after the March 2002.

62. That sequence of events begs the question as to what were the terms of the contract of insurance concerning the risk insured and any exclusion thereto.

63. It is a principle of the law of contract that a contract can be oral, in a series of documents or in a single document. In this case where parties agree that the contract of insurance took effect before the final document was issued and signed, one may ask the question, ***what were the terms agreed between the parties?*** I do find that a resort must be made to the series of document made between the parties beginning with the proposal form, then the correspondence between the three parties including the risk notes and endorsements.

64. In the insurance industry and practice the proposal form is generally accepted and treated as the offer. By it, the prospective insured offers to have his goods insured by the underwriter. When the underwriter gives a quote for premiums and bills the prospective insured and payment for premium is made and accepted, a contract is at juncture clinched.

65. In this matter, the proposal form at pages 18 – 20 of Exh. P1 once received was met with a quotation for premium dated 30/1/2002 in the sum of Kshs.42,324/=. The document is to be found at pages 22 -25 of EXH P1. An important note in that document is found at the foot of

pages 2, 3 & 4 and reads:

**“This summary of your policy is issued for quick and easy reference and if the cover shown does not meet your precise requirements, please return immediately for alteration...”**

66. At page 3 of the same document, (page 24) of the EXH P1, has the critical terms of the policy including the cover sought to be issued. The cover sought was disclosed in the following words:

**“Fire, lightning, bush fire, explosion, earthquake (fire shock, and volcanic eruption) riot’ strike, malicious damage and special perils as per policy”.**

67. While it is true that the said documents only concerned the various electrical and hydraulic equipment’s, it is also conceded by parties that thereafter there was a discussion between the parties by which the cover was extended to cover the ‘*reverse osmosis plant*’ with added premium and the sum assured thereof increased by a sum of Kshs.28,000,000/= to make an aggregate sum assured of Kshs.49,000,000/=.

68. I would thus treat the quote as the basis of the contract between the parties capable of disclosing what the terms of the contract yet to be reduced into writing, were to be.

69. By the time the loss occurred on 12/02/2002, the said policy had in fact not been issued and therefore it can only be fair to hold and find that its terms had not been brought to the attention of the plaintiff so as to give him a chance to exercise the contractual right of challenge given to it in the Risk note.

70. The date the policy document was issued was made an issue for determination when the plaintiff said it was given in March while the defendants denied that fact but without expressly stating when it was issued. Even in evidence no evidence was given by the defendant on that aspect which I do consider to have been critical and important for the sake of this court being assisted to determine whether or not the terms in the policy were within the plaintiff’s knowledge on the date the risk occurred. However, documents shall remain documents and in the bundle of EXH P1 at page 61 there is a letter by the 2<sup>nd</sup> defendant dated 22.3.2002 enclosing and forwarding the policy document, date stamped 7.3.2002, to the plaintiff.

71. I do find that at the time of the occurrence of fire the exclusion clause now sought to be relied upon by the 1<sup>st</sup> defendant had not been brought to the plaintiff’s attention so as to incorporate its terms, particularly the exclusion clauses, as terms of the contract between the parties to be used against the plaintiff.

72. The effect would have been different had the occurrence not happened because then the plaintiff would have had the chance to exercise the provided liberty to bring it to the attention of the defendants for purposes of it being altered.

73. The principle of law that I find applicable in such a case is that a term of contract not brought to the attention of an insured beforehand but later introduced in the policy document after the contract of insurance takes effect need to be in consonance with the preliminary contract and not in contradiction thereto<sup>[1]</sup>.

74. In this case the exclusion of bush fire as a whole or bush fire initiated by the insured of his agent was not a term the plaintiff bargain for and committed to by the time the policy was initiated and cannot be made to bind upon it to its disadvantage. This finding applies to the requirement of evidence of title and in fact all the terms in the policy that went against the grain of the proposal form, the debit/Risk notes and endorsements.

75. On the question of the title to the goods and the vesting of an insurable interest upon the plaintiff, I do consider that the evidence of sale between the plaintiff and PW 1 is sufficient proof of title to the goods having passed to the plaintiff.

76. There having been an uncontested contract for sale of goods, the title thereof passes when the parties desires same to pass<sup>[2]</sup>. It matters not that the purchase price is made payable at a late date. Here if there was to be any genuine challenge on the plaintiff’s title and therefore insurable interest, such challenge would come from the seller as the person who would be alleging lack of consideration. There is no evidence that such a challenge exist. Instead the same seller attended court and gave evidence that the good actually belonged for the plaintiff.

77. I find no merit in the contention that the plaintiff lacked title and insurable interest over the goods and do find that the evidence tendered proved on a balance of probabilities that the goods did belong to the plaintiff who then had a right to insure same.

78. It is a basic requirement of the law of contract that parties should be held to their bargain and that merely that the bargain turns out to be less favourable is not a reason to reside from it<sup>[3]</sup>.

79. In this matter the 1<sup>st</sup> defendant through the 2<sup>nd</sup> defendant did undertake to insure the plaintiff’s goods for a specific sum of money and indeed quoted the due consideration in the name of premiums. The 1<sup>st</sup> defendant did, even after the occurrence of the event, issue an endorsement detailing the particulars of the good insured and the sum assured. That follows on the backdrop of the evidence by PW 1 and DW 3 that the goods had been inspected and verified before the business was underwritten. What is more, the plaintiffs witness was consistence in evidence and referred the court to document by which it was said that the documents of purchase had been given to the investigators/assessors sent on site by the 1<sup>st</sup> defendant. None of the investigators however came to a conclusion on the quantum of the loss as to adjust away from the sum assured. Without an adjustment by a professional assessor/loss adjuster, the parties are left to contend with the contract to insure at the sum agreed.<sup>[4]</sup>

80. I do hold that even though other sum claimed is specific not all specific liquidated claims must demand the proof of special damages. In this matter the plaintiffs claim is just that he insured his property for a specific sum against an agreed peril, which peril did occur resulting in total loss and he is entitled to be indemnified to the contracted sum. In this determination, I am persuaded by the words of the author of MacGillivray & Parkington on insurance law, 6<sup>th</sup> Edition paragraph 210 page 210 where the author says:-

**“Insurers’ usual terms. A court will not require the parties to have reached separate agreement on all the terms of the insurance, apart from the essential terms described above, in order that a contract should be held to exist. It will readily be assumed that, when an applicant seeks insurance cover from particular insurers, he impliedly offers to take an insurance on the insurer’s usual, or standard, terms of cover, just as the insurers’ interim cover note will be issued impliedly subject to the usual conditions contained in their policies. When, therefore, the insurers come to issue their policy, their only obligation is to issue it with the terms and conditions usually attached to their policies, in so far as these are not inconsistent with the express terms of the parties preliminary contract”.**

81. My finding therefore is that the sum assured being contractual and the loss having occurred, the plaintiff is entitled to a declaration that it be indemnified by the 1<sup>st</sup> defendant to the full extent of the sum assured.

82. With such declaration it follows that judgment is due for entry for the plaintiff against the 1<sup>st</sup> defendant, as the insurer, in the sum of Kshs.49,000,000/=.

83. The plaintiff having been entitled to the indemnity within a reasonable time and the defendant having failed to do so, I award to the plaintiff interest on the said sum from the date the suit was filed till payment in full.

84. Having so found against the 1<sup>st</sup> defendant and the claim against the 2<sup>nd</sup> defendant having been in the alternative, there is no basis to consider any judgment against the 2<sup>nd</sup> defendant. The suit against that defendant is dismissed but with no orders as to cost. I do award no costs to the second defendant because in my view the plaintiff had a valid claim against it which I would have considered allowing, if not for the finding against the 1<sup>st</sup> defendant.

85. On costs, the plaintiff having succeeded gets the costs of the suit against the 1<sup>st</sup> defendant.

**Dated and delivered at Mombasa this 31<sup>st</sup> day of July 2019.**

**P.J.O. OTIENO**

**JUDGE**

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[1] MacGillivray & Parkington, On Insurance Law (supra)

[2] Section 19 and 20, Sale of good Act

[3] **National Bank of Kenya Ltd V PipePlastic Samkolit (K) Ltd and another (2002) EA 503**

[4] See Nizar Virani v Phoenix of East Africa Ass Co ltd (2004)eklr