



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. 153 OF 2009

UKWALA SUPERMARKET (KISUMU) LIMITED.....PLAINTIFF

VERSUS

KENINDIA ASSURANCE COMPANY LIMITED.....DEFENDANT

JUDGMENT

[1] The Plaintiff, **Ukwala Supermarket (Kisumu) Limited**, is a limited liability company incorporated and carrying on business within the Republic of Kenya. At all times material to this suit, it was engaged in the business of running a chain of supermarkets, with outlets in various towns in Kenya, including **Kisumu**. To protect its business against perils such as fire, theft and other similar risks, the Plaintiff took out the following insurance policies with the Defendant, **Kenindia Assurance Company Limited**:

[a] Fire and Special Perils Policy...No. P/104/041/0441/2004/30063/11

[b] Fire and Special Perils Policy...No. P/104/040/11/33809/2003/08

[c] Electronic Equipment Policy....No. P/104/021/0334/2007/2/03

No. P/104/024/11/40413/2003/08

[d] Cash in Transit Policy.....No. P/104/100/11/31099/2003/08

[2] The Plaintiff averred that it was a fundamental term of the policies that upon paying the respective premiums, the Defendant would unconditionally indemnify and keep the Plaintiff indemnified against the risks covered under the said policies; and would, upon demand and notification of any events covered under the policies, pay to the Plaintiff in respect of any loss, damage or injury suffered in consequence of risks covered in the said policies. In particular, it was the averment of the Plaintiff that it was expressly agreed between the Plaintiff and the Defendant that the Defendant would pay for any losses occasioned by the following risks under the policies aforesaid:

[a] With respect to the Fire and Special Perils Policy, the loss entailed from interruption of or interference with the Plaintiff's business caused by destruction to the Plaintiff's business building or property therein;

[b] With respect to the Electronic Equipment Policy, the loss covered was any unforeseen and

sudden physical loss or damage of electronic equipment necessitating repair or replacement;

[c] With respect to the Cash in Transit Policy, the Plaintiff was insured for loss of cash in direct transit, loss of cash in the premises in cash tills, locked drawers and locked safes.

[3] The Plaintiff's cause of action was that, on the **29 December 2007**, during the existence, subsistence and validity of the said policies, its supermarkets in **Kisumu** were broken into by a mob and as a result, its property, equipment and money was stolen and the premises set on fire. That as a consequence of the foregoing, the Plaintiff suffered substantial loss and damage, amounting to **Kshs. 181,593,208/=** as at **31 January 2008**. The Plaintiff particularized the loss suffered by it as hereunder:

No.	Particulars	Amount (Kshs.)
1.	Loss of stocks	98,079,039.00
2.	Furniture, Fitting and Fixtures (Kenshop)	16,592,943.00
3.	Electronic Equipment	11,053,093.00
4.	Cash	5,868,133.00
5.	Loss of Profit	50,000,000.00
	Total	181,593,208.00

[4] It was the Plaintiff's contention that the aforesaid loss was fully and expressly covered by the policies, and added that, having duly paid the Defendant all the agreed insurance premiums for the year **2007**, it was eligible for indemnity. The Plaintiff further contended that, since none of the exclusion clauses contained in the said policies is applicable to its claim, the Defendant is bound to honour its obligations as set out in the said policies; but that despite several demands made and notice of intention to sue being duly given, the Defendant had failed, neglected and/or refused to settle its claim. Accordingly, the Plaintiff filed this suit praying for Judgment against the Defendant for:

[a] The sum of **Kshs. 181,593,208/=** aforementioned.

[b] Costs of this suit plus interest at court rates till payment in full.

[c] Such other further relief that the Court may deem fit to grant.

[5] In its Statement of Defence filed herein on **6 April 2009**, the Defendant denied the Plaintiff's claim contending that, save that the Plaintiff took out policies as set out in Paragraph 3 of the Plaint, the risks were covered subject to the terms and conditions set out in the said policies. It further averred that, on or about **29 December 2007**, there was civil commotion in **Kisumu** and other areas in the Republic of Kenya in which numerous buildings including the Plaintiff's supermarkets were broken into, looted and set on fire; and that the events that took place in the Plaintiff's premises on or about the **29 December 2007** had every colour and shade of a civil commotion, assuming the proportion of or amounting to a popular uprising and were part of the general effects of the Post Election Violence experienced in Kenya at the conclusion of the 2007 General Elections; and was therefore not covered by any of the respective policies taken by the Plaintiff. The Defendant thus averred that:

[a] The Fire and Special Perils Policy excluded damage occasioned by or through or in consequence, directly or indirectly of civil commotion assuming the proportion of or amounting to a popular uprising;

[b] The electronic Policy excluded riot, civil commotion, a group of malicious persons acting on behalf of or in connection with any political organization;

[c] The Cash in transit policy excluded liability for riot or civil commotion and was only extended to cover those eventualities after the event; and that in any case, the Plaintiff failed to maintain proper books of account, and to provide a safe in each of the premises covered by the policies as specified in each of the respective policy.

[6] Hence, while conceding that the Plaintiff suffered loss and damage as claimed, the Defendant denied that the said loss was to the extent claimed in Paragraph 7 of the Plaintiff, or that the loss was indemnifiable. Accordingly, the Defendant prayed for the dismissal of the Plaintiff's suit with costs. In its Amended Defence filed herein on **17 May 2013**, the Defendant contended, in further reply to Paragraph 6 of the Plaintiff, that the damage to the Plaintiff's premises on **29 December 2007** was occasioned by or through acts of terrorism as defined in the policy; in respect of which the Plaintiff joined issues with the Defendant vide its Amended Reply to Amended Defence filed on **20 May 2013**.

[7] The trial commenced on **4 February 2014** and the Court (**Kamau, J.**) proceeded thereafter to take the evidence of four of the Plaintiff's five witnesses before being transferred out of station. The proceedings thereafter continued pursuant to **Order 18 Rule 8(1)** of the **Civil Procedure Rules, 2010** and came to a close on **18 July 2017** with the oral highlighting of the written submissions filed herein by Learned Counsel for the parties. The Plaintiff set out to prove that it had taken out various policies with the Defendant to protect it against such perils as theft and/or destruction of its premises, equipment, stock and cash; and that during the subsistence of those policies, its supermarkets in **Kisumu** were broken into, looted and one of them burnt down, thereby causing it immense loss and damage. The Plaintiff further set out to demonstrate that the Defendant was under obligation to indemnify it for the loss and damage suffered, amounting to **Kshs. 181,593,208/=**, but that the Defendant had failed to do so. To that end, the Plaintiff called 5 witnesses whose evidence is summarized here below.

[8] The Plaintiff's first witness, **Hitesh M. Dhanani (PW1)** is one of its directors. His evidence, as set out in his Witness Statement dated **14 February 2012**, which he adopted as his evidence herein, was that when he joined the Plaintiff in **2003**, the company had only one outlet in Kisumu known as **Kenshop**. In the course of time, the Plaintiff acquired **Foamat Supermarket** as a going concern and the same was renamed as **Ukwala Foamat** in **November 2006**. He testified that the Plaintiff then commenced renovations of **Ukwala Foamat** in **July 2007** with a view to establishing an additional floor to expand the trading area and to increase the turnover; and that the renovations were completed in **November 2007**, whereupon the supermarket commenced operations with 230 junior staff and 11 senior staff.

[9] It was thus the evidence of **PW1** that the Plaintiff would make up to **Kshs. 75,000,000/=** per month from both shops, and that as at **December 2007** the sales amounted to **Kshs. 83,000,000/=**. He added that it was their routine to collect cash from the cashiers at the tills twice or three times a day, depending on the volume of business, after which the cash would be confirmed and banked; and that whenever it was impossible to bank the money, the same would be kept in a locked safe in the supermarket. Regarding the circumstances giving rise to this claim, it was the testimony of **PW1** that, since **27 December 2007** was the election date for the 2007 General Elections, all the Plaintiff's branches were closed; and that the shops were re-opened on **28 December 2007**, but closed early at 4.30 p.m. because of the low customer turnout.

[10] **PW1** further stated that, on the **29 December 2007** at about 8.30 a.m., he was contacted by **Alex Achebi**, the Plaintiff's Supervisor at both the **Foamat and Kenshop Branches**, with the information that there were riots in Kondele Area of **Kisumu Town**, and that **Ukwala Foamat** had been broken into and goods were being looted therefrom. He added that he confirmed from the news reports on various Television Stations that **Ukwala Foamat** had actually been broken into by looters. He thereupon advised all the Managers of their various branches not to open the branches and to request the staff who had reported to work to go back home. In the meantime, he contacted **G4S Securicor Company** and asked for their intervention, but was advised that no response could be made as the roads to **Kisumu Town Centre** had been blocked.

[11] **PW1** testified that later in the afternoon, he got to learn that the **Kenshop Branch** had also been broken into and that the **Foamat Branch** had been set ablaze. Upon contacting the Officer Commanding Kisumu Station, one **Mr. Wanyama**, he was advised against visiting the scene for security reasons; and that it was not until later that evening that he was able to go to the scene in the company of **Mr. Bharat D. Shah**, a Manager at the **Foamat Branch**, and the Plaintiff's Accounts Assistant, **Mr. Ashwini Patel**, and some security guards. They found police officers at the scene trying to ward off looters from the **Kenshop Supermarket**.

[12] Describing the scene at the **Kenshop Supermarket**, **PW1** testified that upon entering the shop, they found that the right side of the entrance had been broken into and most of the goods stolen from the shelves; he added that there were goods strewn all over the floor. The same situation obtained on the first and second floors; and that not even the Office Block was spared. They checked the computers and realized that the server was broken; the safe was lying on the floor with its handle broken but was otherwise intact; and scattered on the table were some fifty cents coins.

[13] It was the evidence of **PW1** that following the incident, he contacted the Plaintiff's insurance agent, **Mr. Vishal Taank** of **Image Insurance Brokers Limited**, since the Plaintiff had taken out various insurance policies with the Defendant in respect of its various branches. That he was informed by **Mr. Taank** that an assessment would be carried out on **30 December 2007** and a report prepared. To that end, **Mr. Taank** gave him the contacts of **Mr. Mahesh Mavji**, an Assessor with a firm of independent loss adjusters known as **McLarens Young International**. He confirmed that he got in touch with **Mr. Mavji** and, on **31 December 2007**, he accompanied him to the Plaintiff's affected branches for inspection. After the initial site visit, they were instructed to clear up the shops for stock-taking; which was done from **1 January 2008** for about four weeks. According to **PW1**, the Plaintiff suffered substantial loss and damage, assessed to be to the tune of **Kshs. 181,593,208/=**, made up as hereunder:

No.	Particulars	Amount (Kshs.)
1.	Loss of stocks	98,079,039.00
2.	Furniture, Fitting and Fixtures (Kenshop)	16,592,943.00
3.	Electronic Equipment	11,053,093.00
4.	Cash	5,868,133.00
5.	Loss of Profit	50,000,000.00
	Total	181,593,208.00

[14] The Plaintiff's evidence was that, although the **Kenshop Branch** reopened for business on **1 February 2008**, they were able to recall only 28 members of staff as they had difficulties in re-stocking the shop on account of unpaid debts to its suppliers. Thus, as of **6 March 2009** when this suit was filed, only the **Kenshop Branch** was operational, given that the **Foamat Branch** was completely destroyed and required major renovations. It was thus the testimony of **PW1** that, in spite of requests for compensation by the Defendant to enable it revamp its business, no payment was forthcoming; yet other insurance companies had no problem paying their insured customers for the losses suffered in similar circumstances.

[15] In support of the Plaintiff's case, **PW1** relied on all the documents comprised in the Plaintiff's List and Bundle of Documents dated **5 April 2010** and filed on **23 June 2010** as well as the Supplementary Bundle of Documents dated **26 June 2014** and filed on **3 July 2014**, and urged the Court to allow the Plaintiff's claim as prayed in the Plaint.

[16] The Plaintiff's second witness, **Amon Keoga (PW2)**, was a security guard at the time, employed by **Meka Security** in **Kisumu**. He stated that he was assigned day guarding duties at **Ukwala Supermarket, Kenshop Branch**, on the **11 December 2007**; and that while on duty on the **29 December 2007** before the shop was opened to the public, he saw a mob running towards the shop. He immediately pressed the alarm; and while their response team turned up promptly, they were unable to control the crowd. The riotous crowd was stoning cars and he could see that they were carrying goods from **Ukwala Foammat Branch**. He added that, out of fear for his own life he had to flee and returned to the supermarket at about 5.00 p.m., only to find that it had been broken into and looted.

[17] On his part, **Alexander Achebi Ahakulwa (PW3)**, the Plaintiff's Supervisor, stated that he joined **Ukwala Supermarket** in **2003** as a Shop Assistant; and that in **2007**, he was stationed at the **Foamat Branch** as a Supervisor for both the **Foamat** and **Kenshop Branches**. He added that, for the two months preceding **December 2007**, the **Foamat Branch** had been undergoing renovations with a view of increasing shopping space. It was thus his evidence that by **24 December 2007**, there was booming business and the two shops would operate up to 8.00 p.m. He reiterated the evidence of **PW1** that the shops were closed on **27 December 2007**, which was the date for the General Elections; and that they reopened as usual on **28 December 2007**.

[18] Regarding the events of **29 December 2007**, **PW3** testified that he left his house at **8.30 a.m.** for work but could not make it to town due to riots in Kondele Area. About the same time, he received a phone call from a colleague that there was some looting going on in town and that **Ukwala Foammat Branch** had been broken into and was being looted by a riotous mob. He thereupon relayed the information to the Plaintiff's director, **Mr. Hitesh (PW1)**, who said he would notify the police. By about 2.00 p.m., he got to learn from colleagues and from news reports over the radio that **Ukwala Foammat Branch** had been set ablaze. **PW3** further stated that, when he joined **PW1** at the **Ukwala Foammat Supermarket** on **30 December 2007**, he found him in the company of the police and a Manager, **Mr. Bharat**. The shop was still burning and therefore they could not gain access to it. On proceeding to the **Kenshop Supermarket**, they found the metal grille doors ripped open. The shop had been forcibly broken into and looted. They found security guards from **Meka Security** and **G4S** as well as some policemen inside the shop, which was in a mess, with damaged goods strewn all over the floor. He added that it took a very long time for the **Foamat Branch** to re-open; and that before this incident, there had never been any looting in the shops for any reason.

[19] **Visal Taank (PW4)**, was the Plaintiff's fourth witness. He is a director and Chief Executive Officer of **Image Brokers Limited**, the company that had been procuring and managing the Plaintiff's insurance policies. He adopted the witness statement that he made on **14 February 2012** as his evidence; wherein he stated that, as of **2007** when the Plaintiff suffered the loss that is the subject of this suit, it had procured through his company the following insurance covers from the Defendant:

[a] Loss of Profit (Business Interruption) - No. P/104/041/2004/30063/11

[b] Fire and Special Perils (Material damage) - No. 104/040/11/33809/2003/08

[c] Electronic Equipment Insurance Policy - No. P/104/021/0224/2007/03

No. P/104/024/11/40413/2003/08

[d] Cash in Transit Policy - No. 104/100/11/31099/2003/08

[20] It was the testimony of **PW4** that it was a fundamental term that of the policies aforesaid that upon the Plaintiff paying the respective policy premiums, the Defendant would unconditionally indemnify and keep the Plaintiff indemnified against the risks covered under the policies; and would, upon demand and notification of any events covered under the policies, pay the Plaintiff in respect of any loss, damage or injury suffered in consequence of risks covered in the said policies. He confirmed that the Plaintiff had duly paid all the agreed insurance premium for the year **2007**; and therefore, under the aforementioned policies, the Plaintiff was covered for that year in respect of the following risks:

[a] With respect to the **Fire and Allied Perils Policy**, it covered all movable and immovable property located at particular premises such as buildings, plant, machinery, furniture, fixtures, fittings and other contents, stocks and stocks in process along with goods held in transit or on commission, including stocks at suppliers'/customers' premises, and machinery temporarily removed from the premises for repairs. Also covered by this policy was damage or loss caused by fire, lightning, explosion/implosion aircraft and articles dropped therefrom, impact damage by rail/road or animals, riot and strike, malicious damage, landslide, storm, cyclone, typhoon, tempest, hurricane, tornado, flood and inundation.

[b] With respect to **Fire & Consequential Loss (Loss of Profit)**, the policy covered loss of profits following damage to business premises or any part thereof.

[c] With respect to the **Electronic Equipment Policy** the loss covered was any unforeseen and sudden physical loss or damage of electronic equipment necessitating repair or replacement.

[d] With respect to the **Cash in Transit Policy**, the Plaintiff was insured for loss of cash in direct transit, loss of cash in the premises in cash tills, locked drawers and locked safe.

[21] PW4 further stated that, on **29 December 2007**, he was informed by **Mr. Hitesh Dhanani (PW1)** that the Plaintiff's supermarkets in **Kisumu** had been broken into and that looting was ongoing. He verified the information from the media as the looting was being televised via the televisions and radio. He accordingly contacted the Defendant, and they in turn appointed the assessors, **M/s McLarens Young International** to assess the loss. The Assessor, **Mr. Mahesh Mavji** proceeded to **Kisumu** on **30 December 2007** to initiate the assessment process. PW4 pointed out that the loss to the Plaintiff occurred on **29 December 2007** before the results of the Presidential Election was announced; and that the same was occasioned by looting and theft, and was therefore covered by the policies issued by the Defendant. According to him, the policies did not contain any exclusion clauses with regard to war, civil war, political risks or terrorism. His evidence was that what was excluded was loss occasioned by an organized group seeking to overthrow the government. He further stated that by a letter dated **7 January 2009**, the Defendant wrote to **Image Insurance Brokers Ltd** indicating that all policies being issued or renewed with effect from **1 January 2009** would henceforth be endorsed with a "**War, Civil War, Political Risks & Terrorism Exclusion Clause.**" It was therefore the testimony of PW4 that the Defendant cannot rely on the said exclusion clauses to avoid liability herein, given that the Plaintiff's loss was occasioned by looting and theft.

[22] The Plaintiff's last witness was **Dipesh Shah, PW5** herein. He is a director with **VSC Consultants Ltd**, and a member of the Association of Chartered Certified Accountants (ACCA). He stated that his company was appointed by the Plaintiff to compile and verify the claim for loss of assets which occurred to the Plaintiff on **29 December 2007**. He carried out the assignment and prepared a report dated **23 October 2009** which he produced herein and confirmed the loss as follows:

[a] Total Loss of Assets - Kshs. 27,646,036.00

[b] Loss of Stocks - Kshs. 98,079,039.00

[c] Loss of Cash - Kshs. 5,868,133.00

Total - Kshs. 131,593,208.00

[23] In its behalf, the Defendant called **David Freer (DW1)**, a self-employed Insurance Consultant based in London. He stated that, at the instance of the Defendant, he prepared a report in connection with this matter dated **23 April 2015**, which he adopted and produced herein as an exhibit. He explained that the whole concept of terrorism cover came up after the **September 11, 2001** terrorists attacks in the United States of America. That it was then that the insurance industry realized that they could not cope with the risks posed by terrorism. In his report, filed herein on **6 October 2015**, he analyzed some of the exclusion clauses in the policies issued by the Defendant to the Plaintiff. He noted that the 3rd Policy for electronic

equipment did not specifically talk about terrorism, but included malicious acts in connection with any political organization. He was of the view that the definition of what amounts to civil commotion is varied; and so he was not in a position to give an opinion on whether the incident that occurred in **Kisumu** amounts to civil commotion or not; and that this could only be determined upon a full review of all the relevant evidence.

[24] The foregoing being a summary of the evidence, and having given careful consideration to the pleadings, the evidence, the applicable law and the submissions made herein by Learned Counsel for the parties, I note that there is a preliminary issue emerging therefrom, namely, the argument by **Mr. Munyu**, Counsel for the Plaintiff, as to the admissibility of the expert evidence that was adduced by **David Freer (DW1)** on behalf of the Defendant. According to **Mr. Munyu**, the expert evidence by **DW1** is wholly inadmissible and fails to meet the parameters of an expert. He relied on **Black's Law Dictionary, 8th Edition** definition as well as the following authorities in support of his argument that the said witness did not possess the requisite academic qualifications to be treated as an expert witness:

[a] **Mutonyi vs. Republic [1982] eKLR;**

[b] **Shamas Charania vs. Harit Sheth t/a Harit Sheth Advocates [2007] eKLR;**

[c] **Scorpion Holdings Ltd vs. Lion Assurance Co. Ltd Civil Suit No. 221 of 2013** (a Ugandan authority);

[25] **Mr. Amoko** for the Defendant was however of the contention that in raising the objection, the Plaintiff is factually and legally mistaken; and that nowhere in **the Mutonyi Case** (supra) did the Court of Appeal even suggest that academic qualifications are the *sine quo non* of admissibility. **Mr. Amoko** instead directed the Court's attention to **Section 48** of the **Evidence Act, Chapter 80** of the **Laws of Kenya** and stressed that all that is required is special skills in the area of expertise. Accordingly, it was **Mr. Amoko's** argument that, although not having any academic qualifications, **DW1** is an expert by virtue of his experience, which stems from **1964** to date, and spans the entire gamut of the insurance industry; and that, having handled insurance assessments of policies in connection with political risks, he is precisely the specialist that can render authoritative assistance to the Court in this matter.

[26] The definition of the word "**expert**" according to **Black's Law Dictionary, 8th Edition** is:

"A person who, through education or experience, has developed skill or knowledge in a particular subject, so that he or she may form an opinion that will assist the fact-finder."

Thus, the definition accords well with the text of **Section 48** of the **Evidence Act** in terms of the pertinence of specific skill, whether derived from academic pursuits or experience. Hence, in **Sarkar on Evidence, 10th Edition**, the authors express the view that:

"An expert, in order to be competent as a witness, need not have acquired his knowledge professionally; it is sufficient, so far as the admissibility of the evidence goes, if he made a special study of the subject, or acquired a special experience therein."

[27] This appears to be the tenor and effect of the authorities cited by the Plaintiff. For instance, in **the Mutonyi Case**, the Court of Appeal held that:

"Expert evidence is evidence given by a person skilled and experienced in some professional or special sphere of knowledge of the conclusions he has reached on the basis of his knowledge, from facts reported to him or discovered by him by tests, measurements and the like...Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts put in evidence."

[28] In his report filed herein on **6 October 2015**, **DW1** set out his career background in Paragraph 2

thereof. It is evident that he has been in the insurance industry as from **1964**, when he started off at **Halford, Henry & Montifiore Ltd**, handling all aspects of Marine and Non-Marine claims. It is also evident that between **1976** and **1994**, while working for the Corporation of Lloyds, he rose through the ranks to the position of the Chief Advisory Officer, and had occasion then to serve as the Secretary to **the War & Financial Guarantee Committee**, dealing with the underwriting of, inter alia, political risk business in the Lloyd's market. Between **1995** and **2010**, he was working for **HSBC Insurance Brokers** as the Divisional Director, Political Risks; and his responsibilities included all aspects of broking and client contact for Political Risks and Trade Credit Insurance with clients based in the UK, North America, Europe, Middle East and Australia. As at the time of preparing his report, he was an Independent Reviewer for various Syndicates at Lloyds. Accordingly, I would agree with **Mr. Amoko** that **DW1** does qualify as an expert witness from the range of experience he has under his belt. I would thus overrule **Mr. Munyu's** objection in this connection.

[29] From the evidence adduced herein, there is no dispute that the Plaintiff obtained policies from the Defendant as follows:

[a] **The Fire and Special Perils Policy (Business Interruption) vide Policy No. P/104/041/0441/2004/30063/11:** A copy of the said policy was produced herein at pages 1 to 10 of the Plaintiff's Bundle of Documents filed on **23 June 2010**. The parties are in agreement that this policy covered the Plaintiff from perils resulting in interruption or interference of its business due to fire, lightning, explosion, riots, strikes, lock-outs of workers, as well as damage from aircraft and other aerial devices or articles dropped there from. There is no dispute that this policy excluded damage or loss occasioned by civil commotion assuming the proportion of or amounting to a popular rising and acts of terrorism committed by a person acting on behalf of or in connection with any organization.

[b] **The Fire and Special Perils Policy (Material Damage) No. 104/040/11/33809/2003/08:** A copy of the policy was exhibited at pages 11 to 24 of the Plaintiff's Bundle of Documents and pages 5 to 10 of the Defendant's Bundle of Documents. The parties are in agreement that the scope of this cover was damage related to stock, buildings, plant and machinery due to fire, lightning, explosion, riots, strikes, and lock-outs among others. There is similarly, no dispute that the policy excluded damage occasioned by acts of terrorism committed by a person or persons acting on behalf of or in connection with any organization; civil commotion assuming the proportions of or amounting to a popular rising; and the malicious act of any person (whether or not such act is committed in the course of disturbance of the public peace) not being the wilful act of any rioter, striker or locked-out worker in furtherance of a riot or strike or in resistance to a lock-out.

[c] The Plaintiff's **Electronic Equipment Insurance Cover** was provided by the Defendant vide two policies, being **Policy No. P/104/021/0224/2007/2/03**, which was exhibited at pages 25 to 35; and **Policy No. P/104/024/11/40413/2003/08** at pages 36 to 45 of the of the Plaintiff's Bundle of Documents. There is no disputation herein that, under these policies, the Plaintiff was insured against any unforeseen and sudden physical loss or damage of electronic equipment necessitating repair or replacement. The policy documents show that these policies excluded loss occasioned by invasion, civil war, nuclear related loss, mutiny, riot, strike, civil commotion, a group of malicious people acting on behalf of or in connection with any political organization, conspiracy, confiscation, commandeering, destruction or damage by order of any Government de jure or de facto or by public authority; as well as wilful acts or wilful negligence of the insured or its representatives.

[d] Finally, there is uncontroverted evidence that the Plaintiff applied for and obtained a **Money Insurance Cover** from the Defendant vide **Policy No. 104/100/11/31099/2003/08**, a copy of which was exhibited at pages 103 to 114 of the Defendant's Bundle of Documents; and that under this policy, the Plaintiff was insured against the risk of loss of money, including cash and/or other currency notes occasioned by robbery or theft or any other cause whatsoever whilst in transit or whilst on the premises in cash tills, in locked drawers or in locked safe. There is no dispute that the policy excluded liability for, amongst others, any loss or damage directly or indirectly, proximately or remotely occasioned by, contributed by or arising out of or in connection with civil war, strike, civil commotion, rebellion, military or usurped power. The policy also excluded loss of money following the opening of locks, safes

and strong rooms using keys unless the keys were obtained violently; or loss occasioned by collusion of the Plaintiff's employees.

[30] There is further no dispute that following the General Elections that were held in Kenya on **27 December 2007**, there erupted unprecedented violence in many parts of the country, following the announcement of the presidential election results on **30 December 2007**. The Defendant produced herein extracts of the **Report of the Commission of Inquiry into the Post Election Violence (CIPEV)**, as well as the **Kenya National Commission on Human Rights' Final Report** dated **15 August 2008**, entitled **On the Brink of the Precipice**. Both reports confirm the evidence adduced herein by the Plaintiff that, in the case of **Kisumu**, incidents of violence and looting was reported in the region even before the announcement of the presidential election results. In this connection, it was reported by the **CIPEV** thus at page 177 of its Report:

"The Commission heard that the violence in Nyanza occurred in 3 distinct phases. The first was directly related to the context of elections and took place between 29 and 31 December 2007. It was characterized by demonstrations, riots, acrimony and discontent. The second phase occurred in the New Year and was reactionary apparently in protest against what was viewed as excessive use of force by police and also in response to calls for mass action by the ODM leadership which lasted until mid January 2008. The third phase was associated with two unrelated events, first the targeting of Luo by Kikuyu gangs in Nakuru and Naivasha leading to an influx of Luo IDPs from outside Nyanza..."

[31] At page 159 of the Final Report of the **Kenya National Commission on Human Rights**, it was reported thus:

"The delay in announcement of the presidential elections results as well as widespread rumours of election rigging heightened the tension in the region...the controversial declaration of Mwai Kibaki as the winner of the presidential vote on December 30 2007 sparked off violence throughout the region ... Nyanza Province witnessed violence in the months of December 2007, January, February and March 2008. Initial violence occurred around 29 December 2007 ...There was widespread looting and destruction of property belonging to persons perceived not to be indigenous to the region ("foreign communities")...The first phase of the violence was precipitated by delay in announcement of the presidential results as well as the announcement of Mwai Kibaki as the President and this was largely between 29 December 2007 and 10 January 2008. The second phase of the violence was between 15 and 17 January 2008, which is also the period when ODM called for mass protests. The mass protests had been declared illegal by the police. The third phase of violence was catalyzed by external factors such as the influx of IDPs from areas including Naivasha and Central Province, who recounted harrowing stories of their ordeal in the hands of murderous gangs, as well as the deaths of ODM politicians Mugabe Were the MP for Embakasi and David Kimutai Too the MP for Ainamoi..."

[32] The Plaintiff's contention that it suffered damage as a result of the riots and looting that occurred on the **29 December 2007**, is similarly uncontroverted. There is ample evidence in this regard from the evidence of **PW1 - PW5**; and to buttress that evidence, a set of documents were produced herein, including:

[a] A police abstract dated 8 January 2008

[b] A photo album showing a set of photographs taken at the Plaintiff's premises;

[c] Correspondence between the Plaintiff and the Defendant, Loss Adjusters, McLarens Young International;

[d] Plaintiff's advertisement targeting its creditors, demand letters from creditors, and select newspaper extracts of Financial Standard and Daily Nation for the period between **8 January 2008**

and **10 February 2009**; all of which confirm that the Plaintiff's supermarkets were broken into and property looted and/or destroyed by a riotous mob on **29 December 2007**.

[33] In connection with the **Ukwala Supermarket** incident, the **KNCHR Report**, which, as has been pointed out herein above, was produced by the Defendant as one of its exhibits, stated that:

"The mention of Ukwala Supermarket evokes images of badly destroyed and burnt property in Kisumu Town. The event was widely publicized in local and international media and has come to represent the damage that was occasioned to property perpetrated against so-called "foreign communities". The business suffered an estimated loss of about Kshs 150 million..."

[34] Thus, the Plaintiff has demonstrated, to the requisite standard, that its two outlets in **Kisumu**, namely the **Ukwala Foamat Supermarket** and the **Kenshop Supermarket**, were broken into and property looted therefrom by a riotous mob. In the case of the former, the supermarket was set ablaze thereafter and thus completely destroyed. The evidence being wholly un rebutted, it is therefore indubitable that the Plaintiff's property, equipment and money was stolen and destroyed by fire and otherwise, thereby occasioning it immense loss. It is also unquestionable that this occurred during the subsistence of the insurance policies aforementioned as proved by the evidence of **PW1** and **PW2** and the Renewal Certificates exhibited at pages 46 to 62 of the Plaintiff's Bundle of Documents.

[35] As was required of the Plaintiff by the terms of the Policies, **PW1** promptly made a report of the occurrence to **PW4** as the agent for the Defendant and, while not expressly denying that the damage and loss complained of was indeed suffered by the Plaintiff, the Defendant averred, at Paragraphs 6, 7 and 7A of its Defence, that the occurrence of **29 December 2007** was due to civil commotion assuming the proportion or amounting to a popular rising or acts of terrorism; and were part of the general effects of the Post Election Violence experienced in Kenya at the conclusion of the 2007 General Elections.

[36] In the light of the foregoing, the issues that remain for my determination, having looked at the separate Lists of Issues filed herein by the Plaintiff on **4 November 2009** and the Defendant on **20 May 2010**, can be summarized as follows:

[a] Whether the loss suffered by the Plaintiff was occasioned by acts falling within the exclusion clauses contained in the said insurance policies; and if not,

[b] Whether the Plaintiff did suffer loss in the sum of **Kshs. 181,593,208/=** as claimed in the Plaintiff; and

[c] Whether the Plaintiff is entitled to interest on the said sum of **Kshs. 181,593,208/=** and costs.

[a] On whether the Plaintiff's loss was attributable to events excluded by the respective policies:

[37] Having reviewed the policies aforementioned and the exclusion clauses therein, it is evident that the common thread running through them is the contention by the Defendant that the loss and damage suffered by the Plaintiff was specifically and expressly excluded. Under the **Fire and Special Perils (Business Interruption) Policy** and the **Fire and Special Perils (Material Damage) Policy**, the exclusion clauses had to do with damage occasioned by civil commotion assuming the proportions of or amounting to a popular rising; and acts of terrorism committed by a person or persons acting on behalf of or in connection with any organization. In the latter case, the exclusion clauses included the malicious act of any person (whether or not such act is committed in the course of disturbance of the public peace) not being the wilful act of any rioter, striker or locked-out worker in furtherance of a riot or a strike or in resistance to a lock-out.

[38] Similarly, the **Electronic Equipment** and **Money Policies** had exclusion clauses that exempted civil war, nuclear related loss, mutiny, riot, strike, civil commotion, acts of malicious people or wilful negligence or collusion on the part of the Insured or its agents. According to Counsel for the Defendant,

there is no other conclusion possible other than that the events that took place on **29 December 2007** in **Kisumu**, involving the Plaintiff's two supermarkets, were part of the Post Election Violence that occurred in the wake of the disputed outcome of the General Elections of 2007, and are therefore excluded as (a) civil commotion assuming the proportion of or amounting to a popular uprising; and (b) acts of terrorism as defined under the policies.

[39] The Plaintiff's Counsel referred the Court to the case of Spinney's [1948], Spinney's Centres S.A.L and Michel Doumet Joseph Doumet and Distributors and Agencies S.A.L vs. Royal Insurance Co. Ltd [1980] 1 Lloyd's Rep 406 wherein the phrase "civil commotion assuming the proportion of or amounting to a popular uprising" was explained as follows:

"It still remains to be considered whether the civil commotion assumed the proportions of or amounted to a popular rising. The latter words have no recognized technical meaning. Often they must mean the same as "insurrection". Where there is a distinction, it probably lies in the greater spontaneity and looser organization of a popular rising. But I would still be inclined to consider that there must be some unanimity of purpose among those participating, and also that the purpose must involve the displacement of the government. I doubt whether a violent attack by one section of the population on the other on grounds, for example, of religion or race, would be described as a rising. Adopting this interpretation, I would not say that the disturbances in Lebanon amounted to a popular rising. But were they "assuming the proportions" of such a rising. The word "proportions" is sometimes used to mean shape or configuration. I do not think that it has this sense here. To my mind, the word signifies "dimensions". So one must identify the dimensions of a popular rising. This cannot be done precisely. All one can say is that it must involve a really substantial proportion of the populace, although obviously not all the population need participate, and that there should be tumult and violence on a large scale. On the findings which I have made, the events in Lebanon satisfied this test, and the exception therefore applies."

[40] Counsel further submitted that, given the definition of "insurrection" in case law, such as in National Oil Corporation of Zimbabwe (Pte) Limited vs. Sturge [1991] 2 Lloyd's Reply. 281; Pan American World Airways Inc. vs. The Aetna Casualty and Surety co. and Others [1974] 1 Lloyd's Rep. 207; and Levy vs. Assicurazioni Generali [1940] 3 AllER 427, to mean a violent uprising with the main object of overthrowing the government, the events that occurred in Kisumu on **29 December 2007** cannot be classified as civil war or civil commotion assuming the proportion of a popular uprising.

[41] The evidence adduced herein by the Plaintiff was to the effect that the looting and damage that affected their two supermarkets in **Kisumu** took place on **29 December 2007**, before the announcement of the presidential election results; and that the same was perpetrated by the general members of the public who took advantage of the security lapse during the period, granted that most police officers had been deployed on election duties. **PW1** in particular was of the conviction that, to the best of his knowledge and having resided and done business in **Kisumu** for a considerable period of time, the looting and destruction was spontaneous. In cross-examination, **PW1** conceded that since large businesses in **Kisumu** were predominantly ran by Asian businessmen, they were the targets of looters. He however added that this was purely coincidental; and that the same would have happened had the same businesses been owned by members of the Luo community, who, as a matter of local notoriety, are the majority of the residents in the area.

[42] In similar vein, **PW2** gave evidence that the events of **29 December 2007** were riots by members of the general public and were not organized events as there were no ring-leaders leading the riots. According to him the looting in the shops was unplanned and uncoordinated. He added that many other shops in addition to the Plaintiff's supermarkets were broken into and looted. The same evidence was given by **PW3**. In the light of the Plaintiff's evidence as to the nature of events pertaining to its loss and damage, it was the responsibility of the Defendant to then demonstrate by cogent evidence that the events were otherwise; and in particular, that they fell within the exceptions set out in the respective policies in issue.

[43] The Defendant, on its part, called only one witness as **DW1**, an expert, who had no idea as to how the events in **Kisumu** unfolded; and who admitted that he did not know what happened in **Kisumu**; and while it is noteworthy that he made an attempt to define "**terrorism**" and "**civil commotion**" in his report dated **23 April 2015**, he did not provide the court with any clear-cut elucidation or enlightenment as would have been expected of an expert. His report was commissioned by the firm of **Oraro & Company Advocates**, and it shows that specific questions were put to him in his capacity as an expert, seeking his expert opinion as to the meaning and effect of the exclusion clauses in the contracts of insurance. An excerpt of his response is as follows:

"Whilst on the face of it the events of 29 December 2007 may not initially appear to be terroristic in nature and I do not believe the Kenyan authorities ever declared the events of 2007/8 to be an act of terrorism, a strict interpretation of the definition in the fire policy may exclude the loss in question. However, in order to make such a determination on whether the situation that occurred in Kisumu falls within the terrorism exclusion a full review of all the relevant evidence would need to be undertaken."

[44] In respect of the definition of "**civil commotion**" **DW1's** report states as follows at pages 4 and 5 thereof:

"Many insurance policies define civil commotion and one such definition is "means a substantial violent uprising by a large number of persons assembled together and acting with common purpose or intent. Lord Mansfield defines a civil commotion to be "an insurrection of the people for general purposes, though it may not amount to rebellion where there is an usurped power. Civil commotion refers to a public revolt by a large number of people who cause harm to people or property. It is a revolt by a large number of people for general purposes and it usually involves many more people than a riot. Civil commotion is a kind of civil disobedience movement by the people which is serious and prolonged compared to a riot."

[45] In cross-examination, **DW1** conceded that he was not in a position to say whether the damage occasioned in **Kisumu** would fall within the definition of **terrorism** as was set out on pages 4 and 5 of his report. He conceded as much in respect of the definition of **civil commotion**; in effect contradicting the instructions he received, as set out at paragraph 4 of his report on page 2, by stating categorically that:

"I was not asked to give an expert opinion on whether what occurred in Kisumu amounted to terrorism or civil commotion...I cannot say whether this exclusion applies to the facts of this case or not."

[46] Moreover, the evidence adduced by the Plaintiff's witness does show that the looting and destruction was not prolonged in the sense referred to in **DW1's** report. It did not overflow to the following day or days, thus confirming the Plaintiff's contention that the incidents were spontaneous. In the **KNCHR** Report, this is confirmed as follows:

"The information collected by the KNCHR suggests that the first phase of violence had a relatively lower level of organization..."

[47] Needless to say that the burden of proof is on he who alleges. **Section 109** of the **Evidence Act, Chapter 80** of the **Laws of Kenya**, is explicit that:

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence..."

Indeed in **the Spinney's Case** (supra) the question of how the Court should apply the reverse burden clause came up for consideration, and it was held thus:

"...the insurers cannot bring the clause into play simply by asserting that the loss was

excluded by a particular exception, and challenging the insured to prove the contrary. They must produce evidence from which i can reasonably be argued that (a) a state of affairs existed or an event occurred falling within an exception, and (b) the excepted peril directly or indirectly caused the loss. It is only when an arguable case of this nature is made out that the insured is required to disprove it..."

[48] Thus, it was incumbent upon the Defendant to demonstrate, on a balance of probabilities, that the loss and damage suffered by the Plaintiff was attributable to civil war, or civil commotion assuming the proportion of a popular uprising. Hence, the evidence that was adduced by the Plaintiff, which remains uncontroverted, is that the loss was occasioned by sporadic activities of looters who were acting for personal gain and not for any organized cause, let alone the cause of overthrowing the Government. Similarly, as was conceded by the **DW1**, it cannot be said that the loss was an act of terrorism, granted that the looting was neither occasioned by an organized group, nor was any material laid before the Court to show that it was done for the purpose of causing fear on a section of the public within the purview of the definition of 'terrorism' in the said policies. Needless to say that for the purpose of this suit, the letter of **7 January 2009** and the revised definition of terrorism therein is immaterial, as it was inapplicable to the subject policies.

[49] Accordingly, the Defendant having failed to prove that the events complained of by the Plaintiff fall outside the scope of cover envisaged by the respective insurance policies taken by the Plaintiff, I find and hold that the said loss and damage is indemnifiable by the Defendant under the respective policies.

[b] On whether the Plaintiff did suffer loss in the sum of Kshs. 181,593,208/= as claimed in the Plaintiff:

[50] **PW5**, who carried out the loss verification exercise, testified that the exercise was undertaken between **28 January 2008** and **28 March 2008**. According to his report dated **23 October 2009**, the Plaintiff's loss was quantified as follows:

[a] Total Loss of Assets - Kshs. 27,646,036.00

[b] Loss of Stocks - Kshs. 98,079,039.00

[c] Loss of Cash - Kshs. 5,868,133.00

Total - Kshs. 131,593,208.00

[51] **PW5** explained that the figures were arrived at by analyzing the Plaintiff's audited accounts for the period **2005** to **2007**, by taking the opening balances, adding the assets bought in the year and comparing the same with the invoices for the purchases. He stated that he could not verify the existence of the actual assets as most of the assets had been looted or burnt down. As for the stocks, he used the Gross Profit reported in **2006** of 11.57% and the VAT returns for **2007** (at pages 11-22 of the Plaintiff's Supplementary Bundle of Documents) to calculate the sales and purchases to obtain the theoretical quantum of stocks. This sum was adjusted with the value of stocks recovered from at the **Kenshop Branch** and stores to arrive at the approximate stocks lost in the incident. As for the Loss of Cash, worked out at **Kshs. 5,868,133/=**, **PW5** explained that the aforesaid sum was arrived at after a verification of the Cash Book for the period between **1st** and **26th December 2007** against the sales, expenses paid and the banking made in the period to get a cash balance as at **26 December 2007** of **Kshs. 11,118,133/=**. From this amount he deducted the cash recovered on **2 January 2008** of **Kshs. 5,250,000/=** to arrive at the amount of cash lost of **Kshs. 5,868,133/=**. From the evidence of **PW1**, there was a loss of profits component that was capped at **Kshs. 50,000,000/=**, thus making the total of **Kshs. 181,593,208/=**.

[52] In addition to the foregoing, the Plaintiff adduced evidence through **PW1** and **PW3** that upon the occurrence being reported to it, the Defendant instructed the firm of Loss Adjusters, **McLarens Young International Limited**, to conduct an assessment with a view of determining the extent of the losses suffered by the Plaintiff; and that an Assessor, **Mr. Mahesh Mavji**, was dispatched to **Kisumu**; and that

he visited the two affected supermarkets, took photographs at the scene and questioned witnesses, including guards, in connection with the occurrence. Again, the evidence of the Plaintiff is entirely uncontroverted; and there is no indication that the loss adjusters prepared a report as envisaged by **Section 203(2) of the Insurance Act, Chapter 487 of the Laws of Kenya.**

[53] In **Safarilink Aviation Limited vs. Trident Aviation Kenya Limited & Another [2015] eKLR**, **Mabeya, J.** expressed the view that:

"...failure to rebut evidence tendered by one party leaves the court with no option but to draw an inference that the facts as presented are true..."

The same finding was made in **Linus Nganga Kiongo & 3 Others vs. Town Council of Kikuyu [2012] eKLR** and **Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCC No. 1243 of 2001**. The case of **Kenya Akiba Micro Financing Limited vs. Exekiel Chebii & 14 Others [2012] eKLR** was also relied on by the Plaintiff, for the proposition that where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the Court is entitled to make an adverse inference that if such evidence was produced, it would be adverse to such a party. Accordingly, in the absence of evidence to controvert the quantum of loss as pleaded and proved by the Plaintiff herein, the Court is satisfied that the Plaintiff has shown on a balance of probabilities that it is entitled to **Kshs. 181,593,208/=** as prayed for in the Plaintiff.

[c] On Interest and Costs:

[54] In its written submissions, Counsel for the Plaintiff pitched a case for the payment of interest at court rate of 14% per annum, contending that the claim is a liquidated one for **Kshs. 181,593,208/=** and that the Plaintiff has been deprived of the said sum since **31 January 2008**, when the said amount became due. Counsel also relied on **Section 26 of the Civil Procedure Act, Chapter 21** of the Laws of Kenya, as well as the case of **Francis Joseph Kamau Ichatha vs. Housing Finance Company of Kenya Limited [2015] eKLR** to support the claim to interest from **31 January 2008** before the filing of this suit.

[55] No doubt, the Court does have the discretion to award interest, including interest on sums found due to a plaintiff, from such period as appropriate. In **Dipak Emporium vs. Bond's Clothing [1973] EA 553**, it was held that:

"The court's right to award interest is based on Section 26(1) of the Civil Procedure Act which states that where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of payment or to such earlier date as the court thinks fit ... Where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing suit. Where, however, damages have to be assessed by the court, the right to those damages does not arise until they are assessed and therefore interest is only given from the date of judgment."

[56] Thus in **the Ichatha Case (supra)**, **Odunga, J.** had occasion to summarize the three instances provided for in **Section 26(2) of the Civil Procedure Act** in which interest is awardable thus:

[a] Interest adjudged on the principal sum from any period prior to the institution of the suit. Here the court must first decide on the evidence, the question of awardability of this interest and then on the rate at which it is to be awarded if any;

[b] Interest on the principal sum adjudged from the date of filing the suit to the date of the decree, where, the court decides at its discretion, the rate of interest to be awarded; and

[c] Interest on the aggregate sum so adjudged from the date of decree to date of payment in full.

[57] Thus, on the awardability of interest herein, Counsel for the Defendant urged the Court to note that this was only asked for in the Plaintiff's written submissions and was not pleaded in the Plaint. On the authority of **Nairobi city Council vs. Thabiti Enterprises Ltd [1995-98] 2 EA 231**, Counsel urged the Court to find that no interest is recoverable in this case. A look at the prayers in the Plaint confirms that interest on the principal sum was not expressly prayed for. The prayers, as pleaded read:

"WHEREFORE the Plaintiff prays for judgment against the Defendant for:-

- a) The sum of Kshs. 181,593,208.00 from the 31st January 2008 until payment in full.**
- b) Costs of this suit plus interest at court rates till payment in full.**
- c) Such other further relief that this Honourable Court may deem fit to grant."**

[58] Clearly therefore, the Plaintiff is not entitled to interest on the principal sum, for the reason that it did not pray for it. In **Nairobi City Council Case** (supra), it was held that:

"It is now settled law that the only way to raise issues for determination by the Court is through pleadings and it is only then that a claimant will be allowed to proceed to prove them."

[59] As for costs, the proviso to **Section 27(1)** of the **Civil Procedure Act** is explicit that costs shall follow the event, the event herein being that the Plaintiff is successful against the Defendant in respect of its claim for **Kshs. 181,593,208/=**. Similarly, **subsection (2) of Section 27, Civil Procedure Rules**, recognizes that interest on costs is awardable at any rate not exceeding 14% per annum.

[60] In the result, judgment is hereby entered for the Plaintiff in the sum of **Kshs. 181,593,208/=** together with costs of the suit and interest on costs as prayed for in the Plaint dated **10 February, 2009**.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF NOVEMBER 2017

OLGA SEWE

JUDGE