REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO 355 OF 2010

SEDGWICK KENYA INSURANCE BROKERS LIMITED.....PLAINTIFF

VERSUS

KENOL KOBIL PETROLEUM LIMITED.....1ST DEFENDANT

KENYA OIL COMPANY LIMITED.....2ND DEFENDANT

RULING

[1] Before the Court for determination is the Plaintiff's Notice of Motion dated **18 December 2017**. It was filed under **Sections 1A, 1B, 3, 3A and 80 of the Civil Procedure Act,** and **Order 45 Rule 1** of the **Civil Procedure Rules** for orders that the Judgment delivered herein on **19 February 2016** be varied, reviewed and/or amended with regard to the rate of interest awarded to the Plaintiff; and that the costs of the application be provided for. The application is premised on the grounds that there is an error apparent on the face of the record in the said Judgment; and that there is ambiguity as to the date from when the interest ought to accrue. It was supported by the affidavit of **Sammy Kiragu** annexed thereto, sworn on **18 December 2017.**

[2] It was the averment of **Mr. Kiragu** that the Plaintiff filed the instant suit by way of a Plaint dated **13 May 2010** seeking to recover from the Defendants a sum of **USD 62,507.66** being unpaid premium under 2 insurance policies for the period commencing **16 April 2005** and ending **15 April 2006**; and the period commencing **1 February 2007** to **12 July 2007**. The case was heard and Judgment delivered on **19 February 2016,** whereupon judgment was entered in favour of the Plaintiff against the Defendants jointly and severally for the sum of **USD 62,507.66** together with interest and costs.

[3] It was further averred that thereafter, the Decree was drawn and the decretal sum settled on **20 April 2016;** and the costs of the suit were subsequently paid on **27 September 2016**. What has been outstanding is the aspect of interest, which was erroneously reflected as having been awarded at 65% per annum. It was averred by the Plaintiff that although the parties engaged in negotiations with a view of settling the aspect of interest no agreement has been reached, basically on account of the error, and on the ambiguity as to the duration thereof. The Plaintiff indicated its willingness to accept interest at court rates from the date of filing of suit to date of payment, namely **20 April 2016**, as opposed to the year **2007** when the cause of action arose. In addition to copies of the Plaint, the Judgment and the Decree, the Plaintiff annexed to the Supporting Affidavit copies of correspondence exchanged between the parties evidencing, inter alia, the payment of the decretal sum together with costs.

[4] In the Replying Affidavit sworn on behalf of the Defendants by **Mary Mutungi,** it was conceded that there was indeed an error on the face of the record in connection with the interest rate of 65% and urged that the same be corrected under **Section 99** of the **Civil Procedure Act**. The Defendant however opposed the proposal that interest be paid from the date of filing suit, contending that such interest ought to be payable from the date of Judgment, since the Plaint was silent on the effective date that interest would be payable.

[5] Mr. Mburu for the Plaintiff in his submissions made herein on **6 March 2018** argued that, though the Plaintiff had been deprived of the money from **2007,** it had sought interest effective from the date of filing of the suit; and that the Court has the discretion under **Section 26** of the **Civil Procedure Act,** to award interest from the date of the suit. He relied on the cases of **Prem Lata vs. Peter Musa Mbiyu [1965] EA 92**; **Orix Oil (Kenya) Limited vs. Paul Kabeu & 2 Others [2014] eKLR** and **Autolog Kenya Limited vs. Navisat Telematics (Kenya) Limited [2013] eKLR.**

[6] On behalf of the Defendants, **Ms. Effendy** reiterated the averments in the Replying Affidavit filed by the 1st Defendant/Respondent and conceded that there was indeed a clerical error in the Judgment which ought to be corrected under **the Slip Rule**. She was however opposed to the proposal by the Plaintiff that interest be paid from the date of filing of the suit. She submitted that the discretion of the Court in awarding interest must be judiciously exercised, and is dependent on the circumstances of each case. She also urged the Court to take into account that the decretal amount was paid quickly, notwithstanding the clerical error. She relied on **Practice Note No. 1 of 1982, High Court of Kenya [1982] KLR 485**; **Banque Du Congo Belge S.A vs. M. Mario Sibilia, C. A 22 of 1934;** and **Judicial Hints on Civil Procedure** by **Kuloba** at page 92.

[7] Having perused the pleadings, the proceedings and the Judgment of the Court dated **19 September 2016**, there can be no doubt that the rate of interest of 65% was clearly a typographical error. This is because, no such rate was pleaded in the Plaint dated **13 May 2010.** Further, it needs to be said that around the time of this Judgment, it came to my attention that there was a malware that was detected in my Secretary's desktop computer; which had the effect of tampering with or inserting random figures in files processed by that computer. Accordingly, and there being no disputation that this was a typographical error, I would proceed to correct the same under **the Slip Rule** to reflect the correct intention of the Court in connection with that Judgment.

[8] Indeed, in the case of **Vallabhdas Karsandas Raniga vs. Mansukhalal Jivraj & others [1965] EA 700** in which it was sought to amend a judgment to include a refund of the monies paid by the Appellant, the East African Court of Appeal held that;

> **"A slip order will only be made where the court is fully satisfied that it is giving effect to the intentions of the court at the time when the judgment was given, or in the case of a matter which was overlooked, where it is satisfied beyond doubt, as to the order which it would have made had the matter been brought to its attention."**

[9] Clearly, it was not the intention of the Court to award the Plaintiff interest at 65%, which it did not ask for in the first place. That would have been unconscionable. Moreover, a look at the Plaint does show that no specific rate was pleaded by the Plaintiff.

[10] As for the effective date of payment, again, no specific plea was made in the Plaint in that regard. The Plaintiff simply prayed for **"...Interest and costs thereon till payment in full..."**Hence,vide its Supporting Affidavit filed herein on **1 March 2018**, the Plaintiff asked to be paid interest from the date of filing suit, namely, **26 May 2010.** On the other hand, the Defendants were content to pay interest from the date of Judgment.

[11] Thus, having considered the rival arguments in this regard as well as the authorities that were cited by Learned Counsel, I would agree that, in principle, the Court has the discretion to award pre-judgment and even pre-suit interest if this is warranted. **Section 26(1) of the Civil Procedure Act, Chapter 21** of the **Laws of Kenya,** is explicit 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 decree in addition to any interest adjudged on such principal sum for any period before 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 the decree to the date of payment or to suchearlier date as the court thinks fit."

[12] The rationale for the above provision was well explained in the case of **Lata vs. Mbiyu [1965] EA 592** that an award of interest on the principal sum is, generally speaking, to compensate a plaintiff for the deprivation of any money or specific goods through the wrongful act of a defendant. Hence, 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."

[13] And in **Francis Joseph Kamau Ichatha vs. Housing Finance Company of Kenya Limited [2015] eKLR**, **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.

[14] There is no gainsaying therefore that pre-action or pre-judgment interest have to be pleaded and justification shown for awardability during the trial for the Court to have some basis for making such an award. This was the holding in the case of **Sempra Metals Ltd vs. Inland Revenue Commissioners and Another [2007] 3 WLR 354** in which it was held that:

"In the nature of things the proof required to establish a claimed interest loss will depend upon the nature of the loss and the circumstances of the case. The loss may be the cost of borrowing money. That cost may include an element of compound interest. Or the loss may be loss of an opportunity to invest the promised money. Here again, where the circumstances require, the investment loss may need to include a compound element if it is to be a fair measure of what the plaintiff lost by the late payment. Or the loss flowing from the late payment may take some other form. Whatever form the loss takes the court will here, as elsewhere, draw from the proved or admitted facts such inferences as are appropriate. That is a matter for the trial judge."

[15] Similarly, in **Kawoko Estate Coffee Factory Limited vs. Zassa Civil Appeal No. 32 of 1969 UR** the court was of the view that undue delay in bringing an action may be a good ground for refusing interest on money wrongly withheld, and that failure to prosecute a suit with diligence might well have

the same result; and therefore that the trial court would be best placed to consider all these matters in exercising its discretion in respect of the interest payable. I therefore take the view that whereas pre-action or even pre-judgment interest is awardable, the same would only payable if expressly claimed and justification made in that regard at the trial; and that in the circumstances hereof, there having been no such express claim, there would be no basis for awarding interest from the date of filing of the suit.

[16] In the result I would allow the Notice of Motion dated **18 December 2017** and grant the following orders:

> **[a]** That the Judgment that was delivered herein on **19 February 2016** be and is hereby reviewed and amended with regard to the rate of interest awarded to the Plaintiff by replacing the rate of 65% with the Court rate of interest being 12% per annum.
>
> **[b]** That the interest due as above is payable from the date of Judgment till the date of payment of the principal sum, being **20 April 2016**.
>
> **[c]** That, granted the nature of the application, there be no order as to costs.
>
> **[d]** That a copy of this Ruling be served on the National Council for Law Reporting for appropriate corrective action.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH 2018

OLGA SEWE

JUDGE

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO.355 OF 2010

SEDGWICK KENYA INSURANCE BROKERS LIMITED.....PLAINTIFF

VERSUS

KENOL KOBIL PETROLEUM LIMITED.....1ST DEFENDANT

KENYA OIL COMPANY LIMITED.....2ND DEFENDANT

JUDGMENT

1. The Plaintiff came to Court by way of the Plaint dated **13thMay, 2010** and filed on **26th May, 2010** seeking judgment in its favour against the Defendants jointly and severally for:-

> **a) USD 65,507.66 (or the equivalent of Kenya Shillings 4,875,597.48 at the then prevailing Central Bank mean rate of Kshs. 78 to one US$).**

b) Interest and costs thereon till payment in full.

2. The Plaintiff described itself as a licensed Insurance broker under the Insurance Act, and that at all times material to this suit, it was offering insurance services on behalf of various underwriters in Kenya and overseas. Thus, the Plaintiff's cause of action is that on or about April 2005, the Plaintiff arranged for **cargo insurance** cover in the London market through their correspondent, Marsh Limited, on behalf and at the request of the Defendants. The cover was valid for the period commencing **16th April, 2005** to **15th April, 2006** and the premiums due under the cover was **US$ 57,000.81**. Again, on or about January 2007, at the request of the Defendants, the Plaintiff arranged for an **aviation legal liability** insurance cover in the London Market through Marsh Limited, amounting to **US $5,506.85** valid for the period commencing **1st February 2007** to **12th July 2007**.

3. It is thus the Plaintiff's case that it provided insurance covers at the instance of the Defendant totaling to **US $ 65,507.66** for which it invoiced the Defendants accordingly; and that despite written demands for payment and notice of intention to sue, the Defendants have refused and or failed to make good the payment or any part thereof, hence this suit.

4. The court record shows that although Memorandum of Appearance was filed by **Karimbux-Effendy & Co. Advocates** on behalf of both Defendants, no Statement of Defence was filed by the 1st Defendant. The 2nd Defendant filed a Defence and Counterclaim on **6thJuly, 2010** wherein it admitted that it had requested for insurance cover for **cargo** and **aviation legal liability** for the periods **16th April, 2005 to 15th April, 2006** and **1st February 2007 to 12th July, 2007,** respectively. The 2nd Defendant however made no admissions as to the premiums due during these periods.

5. In its counterclaim, the 2nd Defendant contended that by two policies of cargo insurance for the period of **16th April 2004 to 15th April 2005** and **16th April 2005 to 15th April 2006**, the 2nd Defendant insured cargo consisting principally of, but not limited to, crude oils, refined oils, petroleum or petroleum products, bulk oil, gas oils, gasoline, naptha, kerosene, jet Al condensates and lube oils against the perils specified therein. The perils covered included claims for leakage, shortage or difference in weight/volume however arising.

6. The 2nd Defendant averred that in or about the years 2004 to 2006, it incurred several losses arising from the aforementioned perils from leakage, shortage and/or difference in weight amounting to **US $ 43,553.84**. It is therefore the 2nd Defendant's case that it incurred the losses within the terms of the policy, and that in breach of the contract between the parties, the Plaintiff has failed and/or refused to pay them the aforesaid sum of **US$ 43,553.84** being the amount of insurance claim losses. The 2nd Defendant thus prayed that the Plaintiff's suit be dismissed with costs and that judgment be entered in its favour as follows:-

a) Payment of US $ 43,553.84 on account of insurance loss claims;

b) Interest on (a) above at court rates from the date of filing the counterclaim to the date of full payment;

c) Costs of the suit;

d) Any further or other relief as this Court may deem fit and just to grant.

7. The Plaintiff filed a reply to the Defence and Counterclaim on **12th July, 2010** in which it averred that the alleged losses are not possibly payable by the Plaintiff for the reason that the 2nd Defendant failed to notify its insurers or brokers of the same within 48 hours as required by the policy and for the reason that the shipments fell outside the policy period. It reiterated its position that the Defendants were truly and justly indebted to it in the sum of **US$ 62,507.66**.

8. At the hearing of the case, the Plaintiff called one witness, **Abdalla Bekah**, the Director of the Plaintiff. He adopted his witness statement dated **16th December 2011**. PW1 essentially reiterated the averments in the Plaint. He confirmed that the Defendant took insurance cover through the Plaintiff but failed to pay the premiums therein. The outstanding liabilities were aviation liability premiums amounting to **US $ 5,506.85** and marine cargo premiums amounting to **US $ 57,000.81** totaling to **US $ 62,507.66**.

9. With regard to the insurance loss claims by the Defendant, it was PW1's testimony that the same were reported under the 2004 to 2005 policy and that the said report was made several months after the said policy had expired. The documents that reported the claims were forwarded to the Underwriters in London who did not honour the claims on account of late notification. It was further PW1's testimony that the Defendants' claims under the 2005-2006 policy were mostly claims to third parties other than the insurance company.

10. It was also PW1's testimony that the period for reporting losses was immediate and that the Defendant was to give a written notice within three (3) days of delivery if the loss or damage was not apparent at the time of taking delivery. He added that, other than late notification of the said claims, the documentation forwarded by the Defendants in respect of the said claims was not sufficient, and that in any event, it was for the underwriters to pay the claims. He further stated that there would be no liability and claims could not be honoured where premiums were unpaid.

11. The Defendants, on their part, called two witnesses, **Mr. Alex Mulinge Opati (DW1)**, and **Mr. Patrick Mutiga (DW2**). DW1 relied on his witness statement dated **21st June, 2013** and confirmed in cross examination that it was a requirement that in the event of loss or damage, immediate notice was to be given. He testified that there was a claim for **26/12/2004** which was lodged by the Defendant on **26/9/06**. He admitted not only that this was not immediate but also that at the time of lodging the claim, the policy had lapsed.

12. With regard to the Plaintiff's claim for unpaid premiums for the period between **November 2005 and January 2006**, DW1 testified that the Defendant had not paid premiums for that period. He also testified that the Defendant's counterclaim was in respect of different ships some of which premiums had been paid and others premiums had not been paid.

13. DW2 adopted his witness statement filed in Court on **11th June, 2012** and explained that his employer was Kenya Oil Company Limited, the 2nd Defendant. He clarified that **Kenol-Kobil,** impleaded as the 1st Defendant herein, previously used the name **Kenya Oil** and therefore that the names **Kenol-Kobil** and **Kenya Oil** have been heretofore used interchangeably. This explains why no Defence was filed by the 1st Defendant.

14. DW1 confirmed that the 2nd Defendant had entered into an open marine insurance with the Plaintiff, and that there were outstanding premiums due on the same. With regard to the claims in the Defendant's counterclaim, DW1 testified that the same were reported late due to change in personnel. He also conceded that some of the claims were made when the relevant policy had lapsed.

15. The court has gone through the parties' pleadings herein, the statements of the witnesses, the bundles of documents attached thereto, the *viva voce* evidence presented herein as well as the written submissions filed by Learned Counsel. I note that the parties filed a Statement of Agreed issues dated **27th January, 2011** on **2nd February, 2011**. Having considered the same in the light of the evidence adduced, the Court has narrowed them down to the following main issues for determination, noting that most of them were admitted or conceded to in the course of the hearing:-

> ***1) Whether the 2nd Defendant owes the Plaintiff US $ 62,507.66 being the total insurance premiums for the cargo and the Aviation liability cover.***
>
> ***2)*** **Whether the Plaintiff is liable for the Defendant's counterclaim of US $ 43,553/84 arising from the losses the 2nd Defendant incurred in the years 2004 to 2006**

1) Whether *the 2nd Defendant owes the Plaintiff US $ 62,507.66 being the total insurance premiums for Cargo and Aviation Legal Liability covers:*

16. The 2ndDefendant has admitted that it requested the Plaintiff for insurance cover for cargo and aviation liability for the periods **16thApril, 2005** to **15th April 2006** and **1st February 2007** to **12th July 2007,** respectively. It is therefore not disputed that the Plaintiff arranged for the said insurance covers. The Plaintiff's case is that the 2nd Defendant having requested for the covers and having been provided with the same is liable to pay premiums arising therein. The 2nd Defendant however made no admission with regard to the premiums due, an indication that it was disputing the same.

17. According to the Plaintiff, under the cargo cover the premium payable for shipment declarations between **November 2005** and **January 2006** was **US $ 57,000.82**. These shipments were covered under the insurance policy for the period **16th April 2005** to **15th April 2006.** (See the Invoice and Statement of accounts at pages 15 to 16 of the Plaintiff's list of documents. The Plaintiff further contended that the aviation liability insurance cover which was initially issued for a period of 12 months from **1st February 2007** to **31st January 2008** was cancelled on **12th February 2007**. It was the Plaintiff's position that the premium payable for the period **1st February 2007** to **12th February 2007** was **US$ 5,506.85.** The Plaintiff relied on the correspondences at pages 6 to 8 of its supplementary list of documents in support of the aforesaid position.

18. The 2nd Defendant on the other hand argued that the invoice for cargo insurance for the period **16th April 2005** to **15th April 2006** was received from the underwriters 6 weeks after the policy had lapsed. According to the defendant the late invoicing was not unusual as it was a common practice between the parties. The Defendant further submitted that based on its relationship with the Plaintiff, premiums were duly paid save for the balance of **US$ 57,000.81** which payment they declined on account of pending claims which had been lodged with the Plaintiff and which had not been settled.

19. At this point it is clear that the 2nd Defendant admits to owing the Plaintiff **US $ 57,000.81** being the premiums payable for the cargo insurance. The 2nd Defendant's case is that it has not paid the same because the Plaintiff had not settled certain claims that had been lodged by it. However, there being no provision in the said insurance policy specifically stipulating that the 2nd Defendant would be exempted from paying premiums in the event that there were unsettled claims by the Plaintiff, the court takes the view that the issue of unsettled claims is not in any way contingent on the payment of premiums, and therefore that the 2nd Defendant is liable to the Plaintiff in respect of the unpaid premiums relative to the cargo policy.

20. It is a cardinal principle that the duty of Court in such situations is to enforce the terms of the contract as agreed between the parties. For instance, in the case of **National Bank of Kenya Limited Vs Pipe Plastic Samkolit (K) Limited and Another (2002)EA 503**, the Court of Appeal stated thus:

> **"A Court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are proved."**

21. With regard to the aviation policy which was initially issued for a period of 12 months from **1st February 2007** to **31st January 2008** and subsequently cancelled on **12th February 2007**, the Plaintiff's position was that the premium payable for the period **1st February 2007** to **12th February 2007** was **US$ 5,506.85**. The Defendant on the other hand disputed the outstanding amount on grounds that the said policy was terminated and transferred to another party and as such they were not liable for the same. The Plaintiff relied on the correspondences at pages 6 to 8 of its supplementary list of documents in support of the claim of **US $ 5,506.85**. At page 7 is a letter from the Defendant to Alexander Forbes, (its new insurance broker) after the termination of the aviation liability insurance with the Plaintiff.

22. In the said letter the Defendant acknowledged that the Plaintiff was to charge **US $ 5,506.85** on pro

rata basis for the short period covered the Defendant and that **Alexander Forbes** had promised to offset the same. The Defendant further acknowledged having received a debit note for the outstanding premium from **Marsh Limited**, and forwarded it to **Alexander Forbes** for settlement. In the circumstances, the Defendant cannot now turn round and say that since the policy was cancelled they are not liable. It is not in dispute that they were covered by **Marsh Limited** through their broker, the Plaintiff herein, for the period **1st February 2007** to **12th February, 2007** when the same was terminated.

23. It is the law, in **Section 53** of the **Marine Insurance Act (Cap. 390 of the Laws of Kenya,** that:-

> "**unless otherwise agreed, where a policy is effected on behalf of the assured by a broker, the broker is directly responsible to the insurer for the premium, and the insurer is directly responsible to the assured for the amount which may be payable in respect of losses, or in respect of returnable premium."**

Consequently, the Plaintiff herein as the insurance broker is directly responsible to the Underwriter, **Marsh Limited**, for the outstanding premiums and therefore has the right to sue the insured for recovery of the outstanding premiums. (See **Benjamin Onkoba Nyaachi & Another Vs Victoria Insurance Brokers [2010] eKLR**) In the present case it has been demonstrated that the amount of **US $ 62,507.66** is due from the 2nd Defendant to **Marsh Limited** being the total premiums outstanding for the aforesaid insurance covers. I find and hold that the Plaintiff being the brokers and agents of **Marsh Limited,** is entitled to recovery of the aforesaid amount.

2) Whether the Plaintiff is liable for the Defendant's counterclaim of US $ 43,553/84 arising from the losses the 2nd Defendant incurred in the years 2004 to 2006:

24. The 2nd Defendant vide its counterclaim seeks a sum of **US$ 43,553.84** from the Plaintiff being alleged losses suffered from leakage and/or shortage and/or difference in weight or volume covered under the cargo insurance policy during the years 2004 to 2006.

25. The Plaintiff disputed the said claim and submitted that, being an insurance broker, it could not be held liable for claims which were in the province of the Underwriter, and that the 2nd Defendant breached the express terms of the insurance policy which required it to notify the insurance brokers of the alleged losses **within 48 hours.** It was also the Plaintiff's submission that the Defendants, in breach of the agreement between the parties, failed to provide supporting documentation within the specified period. The Plaintiff further contended that the Defendant failed to pay the premiums due and payable under the two policies prior to lodging the time barred claims.

With regard to the Plaintiff's contention that as an insurance broker it could not be held liable for the losses incurred by the 2nd Defendant under the insurance covers, both the insurance policy is clear that the underwriter, **Marsh Limited** was liable for such losses, if any, having undertaken to pay such claims whenever they arose. Indeed, this accords well with **section 58** of the **Marine Insurance Act,** which stipulates that "**the insurer is directly responsible to the assured" for the amount which may be payable in respect of losses, or in respect of returnable premium."**

26. Also noteworthy is the conceded fact that under the insurance contract the losses were to be reported immediately to the Plaintiff as the broker and agent of **Marsh Limited**. Therefore the best the Plaintiff could do in this case as an insurance broker was to forward the claims to the underwriter once notified thereof by the 2nd Defendant.

27. With regard to the notification of loss, it is not in dispute that the aforesaid claims were made late, in breach of the agreement between the parties, which required that the Plaintiff be notified of any claims immediately (see page 21 of the 2ndDefendant's list of documents). DW1 conceded as much. In cross-examination, he confirmed that indeed the insurance policy did specify a time frame within which the 2nd Defendant was to report claims to the Plaintiff.

28. It was however the Defendants' submission that the term **"immediately"** could be construed to mean **"within a reasonable time"** or **"without unjustifiable delay."** To this end the Defendant relied on the definition of immediately as provided in the **Black's law dictionary 6th Edition** at **page 750** as follows:-

> "**without interval of time, without delay, straightaway, or without any delay or lapse of time…when used in contract is usually construed to mean "within a reasonable time having due regard to the nature and circumstances of the case…"**

Even going by the above definition of the word **"immediately"** in legal parlance, it cannot be said that the 2nd Defendant reported the loss immediately, that is, without delay or lapse of time. The claims were for the period between **December 2004 and March 2006** while the report of the loss was made in **September 2006,** after a period of 6 months. That there was unreasonable delay in submitting the loss reports was conceded to even by the Defence witnesses, though they attempted a justification, contending that the delay was due to change of personnel in the 2nd Defendant's Dar es Salaam office and that their induction into the operations of the Defendant Company, took some time to conclude.

The Court is far from satisfied that the explanation is tenable granted that the policy expressly provided that losses were to be reported immediately. In the circumstances foregoing this Court finds that the claims by the Defendant were made in breach of the relevnt stipulations in agreement between the parties.

29. As regards the contention by the Plaintiff that the 2nd Defendant did not submit documentation to prove the loss of **US $ 43,553.84,** DW1 confirmed that he could not trace the particular supporting documents in support of the said loss by the 2nd Defendant. All that was availed before the court in proof thereof was an email dated **8th September 2006** reporting the loss and a document showing the summary of the said losses. (See pages 30 to 31 of the 2nd Defendant's list of documents.) Clearly, these two documents are insufficient to prove the alleged loss claimed by the 2nd Defendant. The Plaintiff in its submissions referred the Court to pages 1 to 2 and pages 6 to 7 of the 2nd Defendant's Supplementary list of documents to demonstrate what would be required in the event of a claim, and proceeded to set these out to be:

> **a) Original policy or certificate of insurance.**
>
> **b) Original or copy of shipping invoices, together with shipping specifications and/or weight notes.**
>
> **c) Original Bill of Lading and/or other contract of carriage**
>
> **d) Survey report or other documentary evidence to show the extent of the loss or damage.**
>
> **e) Landing account and weight notes at final destination.**
>
> **f) Correspondence exchanged with the carriers and other parties regarding their liability for the loss or damage.**

It is evident that, other than the Bill of Lading and invoices appearing at pages 35 to 83 of the Defendant's List of Documents, the 2nd Defendant failed to produce critical supporting documentation to support their case, a fact conceded by DW2. DW2 further conceded in cross examination that the Bill of Lading and Invoices exhibited at best, only go to prove that the 2nd Defendant purchased crude oil, but not loss, and that no port outturn report, which would have shown any difference between the volume of crude oil purchased and what offloaded from the ships, was availed to the Court.

30. There being no documentation to demonstrate that the 2nd Defendant had suffered losses as a result of difference in volume or weight of the fuel offloaded as envisaged under the policy, it follows that the 2nd Defendant's counter-claim cannot stand. It is trite law that he who alleges must prove. **Section 107** of the

Evidence Act is instructive to this end and it states as follows:-

> **"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."**

31. In the result, having found that the Plaintiff has proved its case against the Defendants for recovery of **US$ 62,507.66** judgment is hereby entered in its favour for **US$ 62,507.66** together with interest **65%** and costs as prayed for in the Plaint. The 2nd Defendant's counterclaim against the Plaintiff having not been proved is dismissed with attendant costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF FEBRUARY 2016

OLGA SEWE

JUDGE