REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Civil Case 353 of 2007

MUTHAMA GEMSTONES (K) LTD……..…..……. PLAINTIFF

VERSUS

CMC MOTORS GROUP LTD……..……..……1ST DEFENDANT

AMERICAN LIFE INSURANCE COMPANY LTD……..…2ND DEFENDANT

JUDGMENT

1. The admitted facts of this case are briefly that the Plaintiff was at all times the registered owner of Motor Vehicle registration No. KAJ 537K (hereinafter "the vehicle"), that the said vehicle was comprehensively insured by the 2nd Defendant against damage, loss or claims from 3rd parties, that on the 22nd June, 2002 it was involved in an accident and was extensively damaged. The vehicle was taken to the 1st Defendant's workshop on 24th June, 2002 for repairs, restoration and related services, that on the basis of the estimates prepared by the 1st Defendant the 2nd Defendant's agent prepared an assessment report whereby the 2nd Defendant gave the 1st Defendant specific instructions on the repairs to be carried out on the said vehicle.

2. On the instructions of the 2nd Defendant, the 1st Defendant commenced repairs and an invoice was issued in October, 2002 whereby on 5th December, 2002, the 2nd Defendant authorized the 1st Defendant to release the said vehicle to the Plaintiff subject to satisfactory completion of repairs and re-inspection. However, when the Plaintiff went to collect the vehicle, the same could not move, that in early 2003 it was discovered that there was a problem with the gear box of the said vehicle. In September, 2003, the 2nd Defendant repudiated liability for repairs to the gearbox. It would take nearly another one and half years for the ABS Unit booster to be fitted to the said vehicle in July, 2005. However, as late as 23rd April, 2008, the Plaintiff still found that its vehicle was in an uncollectable state due to some defects on it. The 1st Defendant threatened to dispose off the said motor vehicle under the Disposal of Uncollected Goods Act whereby the Plaintiff came to court praying for, inter alia, various injunctive orders, General damages, special damages amongst other prayers.

3. Hon. Johnstone Muthama, the executive Chairman of the Plaintiff testified on its behalf. He told the court that the said vehicle was purchased in 1997. It was comprehensively insured with the 2nd Defendant. That on 22nd June, 2002, it was involved in an accident whereby it was extensively damaged. That it was taken to the 1st Defendant's body workshop for repairs, it was repaired but later the issue regarding the Gear Box arose, that before the accident the said vehicle had no problem at all. That

when the issue of the Gear Box arose, the 2nd Defendant called him for a meeting. That after their discussion, he later learnt that the 2nd Defendant had sent the Gear Box to the United Kingdom where it was found that the gear box had a fault. That the motor vehicle was still found to be mechanically unsound in January, 2008 through a valuation carried out by AA Kenya.

4. On cross examination, Hon. Muthama told the court that some repairs took too long to be authorized by the 1st Defendant. He gave the example of the ABS Pump and Accumulator whose authority to repair and/or fix was being given on 27th July, 2004, that the 2nd Defendant being the experts and technicians should have diagnosed the problem at the earliest opportunity. To Hon. Muthama, the motor vehicle was insured, it had an accident, it was delivered to the workshop for repair and it was therefore the obligation of both the Defendants to deliver it back to the Plaintiff duly repaired. He admitted that prior to the accident the motor vehicle had been taken to the 1st Defendant twice with the gear box problem but on both occasions, the problem was fixed and the motor vehicle worked well thereafter. That by referring to the historical problem of the gear box, the 1st Defendant may have intended to influence 1st Defendant to keep away from the gear box issue. That he did not discuss with the 1st Defendant that the gear box be referred to the United Kingdom. He testified that after a discussion with DW1 Mr. Dunlop of the 1st Defendant, the Plaintiff was given an offer to settle the matter by the 1st Defendant which it declined. He further told the court that the Plaintiff did not meet the cost for the replacement of the gear box after it was taken to the UK and that none of the Defendants had sent the Plaintiff the invoice for the gear box replacement.

5. DW1, Mr. Mike Dunlop, testified on behalf of the 1st Defendant. He told the court that the instructions to repair the said vehicle were received from the 2nd Defendant, that an assessment report prepared by the 2nd Defendant's assessor dated 11th July, 2002 showed the parts that required repairs, there was no time frame given for repairs, that there was a supplementary report to replace the ABS pump and Accumulator given on 14th October, 2002, that the repairs were over by 31st October, 2002 when an invoice for Kshs.1,444,677/- was raised against the 2nd Defendant, that the 1st Defendant was not supposed to replace the reverse gear, that it is not the obligation of the 1st Defendant to identify defects but that of the assessors sent by the insurance companies. He testified that the 1st Defendant decided to inform the 2nd Defendant of the pre-accident history of the gear box because of an inquiry for the same by the 2nd Defendant and it was not meant to discourage the latter from taking responsibility for the same.

6. Mr. Dunlop further told the court that after the 2nd Defendant had declined to be involved with the issue of the gear box, he got in touch with the Plaintiff. That he decided to have the manufacturers replace the gear box on a purely goodwill basis. The new gear box was fitted and tested on 30th March, 2004, the cost of replacement was never passed to the Plaintiff. He testified that as at 19th February, 2004, the value of the said motor vehicle was Kshs.2,500,000/- due to rapid depreciation. That the 1st Defendant received instructions to replace the defective brake booster unit on 27th July, 2004 and a report on the same was given on 14th July,2005 a year later. That as at that time, the 1st Defendant had carried out all the accident repairs authorized by the 2nd Defendant. He concluded that the report by the Automobile Association of Kenya made in January, 2008 had referred to parts that had not been authorized by the 2nd Defendant.

7. On cross examination, Mr. Dunlop admitted that the 1st Defendant had misrepresented the facts regarding the service of the gear box carried on the said motor vehicle in January and April, 2002, respectively. He also admitted having lied on the report by AA Kenya as regards the repairs that had been authorized by the 2nd Defendant. He admitted that since 2002 up to the time he was giving testimony the motor vehicle was still under the 1st Defendant's control, possession and custody. He admitted that the 1st Defendant had a duty of care to the Plaintiff to keep the motor vehicle in good and serviceable condition. That the motor vehicle was ready to be collected on 6th August, 2004 but no effort had been made to collect the same. He admitted that whilst the 1st Defendant had advised the Plaintiff that the gear box had been sent to the UK, the 1st Defendant did not advise the Plaintiff of its return. He

admitted that the report of AA Kenya Ltd dated 22nd January, 2008 showed that the motor vehicle was still having a problem. He further told the court that the manufacturer did not send any report to the 1st Defendant regarding the status of the removed Gear Box although it was usual for the manufacturer to send such reports when they find anything untoward.

8. On the foregoing, the parties set out a total of 13 broad issues for determination. These issues can be summarized into four (4) as follows:-

a) What damage was occasioned to the vehicle as a result of the accident and the parts that required repair and/or replacement.

b)Whether the repairs authorized by the 2nd Defendant were satisfactorily undertaken by the 1st Defendant and if so, whether the repairs did put the said vehicle in a collectable state obligating the Plaintiff to execute a satisfaction note and collect the vehicle.

c) Whether there was a delay in repairing the vehicle and if so who is responsible therefor.

d)Whether the Plaintiff has suffered any damage and the quantum therefor. Who is liable for such damage?

e) Is the Plaintiff entitled to the prayers sought in the Plaint? Who bears the cost of the suit?

9. In this matter, the parties filed a list of admitted facts. All documents were also produced by consent. From the admitted facts, the parties were in agreement that as a result of the accident of 22nd June, 2002, the said motor vehicle was extensively damaged. Various reports and documents relating to the damage to the said vehicle were produced. These are the Assessment and Supplementary Assessment report by Safety Surveyors Ltd dated 11th July, 2002 and 14th October, 2002 respectively, Quest Technical Consultant's Post Repair Inspection Report dated 26th March, 2004, Post Repairs Re-inspection report dated 22nd January, 2003 by Yamamoto Auto Engineers and a Memo dated 7th March,2003 by the 2nd Defendant. These reports having been produced by consent, I am of the view and satisfied that whatever is set out therein is the damage that was occasioned to the said motor vehicle and the parts that required repair and/or replacement are conclusively set out therein.

10. One issue that remained in dispute was that of the gear box and computer. There is uncontested evidence that in January, 2002 as well as April, 2002, the Plaintiff took the vehicle to the 1st Defendant for repairs. On 25th January, 2002, the complaint by the Plaintiff in D3 was that **"ATTEND TO REVERSE GEAR NOT EFFECTIVE ON DOWNHILL".** The 1st Defendant's remarks against these instructions on D3 was **"OK"** meaning, the 1st Defendant's technicians had looked at the problem and concluded that there was no more problem with the gear box. The future work recommended was "**Air suspension mounting body to weld and AC gas to refill**". A sum of Kshs.34,466/- was paid for the said service and no charges were levied on the problem of the gear box. In April, 2002 the vehicle was again at the 1st Defendant's workshop and the instructions on D7 were, inter alia, **"2. CHECK & RECT – VEHICLE NOT REVERSING ON A STEEP HILL – vehicle cannot move back under load – 2nd time complain."** On the future work, the 1st Defendant noted that "**G/BOX REPAIRED BUT NOT GUARANTEED MIGHT REQUIRE REPLACMENT IN FUTURE."** A charge of Kshs.8,550/- was levied and paid for. What the 1st Defendant indicated in D9 was **"REMOVE & REFITTED G/BOX."** After all this, the said vehicle put in use and was in a moving condition until the date of the accident on 22nd June, 2002.

11. According to the Assessment Report by Safety Surveyors Ltd dated 11th July, 2002, the point of impact for the said vehicle was the front part on the front right hand side. However, after all the recommended repairs had been carried out, the said motor vehicle could not move. A flurry of correspondence ensued between the parties between January, 2003 until September, 2003. The Plaintiff

contended that since the motor vehicle was in good and movingcondition before the accident, the problem to the gear box must have been as a result of the accident. The 2nd Defendant has contended that the bear box problem was a pre-accident condition. The evidence produced is that the motor vehicle had been taken to the 1st Defendant on two previous occasions (January and April, 2002) with a gear box problem. With such conflicting evidence, the court is left only to rely on the expertise of the 1st Defendant to reach a conclusion as there was no expert reports produced. The assessment reports by the Assessors were silent on the matter and of no help at all.

12. From the evidence of DW1 Mike Dunlop, the 1st Defendant are the experts on Land Rovers and Range Rover models at least in Kenya. They import, sell and provide after sale services for these motor vehicles. When the said motor vehicle was taken to the 1st
Defendant in January and April, 2002, the 1st Defendant did not advise the Plaintiff what the **actual** problem with the Gear Box was. It only indicated that the same had been repaired but not guaranteed and might require replacement in future! In D25, a document dated 27th January, 2003 which seems to have been specifically prepared for and received by the 2nd Defendant on 12th March, 2003, the 1st Defendant wrote of the subject motor vehicle.

"IN REGARDS TO THE ABOVE VEHICLE AUTO BOX, ALL TESTS WERE PERFORMED AND ITS BEEN ESTABLISHED THAT A SEIZED REVERSE INTERLOCK VALVE CAUSED BY ELECTRIC SHORT CIRCUIT, WHICH BURNED THE MODULATOR VALVE, IS THE ONE HINDERING REVERSE GEAR FROM ENGAGING.

…….

WHERE FAULT IS DIAGNOSED AS BEING IN THE VALVE BLOCK THE COMPLETE UNIT SHOULD BE REPLACED.

MAJOR UNIT REPAIR SHOP SUPERVISOR.
Signed
JOHN MAINGI/LAND ROVER W/SHOP"

13. After this, on 31st March, 2003, DW1 wrote to the 2nd Defendant in D31 thus:-

"I am in receipt of your letter dated 18th March, regarding diagnostic work carried out on the above mentioned vehicle's gear box.

It was ascertained that the clutches were slipping in the automatic gear box and because gear boxes cannot be overhauled, it was advised that a replacement unit would be required to remedy."

The two (2) documents in my view are significant in two ways. Firstly, D25 does not state when the electric short circuit that burnt the modulator valve occurred and also does not state whether the same was caused by the impact of the accident, and secondly, the dishonesty of the 1st Defendant. I say so because the crucial information and expert opinion contained in the 1st Defendant's letter dated 31st March, 2003 produced as D31 was NEVER communicated to the Plaintiff either in January or April, 2002. The Plaintiff had sought for the 1st Defendant's expertise services and paid for the same yet the actual problem diagnosed by the 1st Defendant was never disclosed to the Plaintiff to enable it make an informed decision. Further, by asserting as it did in D31, the 1st Defendant was side stepping the issue of the electric short circuit alluded to by Mr. John Maingi, the 1st Defendant's Major Unit Repair Shop supervisor in his **"letter"** dated 27th January, 2003. The question is, would the slipping clutches in the automatic gear box cause the motor vehicle fail to move? It had been moving before the accident on 22nd June, 2002. When did the electric short circuit burn the modulator valve that led to the Reverse Interlock Valve to seize? My view is, since the slipping clutches had not hindered the said motor vehicle from moving since January and then April, 2002 and there was no evidence to that effect, it must have been the

seizing of the Reverse Interlock Valve caused by the electric short circuit that must have caused the motor vehicle not to move. This obviously was after the accident and not before. I hold so because, it would seem that he arrived at that conclusion after carrying out and performing "All Tests"

14. It should be noted that the report by John Maingi dated 27th January, 2003 was given after **"ALL TESTS WERE PERFROMED"** to the vehicle auto box in January, 2003. When the report was being made, the said report was received by the 2nd Defendant on 12th March, 2003. On receiving the same, the 2nd Defendant did not raise any issues on the same such as when and how the modulator valve was burnt. Instead, it wrote to the 1st Defendant on 18th March, 2003 making inquiries about the service of April, 2002 after which the 1st Defendant had recommended future replacement. Mr. Peter Kahuriah of the 2nd Defendant inquired:-

"The above motor vehicle was brought for service in April, 2002 whereby you spent 8,550/- on the gear box after which you recommended for its replacements. In view of the above, we would like to know what you did to the gear box at a cost of Kshs.8,550/-. Also let us know the reasons as to why you recommended for its replacement."

This letter was written after having received the report by Mr. John Maingi dated 27/1/03 on 12/1/03 and produced as D25. Obviously the 2nd Defendant had side stepped the contents of that report. Can the contents of John Maingi's report of 27th January, 2002 be ignored? Can they be wished away? I think not.

15. My view is, in the circumstances of this case, it is imperative to ascertain what caused the ultimate failure of the Gear Box. As I have already held above, Mr. John Maingi, the 1st Defendant's Major Unit Repair Supervisor had conclusively found that it was the short circuit that had burnt the modulator valve that caused the Reverse Interlock valve to seize leading to the total failure of the Gear box and therefore the motor vehicle not to move. In the circumstances therefore, my view is the issue for determination would be, what was the cause of the short circuit? Neither the Plaintiff nor the Defendants addressed the court on this issue either in evidence or submissions. The court's view is that it is important to determine the ultimate cause for the failure of the gear box. My view is founded on the fact that it is this fact (the short circuit that had burnt the modulator) that had caused the reverse gear to fail and ultimately the vehicle not to move. My view is that, in such a case, the doctrine of causation will apply, i.e. the proximate cause for the ultimate failure of the gear box. Assistance may be sought from marine policies. In the text **Insurance Law: Doctrines and principles Third Edition John Lowry and others oxford & Portland Oregon 2011** the learned writer when commenting on the case of **Syarikal Takaful Malaysia Berhard –vs- Global Process Systems Inc (The Cender Mopu) (2011)** UKSC 5 observed a page 274:-

"In the Cender Mopu, the Supreme Court emphasized that Section 55(1) of the Marine Insurance Act 1906 required the court's inquiry to be based on fact and common sense principles, and reaffirmed the principle that the proximate cause is the cause which is proximate inefficiency. In this case, the insurance related to an offshore oil-drilling platform during a towage voyage from the US to Malaysia. The policy covered all risks, except loss 'caused by inherent vice or nature of the subject matter insured', which reflected the wording of Section 55(2) (c) of Marine Insurance Act 1906. In mid voyage one leg of the rig broke and the next day the other two legs broke. The question was whether the loss had been caused by perils of the sea, which were covered, or inherent vice of the rig, which was not. As the insurers knew, there were stress cracks in the legs before the voyage and, indeed, the insurers required the rig to be checked in mid-voyage. The weather encountered had been such as might have been reasonably expected during such a voyage. The Court held the insurer liable. The proximate cause of the loss was the perils of the sea, namely a wave that caught the first leg in such a way as to cause it to break, which, in turn, led to stress on the other legs and their failure. Lord Mance concluded a comprehensive discussion of the distinction between inherent vice and perils of the sea by saying that the insurer will only avoid liability by showing that the loss arose from 'inherent characteristics or defects in a hull or cargo leading to it causing loss or damage to itself….. without any fortuitous external accident or casualty'. The loss was caused, not by some

inherent defect in the rig itself, but by a wave hitting the leg in such a way as to break it."

From the said text, it is obvious that liability will be assigned to the actual last act that was the cause of the ultimate mischief or as it is abtly put **'that broke the camel's back'**. In the present case, whilst the slipping clutches in the gear box may have been causing the reverse gear not to engage, they did not lead to the total stalling of or the gear box to completely fail thereby make the motor vehicle not to move. It is only after the accident that the gear box totally failed after the electric short circuit burnt the modulator valve as per John Maingi's observation in D25.

16. What was the cause of the electric shock that burnt the modulator valve? Again none of the parties addressed this issue. The court is inclined to apply the doctrine of *res ipsa loquitor*, that since the motor vehicle had been moving before the accident, and since the gear box completely seized after the accident and for the reason that the tests of January, 2003 disclosed the fact of the electric short circuit having burnt the modulator valve thereby leading to the gear box to seize and there lacking any explanation to the contrary, the court is left with no alternative but to hold that the electric shock may have been as a result of the violent impact of the front of the said motor vehicle at the time of the accident.

17. Accordingly, I hold that the damage to the gear box and computer was as a result of the accident. Such damage was covered under the policy.

18. On the issue as to whether the authorized repairs were satisfactorily carried out to put the said vehicle in a collectable state, it is worthy to note that the vehicle was delivered to the 1st Defendant's workshop on 24th June, 2002, the 1st Defendant prepared its estimates on 2nd July, 2002 meaning it had already inspected the motor vehicle to confirm the damage. Instructions to carry out repairs were given in or about 11th July, 2002. The repairs were specified in the Assessment Report of Safety Surveyors Ltd dated 11th July, 2002. The 1st Defendant raised its invoice on 31st October, 2002 on the basis of having satisfactorily completed the authorized repairs. It was fully paid for the repairs. However, the motor vehicle could not move in January, 2003. Although this was as a result of the gear box problem which I have already addressed above, even after the Gear box had been replaced by March, 2004 as shown by Exhibit D40 to D46, there were still other repairs that had not been satisfactorily carried out.

19. In D21, Yamamoto Auto Engineers in their Post Re-inspection Report of 20th January, 2003 observed that two (2) parts, the Bonnet Insulator (pad) and E.C.U had not been replaced as recommended. I do not accept the explanation by Dw1 that these two parts were not in stock at the time the 1st Defendant was carrying out the repairs. The instructions to it were to carry out "all necessary repairs and replacements." It did not advise the Plaintiff or the 2nd Defendant of this fact before or immediately after raising its invoice on 31st October, 2002! In D65 and D66, the reports by the AA Kenya dated 18th September, 2007 and 22nd January, 2008 respectively revealed, inter alia, that there was slight engine oil and front differential oil leaks, the left hand fog light was faulty and the suspension system was stiff. These in my view did not make the motor vehicle collectable.

20. DW1 testified that the 1st Defendant only carries out repairs as directed by the insurance companies that, it does not detect and report defects and that it wholly relies on the assessors. That may be so, but the said motor vehicle was no ordinary motor vehicle. It required specialized personnel to be able to detect defects and repair the same. In DW1's own words, the 1st Defendants are the experts on such motor vehicles in Kenya. When being cross examined by Mr. Billing, Mr. Mike Dunlop DW1 had this to say:-

"At D5 to D9, CMC has indicated that the Gear Box was repaired. That is not correct. It is a misrepresentation. Two assessment reports and a supplementary were done and repairs authorized. In those reports, there was no complaint about the gear box. I see D13 – it is our workshop Estimate dated 2nd July, 2002. There is no mention of repairs or replacement of the Gear Box. The 1st and 2nd items were authorized to be repaired. These were replaced. I must have lied when I stated that in D65 – the two items had not been authorized."

21. I have seen in D13, the 1st Defendant's Estimate dated 2nd July, 2002, some of the items that were earmarked for repair and/or for replacement were the front Air springs, Strg Column Strg Damper, Track Rod Assy, Drive Shaft Boo, Drive Shaft Seal, pneumatic from suspension unit, DW1 under cross examination stated:-

"I see D13 – the ABS suspension, differential were areas we were working on. The ABS works differently from the engine. The gear box is mounted on the engine."

He also admitted that at page 4 of Exhibit D4, one of the parts mentioned was a hinge (door) but as late as 2008 (D65) the hinge was still making noise and the suspension was stiff meaning that the same had not been properly fixed.

22. The totality of the foregoing leads the court to conclude that the repairs carried out by the 1st Defendant on the vehicle were not satisfactory and did not put the said vehicle in a collectable state. Further, the Plaintiff was under no obligation in my view therefore to execute a satisfaction note and/or collect the said vehicle.

23. As regards the period of repairing the vehicle, as indicated above, the said vehicle was taken to the 1st Defendant's workshop on 2nd June, 2002, initial authority to repair the same was given on 11th July, 2002. The authority for additional repairs/replacement was given on 14th October, 2002 vide the Supplementary Assessment Report of that date. Although the 1st Defendant contended that it had completed the authorized repairs as at 31st October, 2002, the motor vehicle could not move in January, 2003! The motor vehicle remained in the workshop of the 1st Defendant until this suit was filed. Indeed the last communication by the 1st Defendant to the Plaintiff to collect the vehicle was 22nd June, 2007. That was exactly five (5) years ever since the said motor vehicle was delivered to the 1st Defendant's workshop! My view is, with the nature of the damage caused to the motor vehicle, the repairs should have taken a reasonable time. This is so not withstanding that the 2nd Defendant's assessor had not given the duration of the repair.

24. This court has examined the delays as follows:- there was a delay between 31st October, 2002 when the 1st Defendant indicated completion of repairs till 20th January, 2003 when Yamamoto auto auctioneers carried out Post Repair Re inspection, a period of three (3) months. The Plaintiff complained of the motor vehicle not moving on 20th January, 2003. The 2nd Defendant did not categorically decline liability on the issue of the Gear box until 5th September, 2003 (D37) when they formally informed the Plaintiff that they were not liable for the gear box problem, it should be noted that a period of eight (8) months the last letter written by the 2nd Defendant was on 2nd April, 2003 when they stated:, ***"we have written to CMC asking them to confirm the kind of repairs they did and the reasons why they recommended for the gear box replacement. However, we are yet to receive the response from the CMC."*** The Gear box problem was sorted out in or about March, 2004 when Quest Technical Consultants wrote to the 2nd Defendants on 26/3/2004 to authorize the replacement of the Booster Unit. The authority only came four (4) months later on 27th July, 2004. The 1st Defendant finally wrote to the Plaintiff's Advocates on 6th August, 2004 asking that the motor vehicle be collected. In D58, the 1st Defendant admitted that a lot of time was wasted between the discovery of the internal damages and authority to repair either from the 2nd Defendant or the Plaintiff. Here, the court observes that it does not see any authority that was required from the Plaintiff to repair the vehicle. The issue of repairs was between the Defendants inter se. I therefore hold that there was long delay in the repair of the motor vehicle which was unreasonable in the circumstances and the same was caused by both the 1st Defendant (for failure to carry out substantive repairs leading to supplementary instructions) and the 2nd Defendant in delaying to give prompt authority to carry out the authorized and/or necessary repairs. Their responsibility in my view is greater on the part of the 1st Defendant and losses on the part of the 2nd Defendant.

25. The 2nd Defendant has submitted through Mr. Billing that if there was any liability on the part of the

2nd Defendant whatsoever, the 2nd Defendant was exonerated by virtue of exception Clause No. 1 to section 1 of the policy. That Clause provides:-

"The company shall not be liable to pay for

a) Consequential loss depreciation, wear and tear, mechanical or electrical breakdowns, failures or breakages.

b)Damage to tyres unless the motor vehicle is damages at the same time."

The relevant provisions is Section 1 (a) mechanical or electrical breakdowns, failures, breakages.

As I have already held the electrical fault to the Auto box – reverse gear must have been as a result of the accident. The provision (a) to Section 1 above presupposes where the mechanical or electrical fault is in the normal usage of the motor vehicle. However, in this case the only conclusion to be made and which I arrived at is that the same arose as a result of the violent impact to the frontal of the vehicle by virtue of the accident which was an insured risk. Accordingly, I reject the 2nd Defendant's contention that it can escape liability by reliance on the proviso to Section 1 of the policy.

26. From the delay in satisfactorily having the motor vehicle repaired, PW1 testified that the Plaintiff had suffered loss and damage. The Defendants have contended otherwise. The subject motor vehicle was insured at Kshs.7,500,000/- in October, 2000. The same was valued at Kshs.7,030,000/- on 2nd March, 2001 by AA of Kenya. Indeed, that is the value on which the Plaintiff paid the excess after the accident. In the premises and on the evidence on record, I am persuaded to believe that the said vehicle was valued in the region of Kshs. 7 million as at the time of the accident. It cannot be said that there was no valuation to show what the motor vehicle was valued as at 22nd June, 2002. If the same had been written off, the amount of compensation would have been the said sum of Kshs.7,030,000/- which value the 2nd Defendant had approved for the purposes of the premium and excess, less the salvage value. DW1 testified that hi-end motor vehicles such as the said motor vehicle depreciate very fast. That that fact coupled with the accident of 22nd June, 2002 had made the said vehicle lose considerable value. He told the court that the 1st Defendant had given the vehicle a trade in value of Kshs.2.5million as at February, 2004 (D24). The inspection report of AA Kenya of 18th September, 2007 had put the value of the subject vehicle at that date at Kshs.3,560,000/-.

27. It is obvious that as a result of the accident, the unsatisfactory and delayed repairs, the plaintiff has totally lost the use of the said motor vehicle. PW1 testified that the Plaintiff replaced the said vehicle with two other hi-end motor vehicles. Their value was however not disclosed to the court. My view is that, the Plaintiff did suffer loss of use of its motor vehicle as a result of the wrongful acts of the Defendants. I will assess the loss at Kshs.4million only. The Defendants are liable to the Plaintiff for the loss.

28. Since both the Defendants filed a Notice of Indemnity and contribution, I have considered the cases of the respective Defendants. I have considered the delay caused by the 2nd Defendant in giving authority to repair and the general conduct of the 1st Defendant in the whole saga. I apportion their liability at 75% against the 1st Defendant and 25% against the 2nd Defendant.

29. As to whether the Plaintiff is entitled to the reliefs sought in the Plaint, I am of the view that no injunction can issue for the reason that the Plaintiff prayed for damages which have been awarded. I decline to grant the declaration sought as the gear box was long replaced. I will not award any special damages as none were proved.

Accordingly, I enter judgment for the Plaintiff against the Defendants jointly and severally, for Kshs. 4,000,000/- together with interest thereon at court rate from the date of this judgment until payment in full. I apportion liability between the 1st and 2nd Defendant at 75% and 25%, respectively. I also award

the Plaintiff the costs of the suit to be shared by the Defendants in the proportion of 75% - 25% aforesaid.

DATED and DELIVERED at Nairobi this 21st day of September, 2012.

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A. MABEYA

JUDGE