REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suit 86 of 2000

SITA STEEL ROLLING MILLS LTD. ……PLAINTIFF

- V E R S U S –

JUBILEE INSURANCE CO. LIMITED. …….…….....…. DEFENDANT

JUDGEMENT

The plaintiffs are a limited liability company incorporated in the Republic of Tanzania but wholly owned and controlled by Mombasa based entrepreneurs. In late 1997 they acquired an industrial site at Plot Nos. 23 and 24, along Nelson Mandela Highway in Dar-es-Salaam. While in the process of building a steel rolling factory thereon and after they had imported the machinery required for that factory, they insured them with the defendants against loss and damage caused *inter alia* by floods.

The negotiations leading to the cover were carried out in the first week of December 1997 between the plaintiffs' broker Mr. Abdul Majid Aboo of Aboo Insurance Brokers Limited and Mr. George Okayo, the defendants' underwriter and assistant manager of their Mombasa Branch. As a result of those negotiations the plaintiffs' machinery were covered by the defendants for a period of twelve months from the 5th December 1997.

During the night of 2nd and 3rd May 1998 there was a torrential downpour of rain in Dar-es-Salaam that flooded the plant and machinery in the said factory causing loss and damage to the plaintiffs. The plaintiffs claim in their plaint that despite demand the defendants have refused to indemnify them of the loss suffered in the sum of US Dollars 112,435.06 and have instead wrongfully repudiated their liability to do so. They therefore claim this sum or its equivalent in Kenya shillings or alternatively damages for breach of policy plus costs and interest

In their defence the defendants aver that they are not liable to indemnify the plaintiffs for three reasons. First, that the alleged loss and damage on the 2nd and 3rd May 1998 occurred before the commencement of the insurance cover for the risk in issue; secondly that they are entitled to repudiate liability for the reason that at the time of entering into the contract of insurance the plaintiffs failed and or neglected to disclose to the defendants the existence of a water channel running next to the plaintiffs' premises which channel overflowed resulting in the alleged loss and damage and thirdly that at the time of entering into the contract of insurance the plaintiffs misrepresented to the defendants that the machinery was located in an enclosed godown when in fact it was in a structure whose two walls were not completely enclosed. The defendants further aver that this suit is incompetent and bad in law as the same, contrary to the contract of insurance, was filed after the expiration of twelve months from the date of the alleged losses. They also dispute the sum claimed.

From these pleadings and the submissions made by counsel for the parties, four main issues arise for

determination. They are whether or not the flooding which caused the loss alleged in this case occurred before the commencement of the insurance cover; whether or not this suit is incompetent for having been filed after the expiry of twelve months from the date of the alleged loss; whether or not the defendant is entitled to repudiate liability for non-disclosure of material facts and whether or not the defendants are entitled to repudiate liability for misrepresentation.

In his submissions Mr. Magan counsel for the defendants, conceded that the loss occurred after the commencement of the insurance cover. That settles the first issue and I do not therefore need to say anything about it.

As regards the second issue, Mr. Magan submitted that the dispute between the parties having not been the subject of any pending action or arbitration, Clause 19 of the policy of insurance in this case provides a complete defence to the plaintiffs' claim and the same should therefore be dismissed. He contended that in exchanging correspondence with the plaintiffs after the limitation period the defendants were merely extending common commercial courtesy to a good client and that should not be construed as a waiver of their rights.

In response to those submissions, Mr. Inamdar for the plaintiffs submitted that in engaging the plaintiffs in correspondence after the limitation period and even causing them to go into the trouble of obtaining a further report on the matter the defendants should be treated as having waived their right to seek refuge in the limitation clause and be estopped from relying on it.

I have considered these rival submissions. The doctrines of waiver and estoppel need to be clearly understood. While they may have a common base they are essentially different. See the judgment of **Lord Goff in Motor Oil Hellas (Corinth)Refineries SA –Vs- Shipping Corp. of India, The Kanchenjunga (1990) 1 Lloyd's Rep. 391.**

Waiver can be express or implied. Disputes hardly arise where it is express. They however do where it is implied. An implied waiver may arise where a person has pursued such a course of conduct as to evidence an intention to waive his right or where his conduct is inconsistent with any other intension than to waive it. It may be inferred from conduct or acts putting one off one's guard and leading one to believe that the other has waived his right.

Waiver is a form of election. In insurance claims, an insurer which has a right to avoid liability may elect not to do so or may be deemed to have so elected, provided that it has knowledge of the breach and either expressly so elects or acts in such a way as would induce a reasonable insured to believe that it is not going to insist upon its legal rights. This kind of waiver requires a conscious act by the insurer or its agent, but it does not require the insured to act in response in any way.

Estoppel on the other hand requires a representation by words or conduct to the insured that the insurer will not rely upon a breach of condition, which representation the insured relies and acts upon to his detriment. It does not depend upon the knowledge of the person estopped and is a doctrine of much wider consideration.

Though the distinction between them is important waiver and estoppel often arise from and can obtain in the same case. Expounding on the doctrine of equitable estoppel which he had developed in the famous case of **Central London Property Trust –Vs- High Trees House Ltd [1947] KB 130** this is how Lord Denning put it in his book "**The Disciple of Law"** at page 206:-

"**If the defendant led the plaintiff to believe that he would not insist on the stipulation as to time and that if they carried out the work he would accept it, and they did it, he would not afterwards set up the stipulation as to time, against them. Whether it be called waiver or performance on his part it is a kind of estoppel. By his conduct he evinced an intention to affect their legal relations."**

And at P.217 he further stated:-

"**Where a man has led another to believe in a particular state of affairs he will not be allowed to go back on it when it would be unjust or inequitable for him to do so."**

Reverting to the facts of this case can it be said that there has been waiver or estoppel or both? The plaintiffs say that there have been both and rely on the correspondence they exchanged with the defendants. On their part the defendants say there is nothing of the sort.

I have perused that correspondence. It is clear to me from Aboo's letter of 7th May 1998 that the incident giving rise to this claim was reported to the defendants immediately after it occurred or at least within a day or two. Thereafter a claim form was completed and forwarded to them. It was, however, not until the 4th February 1999, about nine months later, that the defendants intimated that they were repudiating liability. In response Mr. Aboo wrote back on 9th February 1999, to state that the repudiation was unacceptable and that they were going to contact the defendants further on the matter. Had the defendants responded that they were not going to entertain further correspondence on the matter and indeed refused to respond to the plaintiffs' subsequent letters, I am sure that the plaintiffs could have filed this suit before the limitation period expired. That they did not do. Instead as is clear from their letter of 10th May 1999 they went into negotiations with the plaintiffs and referred the matter to their head office and their external lawyers. By the time they wrote the letter of 10th May 1999 maintaining their repudiation of liability the limitation period had already expired.

That is not all. On 19th May 1999 Mr. Aboo in response to the defendants said letter of 10th May 1999 wrote back and stated that given the facts of the case the defendants repudiation of liability was not right and advised that they had appointed the loss adjusters who had been to the site immediately after the flooding and that their report was awaited. Again the defendants did not state that they were not going to consider any such report. Instead they later received the report and considered it. They even entertained the plaintiffs' claim for further loss as is clear from their letters of 10th and 31st August and 6th September 1999.

The plaintiff still did not accept the repudiation and on 23rd September 1999 Mr. Aboo wrote to the Technical Director of the defendants after having had discussions with him and exhorted him, in view of the relationship between the parties, to consider settling the claim. On receipt of that letter the defendants asked for time as their Messrs Datoo and Dhanji were away in Kampala. Upon their return they dropped the clincher on 4th October 1999 that the defendants' decision to repudiate liability remained unchanged. There was no further correspondence exchanged between the parties on the matter until the 23rd December 1999 when the plaintiffs' advocates gave notice of institution of suit and thereafter filed this suit on 17th February 2000.

From this correspondence it is clear to me and I therefore find that the defendants were not categorical in their repudiation of liability until the 4th October 1999. After they had first intimated their repudiation of their liability they nonetheless led the plaintiffs to believe that the claim could still be negotiated and settled. As already stated they even entertained and considered the plaintiffs' claim for further loss although they ultimately rejected it along with the original claim. When the plaintiffs intimated that they had called for a further report from the loss adjusters the defendants did not dissuade them. Instead they let the plaintiffs go into the trouble of obtaining the report and when they received it they took over a month to consider it. I am satisfied that the defendants' conduct in engaging the plaintiffs in such correspondence even after the limitation period had expired was not a mere exercise of good business courtesy as contended by their counsel. It amounted to waiver and the defendants are therefore estopped from invoking the twelve months limitation clause in the policy.

The facts of this case are clearly distinguishable from those obtaining in **Kenya National Assurance – Vs- J. Kimani (1982 – 88)1KAR 1106** relied on by Mr. Magan . In that case the Respondent sought to hinge waiver on the acceptance and retention of excess. The circumstances in this case are quite different. I therefore find that this suit is competent and properly before court and I now wish to consider the other issues raised in it.

The next issue that I want to deal with is whether or not the defendants are entitled to repudiate liability for failure by the plaintiffs to disclose material facts. What is alleged to have been omitted or concealed is, according to the defence, "the existence of a water channel running next to the plaintiffs' premises which said water channel over-flowed resulting in the alleged loss and damage, the subject matter of this suit."

This is the main issue in this case and the evidence called by both parties was mainly on it. In his submissions Mr. Magan for the defendants called the water channel a river and said that from the evidence of DW1 and DW2 as well as Mr. McAfee's report given immediately following the incident it is clear that there is a river at the rear of the plaintiffs' premises. He dismissed Mr. Kalidas, PW1, "as a turncoat and a person who obviously has not heard of the expression 'professional ethics' or 'conflict of interest.'" This is because Mr. Kalida's employer, M/s. Toplis and Harding, had immediately after the incident been briefed to report on it and had filed a report stating that there is a river at the eastern boundary of the plaintiffs premises. It was therefore unethical for Mr. Kalidas to contradict his employer. He also dismissed Mr. Kalidas' report as being full of contradictory statements, flawed assumptions and convulted reasoning.

Mr. Magan further submitted that all witnesses, both the plaintiffs' and the defendants' without exception, are agreed that if there was indeed a river besides or at the rear of the plaintiffs' premises that is a material fact that should have been disclosed under clause 16 of the proposal form. He said the plaintiffs having failed to disclose it the defendants are entitled to repudiate liability. Citing several authorities he urged me to find the plaintiffs guilty of material non-disclosure and dismiss this case.

In response Mr. Inamdar for the plaintiffs countered those submissions by contending that the issue of the existence of a river near the plaintiffs' premises does not arise as it is not pleaded. What is pleaded in the defence is a water channel, which is not a material fact that needed to be disclosed. He went on to argue that even if the issue of a river is considered there is none within the vicinity of the plaintiffs' premises. He took me through the evidence on record on this point especially that of the defence witnesses and concluded that it does not prove the existence of a river anywhere near the plaintiffs' premises.

Regarding the question in clause 16 of the proposal form Mr.Inamdar submitted that the same is not only too wide but is also vague. As the answer given to that question was admittedly irrelevant it was incumbent upon the defendants to seek clarification and as they did not he cited several authorities in support of his argument that the defendants cannot now be heard to complain. Mr. Inamdar concluded his submissions on this point by arguing that even if the issue of a river is considered and it is found that one actually does or did exist near the plaintiffs' premises the defendants' defence of non-disclosure of material facts still cannot succeed as the existence or non-existence of a river did not influence the underwriting of the risk. In support of this argument he cited other authorities, which I will consider in a moment.

I have carefully considered these submissions together with the evidence on record on this issue. Before I comment on the evidence, I would like to state that the contract of insurance is perhaps the best illustration of a class of contracts described as *uberrimae fidei*, that is, of the utmost good faith. That being so the potential parties to such contract are bound to volunteer to each other, before the contract is concluded, information that is material. This principle imposes on the proposer or insured the duty to disclose to the insurer, prior to the conclusion of the contract, but only up to that point, all material facts within his knowledge that the latter does not or is not deemed to know. A failure to disclose however innocent, entitles the insurer to avoid the contract *ab initio* and upon avoidance it is deemed never to have exited – **Mackender –Vs- Feldia AG [1967] 2 QB 590**. The rationale for this rule was stated by Lord Mansfied in the old English case of **Carter Vs- Boehm (1766) 3 Burr. 1905** thus: -

"**Insurance is a contract upon speculation. The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the underwriter trusts to his representation, and proceeds upon the confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risqué as if it did not exist."**

There can be no doubt therefore that the contract of insurance is a special one in terms that Lord Mansfield expressed but it is important to remember that the case of **Carter –Vs- Boehm** in which he formulated those terms involved a contract entered into at a time when communications were poor and insurers were not equipped with means of easily discovering all the information they needed to know by asking the proposer questions. I will in due course revert to this point. At this stage what I need to add is that because the duty of disclosure arises by law and not as a term of the contract, whether or not the proposer knows that he is under duty to disclose is totally irrelevant. Innocent non-disclosure is as actionable as negligent non-disclosure or fraudulent concealment. It must, however, be emphasized that it is only actual knowledge of those facts that imposes the duty to disclose. As was stated by Moulton L.J. in **Joel -Vs- Law Union and Crown Insurance Co. [1908] 2 K.B. 863 at P.884:-**

"**The duty is a duty to disclose, and you cannot disclose what you don't know. The obligation to disclose, therefore, necessarily depends on the knowledge you possess."**

In this case what are the plaintiffs guilty of non-disclosure? From Mr. Magan's submissions and the evidence he led on behalf of the defendants it is clear that the plaintiffs are being accused of having failed to disclose the existence of a river near their premises. I agree with Mr. Inamdar that that fact is not pleaded in the defence . Ordinarily I would therefore have rejected that accusation and proceeded to deal with the other issues in the case. However, since that is one of the grounds given in the defendants' letter of repudiation dated 4th February 1999 and in his submissions Mr. Magan appears to suggest that the definition of a river encompasses a water channel which is pleaded, I want to consider the issue as though the existence or non-existence of a river was explicitly pleaded. Having taken that stand and in view of what I have already stated as to what should be disclosed, the questions that spring up to my mind and need to be answered are whether or not there was indeed a river near the plaintiffs' premises and if so whether the plaintiffs knew of it.

The second question can easily be disposed of. The plaintiffs being the owners of the premises on which they were constructing a factory if there was a river near it they knew or ought to have known of it. Their case, however, is that there is none.

Whether or not there is a river near the plaintiffs' premises is a hotly contested issue that can only be resolved after a careful consideration of the evidence adduced in this case. Before I consider the evidence on record, however, I wish to point out that as stated in **General Principles of Insurance Law by E.R. Hardy Iramy** cited by Mr. Inamdar, where non-disclosure is alleged the onus is on the insurers, who in this case are the defendants, to prove: -

i) That the fact not disclosed was material;

ii) That it was within the knowledge of the insured; and

iii) That it was not communicated to them.

As I will show in due course when dealing with the issue of misrepresentation, a fact is material for the purposes of both non-disclosure and misrepresentation if it is one that would influence the judgment of a reasonable or prudent insurer in deciding whether or not to accept the risk or what premiums to charge. Quoting from **Marshall on Insurance (3rd Ed) Vol I, P. 465**, this is how Lord Mustill defined what a material fact is in the famous case of **Pan Atlantic Insuance Co. –Vs- Pine Top insuance Co. Ltd. [1994] 3 ALL ER 581 at P.606:-**

"**Every fact and circumstance, which can possibly influence the mind of a prudent intelligent insurer, in determining whether he will underwrite the policy at all, or at what premium he will underwrite it, is material."**

Again quoting this time from **Parsons on Marine Insurance and General Average Vol. 1, P. 409 – 410** Lord Mustill added:

"**the question of materiality of a representation is not whether the fact stated actually did, or possibly could, affect the risk but whether it would naturally end to influence the insurer, in his estimate of the risk."**

In property insurance material facts include the nature of construction and use of the insured building and or whether it is particularly exposed to risk.

In this case the issue of the material fact that ought to have been disclosed appears to be agreed upon. As submitted by Mr. Magan all the witnesses on both sides stated that if indeed there was a river near the plaintiffs' premises that was a material fact that ought to have been disclosed. The plaintiffs never disclosed the existence of any such a river and as I have already stated if there was indeed a river near the plaintiffs' premises they must have known of it. What therefore remains to be answered is whether or not there was one and that now brings me to the examination of the evidence in this case.

To prove the existence of a river at the rear of the plaintiffs' premises the defendants rely on the initial report dated the 18th May 1998 which is on page 20 (a) – (b) of the agreed bundle of documents and the evidence of the two defence witnesses, Messrs Dawson and Sheth. The two are experienced loss adjusters whose evidence, in a nutshell is that there is a river at the rear of the plaintiffs' premises.

The plaintiffs on the other hand maintain that there is no river in the vicinity of their premises, leave alone at its rear and rely on he evidence of Mr. Kalidas PW1, their director Mr. Shah PW3 and that of their broker Mr. Aboo PW4.

Collins James Dawson DW1, did not impress me as a truthful witness. His evidence was based on the opinion of the people he said he interviewed at the site and not what he saw. This is what he said: -

"**At the time of my visit [to the site] it was not during the rain season. At the rear of the premises there was a railway embankment. The land between that embankement and the premises is marshy. I formed the opinion that what I was looking at was the base of what was a river. The depression ran almost parallel to the wall of the premises. It changed direction to the left and disappeared into a tunnel or culvert which had been built to accommodate the river under the road. I did not see any water running."**

He went on to state: -

"I talked to a number of local people. No one gave me the name of the river but they confirmed that during the rain season there is a river. From these enquiries I concluded that there was indeed a river that runs behind the premises and that is my **advise to the defendant."**

Later on he added:

"**I believe there is a river running adjacent to the plaintiffs' premises. My opinion was confirmed by the locals I interviewed."**

These are all matters of opinion. Though Mr. Dawson is an experienced loss adjuster the existence or non-existence of a river at the rear of the plaintiffs' premises required hard evidence and not any expertise. Mr. Dawson himself stated as much. If at all an opinion was required on that, and I do not think it was, then Mr. Dawson, who admittedly is not a surveyor or cartographer, was least qualified to give it.

In cross-examination Mr. Dawson said that apart from interviewing the local people he did not make any enquiries. He did not go to the local authority's offices or those of the survey department or even inspect the course of the alleged river to determine its origin and or destination.

Though he did not himself make any report of his visits to the site and what he found, he had the audacity to dismiss that of PW1 not only as false but also as unethical. Unethical because, according to him, M/s.

Toplis and Harding, the employers of PW1, having given a report that there was a river near the plaintiffs' premises, PW1 should not have contradicted that position. Instead, he said, PW1 went ahead and stated that M/s. Toplis & Harding's report placing a river on the eastern boundary of the plaintiffs' premises is wrong. There is no river there.

The other witness called by the defendants was M. Harith Sheth DW2. He said he saw a stream at the rear of the premises, which crossed Nelson Mandela road although it is not shown on the survey map **Ex.4.** Like DW1 he also did not inspect its course to determine its origin and or destination. He also confirmed that contrary to what is stated on M/s. Toplis and Hardings' initial report dated 13th May 1998 there is no river on the eastern boundary of the plaintiffs' premises.

Against this defence evidence is that of Mr. Kalidas PW1, the plaintiffs' director PW3 and that of their broker PW4. They all said there is no river near the premises. Mr. Shah as the owner of the premises said there is no river near it. Mr. Aboo the broker said he visited the site twice but he did not see any river near the premises.

I have read PW1's report and considered his evidence. Despite the uncomplimentary remarks made of him by Mr. Magan and DW1, he impressed me as a honest and candid witness. He said he was born and raised in Dar-es-Salaam where he also went to school and has worked for over 20 years. So he knows the site of the plaintiffs' premises fairly well. Despite that knowledge he visited the site twice and made a comprehensive report. In spite of the long and thorough cross-examination he was categorical that there is no river at the rear of the premises. What there is, perhaps for want of a better term, is what he variously described as a natural storm water drainage, a water course or a water drain. He said the same came about as a result of the railway embankment constructed at the rear of the premises. As I have said he was categorical that what there is at the rear of the plaintiffs' premises is a storm water drainage that is dry most of the year. That is confirmed by the testimony of DW1 who went to the site during the dry season and never saw any water running.

When confronted with a letter from Ilara Municipal Council that had alleged the existence of a river at the rear of the premises, PW1 said he went back to Dar and talked with the author of that letter who on her own went to the site and later wrote another letter recanting the earlier assertion. Though the defense had promised to call the author of those letters it did not and proffered no explanation for that failure. In the circumstances I agree with Mr. Inamdar that the only logical inference to be drawn from that is that if called she would have denied the existence of a river there. Taking all this evidence into account I have no doubt in my mind that there is now and was at the material time no river at the rear or near the plaintiffs' premises. What there was and still is, is natural storm water drainage, which did not require to be disclosed.

Even if I had found that there was indeed a river at the rear or near the plaintiffs' premises and that the plaintiffs were guilty of material non-disclosure that would not have been the end of the matter. In that event I would have had to consider, as I now wish to do, whether or not that non- disclosure actually induced the defendants to write the risk. If not then the defendants would not be entitled to repudiate the liability on that ground. The *locus classicus* decision of the House of Lords in **Pan Atlantic Insurance Co. Ltd. –Vs- Atlantic Insurance Co. Ltd.**. **–Vs- Pine Top Insurance Co. Ltd. [1994] 3 ALL ER. 581** makes that quite clear.

Stating that both criteria of non disclosure and whether or not the same influenced the underwriting of the policy must be satisfied Lord Lloyd had this to say at P.638:-

"**Whenever an insurer seeks to avoid a contract of insurance or re-insurance on the ground of misrepresentation or non-disclosure, there will be two separate but closely related questions. (1) Did the misrepresentation or non-disclosure induce the actual insurer to enter into the contract on the those terms? (2) Would the prudent insurer have entered into the contract on the same terms if he had known of the misrepresentation or non –disclosure immediately before the contract was concluded? <u>If both questions are answered in favour of the insurer, he will be entitled to avoid the contract , but not otherwise</u>."** (emphasis supplied)

On his part Lord Mustill had earlier on at page 618 stated that:-

"…**If the misrepresentation or non-disclosure of a material fact did not infact induce the making of the contract (in the sense in which that expression is used in the general law of misrepresentation) the underwriter is not entitled to rely on it as a ground for avoiding the contract."**

Like the issue or defense of non-disclosure the onus is on the insurer to prove inducement. He has to clear the court's mind that the non-disclosure had an effect on its mind in weighing up the risk and did actually influence it to underwrite the risk. Examining the scope of the test for proving this inducement as outlined in the **Pan Atlantic case** Longmore J in the later case of **Mac Rich & Co. AG –Vs- Portman [1996] 1 LLR 430** had this to say:-

"**In most cases in which the underwriter is called to give evidence and is cross-examined, the court will be able to makeup its mind on the question of inducement …. [if] it genuinely cannot make up its mind on the question … [then] the insurer's defence of non-disclosure should fail because he will not have been able to show that he had been induced to enter into the insurance on the relevant terms. At the end of the day it is for the insurer to prove that the non-disclosure did induce the writing of the risk on the terms in which it was written."**

The underwriter in this case is George Okayo and although he was called by the plaintiffs as PW2, nowhere in his evidence did he say that he was induced to write the risk on the basis of the fact that there was no river at the rear or anywhere near the plaintiffs' premises. So the question of the court not making up its mind on the issue of inducement does not arise. I am satisfied that the non-existence of the river did not induce the defendants into writing the risk in this case. In the result I find that the defendants are not entitled to repudiate their liability on the ground on non-disclosure of material facts.

In view of this holding I do not find it necessary to consider in detail the question in clause 16 of the proposal form though heavy weather was made of it. This is the question the answer to which, it was alleged, should have disclosed the existence of the river. I agree with the witnesses that the answer the plaintiffs gave to that question was totally irrelevant but as I have said I do not need to go into it now. The point, in my view, could have been important if there was a river near the plaintiffs' premises and the plaintiffs were saying they did not know of it or that they were required to disclose it.

That brings me to the third issue in this case which is whether or not the plaintiffs failed to disclose that the premises which housed the insured machinery was not completely enclosed or whether or not the plaintiffs misrepresented that fact.

The defendants contend that the plaintiffs' failure to be forthright on that issue entitled them to repudiate liability under clause 5 (iii) of the policy. They contend that under clause 5 of the proposal form the plaintiffs misrepresented that the machinery was in a godown when infact two walls of that building had been constructed. The defendants' underwriting manager Mr. Okayo, said if the correct position had been disclosed the defendants would have properly assessed the risk involved and known what to do about it.

While admitting that they had initially been informed of the goods being in the open, the defendants said that later on a proposal form was submitted by the plaintiffs which stated that the goods were stored in a godown and as a result of that they re-rated the risk and covered the goods as stored in an enclosed premises and issued a policy on that basis.

The defendants further contend that the plaintiffs' claim in this suit is based on that policy which contains the terms of the contract of insurance between them and the plaintiffs. That being the case counsel for the defendants relying on the decision of Ringers J (as he then was) in **Agricultural Finance Corp. –Vs- Kenya Alliance Insurance Co. Ltd & another [2002] 1 KLR** submitted that the terms of the contract of insurance as stated in the policy should be applied strictly to both parties. The Plaintiffs should not be allowed to approbate and reprobate that contract. The plaintiffs should not be allowed to rely only on terms that are favorable to them and be discharged from the unfavorable ones.

Among other things, counsel for the defendant further submitted, the policy contains the agreed and paid premium of Sh. 22770/- which relates to the goods in an enclosed premises, in this case a godown as stated in the proposal form. In the circumstances, he concluded, the defendants are entitled to repudiate liability under clause 5(iii) of the policy.

In response to those submissions counsel for the plaintiffs submitted that the question of approbation and reprobation does not arise as the contract of insurance was entered into long before the policy came into existence. He said the policy was drawn on 4th May 1998 and delivered to the plaintiffs' brokers on 6th May 1998 after the incident giving rise to this suit had occurred on the 3rd May 1998. As regards the premium he said the same was agreed upon on 23rd July 1998 and was not based on any tariff or on the allegation that the goods were in a godown. He said it was based on commercial and market considerations.

According to counsel for the plaintiffs even if the proposal form is taken into consideration, looked at as a whole the information therein contained does not suggest that the goods were in a godown. In the circumstances, he concluded, the defendants should not be allowed to rely on clause 5(iii) *post facto* and depart from the terms of the contract of insurance it had entered into on the 5th December 1997.

I have considered these arguments and the evidence on record on the issue. Save for the principle of *uberrimae fidei* already stated the contract of insurance is no exception to the general rule of offer, acceptance, consideration, agreement and an intention to create legal relations in order to find a binding legal contract. In an insurance contract the parties should agree on the amount of premium, although it does not have to be paid; the nature of the risk including the subject matter of the insurance and the duration of the risk. Though the offer to insure can also be made by the insurer, in practice, however, it is normally made by the proposed insured by completing a proposal form. When that is done no difficult arises as invariably proposal forms stipulate that the proposer's offer is subject to the insurer's usual terms. There are, however, situations, which are by no means uncommon, where contracts of insurance are concluded before the written cover note or proposal form incorporating any express terms came into the picture. The facts of the Australian case of **Mayne Nickless Ltd. –VS- Pegler [1974] 1 N.S.W.L. R28** succinctly illustrates this. The insured in that case purchased a car and the vendor immediately arranged for insurance on telephone. The insured later received a cover note incorporating the insurer's usual terms. Though the case was decided on other grounds it was clear that a binding insurance contract was concluded on telephone before the insured was aware of any express terms, which were held not to apply.

In this case it is common ground that as a result of oral discussions between the defendants' underwriting manager, Mr. George Okayo PW2, and the plaintiffs' broker, Mr. Aboo PW4 on 5th December 1997 the plaintiffs were put on cover on the same day. The major terms of the contract of insurance, that is the subject matter of the insurance being the workshop machinery and the duration of one year were agreed upon. The amount of the premium was, however, not agreed upon. The plaintiffs while arguing that the risk of fire against heavy machinery was minimal proposed a rate of 1.5% per mill. The defendants on the other hand argued that since the goods were in the open the rate should be 3.544% per mill as provided in tariff 52 (a) of the Rating Provisions **Ex.2.**

Though no agreement was reached on the amount of premium that did not pose any problem at all apparently due to the parties' previous business relations. Mr. Shah said they used to pay the defendants an annual premium of about Sh. 1,000,000/= and had a running account with them. It is important to note that discussions on the issue went on even after the flooding giving rise to this case and that the parties reached an agreement on it on 23rd July 1998, almost three months after. As I have said the plaintiffs were put on cover for one year from 5th December 1997 and no issue has been raised in this case on the failure to agree on the premium before the cover was issued. In the circumstances I find and hold that a binding oral contract of insurance was reached on 5th December 1997 and the plaintiffs' goods, valued at that time at about Kshs. 12,081,258/- as stated in Okayo's handwritten note **Ex.5,** were covered for one year.

If I understand the defendants' case well, it is that though an oral contract was reached on 5th December 1997 and they covered the plaintiffs' goods when the proposal form was received the position changed and they covered goods in a godown as stated in that proposal form and the policy. As it later transpired that the goods were not in an enclosed premises at the time of the flooding, the defendants argue that they are entitled to repudiate liability under clause 5 (iii) of the policy. Is that the case? Was there a variation of the original contract entered into on 5th December 1997?

Mr. Okayo said he received the proposal form on the 28th December 1997 and according to him the goods were therein stated to be in a godown. Paragraph 5 of the proposal form which deals with this aspect of the matter reads:-

"**5. PROPERTY TO BE INSURED**

(a) Buildings including landlord's fixtures and fittings described below: -

(i) Building occupied as GODOWN STORAGE OF MACHINERY (initially) and built of …… and roofed with G.C.I SHEETS…"

The other parts of that sub- paragraph are not completed and no figures are given. Against paragraph 5(b), (c), (d) and (e) which sought the values of the machinery, plant, utensils, stock, furniture and others, a sum of US Dollars 191760 is hand written both in figures and words and a conversion figure of Kshs. 11,505,6000/= is also given.

What is one to make of this? If no discussions had been held one would have expected Mr.Okayo to ask for the value of the godown as on the face of the proposal form, it was, together with the plant, machinery, utensils and stock therein, also being insured. But as there had been discussions it was clear that the building was not being insured. So those details regarding the building should not have been given and paragraph 5 (a) should have been left blank.

Paragraph 16 of the proposal form also contained wrong information. The question asked in that paragraph was:-

"**Are there any additional circumstances or facts affecting the proposed insurance which should be disclosed to the company for their consideration of the risk? If so give details."**

The answer given was:-

"**THE COMPANY IS PART OF THE LIGHTWAYS GROUP OF COMPANIES."**

As most of the witnesses said that was totally irrelevant. It was not an answer to the question. Mr. Shah PW3 said that was meant to influence the defendants to charge a reasonable premium as the plaintiffs' sister companies in the Lightways Group of Companies were insured by the defendants with premiums totaling to over Kshs. 1 million being paid to them every year.

Though the details given to these two paragraphs were wrong Mr. Okayo, an underwriter of no mean experience, did not deem it fit to seek clarification and or the correct answers. The allegation in the handwritten note **Ex.6** that he confirmed the rate with the brokers based on the description in the proposal form cannot therefore be true. The note is not only disputed by the brokers but it was also written on 15th February 1999. To me it is clearly an afterthought.

Under paragraph 5(a), upon which the defendants place great reliance the details of the roof of the godown are given. Those of the walls are not given. What the walls were built of and if they had actually been built is not stated. How Mr. Okayo came to the conclusion that the goods were in an enclosed building therefore is difficulty to understand.

Looking at the proposal form as a whole and in particular paragraphs 5 (a), 8 and 11, I cannot find anything to suggest that the position had changed and that the goods were in an enclosed premises. The defendants' contention to the contrary is in my view an afterthought.

The letter of 10th March 1998 allegedly giving the proposed premium does not make any reference to the proposal form. Though it refers to tariff 50, which relates to goods in enclosed premises, at its foot it states "we trust you will find the rate competitive." If it was based on tariff 50 there would have been nothing competitive about it. In my view the competitive rate therein referred to is the one that Mr. Aboo had asked for goods in the open.

In his testimony Mr. Aboo said that the rate of 1.5% per mill that he asked for was based on the prevailing rates and not on any tariff. He said that at that time the rates were quite low. The prestigious Lillian Towers in Nairobi, for instance, he said, was insured at the rate of 1% per mill.

The rate given in the defendants' said letter of 10th March 1998, starting with the basic rate of 1.50, was 1.979%. Eventually the rate agreed upon, long after the flooding, as stated in the defendant's letter of 23rd July 1998 is 1.544%. I agree with Mr. Aboo PW4 that this rate had nothing to do with any tariff and was based on the commercial and market considerations ruling at that time.

Even if I were to agree with Mr. Okayo that the rate given by the defendants was based on tariff 50 which relates to the goods in enclosed premises, I am clear in my mind that the contract of insurance reached on 5th December 1997 was not varied as contended by the defendants. Both the defendants' said letter of 10th March 1998 which contained the revised rate and the policy reached the plaintiffs after the flooding. There is therefore no agreement on the alleged variation. In the circumstances the defendants are also not entitled to repudiate their liability under clause 5 (iii) of the policy.

In the upshot, having found that the defendants are not liable to repudiate liability on either material non-disclosure or misrepresentation, I hold that they are liable to indemnify the plaintiff of the loss suffered. The final question that therefore remains to be determined is the quantum of that loss which I will now proceed to consider.

In the afternoon of 7th October 2005, during the cross-examination of Mr. Sheth DW2, I recorded the parties as telling me that subject to the defendants being found liable the minimum loss suffered by the plaintiffs would be USD 97,113 less excess. The only areas of dispute left for my determination were whether or not the 3 DC motors said to have cost USD 17,538.14 were covered and whether the claim should have been made in Kenya shillings or US Dollars. I therefore, do not understand Mr. Magan's submission that the plaintiffs have failed to prove their loss. I want to believe that that submission must have been inadvertent for a party is not required to prove what is admitted.

As regards the claim in respect of the motors the defendants contend that the same is not payable as they were spare parts and were therefore not covered. In his testimony Mr. Sheth DW2 stated that according to the schedule to the policy what was covered were business, plant and machinery and not spare parts. He said that the three motors were in boxes and were swept away by the floods.

The plaintiffs on the other hand contended that the motors were covered. Mr. Kalidas PW1 whose view I agree with said that spares could not have been required at that early stage in the operations.

What is to be determined here is what is meant by the tem "machinery". Machinery as I understand it in this context refers to the machines collectively or their components as they were being assembled. Mr. Kalidas states in his report that what was damaged were parts of the motors that had not been assembled. I have no reason to doubt that, as Mr. Sheth did not say that other motors required to operate the machinery were already mounted on them. Even if these were spares they were imported along with the rest of the insured machinery and were in the factory. I therefore do not see any reason why they should be excluded. As their value is not in dispute I find that aspect of the claim proved and hold that the defendants are liable to indemnify the plaintiffs in the total sum of USD 114,651.00 less salvage of USD

3000 and excess of USD 16.66.

As regards the currency I agree with Mr. Magan that the cover having been in Kenyan Shillings though the purchase invoices were in US Dollars the claim should have been made in Kenya shillings. In the circumstances I enter judgment for the plaintiffs against the defendants in the equivalent in Kenya shillings of USD 114651 with costs and interest.

I want to end this judgment by expressing my appreciation to counsel for both the parties for their well researched submissions, which were of great assistance to me.

DATED and delivered this 25th day of May 2007.

D. K. MARAGA

JUDGE

25.5.2007

Before Maraga Judge

Inamdar for the Plaintiff

Magan for Defendant

Court clerk – Mitoto

Court – Judgment delivered in open court.

D.K. MARAGA

JUDGE