REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 2757 of 1996

ROY TRANSPORTERS LIMITED……..…………………PLAINTIFF

VERSUS

KENYA TEA DEVELOPMENT AUTHORITY………..DEFENDANT

JUDGMENT

The Plaintiff came to this Court vide a Re-amended plaint which was re-amended on 11th day of October, 2001 and filed on 8th January 2002. The cause of action against the defendant is contained in paragraph 3,4,4A,5(a) 5(b) 5(c), 6,7,8,9,10,11 and 12. The salient features of the same are:-

(1) There was an agreement between the disputants dated 1st July, 1994 between the defendant and the Plaintiff where by the Plaintiff was to provide the defendant with vehicles to transport the defendant's Tea from Kinaro Tea Factory Githongo and Imanti Tea factories to destinations within Kenya.

(2) It was a term of the agreement that in the event of any accident the defendant would release monies held by it on behalf of the transporter.

(3) These transportation agreement was extended to other Tea Factories mentioned in paragraph 4(a) of the Plaintiff without fresh agreements being entered into in respect to those other Tea factories.

(4) The Tea transported was injured by an insurance company of the defendant's choice.

(5) The terms of the insurance that in the event of any theft or loss and or damage this would be reported to the defendant which would then lodge its claim with the insurance company.

(6) On 10.12.1994. The plaintiffs carry registration number KZH 497 while transporting the defendants Tea from Kinaro Tea factory was hijacked at given point by highway robbers at Machakos and drove away with the lorry and the Tea. The truck was later found along the Kapenguria Road near Spring Valley and recovered 9 bags of Tea. Likewise on 30th November, 1994 the plaintiffs lorry registration number KXW 318 while transporting the defendants Tea from Chebit Tea Factory was hijacked by armed gangsters purporting to be traffic officers along Nairobi Mombasa Road. The theft was reported by the Plaintiffs driver and turn boy at Embakasi Police Station. The said driver and turn boy were released without charges being preferred against them. Where as the driver of KZH 497 was charged with a criminal offence in Machakos criminal case No. 5134 of 194 but he was acquitted.

(7) On account of matters set out in number 6 above the plaintiff constraint that there was no breach of contract on its part and the defendant and as such the Plaintiff was entitled to claim the sum of Kshs 2,715,839.00 being the sum held by the defendant on behalf of the Plaintiff.

(8) The defendant declined to release the said sum arguing that its claim had not been admitted by the insurance company when the plaintiff requested to deal with the insurance company directly but the defendant declined him. That request the claim, for Kshs 2,715,839/=, general damages, interest at court rates and any other relief that the court may deem just.

The defendant moved to court to defend the claim vide a defence dated 28th November 1996 and filed and served. The salient features of the serve are:-

(1) The defendant denied having entered unsworn agreement with the plaintiff as alleged in paragraph 3 of the plaint and put the plaintiff to strict proof.

(2) Denied having agreed that in the event of an accident to release any monies to the Plaintiff and puts the plaintiff to strict proof.

(3) Contends that its standard agreement with transporters provides that in the event of an accident the transporter would be held responsible for any loss until the insurer of the tea has assumed responsibility for the loss and no money would be payable to the transporter until then.

(4) Contends being a stranger to paragraphs 5,6,7,8 and 9 of the plaint and put the plaintiff to strict proof save that ht standard agreement with transporters provide that the transporter assumes full liability for any loss or damage to the defendants tea while the tea is in its custody.

(5) Denied holding any money on account of the plaintiff and put him to strict proof.

One witness gave evidence for the Plaintiff. He has described himself as a Mr. Mirita Omar a Director of the Plaintiff. The content of his evidence is a reiteration of the content of the recommended plaint and it is to the effect that:-

· The Plaintiff was contracted by the defendant to transport the defendants made tea from any of the defendant's tea factories to Mombasa. The contract was in written form and was produced as exhibit 1. After execution of the said agreement the Plaintiff continued transporting the defendant's tea as aforesaid until two incidences occurred leading to these proceedings. The first one occurred on 30.11.94 involving his motor vehicle reg. No. KXW 318 which was hijacked by the highway robbers and its crew beaten up and left for dead. The matter was reported to police and investigation commenced.

The vehicle was recovered abandoned with the content all gone. The second incident occurred on 10th December, 1994 involving their motor vehicle KZH 497 enroute from Kinaru to Mombasa. It too was hijacked at the Mombasa Machakos junction. This vehicle too was recovered near Kikuyu area abandoned. 9 bags of tea were recovered from a nearby bush HIM PW1 collaborated with the police who charged some suspects one of whom was discharged while another was convicted as per the court proceedings in exhibit 2 being proceedings in criminal case number 5134 of 1994 conducted at Machakos Law Courts when both incidents occurred the Plaintiff took upon himself the duty to notify the defendant as stipulated in the agreement. As per the content of the agreement exhibit, the tea was supposed to be covered under the defendant's insurance police a certified reply of which was produce by the defence as exhibit D1. This was meant to cover the tea in transit. It was expected that the defendant would claim for the loss from the insurance but would go ahead and pay the plaintiff the transportation costs. When demand for payment was made the defendant declined payment citing the said two incidences of loss and that is what led to the filing of these proceedings but before conclusion on amount of Kshs 667,454.40 was paid necessitating the amendments of the proceedings.

Before moving to Court the parties exchanged correspondence on the subject with a view to settling the same. These are contained in each party's bundle of documents. Their contents have a bearing on the

issues in controversy herein and so it is prudent on the part of this court to set the amount on the body of the judgment.

On 13th December, vide their letter of the said date ref. No.RTL KTDA Gen 1563/94 the Plaintiffs reported to the defendants that their vehicle KZH 497 had been hijacked by robbers at Machakos junction done the Nairobi Mombasa Road and the incident had been reported to Machakos and Pangani police station. The defendants were advised to report the incident to their insurers. The defendants responded to that correspondence vide their letter dated 16.12.1994 ref. INS/5/AAM (15). The content is to the effect that they hold the plaintiff wholly liable for the resultant loss and asked the plaintiff to admit liability within 14 days from that date. In the same letter on a without prejudice basis the defendant asked for a police abstract report the Tea dispatching note and the driver and the turn boy to call at the defendants offices to record statements. An abstract was obtained on 9.1.95 but there is no indication as to whether the same was founded as requested or not.

The defendants instructed a private firm of investigators Messrs Inter African Security Consultants & Investigators to investigate the circumstances surrounding the loss of the tea abode the plaintiff's motor vehicle registration number KZH 497 on 10.12.1994. This firm vide their letter ref. IAC/TFT/020/94 dated 23rd January 1995 informed the plaintiff accordingly. The content indicates clearly that they were carrying out investigation to establish the circumstances surrounding the said loss. In the same correspondence it is indicated that the firm had raised concern with the defendant as regards the unavailability of the driver and turn boy to record statements on the incident. It is indicated that the firm had also raised the same issue with the plaintiff in a previous correspondence and noted that despite the plaintiff promising to call on them on 17th January to sort out the issue they had done so. In the correspondence the plaintiff was asked to provide:-

(a) Date, time and piece of cost as it was reported to their plaintiff.

(b) The circumstances of the loss as reported to them.

(c) Date and time of reporting the said loss to the police and to specify the police station

(d) Provide full names of the driver and the turn boy who were with the value at the time of the loss and avail them for recording of statements. It was further indicated that the plaintiff's positive response would assist accordingly.

In response to the defendants demand that the Plaintiff do assume full responsibility for the lost tea, they plaintiffs wrote to the defendant vide their letter dated 24th January, 1995 asserting that they were not willing to assume responsibility for the loss of the tea because the loss was a calamity beyond their control. The same having been occasioned by armed gangster attack on their turn boy and violently drove away the vehicle. The defendant was also notified that the tea dispatch note was still with Kikuyu police station while the driver was in custody helping police with investigations and this went to explain why the two could not be send to the defendant's office to record a statement. The correspondence occasioned the original copy of the police abstract. The Plaintiff followed this with their letter dated 25th January 1995 enclosing a copy of the turn boy's identity card, a copy of the vehicles inspection report. The logbook was not enclosed because it was held by a Finance company, vide their letter dated 6th February 1995 the Plaintiffs founded to the defendant copies of the driver's identity card and driving license.

On 24th February, 1995 the Plaintiffs respondent to the correspondence then messrs Inter African Security Consultants and Investigations dated 23rd January 1995 already set out above. The information provided in this correspondence is to the effect that they had failed to tell their driver and turn boy after the incident. But information gathered from them was that they had been hijacked by gangsters poising as policemen and later abandoned. They reported the incident to Embakasi police station but were led by police to assist in the investigations. Information was received on 30.11.94 and it was immediately relayed to the defendant. They hoped that information would assist the security firm in their investigations.

The defendants wrote a letter dated 28th February, 1995 Ref. INS/5/AAM/(15) to the Plaintiffs confirming that they had received and forwarded the details of the driver and the turn boy involved in the incident to their Chief Security Officer for necessary action. They promised to take action after hearing from the investigators and their insurers.

Vide their letter dated 2nd March 1995 the Plaintiffs got in touch with Messers Inter African Security Consultants and Investigators, making a follow up to the earlier correspondence and providing more information on the incident. The information provided was that the said value had been parked at Kikuyu junction along the Nairobi Machakos Road. The turn boy was sleeping in the vehicle when some thugs arrived with guns approached him and threatened him. They drove to Nairobi where he escaped and managed to report the matter to Pangani Police station on the same night. The following day the driver went where he had parked the vehicle and on realizing that it and the turn boy were missing decided to report the matter to Machakos police station. The vehicle was later found abandoned and overturned along Kapenguria Road in Spring Valley area on 12.12.94 by Kikuyu police and towed to Kikuyu Police station. A Corporal Mwathe had locked the plaintiff's office and informed them about the recovery of the vehicle with only 9 bags of tea on board. The incident had been reported to the defendant on 13.12.94.

The foregoing information was relayed to the defendants vide the plaintiffs letter dated 21.3.1995. In this letter the plaintiff attempted to correct information relayed to the defendant earlier on. The salient features of this correspondence just for purpose of the record are that it is the turn boy Mr. Josephat Nkamai the turn boy of the vehicle at the time is the one who had reported to Pangani Police Station who later relayed the message to Machakos Police Station. They also confined that through the identity card and driving licence of the driver bear different names they belong to the same person.

On 12th May 1995 United Insurance Company Limited C/CIT/0285/12/94 to the defendant on board KZH 497 on 10.12.94. The content of the same is that they had received the investigation report which reveals that the loss in question was perpetuated by or with the help of the transporters employees hence not recoverable under goods in transit policy cover. In consequence there of they advised that they cannot meet the claim of the defendant and on that account the Plaintiff was advised to turn to his insurers and claim that loss from these insurers of Fidelity guarantee policy. Following that advice the defendant wrote to the plaintiff vide the letter dated 24.7.l995. The contend in that according to the insurers the investigators reports both losses in respect to Kinaru Tea Follows KZH 497 on 10.12.94 both losses have perpetuated by or with the help of the plaintiffs employees and consequently both claim fell outside the provisions of the goods in transit policy. On that account the Plaintiff was advised to recover both losses under his Fidelity guarantee Policy. The total amount involved were Kshs 862,077.60 for the Kinaru claim and Kshs 1.470,468 for the Chebit claim.

The Plaintiffs reaction to the defendant declining to meet their claim is contained on their letter ref. RTL.119B/268/95 dated 13.8.95. The salient features of the same is that they disagreed with the unfounded advise from the insurers because they found it malicious and fallacious to act on the findings of some investigators appointed by interested parties like the insurers who will always be eager to find on excise to repudiate the claim. That their driver of KZH 497 was arrested on suspicion but on through investigations have found innocent and acquitted. A stranger was convicted. That regarding the KZW 318/1076 claim for Chebit Tea their driver had been extensively interrogated by the police and was found innocent and no charge was preferred against him. While others were charged in court. They assist for the defendants GIT policy to enable them study it to determine how the claim falls outside it. Added that they too had suffered a destruction of a 3rd party's truck by the assailants. On that account they appealed to the defendant to release the withheld finds.

The defendant responded vide their letter dated 31st January 1996. The content are that they noted from the enclosed copy of the proceedings that the plaintiffs driver Stephen Mungari Kirima who was driving motor vehicle registration number KZH 497 carrying Kinaro Tea was acquitted but the turn boy Josephat Nkaronguri who was left to award the lawyers the fateful right escaped and ha snot been traced since. That following investigations by the independent insurance loss investigations, it was established that the turn boy perpetuated the loss and hence the reason for his disappearance. As for the theft of the Chebit

Tea, records from the police officers show that the driver Duncan Mugendi Charles together with his turn boy were held as suspects but later released with instructions to report back. The two disappeared and they have not been traced since. On the basis of the aforesaid the defendant maintained that the events outlined proves involvement of the plaintiff's employee in the losses and for that reason the position remains as advised earlier.

It is against the foregoing sequence of events that parties gave evidence herein when cross examined P.W.1 agreed that the contract document is exhibit 1, that though it referred to specific factories it could be extended to cover other tea factories owned by the defendant throughout the country. He agreed that he was required to transport. The tea under the regulations. He conceded that his employees accompanied the tea which was stolen. He confined that what he received as payment while the matter was pending in court related to previous transporter bills independent of the ones subject of there proceedings.

When recalled for further evidence P.W.1 stated that indeed the investigator called for information from them vide their letter dated 23.1.1995 asking information which they supplied denied existence of a claims which allowed him to be compensated only if the different has received reimbursement from his insurers. He maintains that both incidences have thoroughly investigated by police who found his employees innocent. He does not know where the employees are as they left his employment. He confirms that at no time did police come looking for him. They gave particulars of the employees to the defendant. He does not accept the meet the losses the defendant declined to have him insure with a firm of his reputation.

When re-cross-examined the witnesses agreed that as transporters they took responsibility of the whole on board their, values. Agreed that on both occasions when the tea got lost it was in the custody of his employees. Agreed that as per clause 5 of the insurance policy liability was excluded where an employee was involved. But maintained that his employees were not involved though they disappeared. He denied existence of any omission or commission on the part of his employees in conviction with the lost tea.

The defendants called one witness whose evidence was based specifically on records held at the office which have already been set out in trust judgment. However for purposes of the record the salient features of his evidence are that:-

(1) they failed to locate the original policy document relating to this matter bearing the endorsement but managed to get a certified copy from the insurers.

(2) According to routine practice in their office responsibility for tea while on Kensit lay with the transporters as per clause 3(i) of the agreement.

(3) Confined that the defendant had insurance cover for goods in transit for loss whose compensation to the transporter would only arise if the insurance c company would on June responsibility for the loss. That it when money with held would be released to the transporters.

(4) Confirmed that proceedings involve two in accordance of loss of tea, one from Chebit and another from Kinaru both of which were being transported by the defendant trucks. In respect to the consignment from Kinaru Tea factory the driver reported to police, he was projected but acquitted for lack of evidence but the turn boy disappeared and has never been found in the second in stance of the Chebet Tea both driver and turn boy reported to police, they were held as suspects but were never prosecuted because they disappeared.

(5) According to him when they release tea to a transporter they expect him to exercise absolute care and diligence as regards the tea.

(6) That both incidence of theft was reported to the insurer who appointed a private investigator to investigate the losses. He is aware from the records that the said investigator called for certain information form the plaintiff to help in the investigations.

(7) That the results of the investigation was that the plaintiff's employees were blamed and as a result of this the insurer repudiated liability under the exclusion clause as shown by exhibit D1 whose contents were relayed to the insurer as shown by exhibit D2 dated 24.7.95. They responded by their letter of 13.8.95 to which he responded vide their letter dated 31.1.96.

(8) That on that basis of the nature of the contract with the plaintiff and in the light of the repudiation by the insurer there is no way the defendant an be compelled to meet the claim of the plaintiff.

When cross-examined the witness confined his evidence in Chief that his testimony is based on what he gathered from the records. He continued that he did not get the original policy but copies and that had them certified by an officer of the insurance company. He agreed that as per clause 3(i) the transporter is only liable in cases of commission or default. That although the driver concerned in the theft of the Kinaro tea was acquitted liability attaches because the turn boy disappeared. His guilt is based on the fact of disappearance. He agreed that repudiation was solely based on the investigators report and no other opinion was sought from any other source. He has information that police told the driver and turn boy to report back to police but they disappeared although. They themselves have no proof that the plaintiff's employees disappeared and they did not exonerate themselves. That there is no proof that the Plaintiff employee ever reported to Embakasi police post.

He agreed that in the event of any loss then the defendant was entitled to ?37,500. which translates to Kshs 750,000.00 which would be paid by the insurance. The witness conceded that he did not see the investigators report nor does he understand the method used in the investigation. He agreed that the plaintiff raised complaints about the investigations report. He conceded that the convicted had a link with the plaintiff. He has no quarrel with the investigator a she has investigated many incidences before which resulted in the insurance company met its liabilities to the defendant. He maintains that in the circumstances of this case the defendant was justified in withholding the payment to the plaintiff.

At the close of the entire case the counsels filed written submissions followed by highlighting the major points relied upon by the plaintiffs counsel are as follows:-

(1) That the defendant has declined to pay the plaintiff the sum claimed of Kshs 2,332,545.60 claiming that United Insurance repudiated the policy basing their non-payment on the report of Inter African Security Consultants and Investigators yet and yet they did not call the said investigator to give evidence.

(2) The said report relied on from the investigator was not produced in evidence and so the court is not in a potion to know the contents of the said report and so its mention of the same should be treated as more hear say

(3) D.W.1 conceded that the did not participate in the investigation and so cannot confirm the areas visited by the investigators or method used to carry out the investigations.

(4) The defendants seek to rely on secondary evidence without laying the foundation as to why evidence as not availed to court contrary to law. More so when D.W.1 said he could not ………for the existence of the report.

(5) The copy of the policy produced showed that at was renewed for the years from l989 which brings the expiry period to 30th June 1994. In the absence of proof of renewal offer 30th June l994 there is nothing to show that there was insurance cover for the two incidences subject of these proceedings.

(6) It was the duty of the defendant to ensure that tea on transit is well insured. In the absence of a renewal or proof of payment of premiums there is nothing to show that the said insurance policy was in force at the time. This is highly doubtful move so when the plaintiff asked for a copy of the policy way back on 13.8.l995 but none was availed to them up to the time of trial.

(7) It is their stand that since the defendant failed to reveal the non-existence of the insurance policy they are unity of fraudulent concealment of material fact and have no justification to hold the monies they had along and further.

(8) The court is urged no to accept the certified copy of the insurance policy but D.W.1 failed to confirm who certified the said copies of documents and against what original was the certification made. In the absence of proof that the document existed and were either lost or destroyed this has no business accepting that copy.

(9) That the certified copy of the policy shows that the goods were under insured and this demonstrates the insincerity of the defendant in these proceedings.

(10) The money being claimed is in respect of work previously carried out and it has no link to the two instances and so the defendant has no excise in declining to release the same to the plaintiff.

(11) The issue of the insurance company and its policy has nothing to do with the proceedings herein as the insurances company was not a party to the negotiations herein or the contract here. They are not bound by the contract between the plaintiff and the defendant herein. Neither is the plaintiff bound by the insurance contract between the insurance company and the defendant.

(12) The plaintiff having produced documentary proof that the driver of motor vehicle Ref. KZH 497 was acquitted it was wrong for the defence to link the convicted man to the plaintiff or the plaintiff's employees to justifying denying the plaintiff its entitlement.

(13) No proof that the plaintiff's employees were not investigated by the police as there is nothing to show that the investigations visited the said police stations to investigate whether police had any evidence to show that the police had any evidence to show that the plaintiff's employees were either involved or not involved in the said losses. In the absence the investigators report, there is nothing to show that he took into consideration the information that the plaintiff provided.

(14) The defence has not demonstrated existence of omission and commissions on the part of the plaintiff's employees and so the defendant cannot rely on clause 3(i) of the agreement.

(15) There is no proof that the insurance denied liability. The defendant cannot rely on clause 4(f) as it has not been shown that the plaintiff can rely on it in the absence of proof of existence of a valid insurance policy.

(16) It is trite law that he who comes to seek justice has to come with clean hands as it is trying to rely on an expired policy to deprive the plaintiff its rightful claim.

(17) The restructuring of the insurance division is as a result of the in effectiveness of that Section as at the time the events were set in motion.

(18) It is their stand that the plaintiff has proved its case on a balance of probability.

The defence relies on the following points:-

(1) The Plaintiffs stand is that there is an agreement in place which spells out clearly that the transporter assumes responsibility for the Tea being transported and in the event of any loss, the defendant could only assume responsibility only when the insurer assumes responsibility for the loss. The defendant was entitled to take the stand it took as there is proof that the plaintiff's employees were involved in the disappearance of the defendant's tea and for this reason, the plaintiff remained liable for the tea which was lost and the defendant was entitled to withhold the payment.

(2) That the agreement relied upon by the plaintiff exhibit 1 is not registered in terms of section 19 of the stamp duty Act and as such it is in admissible in evidence.

(3) Alternative to number 2 above even if the said agreement were to be held to be admissible it can only be taken to cover only tea from Kinaro tea factory and no proof that it extended to other tea factories.

(4) That under clause 3(i) the defendant was entitled to withhold the payment on account of loss, damage or contamination of the defendant's tea while it was in the possession of the plaintiff.

(5) The plaintiff conceded that there is no excerptor to clause 4(f) of the said agreement and as such there assertion in the plaint that presence of clause 4(f) not withstanding the defendant was entitled to the release of the money withheld by May.

(6) It is their stand that the defendant had truly insured its tea in transit with the United Insurance Company that was in force at the time the theft occurred as the policy had been renewed from time to time. They maintain that the policy was still in force. Had it not been in force the insurance company would not have appointed an investigator into the loss. It did so to protect its interest under the agreement. The existence was further proved by production of a certified copy of the said policy because the original could not be traced.

(7) The plaintiff raised the issue of wanting to talk with the insurer and a .for him to insure the goods with a reputable insurance company only after the liability had been repudiated.

(8) Instances of prohibition of the investigation report is just raised to side tract the issue of the plaintiff's involvement in the loss of the tea which disentitled the plaintiff to the withheld money. The defendant was not in a position to produce the said report because it did not have it as the investigator had been appointed by the insurance company over which the defendant had no control over. The report was independently submitted by the investigator to the insurer and the said insurer singly repudiated liability without availing the report to the defendant.

(9) Given the information given to the investigator and the defendant by the plaintiff the defendant had no reason to doubt the findings of the investigator which resulted in the repudiation of the contract.

(10) They contend the circumstances displayed here fall within clause 5 on exclusion in the insurance policy because it has not been denied by the plaintiff that it was the defendants agent as concerns the transportation of the tea on both occasions and when contacted to avail the drivers and turn boys to the investigator for interrogations the plaintiff failed to do so and admitted so in there proceedings. It is further their stand that since the plaintiffs employees were entrusted with the safety of the tea one would have expected the plaintiff to do all that it could to avail its employees for interrogations as regards the loss of the tea. The Plaintiffs conduct can only give use to an interference that it was either hindering and or obstructing the investigator forming at the truth concerning the loss of the said tea. This is further fortified by the fact that the plaintiff gave conflicting particulars of the driver without proving that these particulars were for one and the same person.

(11) The Plaintiff has relief heavily on the acquittal of the driver of KZH 497 for involvement in the draft of the tea he was conveying but their stand is that acquittal is not conducive of involvement or otherwise of the said driver in the commission of the office.

(12) It is their stand that on the basis of the evidence and assessment in their submissions the plaintiff has not proved its case on a balance of probability as it has not dislodged the defendants assertion that it entitled to withhold the money claimed on account of the insurers repudiation of liability.

(13) It is also their stand that principles of law relief upon by the plaintiffs counsel does not advance the course of the plaintiff's case.

On response to the submission counsel for the plaintiff reiterated his earlier submission and then stressed the following points both in writing and orally in court.

(1). The Plaintiff has proved that it is owned Kshs 2,322,545.60 as per P.W.1s evidence confirmed by the

fact that there is no dispute that the said amount is well. The only dispute that exists is whether the defendant is entitled to withhold the said money or not.

(2). The transporter was only liable where an act, omission or default is proved in his part which has not been done in this case on against the agents of the plaintiff. And the feet that tea was lost while in transit by the plaintiff's agent is not sufficient proof.

(3). They still maintain that there was no policy cover as at the time of the thefts as the debit note relied upon is dated 2.8.95 and in the absence of proof of payment of the premium as at 1.7.94 there is nothing to prove the existence of the cover as at the time of the theft.

(4). In the absence of the align of the investigation report and the calling of the investigator to give evidence to prove collusion or involvement of the plaintiffs employees in the loss of the tea.

(5). That both the Plaintiff and the defendant have relied on the agreement and whether it is stamped or not this court is duty bound to arbitrate upon all the issues canvassed before it more so when no objection was raised against its production as at the time of trial.

(6). As regards agreements to transport tea from other factories the plaintiff was not challenged on his evidence in cross examination hat other factories were covered by temporary requisitions by the defendant, which they have not alleged that they do not exist in any case they have not claimed that the plaintiff wrongfully transported tea from Chebit tea factory.

(7). Still maintain that the court cannot be invited to look at secondary evidence and action it when the absence of the primary evidence has not been accounted for still maintain that it is wrong to make speculate conclusions concerning the investigators report when non was produced in evidence.

(8). Still maintain that it is wrong to make speculate conclusions concerning the investigators report when none was produced as evidence.

(9). The acquittal of the plaintiff's driver by a Machakos Court is final and cannot be questioned in these proceedings.

The Courts assessment of the evidence herein, is to be done in the light of the submissions of both parties, the pleadings and the issues agreed upon by the parties as forming questions to be determined by this court in its effort to resolve the dispute herein. A total of 21 issues were agreed upon by the parties. These are dated 12th January, 2000 and filed on 19th January 2001 issues number 1 to 5 deal with the agreement exhibit. Issues number 6,7,8,9,10 deal with the loss. Whereas issue number 11,12 deal with the insurance policy. No. 13,14 deal with police in moment while issue number 15,16,17,18,19 and 20 deal with the Plaintiffs responsibility for the loss of the tea and the defendants right to withhold the payment. Lastly 21 deals with the issue of costs. For purposes of purity and using the sequence of clustering set out above this court proposes to answer them under the following major heading namely:-

(a) Whether the said agreement was executed as between the parties, what its binding terms relevant to these proceedings are whether it is properly executed and this legally binding on both parties. In the event of it being found to be none binding what is to be it's the effect of its non binding nature on the relationship of the disputants herein.

(b) Whether there was a valid insurance policy cover in favour of the defendant as at the time the events leading to those proceedings were set in motion. And whether proof of existence of such a policy has been satisfied to have been done in accordance with the relevant provision of the law as regards previous and secondary evidence and the effect of compliance and or noncompliance of the same on the proceeding herein.

(c) Whether the loss of the two consignment subjects of these proceedings did in fact occur and if the said loss did occur then who is to bear the consequences of the loss.

(d) Whether the plaintiff has proved its claim against the defendant an a balance of probability or whether the defendant has brought itself within the ambit of the law and the facts enabling it to take refuge under the provisions of the agreement entitling it to disclaim liability.

(e) What are the final orders of the court in this matter.

Regarding the agreement exhibit 1, It is commenced that both parties have raised on it and agree that they duly executed it. In fact no objection was raised against it by either side during the trial. The attack has come during the defence submissions. Being a legal point it cannot be ignored by this court. It has to be ruled upon. Section document Act Cap.285 of the Laws of Kenya

des that "all documents conferring or purporting to confer declare ……….or exhibits' any right title or interest whether rested or contingent 10, in or over immovable property other than such document as may be of tantamount nature and vakallas shall be registered ……..'' Applying this provision to exhibit 1 it is this courts finding that section 4 of Cap.285 Laws of Kenya applies to exhibit 1 as it concerns immovable property. It also confers interest both litigants. It guarantees the plaintiff future transportation fee and to the defendant transportation services for its tea product to specified destinations. It therefore falls within the class of documents required to be mandatory registered. It is common ground that it was not registered. It therefore falls under the provisions of Section 18 of the same Act. It provides "*a document the registration of which is compulsory under this Act shall not unless duly registered be received as evidence in any transaction affecting the property to which the document relates except with the consent of the court and upon such terms and conditions as the court may impose".*

The made of signing the consent by the court is not stated. However, the very fact that the same document went through discovery and production process without observation from the Court. An inference can be drawn that the Court admitted it with its consent. It therefore follows that failure to register exhibit 1 is not fatal to its production.

As for stamp duty Section 5 of the stamp duty Act Cap.480 laws of Kenya makes payment of stamp duty for documents in the schedule to the said Act mandatory. A document whose stamp duty has not been paid and for which the same is required to be paid is not admissible in evidence except in criminal proceedings as per the provisions of section 9 of the said Act. The schedule runs form page 58-80. The defence counsel did not point out under which class exhibit 1 falls in order for it to qualify for compulsory stamp duty. At page 58 there is a mention of an agreement or memorandum of agreement being a contract of service. The nature of the service is not indicated or the value of the service. It is therefore not very clear to the court that exhibit qualifies to be a contract of service in view of its temporary nature. However should it be that it is covered under the contract of service mentioned failure to have stamp duty paid for it renders it in valid. This means that neither party can sue upon it or escape liability on the basis of it. It has to be ignored.

Once ignored the rights, duties and obligations of the parties to it does not …..with it. What is left in place is an oral agreement determinable from the conduct of the parties. The conduct of the parties herein is that the plaintiff transported tea products at a fee, the tea got lost or stolen when in the custody of the plaintiff's agents, the plaintiff blames course to be circumstances beyond his control and that is therefore entitled to payment for the services. The defendant blames the loss on the plaintiff's agents. It therefore follows that the only way the defendant can escape liability is to place material before the court to show that the plaintiff is held liable for the loss and is disentitled to his claim. As to whoever is the looser of the two or the winner will be determined when dealing with the issue as to whether the claim has been proved or not and the reasons for saying that the claiming proved or not proved whether exhibit 1 receives the benefit of doubt as to whether duty is payable or not since it has been referred to extensive in the proceedings it is imperative for this court to unique into its binding or non binding effect. The clauses which have featured are 3(i) and 4(f). 3(i) provides whilst the KTDA tea whilst the KTDA tea is in its possession assume full liability for any loss or damage to or contains in ….. of the said tea due to any act omission or default by the transporter, its agent or employee and indemnity the KTDA against all expenses costs claims and demands on account of such loss damage or contamination as aforesaid" A proper construction of this provision is that defendant to take refuge under it. It has to show that there is

default on the parties of the plaintiff. Clause 4(f) on the other hand provides “in case of an accident involving KTDA tea the transporter will be deemed responsible for any loss until such a time the insurer for the tea on transit has assured liability for incidental monies due to the transporter up to the extent of the anticipated loss. In case of acceptance by the insurer to pay the claim and after payment of the excess, only the exact amount precisely held would be released to the transporter and the same shall not attract any interest whatsoever “A reading of the claim shows that in order to take refuge under it this clause the defendant is obligated to show that:-

(a) the tea was insured as at the time of the incident.

(b) That the insurer has repudiated liability.

Applying the foregoing two clauses to the facts herein it is indeed the defendant’s tea while on board two much belongings to the plaintiff was stolen. The plaintiff dutifully reported to the defendant whom this reported to his insurers United Insurance Company Ltd. They in turn instructed Inter Africa Security Consultants and investigators to investigate and establish the course of the loss. It is on record that Messers Inter Africa indeed notified the plaintiff of this fact and asked for information and availing of the drives and turn boys for recording of statements. The plaintiff passed on whatever information he had on hum but said the drive and turn boy s were being held by police to assist in the investigations. The plaintiff gave particulars of the police stations concerned. There is no further

Communication from the said investigators statutory that they had checked at the police station and faulted to confirm the said information or that the particulars forwarded were false. What we have on record is just a letter from the insurers dated 12th May 1995 to the effect that the report received from the investigators referred that the plaintiffs employees perpetrated the loss and therefore the insurance company was on that account re the claim there is no indication from the content of that letter there is no indication that the said report was ever availed to the dependant. This is confirmed by the evidence of D.W.1 and submission of the defence Counsel that they do not have the report and D.W.1 has never set his eyes on the contents clause 3(1) of the exhibit does not say that liability is absolute upon discovery of the loss. It means that a basis has to be laid for placing the blame on to the plaintiff. Indeed there was a compliant that inadequate information was supplied and the failure to avail the agents. This would however only hold it there is justification for haling that they were not sufficient to provide links to the course of the loss. It was necessary for the contents of the report to be availed to provide basis for the blame. In the absence of the report the contents of the letter of 12th May 1995 cannot be taken seriously. It does not even state the date on which the report was forwarded. It is not proof that such a report exists. This Court has judicial notice of an important rule in judicial practice to the effect that a document speaks for itself and no oral or other secondary or auxiliary evidence can be adduced in respect to it. This being the case D.W.1s oral evidence and the auxiliary evidence displayed in the letter of 12th May 195 does not assist the defence. It is therefore the finding of this court that basis for blaming the lesser the plaintiffs agent has not been laid. It was necessary to bring evidence from the police to confirm that the reports allegedly made were false. On this account the defendant has not brought itself within the ambit of the protection in clause 3 (i) of exhibit 1.

As regards proof of existence of an insurance policy it was necessary to provide the original copy kept by the insurance company and the copy itself given to the court. The copy exhibited shows that it was due to expire on 30th June. The renewal date was 1st of July. Documentations have that it started may back in 1994 1st July and it was to run up to the 30th June of the following year. One of the documents in the bundle show that it was to run from 1.7.89 for five years which would have brought that term to an end on 30th June 1994. There are two debit notes annexed to the copies of the policy both dated 2.8.1995. It is indicated that the cover dates were 1.7.1994 to 30.6.1995. No 35154 has an indication of gross premium of 128,356 l3ss 15%, commission 19253 leaving the net payable as Kshs 109,103,00 No. 35155 with the same cover dates he gross premium 63,180.00 less 15% Commission 9,477.00 leaving a balance of 53,703.00. The date on which the workings were done is not indicated. The receipt for payment of the premiums to show when the same was paid for is not indicated. It is the finding of this court that in the absence of the date when the workings for the premiums was worked out and in the

absence of a receipt to show orders payment was affected. There is nothing to show when payment was effected there is nothing to show that these payments and renewals were made prior 1.7.94 and not on 02.8.95 the date appearing on the debt notes. These are documents speaking for themselves the law forbids oral evidence to quality the contents. They can only be qualified by the premium payment receipt. This goes to confirm the doubt expressed by the plaintiffs Counsel as regards existence of a raid cover of insurance at the time of the loss.

Another handle that the insurance policy documents have to pass is its evidential value. As noted they are photocopies they bear two certified true copy of the original one endorsed on 8.12.2003 and another one on 17.5.2007. it is therefore subject to the provision of Section 64, 65,66,67 and 68 of the Evidence Act Cap.80 Laws of Kenya. Under Section 64 the contents of a document may be proved by primary or secondary evidence. Primary evidence means the document itself whether produced simply or made by the process as in the case of printing lithography or photography, each is primary evidence of the contents of the rest, but where they are all copies of a common original they are not primary evidence of the contents of the original. Section 66 provides that secondary evidence includes certified copies of the original copies made from the original by mechanized process which in themselves ensure the accuracy of the copy and copies compared with such copies made form or compared with the original counter parts of documents as against the parties who did not execute them, oral accounts of the contents of a document given by same person who has himself seen it. Section 67 makes it mandatory that documents must be proved by primary evidence except in cases mentioned in Section 68. Section 68 provides that secondary evidence may be given of the existence or contents of document in the following cases:-

(a) When the original is shown or appears to be in the possession or power of –

(i) The person against whom the document is sought to be proved; or

(ii) A person out of reach of or not subject to the process of the least or

(iii) Any person legally bound to produce it, and when after the notice required by section 69 of this Act has been given such person refuses or fails to produce it.

(b) When the existence condition or contents of the original are proved to be admitted in writing by the person against him it is proved or by his representative in interests

(c) When the original has been destroyed or lost or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect produce it in a reasonable time:-

(d) When the original is of such a nature as not to be easily movable

(e) When the original is a public document within the meaning of Section 79.

(f) When the original is a document of which a certified copy is permitted by this Act or by any written law to be given in evidence.

(g) When the original consists of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collections.

2 (a) in the cases mentioned in paragraph (a) (c) and (d) of subjection (1) and secondary evidence of the contents of the documents is admissible.

(b) In the case mentioned in subjection (1) (b) the written admission is admissible

(c) In the cases mentioned in paragraphs (e) and (f) of subsection (a) a certified copy of the document but no other kind of secondary evidence is admissible.

(c) In the case mentioned is sub section (1) (9) evidence may be given as to the general result of the

accounts or documents by any person who has examined them and who is skilled in the examination of such accounts or documents.

Further assistance on this can be derived from Halisburys Laws of England Volume 9 4th Edition page 102 paragraph 138 on secondary evidence of private documents. It is stated that the general rule is that secondary evidence of the contents of private documents is in admissible of primary evidence is available. Before secondary evidence is tendered, it is therefore usually necessary to account for the absence of the original and for this purpose proof that primary evidence is not available may be required is admissible. The court must be satisfied that the document existed, that the loss or destruction has in fact taken place and that a reasonable explanation of this has been given. This a diligent search must have been made in good faith in the place where the instrument would most properly be found, but not necessary in every possible place, nor need the search have been made recently or for the purpose of the course objection as to the sufficiently of ht search must be taken at the trial and cannot be raised afterwards.

The question of the sufficiency of the search is far the judge and must vary wit the circumstances of each case. This is the document is of considerable value or is of recent date, or if the party who sought to produce it appears to have some interest in withholding it greatest diligence must have been shown before secondary evidence can be admitted where if the evidence is valueless, very little search will sufficient and no search is required where direct proof of the destruction or irrefutable loss of the instrument is given.

On validity of insurance policy Halisbuys Laws of England 4th Edition Volume 25 pag3e 278 paragraph 478 on effect of tender of premium during days of grace. It is stated that if by a stipulation in the policy days of grace are adjourned for payment of a premium for the continuance or renewal of the insurance and the event insured against accrues before payment of the preliminary but within the days of the grace, the rights of the parties depend on the nature and terms of the policy. Where the policy stipulates that the insured is covered during the period of grace pending payment of the premium the cover is still effective. Where it does not specify so there is no cover until premium is paid. At page 48- paragraph 479 on reveal of lapsed policy it is stated that an insurance policy may lapse if the insured fails to pay consideration due from him in the form of premium on the due date or within the period of grace allowed.

In the circumstances of this case it was necessary for the original policy document. Inclusive of the renewals to be displayed to enable this court determine the period of grace. In the absence of this together with the date on which the renewal premium was paid. There is nothing to show that there was policy in existence between 1.7.94 to 30th June 1995.

As regards acceptance of the copies of the Insurance policy documents as secondary evidence it was necessary for the defendants that the original policy as well as the original extension were in existence.

(2) That this original and extensions had been seen by the person attesting to their contents.

(3) That the copy is a copy of the original and has been certified by the person certifying using the original.

(4) That the original has been destroyed or that it is in possession of the person against when it is sought to be produced against and notice to produce had been issued in accordance with Section 69 of the evidence Act.

(5) In the absence of allegation that the original is with the opposite party has the original proof has been shown to show that due diligent steps have the same to no avail.

(6) The business of determining whether correct steps have been taken to lay the basis for production of the secondary document has with the judge seized of the matter. It is not indicated when this determination is to be made. But it should be at the stage objection has been raised or whenever a determination of its admissibility is being inquired into. It matters not that the document has already been

admitted in accordance.

Herein objection was raised at the submission stage. That not withstanding this court on its own motion is enjoined to inquire into the admissibility of the secondary evidence at the judgment stage.

The insurance cover document was produced by the defence through D.W.1. He conceded in evidence that the had never laid his hands on the original and cannot much for the contents. He does not know who certified the document in 2003 and in 2007. Neither does he know certification were being amended. The person certifying did not tender evidence to explain the presence of the two certifying stamps. In the absence of production of the original explanation as regards the whereabouts of the original held by both the insurer and the insured that the original cannot be attracted despite due diligence to find the same, evidence of what was used to append the certifying stamps, the defence has not brought itself within the requirements in Section 68 of the evidence Act. Further in the absence of explanation why the document been two certification stamps one in 2003 and another in 2007 two presumption is that the original was not available when the 2007 was affixed. This being the case the document does not even qualify to be termed secondary evidence in terms of Section 68 of the evidence Act.

The arms of proving existence of an insurance cover lay with the defendant. In the absence of such proof the defendant cannot take refuge under Section 4(f) of exhibit 1. It also means that thee was no basis for them reporting to the insurance company the loss. In the absence of being for reporting such loss to the insurance company, it follows consequently that the institution of investigations in pursuance of an insurance cover was null and void. Being null and void then it follows that the alleged repudiation of liability on the basis of the insurance cover is also null and void and of no effect.

Having put the insurance company out of the way, the contest is left as between the plaintiff and the defendant. This leads me to determine question, 3 and 4 as framed by the court which are inter twined and which deal with the questions as to whether the plaintiff has proved its claim against the defendant and likewise whether the defendant is entitled to discretion liability. The burden of proof is on a balance of probability. This court has already ruled that the loss is not disputed. No evidence exists to show that the plaintiff was required to do anything more than reporting to the defendant who were to carry out the investigations. Documents displayed here show that the procedure was that the loss be reported to the insurer who then would mount investigation, make findings and on the basis of those findings, they would then make an election to repudiate or not to repudiate liability.

Herein the plaintiff took the same path as confirmed by documentations outlined earlier on in this judgment. In fact one of the drives was prosecuted but acquitted. Indeed this court has judicial notice of the fact that on acquittal in criminal proceedings does not free one from civil liability. A Civic Court in the exercise of its civil jurisdiction is entitled to revisit the same facts and make its own decision as regards civil liability more so when the burden of proof is different in each case. In criminal it is proof beyond reasonable doubt which in civil it is on a balance of probability. This court therefore finds that it is indeed true that the acquittal of the plaintiff driver in criminal proceedings is not perse ground for absolving him of any blame of involvement in the disappearance of the defendants tea and that this court is entitled to revisit that matter and arrive at its own conclusion on the issue of involvement in the theft. Indeed it has been urged by the defence both through the evidence of D.W.1 and the submissions. It has done so and arrived at the conclusion that no material has been put before this court to enable it arrive at a contrary conclusion as the investigation report was not availed.

Issue was raised about the disappearance of the other employees as a sign of proof of involvement. D.W.1 testified that there were hired on casual or contract basis there was therefore nothing that could have tied them to the plaintiffs employment. They could have chosen to look for greener pastures elsewhere. This could only have been an issue had the investigation report been availed proving that no reports were made to the police stations involved. In the absence of that the court finds that after reporting it was in to the police to arrest and prosecute as they did with the one who was prosecuted and acquitted. Further this could have been an issue if it had been proved that the particulars of the employees given by the plaintiff were false. No such allegation has been made. In the absence of proof of convince in the disappearance the possibility of the concerned employees choosing not to cooperate

with the police and the plaintiff a casual employer could be explained away as an act of in difference on their part.

(a) Lastly disclaimer of liability having solely been based on the repudiation by the insurance company and this court having faulted the existence of a valid insurance cover as at the time the loss occurred firstly on lack of proof of there being agree period of one year during which the insured remained insured awaiting renewal and secondly in the absence of proof that renewal premium for 1.7.94 to 30.6.95 was not paid on 2.8.95 the date the debit notes were made and thirdly having ruled that the insurance policy document relied upon by the defence do not qualify to be received as secondary evidence in terms of Section 65 – 68 of the evidence at as demonstrated herein, there is nothing to form a basis on which the defendants disclaimer can be protected. Once removed the plaintiff claim is left bare, standing alone in the arena and calling upon the defendant to make good of it to the plaintiff. It therefore succeeds on transit.

The second front arises as to whether it can be anchored on exhibit 1. Indeed as outlined the document falls among the class of document that require mandatory registration. It is on record that it was not so registered. It is also ruled that should this be the case hen failure to register is not fatal as the court has a discretion to admit such a document and that this requirement was fulfilled when the same was admitted in evidence. However that should failure to pay stamp duty be fatal to the document rendering it in valid and incapable of being relief upon it done will not in validate the contract. In its absence stands a legally enforceable contract by conduct of parties where by services are rendered not for free but for value from which the defendant on any escape liability if they con show that the less was due to default of the plaintiff which has not been shown. The defendant was under a duty to insure the goods and in the absence of such insurance cover they assume the rise of les which this court finds that on the evidence before it mere is no basis for the defence to pass that risk on to the plaintiff. They will bear it themselves. On that account the plaintiff also succeeds on this fault.

In view of the foregoing assessment the final orders of this court are:-

(1) It is correctly submitted that the agreement exhibit 1 falls into the class of registrar able documents but tit is not registered. As per section 18 of the Registration of documents Acts Cap.285 Laws of Kenya non registration Is not fatal so long as the document is admitted by the court. Exhibit one was accepted by the court both at the discovery and production stage and so. It is properly on record and has been properly referred to by this court in the assessment of the evidence. The passing of the validity test referred to herein number 1 is limited to the requirement of registration only. It does not operate to affect the issue of non payment of stamp duty which in a distant requirement falling under a different legislation.

(2) On the requirement of payment of stamp duty for exhibit 1 this court made observation that in so far as exhibit 1 is an agreement in respect of immovable property and in so far as it goes to confer on interest to both parties. The interest to the plaintiff being transport fee which to the defendants is transportation of its tea products at in consideration. On this account it apparently required that stamp duty be paid in respect of it. The Court is however hand capped as the issue was not raised at the trial stage and evidence adduced on it. The matter was only raised at the submission stage. This led the court to take an open option and look at the rights and obligation of both litigants in a situation where the on payment of stamp duty is fatal and where it is not fatal.

(3). If exhibit 1 is subject to Section 19 of the stamp duty Act which was not complied with, then the same is therefore in valid by operation of the law. The invalidity will mean that neither party can rely on it either in support or in opposition of the claim arising herein.

(4). Once the agreement exhibit 1 is discarded. What the court is left with if the conduct of the parties. It is on record that they had transacted similar business to transaction prior and after the incident subject of these proceedings. It is as record that in the course of transportation of the defendant’s tea products to disclosed destination, the Plaintiff assumed responsibility of its safe custody and conveyance. In the event of its loss, the defendant would assume responsibility if the insurer does not repudiate liability on

account of the plaintiff /defendant culminating in the loss. It therefore follows that the conditions for liability against both litigants are the same as those arising from a record agreement.

(5). If exhibit 1 does not require stamp duty then it means its terms operate to fix liability one either party. These are that the defendants will be entitled to withhold payment where the insurer has repudiated liability. This arises where there exists a valid insurance cover covering the period during which the incident could and in respect of which it has been proved that the insurers was entitled to repudiate on account of existence of proof that the plaintiff through its agents was in fact at fault in so far as the loss of goods is concerned.

(6). It is the finding of this court that for the reasons given in the body of the assessment the defendant cannot take refuge under the repudiation of the insurer for purposes of these producing because:

(i) There was no proof of there having been in existence a valid insurance cover by the repudiating insurance company because there is no documentation is played herein.

(ii) payment of previous which was not even proved in August 1995. Could not operate events which occurred in November and December 1994 in the absence of proof of a clause giving a one year grace period even for a continuing policy.

(iii) In the absence of a valid Insurance cover for that period the purported instructions to the Inter African Security and consultants firm to investigate the loss and the subsequent allegation of existence of report placing blame on the plaintiffs agent for the loss was an exercise in futility as there was no basis for it. Such instructions would only be valid where a valid insurance cover exists.

(iv) All the documents relied upon to prove existence of insurance cover have been faulted as they failed to pass the eligibility test for secondary evidence under Section 68 of the evidence Act.

(v) The alleged report purporting to place blame on the plaintiff's agents was not produced and it is non existent as the defendants themselves confirm that it was never forwarded to them and they have never seen it. The prescription is that it does not exist. If it exists then the parties obligated to produce it are the defendant and its agent the insurance company and their failure to produce leads to the drawing of an inference that the contracts of the same are unfavourable to the defendant and the insurance company.

(vi) In the absence of the said alleged fault finding report the evidence shows that the plaintiff acted diligently by reporting the matter to police leading to one prosecution. He cannot be held responsible for non prosecutions in the case as it has not been shown that he had a word in it.

(vii) Disappearance of has employers cannot also be blamed on the plaintiff as be stated that these were casual employees. He gave particulars alleged to be in adequate but there is nothing to show that they were not helpful. The plaintiffs conduct as regards the matter absolves him of blame as it has not been proved that he did not report to police. Secondly no justification has been shown for the plaintiff to did same employees to run away and then leave others to face to face prosecution. The police have not come to complain that he interfered with the investigations. The possibility of the employees running away on their own and not bothering to help in view of the casual nature of their employment and they opting to look for greener pastures else where cannot be ruled out.

(7). The circumstances dis-entitling the defendant to take refuge under the repudiation by the insurance company and the alleged report leading to the repudiation operate for both the circumstances where the contract is to be enforced on one arising from the conduct of the parties where exhibit 1 has been invalidated due to non payment of stamp duty and where exhbit 1 is valid because there is no requirement for paymen of stamp duty.

(8) Once the repudiation by the insurance company has been faulted and the plaintiff cleared of any blame as regards the loss of the said tea products the defendant has no alternative but to meet the plaintiffs claim as there is no other justification for withholding it. It is their own fault that they took a

risk in not renewing the policy to cover the said period. They also took a risk in not asking fo rhte investigation report which purported to block the blame on to the plaintiffs agents and have it produced in court in support of their case.

(9). The net result of the findings in No. 1,2,3,4,5,6,7 and 8 above is that the plaintiff has proved its claim against he defendant in the sum of Kshs 2,322,545.60.00 in respect of which judgment is given in his favour.

(10). The amount will carry interest form the date of judgment till payment in full.

(11).The Plaintiff will also have costs of this suit paid to them.

DATED, READ AND DELIVERED AT NAIROBI THIS 20TH DAY OF NOVEMBER, 2007.

R. NAMBUYE

JUDGE