



REPUBLIC OF KENYA



**Ndovu Estate Ltd v Apa Insurance Ltd & another (Civil Suit 438 of 2011)  
[2023] KEHC 3043 (KLR) (Commercial and Tax) (3 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 3043 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 438 OF 2011  
GL NZIOKA, J  
MARCH 3, 2023**

**BETWEEN**

**NDOVU ESTATE LTD ..... PLAINTIFF**

**AND**

**APA INSURANCE LTD ..... 1<sup>ST</sup> DEFENDANT**

**AON KENYA INSURANCE BROKERS LTD ..... 2<sup>ND</sup> DEFENDANT**

**The law relating to crop insurance needs to be developed to provide for the terms and conditions of engagement between the policy holder and the insurance company**

Reported by Kakai Toili

**Insurance Law** - crop insurance - crop certificate - crop certificate vis-a-vis a policy document - what was the nature of a crop certificate and whether it was equivalent to a policy document in insurance - what was the distinction between a crop certificate and a policy document - whether the issuance of a crop certificate per se created a contract of insurance between an insurance company and the recipient of the crop certificate.

**Insurance Law** - insurance contracts - nature of an insurance contract - what were the conditions to be met for there to be an insurance cover?

**Civil Practice and Procedure** - suits - institution of suits - institution of suits by companies - whether a resolution of the board of directors of a company was required before the company could institute a suit.

**Law of Torts** - negligence - negligent misstatement - elements of the tort of negligent misstatement - whether one could claim for economic loss arising out of negligent misstatements where no contractual or fiduciary relationship existed between the parties.

**Civil Practice and Procedures** - damages - damages for incurred loss (*damnum emergens*) and lost profit (*lucrum cessans*) - damages for contracts entered into by misrepresentation - circumstances in which damages could be awarded for contract entered into by misrepresentation - whether the rescission of a contract prevented a claim for damages where the misrepresentation also caused loss - whether a court may award damages where they had



*not been specifically requested - what did courts consider in the assessment of damages for incurred loss and expected profit.*

### **Brief facts**

The plaintiff's case was that it was involved in large-scale farming and that in 2011, it planted 3,671.96 acres of wheat and decided to secure an insurance cover for it. The plaintiff stated that it instructed the 2<sup>nd</sup> defendant to source, procure, and secure the insurance cover against financial loss arising from various perils, including drought, and that the 2<sup>nd</sup> defendant accepted the instructions. A quotation from the 1<sup>st</sup> defendant giving options of cover and corresponding premiums was forwarded to the plaintiff, and on April 13, 2011, it signed the quotation, rubber-stamped and dated it, signifying acceptance.

An emergency survey inspection was arranged for April 13, 2011, but none of the defendants' agents appeared at the farm. However, one of the officers of the 1<sup>st</sup> defendant on April 16, 2011, conducted the survey and notified the plaintiff that it was required to pay premiums by April 21, 2011. The 1<sup>st</sup> defendant's officer forwarded to the 2<sup>nd</sup> defendant the crop certificates and the survey report, which included mapping of the farm using global positioning system (GPS). The 2<sup>nd</sup> defendant forwarded the certificates to the plaintiff on April 20, 2011, and allegedly confirmed the cover was in place. The plaintiff claimed that by an email of April 13, 2011, it instructed its bankers to pay the premium due to the 2<sup>nd</sup> defendant, and the 2<sup>nd</sup> defendant acknowledged receipt of the premium. Subsequently, the 2<sup>nd</sup> defendant sent to the plaintiff the risk note, debit note, and crop certificate. However, the insurance policy was never availed.

The plaintiff contended that on August 9, 2011, the 1<sup>st</sup> defendant stated that the plaintiff was not on the cover due to the non-availability of a reinsurer, contrary to all their previous communication. The plaintiff argued that there was no precondition or term in any documents that the policy would be issued subject to obtaining reinsurance for a portion or full risk. Aggrieved, the plaintiff filed the instant suit. It was the plaintiff's case that the defendants were negligent in the manner in which they dealt with the entire insurance transaction.

### **Issues**

- i. Whether the issuance of a crop certificate *per se* created a contract of insurance between an insurance company and the recipient of the crop certificate.
- ii. What was the nature of a crop certificate, and was it equivalent to a policy document in insurance?
- iii. What was the distinction between a crop certificate and a policy document?
- iv. What was the nature of an insurance contract, and what were the conditions for there to be insurance coverage?
- v. Whether a resolution of the board of directors of a company was required before the company could institute a suit.
- vi. What were the elements of the tort of negligent misstatement?
- vii. Whether one could claim for economic loss arising out of negligent misstatements where no contractual or fiduciary relationship existed between the parties.
- viii. What were the circumstances in which damages could be awarded for a contract entered into by misrepresentation?
- ix. Whether the rescission of a contract prevented a claim for damages where the misrepresentation also caused loss.
- x. Whether a court may award damages where they had not been specifically pleaded.
- xi. What did courts consider in the assessment of damages for incurred loss and expected profit?

### **Held**

1. The board of directors' resolution was required before the company could institute a suit. However, the plaintiff applied to be allowed to file and produce the board of directors' resolution authorizing the plaintiff to institute the instant suit. The matter was heard on February 12, 2020, and the same was allowed by the consent of the parties. Therefore, the plaintiff's suit was properly before the court.



2. Note 3 to the quotation required the premium to be paid before the crop emergence survey was done, but the survey was done on April 16, and payments were made on April 18, 2011. Therefore, *prima facie*, that note was not met. Note 5 was complied with on April 20, 2011.
3. Reinsurance was not one of the requirements in the quotation to be fulfilled. If it was, then there was no evidence by the 1<sup>st</sup> defendant to prove the same.
4. In crop insurance, a crop certificate was a document that served as evidence of a policyholder's coverage and details of their insurance policy. It was typically issued by the insurance company or its authorized agent and provided important information about the policyholder's coverage, such as the type of policy they had, the insured crops and acreage, the policy limits and terms, and the policy period. That information helped to define the policyholder's rights and obligations under the insurance contract.
5. In the event of a claim, the crop certificate could be used to verify the policyholders' coverage and to determine the amount of compensation that was due. Thus, a crop certificate was typically not equivalent to a policy document. A crop certificate was a document that served as evidence of a policyholder's insurance coverage, but it did not provide all the details and terms of the insurance policy.
6. A policy document was the main document that outlined the terms and conditions of the insurance contract between the policyholder and the insurance company. The policy document typically included information about the type of policy, the insured crops and acreage, the policy limits and terms, the premium, and other details relevant to the policyholder's coverage. Therefore, as much as the crop certificate could provide important information, it was not a substitute for the policy document, which provided a more comprehensive and detailed picture of the policyholder's insurance coverage.
7. The law relating to crop insurance in Kenya needed to be developed to provide for, *inter alia*, the terms and conditions of engagement between the policy holder and the insurance company, in view of its unique, technical and risky nature and taking into account unlike all other types of insurances the crop insurance was not a one-off event, it was a process. It could require its law, an Act of Parliament, Regulations, and Rules to regulate it.
8. The issuance of the crop certificate therein *per se* did not create a contract of insurance between the plaintiff and the 1<sup>st</sup> defendant. Furthermore, generally, meeting the conditions for the insurance cover did not necessarily amount to the issuance of the cover.
9. An insurance contract was a contract between the policyholder and the insurance company, and the terms and conditions of the contract must be fulfilled before coverage becomes effective. The conditions for the insurance cover typically include payment of premium, completion of the application process, and fulfillment of any other requirements specified in the policy, such as providing proof of ownership.
10. If the conditions for the insurance cover were not met, the insurance company was not obligated to issue the cover, even if the policyholder had met all the other requirements. To the contrary, once the conditions for the issuance of the insurance cover had been met, the insurance company was obligated to issue the cover and provide the policyholders with proof of insurance, such as a policy document or a certificate of insurance.
11. Note 1 attached to the subject quotation was fulfilled on April 16, 2011, when the emergence survey was done and premiums paid on April 18, 2011. Note 2 attached to the subject quotation required the farm to be mapped using GPS. That was done. Note 3 attached to the subject quotation required that the premium be paid before the emergence survey was done. It was fulfilled in reverse, as the survey was done before the premium was paid. Note 4 attached to the subject quotation was fulfilled. As regards Note 5 attached to the subject quotation, there was no evidence that the 1<sup>st</sup> defendant at any time upon receipt of the crop management plan called for the micronutrients application schedule or gave notice of termination of the relationship (if any) between it and the plaintiff. Therefore, the 1<sup>st</sup> defendant could not rely on the 2<sup>nd</sup> defendant's alleged admission that Note 5 was not met.



12. Payment of premiums after the survey was done in breach of note 3 attached to the subject quotation, and therefore, it could not be argued that the cover was attached by partial fulfilment of Note 3 of carrying out the emergence survey. The premium was the consideration for the contract between the parties. On the other hand, the 1<sup>st</sup> defendant had no clean hands on the issue as it opted to conduct the survey before the premium was paid, and similarly breached Note 3.
13. A cover could not have been attached merely because an emergence survey inspection was carried out and crop certificates issued. It would be a dangerous precedent to hold that, once a certificate was issued, a contract was created between the parties. Had the premium been paid before April 16, 2011, the logical conclusion would be that the visit to the farm for the emergence survey on April 16, 2011, crystallised into a contract. Consideration in every contract was what placed upon the promisor the legal liability to perform the contract.
14. A contract was not created between the plaintiff and the 1<sup>st</sup> defendant on April 16, 2011, when the crop certificates were issued and before the premium was paid. Further, the contract between the plaintiff and the 1<sup>st</sup> defendant could not have been concluded on April 16, 2011, in that the 1<sup>st</sup> defendant continued to engage the plaintiff thereafter.
15. There was no condition in the relevant quotation that a reinsurer was a prerequisite for the cover to attach. The 1<sup>st</sup> defendant was introducing the issue of re-insurance too late in the day and after the horse had bolted.
16. Considering that no policy document was issued or executed and the fact that the proposal form availed was blank, there was no valid contract between the plaintiff and the 1<sup>st</sup> defendant.
17. The tort of negligent misstatement entailed three elements: -
  1. the defendant owed the plaintiff a duty of care.
  2. The defendant breached that duty of care.
  3. The breach caused the plaintiff harm/loss.
18. Negligent misstatement related to a representation of fact, which was carelessly made and was relied on by another party to their disadvantage. Indeed, it was possible to claim for economic loss arising out of negligent misstatements where no contractual or fiduciary relationship existed between the parties. However, a special relationship or sufficient proximity relationship should exist between the parties. A court would not impute a duty of care following informal discussions or during social courtesies. The scope of that special relationship would be defined within the following parameters:
  1. the plaintiff relied on the defendant's skill and judgment.
  2. The person who gave the advice knew or ought to have known that the other party was relying on him, and it was reasonable in the circumstances for the plaintiff to rely on the defendant.
19. Liability for negligent misstatement could be disclaimed if the statement was accompanied by a form of words which made the intention of the disclaimer clear.
20. Damages could be awarded where the representee or plaintiff suffered loss as a result of having been induced to enter into the contract by misrepresentation. The claimant may have a claim for damages;
  1. where the misrepresentation was fraudulent;
  2. where the representation was not fraudulent, but the representor was unable to show that they had reasonable ground to believe the facts stated were true; and
  3. where the representation was not fraudulent, but the court decided in its discretion to award damages *in lieu* of rescission
21. If the claimant was entitled to rescind the contract, damages could be awarded *in lieu* thereof. Rescission did not prevent a claim for damages where the misrepresentation also caused loss. If a negligent misstatement was proved, then the claimant may be entitled to tortious damages. They were awarded to place the claimant party in the position they would have been if the defendant had not made the misrepresentation.



22. Damages could be awarded *in lieu* of rescission. If breach of contract was proved, then the claimant may be entitled to contractual damages, awarded to place the claimant in the position they would have been if no breach of contract had occurred. The fact that the 1<sup>st</sup> defendant was aware that the plaintiff could not get a cover after April 21, 2011 and continued to engage the plaintiff thereafter and even confirmed that cover could be issued and only raised the re-insurer issue on the eve of deadline, clearly indicated that the 1<sup>st</sup> defendant negligently misled the plaintiff that it was on cover or the crop could be covered.
23. The issue of reinsurer was an afterthought. Had the 1<sup>st</sup> defendant been careful in its duty of care, it would have been candid from the outset that it was still seeking a reinsurer and not called for the premium, and would have given the plaintiff adequate time to source an alternative insurance provider. The 1<sup>st</sup> defendant acted negligently through its various correspondence and conduct towards the plaintiff.
24. The contract between the 2<sup>nd</sup> defendant and the plaintiff was an agency relationship. The 2<sup>nd</sup> defendant being an agent was duty bound *inter alia*: to observe and execute the plaintiff's instruction and act in the plaintiff's interest to an extent that if there was a conflict between its interest and the interest of the plaintiff then the interest of the plaintiff prevailed and in so doing the 2<sup>nd</sup> defendant was bound to act with due care and skill.
25. The two emails forwarded to the plaintiff put the plaintiff at rest that the crop would be insured. Furthermore, it was not clear when the 2<sup>nd</sup> defendant forwarded the premium to the 1<sup>st</sup> defendant. Initially, the plaintiff seemed to have been a lone ranger as the 2<sup>nd</sup> defendant failed to respond to some of its correspondence. The 2<sup>nd</sup> defendant did not act with due care and skill, as it should have ensured the policy document was issued in time. Both the defendants were jointly and severally liable under the tort of negligent misstatements as pleaded under paragraphs 24 and 26 of the amended plaint dated February 23, 2018.
26. The accumulated years of experience were of individual directors and not the plaintiff, which was a legal entity separate from its members. The law was clear that he who alleges must prove, so if the 1<sup>st</sup> defendant was of the opinion that the plaintiff had suffered losses in the past, they needed to give evidence of the same.
27. A due diligence exercise, inclusive of the relevant search, would have dealt with some of the issues. Even then, having held that there was no contract between the plaintiff and the 1<sup>st</sup> defendant, the issue of non-disclosure of material facts to vitiate it did not arise. There was no breach of contract, but negligent misstatement was established.
28. The court would not award a remedy not requested. However, in common law a court may award damages even if they had not been specifically requested for in certain circumstances, for example where there was breach of contract case, the court may award damages to compensate the injured party for harm suffered as the result of the breach, even if the damages were not specifically requested for in the plaint.
29. Article 159 of the Constitution implored the courts to uphold substantive justice. It would be in the interest of justice if the court awarded damages to the plaintiff. Assessment of damages involved appraisal of the incurred loss (*damnum emergens*) and lost profit (*lucrum cessans*). That included valuation of lost profit, measurement of the earnings of which the victim was deprived or would be deprived, or measurement of the increase in net worth of which the victim was deprived. The incurred loss included costs that could be external or internal. Disputes between companies often uncover issues that must be approached with an economic, accounting, and financial eye. To appreciate the difficulties in the valuation of damages, the key issues were:
  1. definition of incurred damages;
  2. restoration;
  3. different methods of calculating the margin; and



4. different valuation techniques.
30. It was not in the interests of justice to award damages without granting the defendants the opportunity to address the court on the same. The High Court allowed the parties to submit on damages before making its final determination.

*Defendants found jointly and severally liable for negligent statements.*

### **Orders**

- i. *The premium was to be refunded to the plaintiff.*
- ii. *An award of Kshs 50,000,000 was made as general damages in favour of the plaintiff as against the defendants jointly and severally.*
- iii. *The interest at court rate shall be payable on that sum for a period of three (3) years taking into account delay in finalizing the matter was not caused by the defendants and shall continue from the date of judgment until payment in full.*
- iv. *The costs of the suit shall be borne by the defendants, jointly.*

### **Editorial notes**

The court delivered its liability findings on February 14, 2023, establishing negligent misstatement but no breach of contract. After hearing additional submissions on damages, the final judgment with monetary orders was issued on March 3, 2023.

### **Citations**

#### **Cases**

#### **Kenya**

1. *Affordable Homes Africa Ltd v Henderson & 2 others* Civil Case 524 of 2004; [2004] KEHC 2682 (KLR); [2004] 2 KLR 473 - (Mentioned)
2. *BK v JD Patel & Komatsu Limited* Civil Case 4942 of 1990; [2014] KEHC 2129 (KLR); [2014] eKLR - (Mentioned)
3. *Chase Bank (Kenya) Limited v Cannon Assurance (K) Limited* Civil Appeal 11 of 2017; [2019] KECA 313 (KLR); [2019] eKLR - (Mentioned)
4. *Industrial & Commercial Development Corporation (ICDC) v Patheon Limited* Civil Appeal 74 of 2011; [2015] KECA 96 (KLR); [2015] eKLR - (Mentioned)
5. *John Kimani Njenga v Margaret Wanjiru Kanyiri, Obadia Muchiri Mungai & National Bank of Kenya Ltd* Environment & Land Case 345 of 2014; [2015] KEELC 452 (KLR); [2015] eKLR - (Mentioned)
6. *K & K Amman Limited v Mount Kenya Game Ranch Ltd & 3 others* Civil Case 6076 of 1993 - (Mentioned)
7. *Kenindia Assurance Company Limited v Margaret Nduta Kimiti* [2004] 2 EA 115 - (Mentioned)
8. *Kenneth Nyaga Mwige v Austin Kiguta, Bedan Mbugua & The People Limited* Civil Appeal 140 of 2008; [2015] KECA 334 (KLR); [2015] eKLR - (Mentioned)
9. *Kenya National Assurance Co Ltd v Kimani & another* Civil Appeal 42 of 1984; [1987] KECA 58 (KLR); [1987] eKLR; [1987] KLR 236 - (Mentioned)
10. *Mariam Fadhili v Samson Maricho Otweyo, Soud Hafidh Rashid, Rukiya Soud Bashir & Haider Soud* Civil Appeal 86 of 2015; [2016] KECA 249 (KLR); [2016] eKLR - (Mentioned)
11. *Ole Tukai, David Sirona v Francis Arap Muge, Kiprotich Arap Kirui & Johannah Kiprono Arap Mosonik (Sued as Chairman, Secretary & Treasurer of Kapkween Farmers Co-operative Society Ltd)* Civil Appeal 76 of 2014; [2014] KECA 155 (KLR); [2014] eKLR - (Applied)
12. *Parklands Shade Hotel Ltd v Kenya Alliance Insurance Company Ltd & another* Civil Case 281 of 2002 - (Mentioned)
13. *Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Company Ltd* Civil Appeal 88 of 2002; [2004] KECA 145 (KLR); [2004] 2 KLR 269 - (Mentioned)



## **United Kingdom**

1. *Box v Midland Bank* [1981] 1 Lloyds LR 434 - (Applied)
2. *Hedley Byrne and Company Limited v Heller & Partners Limited* [1963] 2 All ER 575; [1963] 3 WLR 101, [1963] UKHL 4 - (Applied)
3. *Hemmings v Sceptre Life Association Ltd* (1905) 1 Ch 365 - (Mentioned)
4. *Murfit v The Royal Insurance Company Ltd* (1922) 10 Lloyd's Law Reports 191 - (Mentioned)
5. *Pan Atlantic Insurance Co v Pine Top Insurance Co Ltd* [1994] 3 All ER 581; [1994] 3 WLR 677 - (Mentioned)
6. *Salomon v Salomon & Co Ltd* (1895-1899) All ER Rep 33 - (Applied)

## **Regional Court**

*Bugerere Coffee Growers Ltd v Sebaduka & another* [1970] EA 147 - (Mentioned)

## **Texts**

1. Birds, J., (Ed) (2012), *MacGillivray on Insurance Law* London: Sweet and Maxwell Limited 12<sup>th</sup> Edn
2. Mwimali, JB., (Dr) (Ed) (2015) *Insurance Law and Practice in Kenya* Nairobi, Kenya: LawAfrica Publishing (K) Ltd pp 98, 99
3. Garner, BA., (Ed) (2004) *Black's Law Dictionary* St Paul Minnesota: Thomson West; 8<sup>th</sup> edition
4. Hogg, QM., (Lord Hailsham) *et al* (Eds) (1995) *Halsbury's Laws England* London: Butterworth 4<sup>th</sup> Edn Vol 17 para 13
5. Mackay, JPH., (Lord of Clashfern) (2010) *Halsbury's Laws of England* London: LexisNexis Butterworths 5<sup>th</sup> Edn Vol 61 para 656
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7. Legh-Jones, N., *et al* (Eds) (2003), *Macgillivray on Insurance Law* London: Sweet & Maxwell Ltd 10th Edition
8. Odunga, GV., (Ed) (2010) *Odunga's Digest on Civil Case Law & Procedure* Nairobi: LawAfrica Publishers (K) 3<sup>rd</sup> Edn Vol 6 p 4050

## **Statutes**

### **Kenya**

1. Civil Procedure Act (cap 21) sections 26, 27 - (Interpreted)
2. Companies Act (Repealed) (cap 486) section 348(1)(a) - (Interpreted)
3. Constitution of Kenya article 159 - (Interpreted)
4. Insurance (Amendment) Act, 2019 (Act No 11 of 2019) In general - (Cited)
5. Insurance Act (cap 487) section 156(1) - (Interpreted)

### **United Kingdom**

Insurance Contracts Act, 1984 In general - (Cited)

### **United States**

1. Common Crop Insurance Regulations part 400 - (Interpreted)
2. Federal Crop Insurance Act (FCIA) In general - (Cited)

## **Advocates**

*Ms Odwa* h/b for *Mr Nyairo* for the plaintiff

*Ms Jan Mohammed* Senior Counsel for the 1<sup>st</sup> defendant

*Mr Mwihuri* for the 2<sup>nd</sup> defendant



## JUDGMENT

1. The plaintiff commenced the suit herein by filing a plaint dated October 1, 2011 and amended on February 23, 2018, seeking for judgement jointly and severally against the defendants for:-
  - a. Kshs 120,291,170.20;
  - b. Interest at the commercial bank rate of:
    - i. 13.75% from 3/3/2011 to 23/10/2011;
    - ii. 17% from 24/10/2011 to 20/11/2011;
    - iii. 22% from 21/11/2011 to 24/8/2016
    - iv. 14.5% from 25/8/2016 to date,
  - c. Costs of the suit;
2. The plaintiff's case as stated in the pleadings and supported by the evidence of its key witness; Rajesh Bachulal Vyas is that, it is a limited liability company involved in large scale farming operations in Narok and Uasin Gishu County(s). That in the year 2011, it planted 3,671.96 acres of wheat at Olulunga, lower Narok area and decide secure an insurance cover for it.
3. That due to the complexity of the nature of the cover, by a letter dated November 10, 2010, it instructed the 2<sup>nd</sup> defendant, a limited liability company duly licensed to carry out insurance brokerage business, to source, procure and secure the insurance cover against financial loss arising from various perils including drought.
4. That, by an e-mail dated November 17, 2010, written by one John Gangla, the 2<sup>nd</sup> defendant accepted the instructions and forwarded to the plaintiff a data collection sheet for completion in the areas marked in green. However, the plaintiff noted anomalies in details relating to; the crop which was indicated as commercial maize whereas it was wheat. That the acreage too was incorrect and the unit price in Kshs per bag was low.
5. However, Mr Gangla did not respond until March 2011 when he forwarded a quotation from the 1<sup>st</sup> defendant, a limited liability company engaged in insurance business, giving options of cover and corresponding premiums. That, attached to the quotations was a document headed; "wheat crop insurance quote 2010" issued by the 2<sup>nd</sup> defendant and a letter dated April 18, 2011, written by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant headed; "insurance quotation- Ndovu holding wheat."
6. That the plaintiff suggested changes on the quotation and informed the 2<sup>nd</sup> defendant but there was no response. As a result, to fast track the process My Vyas requested Mr Gangla to give him particulars of the officers of the 1<sup>st</sup> defendant he was dealing with and he was given the names of; Mr Francis Ngari, an agronomist and Mr Parul Khimasia, whom the plaintiff contacted directly.
7. Subsequently the parties exchanged a series of emails between 4<sup>th</sup> and April 12, 2011, culminating in the 1<sup>st</sup> defendant issuing a second quotation, though bearing the same date of March 18, 2011 as the first quotation. That, the difference between the two quotations was that the 1<sup>st</sup> one gave the yield based or cost of production and corresponding premiums while the 2<sup>nd</sup> quotation was yield based only. The plaintiff opted for the second quotation and on April 13, 2011, signed the quotation, rubber stamped and dated it signifying acceptance.



8. In the meantime, an emergence survey inspection was arranged for the April 13, 2011, but none of the defendants' agents appeared at the farm. However, Mr. Ngari, went to the plaintiff's farm on April 16, 2011, conducted the survey and notified the plaintiff emphasizing that the plaintiff was required to pay premiums by April 21, 2011, since the re-insurer would not accept to insure the crop for the area after the said date. That Mr Gangla also confirmed that the deadline for crop insurance cover was April 21, 2011.
9. That, Mr Ngari forwarded to the 2<sup>nd</sup> defendant the crop certificates and the survey report which included mapping of the farm using Global Positioning System (GPS) and arriving at acreage of 3671.96. The 2<sup>nd</sup> defendant forwarded the certificates to plaintiff on April 20, 2011 and allegedly confirmed the cover was in place.
10. The plaintiff avers that by an email of April 13, 2011, it instructed its bankers to pay the premium due by RTGS in the sum of; Kshs 10, 333, 860. 60 to the 2<sup>nd</sup> defendant as per banks details provided and by an email dated April 20, 2011, the 2<sup>nd</sup> defendant acknowledged receipt of the premium, although the premium was re-calculated to a figure of, Kshs 9,885, 276. 00 and a refund of excess payment of Kshs 448,585.00 made.
11. Subsequently, the 2<sup>nd</sup> defendant sent to the plaintiff; the Risk note, Debit note and Crop certificate. However, the insurance policy was never availed with the insurance number reading "TBA" which means "to be advised".
12. Further as part of the requirements in the 2<sup>nd</sup> quotation, the plaintiff prepared micronutrients application schedule for the entire length of growth cycle and cropping plan and submitted it to the 2<sup>nd</sup> defendant on April 20, 2011, to be forwarded to the 1<sup>st</sup> defendant. That on May 20, 2011, the 1<sup>st</sup> and 2<sup>nd</sup> defendants conducted a mid-season crop inspection and by emails dated June 20, 2011, the plaintiff wrote to the 2<sup>nd</sup> defendant to arrange for a pre-harvest crop and harvest inspection.
13. However, there was no responds and the plaintiff sent several reminders. That on July 5, 2011, the 2<sup>nd</sup> defendant responded and said that the inspection is normally carried out by the insurer and since the 1<sup>st</sup> defendant had declined to attend to it, the plaintiff should proceed with the same and keep the records.
14. That by emails of August 4, 2011 the plaintiff wrote to Mr Gangla and Mr Kuu seeking confirmation of attendance to certify the harvest in the store, the loss and the value of the claim. Further by an email of August 8, 2011, the plaintiff sought for confirmation of attendance for stock verification exercise slated for August 10, 2011.
15. However, the 1<sup>st</sup> defendant responded on August 9, 2011, and stated that the plaintiff was not on cover due to non-availability of a re-insurer contrary to all their previous communication. The plaintiff argues that, there was no pre-condition or term in any documents that cover would be issued subject to obtaining re-insurance for a portion or full risk.
16. That even then, the 2<sup>nd</sup> defendant conducted the post-harvest inspection on August 10, 2011, and issued stock yield certification. That, pursuant to the post-harvest inspection and stock/yield verification exercise, and as per instruction of Mr. Gangla, the plaintiff prepared reports set out on a field by field basis, since each field had an insured sum and sent to the defendants vide an email dated August 25, 2011.
17. However, the 1<sup>st</sup> defendant by a letter dated September 5, 2011, maintained that there was no cover in existence on the ground that it was subject to securing of re-insurance, which had not been secured. As a result, the plaintiff instructed its advocates to issue the defendants with a demand letter for the sum



- of; Kshs 120,291,170.21 on the basis of indemnity as per the risk note and tabulated at paragraph 28 of the amended plaint, but there was no compliance.
18. It is the plaintiff's case that the defendants were negligent in the manner in which they dealt with the entire insurance transaction. That, if there was no cover as alleged by the 1<sup>st</sup> defendant, then it is to blame for not placing a cover or in the alternative failing to inform the plaintiff in good time that there was no cover to enable it take cover with any other insurance company. Further, the 1<sup>st</sup> defendant conducted itself in a careless, dishonest, fraudulent, unprofessional and unethical manner.
  19. Further, if there is no cover, then the 2<sup>nd</sup> defendant is to blame, solely or jointly with the 1<sup>st</sup> defendant, in that they accepted instructions from the plaintiff to source for the crop insurance cover and proceeded to engage the 1<sup>st</sup> defendant on the same. Furthermore, the plaintiff paid premiums to the 2<sup>nd</sup> defendant and provided crop management plans as instructed. In addition, the 2<sup>nd</sup> defendant issued receipts for the premiums, a debit note, risk note and crop certificates all in its name and attended and conducted the mid-season crop inspection and post-harvest inspection and stock yield verification.
  20. The plaintiff avers that its claims for interest from the defendants is based on the fact that it borrowed funds from the Bank of Baroda Limited and was granted an overdraft of Kshs 70 million and term loan of Kshs. 57 million for its farming activities including payment of the premium. That, at the time of granting the facility the interest charged by the bank was 13.75% per annum compounded from March 3, 2011 to October 24, 2011.
  21. That the interest rate was increased to 17% per annum compounded from October 25, 2011 up to November 20, 2011 and increased to 22% from November 21, 2011 to August 24, 2016. Further on August 25, 2016, the law was amended and it capped interest at 14.5% and that the plaintiff had made it known to the defendants that it had borrowed funds from the bank, which was reflected on the risk note by the 2<sup>nd</sup> defendant. That despite demand for payment the defendants failed and/or neglected to pay hence the suit herein.
  22. However, the 1<sup>st</sup> defendant filed a defence and a counterclaim dated November 21, 2011, seeking for judgment against the plaintiff for: -
    - a. A declaration that the defendant was and is entitled to avoid the contract (which is denied) and has validly avoided the same.
    - b. Costs of this suit and interest thereon at court rates.
    - c. Such further or other relief as this honourable court may deem fit.
  23. The 1<sup>st</sup> defendant avers through evidence of its witness Raman Suresh Kumar, the Chief Operating Officer that in the 3<sup>rd</sup> week of April 2011, he came across an email by Mr Ngari, the agronomist to the effect that he was to go to the farm of the plaintiff with a representative of the 2<sup>nd</sup> defendant to do certification of a wheat crop that was the subject of a proposed cover.
  24. That on April 18, 2011, he met Mr Ngari to discuss about the issue where it was mentioned that the 1<sup>st</sup> defendant would be quoting the risk. Further, they discussed the re-insurance capacity for the risk as the sum insured was larger than the 1<sup>st</sup> defendant's treaty capacity. That, where the risk to be insured is beyond the company's treaty capacity, it is standard practice for insurance companies to quote a risk and approach the insurance market for re-insurance or co-insurance.
  25. That, on April 21, 2011, Mr Suresh was copied into an email by Mr Gangla of the 2<sup>nd</sup> defendant attaching a risk note to the plaintiff and Mr Suresh responded and informed the 2<sup>nd</sup> defendant that they were forwarding the information received on the plaintiff to their re-insurers and would confirm cover



- once approval was received. That, the 2<sup>nd</sup> defendant approached a number of re-insurers in Kenya, Mauritius, South Africa, and London but they were reluctant to quote for the risk.
26. As a result, on May 13, 2011, the 2<sup>nd</sup> defendant was informed of the difficulty in getting support from re-insurers and that the plaintiff was not on cover. However, the 1<sup>st</sup> defendant continued seeking re-insurance and managed to secure support from a Mauritius based insurance broker who was ready to offer cover for a guaranteed yield of 65%.
  27. That in a meeting held on May 16, 2011, the 2<sup>nd</sup> defendant was informed of the offer and it was agreed that Mr Ngari and Mr Gangla would visit the plaintiff and convey the said offer. Further, the 1<sup>st</sup> defendant would inspect the farm, which inspection would be handy in forwarding a report to the re-insurer to expedite the cover, if the plaintiff accepted the offer.
  28. However, by email on May 25, 2011, Mr Gangla informed the 1<sup>st</sup> defendant that the plaintiff had rejected the offer of 65% guaranteed yield and was adamant the 1<sup>st</sup> defendant approach the re-insurer with the original quote of 85%. By an email on the May 30, 2011 the 1<sup>st</sup> defendant informed Mr Gangla that it did not succeed in getting support for the cover and therefore they were unable to confirm cover for the plaintiff.
  29. That after an exchange of emails, Mr Ochieng of the 2<sup>nd</sup> defendant advised the plaintiff to institute legal proceedings against the 1<sup>st</sup> defendant, if the 1<sup>st</sup> defendant failed to give a favourable response by June 6, 2011. The suit was then filed.
  30. The 1<sup>st</sup> defendant denied having carried out the emergence survey but argues it was a preliminary appraisal to ascertain whether the risk was viable and issued crop certificates. It also denied having received nutrients application schedule or cropping plans or at all
  31. Further, the alleged window period to source for and obtain a cover was denied and so is the allegation that there was a binding contract between the plaintiff and the 1<sup>st</sup> defendant and neither did the quotation given amount to an offer and nor was the calling of the premium an acceptance of offer. That for there to have been a contract the 1<sup>st</sup> defendant had to confirm the cover which was never done and that the plaintiff failed to comply with the conditions given in the 2<sup>nd</sup> quotation.
  32. That there was no claim in negligence against the 1<sup>st</sup> defendant in law and the same be struck out in limine. However, in the alternative and without prejudice, there was no full and frank disclosure by the plaintiff in its dealing with the 1<sup>st</sup> defendant. That the plaintiff misled the 1<sup>st</sup> defendant it was in farming business for 40 years and it had no loss history which would impact on any cover and failure to disclose it had previous insurers and/or insurance in respect of crop insurance and history related thereto.
  33. In the same manner, the 2<sup>nd</sup> defendant filed its defence dated November 18, 2011 and through the evidence of John Gangla, its Senior Accounts Manager averred that, in November 2010, the plaintiff asked for a quotation for insurance of its wheat crop for the year 2011 and the 2<sup>nd</sup> defendant gave a quotation in November 2010 and asked for some information which the plaintiff did not provide for some time.
  34. That, the plaintiff returned in March 2011 stating that they had quotations from APA and Jubilee Insurance Company Limited and that the latter had been to the farm for inspection. That APA was giving a guarantee of 85% and Jubilee Insurance Company Limited 65%.
  35. That, in March 2011, the 2<sup>nd</sup> defendant got a quotation from the 1<sup>st</sup> defendant put it on its notepaper and sent it to the plaintiff, which the plaintiff signed and returned. That, even then the plaintiff had engaged the 1<sup>st</sup> defendant directly and obtained a quotation from it.



36. That, on April 12, 2011, Mr Ngari sent the final quotation to the plaintiff following direct discussions between the plaintiff and the 1<sup>st</sup> defendant, agreed on terms and arranged for the emergence survey inspection. That, the 2<sup>nd</sup> defendant was just informed of the survey the day before it was to be undertaken which was too short notice to attend. Further, by a letter dated April 18, 2011, Mr Ngari informed the 2<sup>nd</sup> defendant that the latest the plaintiff could get a cover was April 21, 2021.
37. That on April 18, 2011, Mr Ngari sent the crop certificates to the 2<sup>nd</sup> defendant vide an email which read in part that “attached please find crop certificates in a format agreed with our re-insurer”. That Mr Gangla went through the certificates and informed Mr Ngari that he had not put the percentage of germination which is critical as it has a bearing on the yield and requested him to correct the anomaly and issue a policy document.
38. That on April 19, 2011 the premium was credited in the 2<sup>nd</sup> defendant’s account. On the same date Mr. Gangla asked Mr Ngari to confirm if the plaintiff was on cover. In response Mr Ngari asked for crop management plans and by this time the 2<sup>nd</sup> defendant had issued the risk note to the 1<sup>st</sup> defendant on April 20, 2011 and requested it to issue a policy document
39. That on the same date Mr Ngari confirmed that, the 2<sup>nd</sup> defendant’s commission had been enhanced to 15%. On April 21, 2011, the 1<sup>st</sup> defendant vide an email from Mr Suresh requested the 2<sup>nd</sup> defendant to get in touch with him so that they could finalise and confirm cover.
40. That several correspondences followed wherein the 1<sup>st</sup> defendant kept on stating that they were looking for a re-insurer and had a challenge as the re-insurers were hesitate due to the plaintiff’s history of cancellation. The correspondence continued with the 2<sup>nd</sup> defendant holding the view that the plaintiff was on cover while the 1<sup>st</sup> defendant held the view that the cover was subject to re-insurance.
41. That on May 16, 2011, the defendants held a meeting to settle the issue and it emerged that the 1<sup>st</sup> defendant did not have a treaty capacity, that is re-insurance, when they were quoting on April 19, 2011. However, later Mr Suresh said that he was misquoted as the 1<sup>st</sup> defendant had treaty capacity albeit not adequate. That Mr Suresh said that he would talk to Mauritius Re to place the risk with 65% guarantee and requested the 2<sup>nd</sup> defendant to help them place the balance of the 50% risk.
42. That the 2<sup>nd</sup> defendant approached CIC Limited, Jubilee Insurance Limited and ICEA Limited but they all declined and when the 1<sup>st</sup> defendant asked the plaintiff to accept 65% risk guarantee, the plaintiff declined. Further, when the mid-season survey was done the crop had started showing distress and the hope was that it would rain but that did not happen.
43. The 2<sup>nd</sup> defendant averred that, it is normal practice for the insurance broker to remit premiums in batches and once the broker has the premium it is as good as with the insurer. That it is not a practice for the broker to inquire whether the insurer has a re-insurance or not, as that would amount to insulting the insurer. That, the plaintiff lodged a claim and the 2<sup>nd</sup> defendant forwarded to the 1<sup>st</sup> defendant but it was returned.
44. The 2<sup>nd</sup> defendant averred that a premium of; Kshs 10,333,860.60 was credited into its account on April 19, 2011 and the difference between the 1<sup>st</sup> defendant’s quote and their quote was that they added the insurance training levy at 0.45% to the premium, being Kshs 46,293.60, and a policy charge of Kshs 100.
45. However, the 1<sup>st</sup> defendant returned the premiums on two (2) occasions, the first being on July 4, 2011 and the second after the suit was filed without informing the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant denied



having acted negligently and in particular; failed to procure crop insurance cover or timeously advise the plaintiff that it had no crop insurance cover or exercise due care and attention.

46. That as a broker it has no obligation to settle the claim. That the plaintiff dealt with the 1<sup>st</sup> defendant directly and obtained the quotations from the 1<sup>st</sup> defendant. Further, the plaintiff has no claim against the 2<sup>nd</sup> defendant and the suit be struck out for being frivolous.
47. At the conclusion of the hearing the parties filed their respective submissions. The plaintiff filed submissions dated; October 7, 2021, the 1<sup>st</sup> defendant are dated; November 30, 2021, while the 2<sup>nd</sup> defendant are dated November 4, 2021.
48. The plaintiff submitted in a nutshell that a cover can come into effect before a policy is issued and relied on the Court of Appeal case of; *Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Company Ltd.* (2004) eKLR, where it held that a risk may begin to run from the date of acceptance of offer or payment of the first premium, depending on the terms of the preliminary agreement.
49. The plaintiff also relied on quotation at page 96-97 of *Insurance Law and Practice in Kenya* by Dr JB Mwimali (2015) where the author states that: -

“The cover note need not be a formal document. It is sufficient if the insurer intimates to the proposer that cover has been extended from a particular date. In *Murfit v Royal Insurance Co Ltd*, it was held that a letter from the head office of the company stating that cover had been extended in a particular situation constituted a cover note.”
50. That in the instant matter, the 1<sup>st</sup> defendant’s quotation of March 18, 2011, contained conditions or cover notes, which stated that; cover would attach once the emergence survey was done by an Agronomist and premium paid. That, evidence adduced proves that an emergence survey was conducted by 1<sup>st</sup> defendant’s witness Mr Ngari, thus satisfying the first condition or note.
51. Further, the 2<sup>nd</sup> defendant instructed the plaintiff to pay the premiums into its account and copied the mail to Mr Kumar of the 1<sup>st</sup> defendant and there was no objection to the instructions. That the premium was paid to the 2<sup>nd</sup> defendant on April 18, 2011 and receipts issued. It was later sent to the 1<sup>st</sup> defendant and acknowledged.
52. Be that as may, the plaintiff submitted that, payment of a premium is not a pre-condition for cover to attach and relied on the case of *Nizar Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Company Limited* (2004) eKLR where the Court of Appeal quoted with approval *MacGillivray & Parkington on Insurance Law*, 7<sup>th</sup> Edition at paragraph 861 and stated that :-

“There is no rule of law to the effect that there cannot be a complete contract of insurance concluded until the premium is paid, and it has been held in several jurisdictions that the Courts will not imply a condition that the insurance is not to attach until payment. It would seem to follow that, if credit has been given for the premium, the insurer is liable to pay in the event of a loss before payment, although, as has been held in a South African decision, the insurer would be entitled to deduct the amount of the premium from the loss payable, at least where the period of credit had expired by that time, since the assured could not insist on payment when in breach of any obligation assumed on his part under the contract.”



53. Further, the contract between the 1<sup>st</sup> defendant and the plaintiff came into effect by the conduct of the parties. The plaintiff relied on an extract at pages 98-99 of *Insurance Law and Practice in Kenya* by Dr JB Mwimali (2015).

“7.4 Signification of Acceptance and the Attachment of Risk

In *Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Company Ltd* (Court of Appeal, Kisumu, Civil Appeal 88 of 2002, judgment of 17<sup>th</sup> December, 2004 (2004) 2 KLR 269) it was aptly stated that the risk covered by an insurance policy may begin to run either before or after the policy is issued. It may run from the date of acceptance of the offer; from the payment of the first premium; or from the execution or delivery of the policy. The risk may thus attach on the basis of the following.

- (i) ...
- (ii) ...
- (iii) ...
- (iv) Conduct of the Insurer: The fact that premium has not been paid nor the policy issued does not necessarily mean that the proposal form has not been accepted. Evidence may clearly show that it has been accepted and that there is a binding agreement between the parties. On the part of the proposer to pay the premium; and on the part of the insurer, to issue the policy, in which case the insurer cannot refuse to accept the premium when tendered or repudiate the contract (*Thompson v Adams* (1889) 23 QBD 361; *Adie and Sons v Insurance Corporation Ltd* (1898) 14 TLR 544; *Re Yager* (1912) LT 38; *White Well v Auto Car Fire and Accident Insurance Co.*(1927) 27 Lloyd's Rep.41."

54. The plaintiff further submitted that, PW2 (Michael Waigwa) and the 1<sup>st</sup> defendant's DW2 (Mr Ngari) stated that Narok Area had a cut-off date of April 21, 2011 after which, no insurance company would accept to cover the crop, as the crop was going to a grow-off season. That by April 21, 2011, the 1<sup>st</sup> defendant had not communicated lack of cover or re-insurer which denied the plaintiff the opportunity to seek for an alternative cover.
55. Further by conducting the emergency survey before the premium was paid, the 1<sup>st</sup> defendant waived note 3 which required that the premium be paid before the survey was conducted. Furthermore DW1 Mr Kumar confirmed in cross-examination that the plaintiff was not a party to matters of re-insurance and by an email dated April 18, 2011 DW2 (Mr Ngari) confirmed cover, therefore the re-insurance was not a pre-condition to issuance of the cover.
56. That there was a valid insurance contract between the plaintiff and the 1<sup>st</sup> defendant, and failure to pay for the loss suffered by the plaintiff, the defendants are in breach of the contract and therefore liable to pay the sum of Kshs 120,291,170.20, which is the loss recoverable under the policy.



57. The plaintiff further submitted that, alternatively, if the court finds there was no contract between the plaintiff and the 1<sup>st</sup> defendant, the plaintiff has proved negligence, misrepresentation and negligent misstatement against the 1<sup>st</sup> defendant and is therefore liable to pay the loss. Reliance was placed on the case of *Hedley Byrne and Company Limited v Heller & Partners Limited* [1963] 2 All ER 575 which says: -

“I consider that it follows and that it should now be regarded as settled that if someone possessing special skills undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skills or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allow his information or advice to be passed on to, another person who as he knows or should know will place reliance upon it, then a duty of care will arise. ”

58. That, the breach of the duty of utmost good faith or *uberrimae fides* can only be pleaded where there is an existing contract that needs to be invalidated, therefore the 1<sup>st</sup> defendant is admitting to existence of a contract. Further, that there was no misrepresentation or non-disclosure as the un-highlighted spaces in the data collection form were pre-filled by the 2<sup>nd</sup> defendant, and the plaintiff filled the highlighted boxes only.

59. Further, the forty (40) years’ experience in business related to the combined experience of forty-nine (49) years, of the two (2) directors of the company, since the company is an artificial person and derives its expertise from the directors manning it.

60. That the 1<sup>st</sup> defendant would have been able to find out using their own diligence the number of years the company had been in business prior to assuming the risk. That, it is judicial notice that under section 384(1)(a) of the *Companies Act* (cap. 486) (now repealed), any person has a right to carry out a search at the Companies Registry to find out when a company was registered.

61. Further, that due to the availability of a search, it must be deemed that the 1<sup>st</sup> defendant was constructively aware of the year of registration of the plaintiff and was required to communicate to the plaintiff within reasonable time and repudiate the contract. It cited the case of *Kenindia Assurance Company Limited v Margaret Nduta Kimiti* [2004] 2 EA 115 where it was held that non-disclosure or concealment or misrepresentation of material facts do not have the effect of automatically avoiding a contract of insurance as its effect is to make the contract voidable at the insistence of the insurer. Further, that it is incumbent on the insurer who has the full facts to elect to avoid the contract at once or within a reasonable time thereafter but has a reasonable time within which to make up his mind, either way he should communicate such decision to the assured.

62. Furthermore, no evidence was provided by the 1<sup>st</sup> defendant to the effect that the non-disclosure or misrepresentation of number of years and failure to fill the loss history was material to their evaluation of the risk as to determine whether to take it or not and if they did, whether the premium would change. That it was possible that the plaintiff did not have loss history. Reliance was placed on *Parklands Shade Hotel Ltd v Kenya Alliance Insurance Company Ltd and another*, Nbi HCCC No 281 of 2002 reported in Vol 6 of the 3<sup>rd</sup> Ed of *Odunga's Digest on Civil Case Law and Procedure* pg 4050.

63. The 1<sup>st</sup> defendant submitted that, plaintiff has no locus standi to institute the suit herein. That a company, being artificial in nature, that needs to make a decision as to whether to institute or defend



a suit, needs to pass a resolution either at a company or Board of Directors meeting and recorded in the minutes, and in the absence of such resolution the company is not before the court. Reliance was placed in the case of *Bugerere Coffee Growers Ltd v Sebaduka & Another* [1970] EA 147 and *Affordable Homes Africa Ltd v Henderson & 2 others* [2004] eKLR.

64. Further, although PW1 Vyas stated in his re-examination that there was a board of directors' resolution authorizing the plaintiff to institute the suit, no such resolution was produced as an exhibit either in the plaintiff's bundle of documents or tendered before the court. Furthermore, despite the issue being raised in cross examination, the plaintiff did not bother to move the court to remedy the fundamental legal defect. As such the plaintiff cannot rely on a document not produced as an exhibit. Therefore, the suit should be struck out. Reliance was placed on the case of; *Kenneth Nyaga Mwige v Austin Kiguta & 2 Others* [2015] eKLR.
65. The 1<sup>st</sup> defendant maintained that approval by its re-insurer was a requisite requirement as evidenced by various correspondences between the parties and in addition to satisfying conditions in note 1 to 5 of the final quotation dated March 18, 2011. As such it had to be fulfilled before the 1<sup>st</sup> defendant could issue crop insurance.
66. That, even then the plaintiff did not meet note 1 as it belatedly paid the premiums on April 18, 2011, which was after the emergence survey had taken place on April 16, 2011. Furthermore, the premium was paid to the second defendant who failed to indicate the date it was remitted to the 1<sup>st</sup> defendant.
67. The 1<sup>st</sup> defendant submitted that under the principle of cash and carry and section 156(1) of the *Insurance Act* (cap 487) laws of Kenya, prior to amendment by the *Insurance (Amendment) Act* No 11 of 2019, a company can only assume risk when it has received premium payment from the client. Therefore, the 1<sup>st</sup> defendant could not assume risk of the plaintiff due to the non-payment of the premiums as per the final quotation dated March 18, 2011.
68. Further, as the 1<sup>st</sup> defendant never issued the plaintiff with a policy document, the risk could not commence or pass to it. Reference was made to the book of "*Macgillivray on Insurance Law* Tenth Edition Chapter 6" on the commencement and termination of risk.
69. Further, note 5 required the plaintiff to attach crop production costing and micronutrients application cover for the entire length of the crop cycle stage as well as cropping plan but it was not met as only a crop management plan was sent to the 1<sup>st</sup> defendant on April 20, 2011 after the emergency survey and crop certificate had been prepared.
70. That even if note 1 and 5 was met, cover could not attach until the re-insurance was obtained. That despite the effort to secure a Mauritius based insurance broker for a guaranteed yield of 65% and not 85 % as in the final quote, the plaintiff declined the offer.
71. As to whether the crop certificate amounted to a cover, the 1<sup>st</sup> defendant submitted that, issuance of the crop certificates was part of the documents to confirm cover and not a cover by themselves. Further, the contention by the plaintiff and the 2<sup>nd</sup> defendant that a crop certificate is equivalent to a motor vehicle insurance certificate, cannot hold as the motor vehicle insurance certificate has a policy number, commencement date and motor vehicle number, while on the other hand the crop certificate only has details on what is on the ground.
72. That the risk note issued on April 20, 2011 indicated the premiums were to be paid in full once the crop certificates were issued and cover confirmed and that the risk note was premature and misleading to the plaintiff. Further as at May 11, 2011, the parties were still negotiating several terms of the proposed



- cover and therefore the narration that the plaintiff was on cover on April 16, 2011 does not hold water. That there can never be a contract if there was no consensus as idem.
73. The 1<sup>st</sup> defendant further submitted that, the 2<sup>nd</sup> defendant was under a duty to disclose to the plaintiff all necessary information pertaining to the cover but it failed to do so in relation to the reinsurance and therefore should be held liable for any loss suffered by the plaintiff.
  74. That the sum of Kshs 120,291,170 claimed is calculated on the basis of the indemnity as per the risk note signed by John Gangla and is therefore special damages that must be specifically pleaded and proved. However, the plaintiff did not tender step to step calculation to show how the sum was arrived at save for the self-analysis or assessment done.
  75. Further, the plaintiff did not call a loss assessor/adjuster to access the exact alleged loss so as to assist the court on how the sum was arrived at. Furthermore, the plaintiff failed to tender any evidence on how it tried to mitigate the loss if any. Therefore, the plaintiff's only recourse is a refund of the premiums still being held by the 2<sup>nd</sup> defendant.
  76. As regards interest claimed, it was submitted no evidence was tendered by the plaintiff to justify the calculations of interest at court rates from the time of judgement. Furthermore, the interest rates claimed from a retrospective date should have been pleaded as special damages, considering the amended plaint dated February 23, 2018 was filed, therefore interest should not be awarded.
  77. On the issue of costs, it was submitted that, under section 26 and 27 of the *Civil Procedure Act*, that costs follow the event and the court has discretion to award the costs as it deems fit, but the discretion should be exercised judiciously considering the special circumstances of the case.
  78. On the counter claim, reference was made to *Black Law's Dictionary* 8<sup>th</sup> Edition and *Halsbury's Laws of England*, 4<sup>th</sup> Edition, Volume 25, paragraph 366 to argue that as per the definition of utmost good faith, it is imperative that parties to a proposed insurance contract, but in particular the insured who knows the facts material to the insurance, to disclose all material facts in respect to the insurance contract at hand.
  79. That, the argument by PW1, Mr Vyas that the forty (40) years was the experience of the two directors of the plaintiff company in the farming industry cannot hold as it is universally accepted principle of law that a duly incorporated company is a separate legal entity from its directors as held in the case of *Salomon v Salomon & Co Ltd* (1895-1899) All ER 33.
  80. That disclosure of the period in business, its loss history in the data information sheet which was left blank, and the history with previous insurers more so in respect to crop insurance, would have impacted the whole contract and more specifically the premium and risk involved. The case of *Pan Atlantic Insurance Co v Pine Top Insurance Co Ltd* [1994] 3 All ER 581 was relied on.
  81. The 1<sup>st</sup> defendant relied on the case of; *Pan Atlantic Insurance Co v Pine Top Insurance Co Ltd* [1994] 3 All ER 581 where the court held that, where an insurer seeks to avoid a contract on misrepresentation or non-disclosure it has to be determined whether the misrepresentation and non-disclosure induced the insurer to enter into the contract on the terms and whether a prudent insurer would have entered into a contract on the same terms if they had known of the misrepresentation or non-disclosure immediately before the contract was concluded.



82. The 2<sup>nd</sup> defendant on its part submitted that, the *Halsbury's Laws of England*, Vol 60, Fifth Edition 2018 page 7 stipulates the essential elements of an insurance contract as follows: -
- “Insurance contracts are governed by the general law of contract subject to some additional special principles such as the duty of good faith... The essential features of an insurance contract are: that a sum of money will be paid by the insurers on the happening of a specified event; there must be uncertainty as to the happening of the event, either as to whether it will happen or not, or, if it is bound to happen, like the death of a human being, as to the time at which it will happen. There must also be an insurable interest in the insured...”
83. That the terms of the quote dated March 18, 2011 were complied with and therefore the insurance contract between the plaintiff and the 1<sup>st</sup> defendant was formed and concluded on April 18, 2011. Furthermore, there is no requirement for a policy document to be issued for a contract of insurance to be made as was held in the decision of *Murfit v The Royal Insurance Company Ltd* (1922) Lloyd's Law Reports 191 and further stated in *MacGillivray on Insurance Law*, Twelfth Edition, at page 131. Therefore, the 1<sup>st</sup> defendant's argument in relation to the same fails.
84. Further, they relied on page 11 of the *Halsbury's Laws of England* as above where it was stated that contracts of non-marine insurance can be made orally and are enforceable even though no policy has been issued.
85. It was submitted that, while the premiums were paid after the emergence survey was done, contrary to the conditions in the quote, there was no complaint by the 1<sup>st</sup> defendant on this change of mind and thus there was a meeting of minds on the sequence of events.
86. It was reiterated that due to the sheer volume of business between the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant, the 2<sup>nd</sup> defendant ran an account for the 1<sup>st</sup> defendant, and 2<sup>nd</sup> defendant would remit premiums to the 1<sup>st</sup> defendant on a regular basis, a fact that was admitted by the 1<sup>st</sup> defendant's DW1. Reliance was placed on the case of *Murfit v The Royal Insurance Company Ltd (supra)* in support of their submission.
87. That the premium received was forwarded to the 1<sup>st</sup> defendant and, the 1<sup>st</sup> defendant did not proffer any evidence that the 2<sup>nd</sup> defendant had reduced the premium without authority. Further the allegation made during cross examination is a belated attempt to evade liability by casting aspersions on the conduct of the 2<sup>nd</sup> defendant.
88. The 2<sup>nd</sup> defendant further submitted the allegation that note number 5 of the quote signed by the plaintiff was slightly different from note number 5 of the quote issued by the 1<sup>st</sup> defendant was explained by Mr Gangla that he merely paraphrased note number 5 in 1<sup>st</sup> defendant's quote and there were no substantive amendments in the quote was signed by plaintiff. Moreover, the 1<sup>st</sup> defendant never raised any complaints about the paraphrasing and neither did Mr Ngari object or allege that quote number 5 in the quote signed by the plaintiff had been paraphrased.
89. That other than the defence of re-insurance, whatever other postulations the 1<sup>st</sup> defendant advanced were made through allegations cast during cross examination.
90. Further the 1<sup>st</sup> defendant having received the premium from the 2<sup>nd</sup> defendant, it affirmed the policy with the plaintiff and is bound by it as held in the case of; *Kenya National Assurance Co Ltd v Kimani & another* [1987] eKLR where the court cited the English case of *Hemmings v Sceptre Life Association Ltd* (1905) 1 Ch 365



91. Therefore, the 1<sup>st</sup> defendant covertly returned the premiums to the 2<sup>nd</sup> defendant on 1<sup>st</sup> July 2011, in an effort to evade the claim. That the 1<sup>st</sup> defendant failed to proffer any explanation as to why it secretly returned the premium to the 2<sup>nd</sup> defendant and more tellingly after the case was filed, thus the court is entitled to draw an adverse inference against the 1<sup>st</sup> defendant as held in *Chase Bank (Kenya) Limited v Cannon Assurance (K) Limited* [2019] eKLR.
92. Further on the issue of re-insurance, all witnesses who testified agreed that the issue or re-insurance was a back office issue that is handled by insurance companies and that clients seeking to be insured and/or the brokers are not concerned and do not need to ascertain the re-insurance status of the insurance company.
93. The 2<sup>nd</sup> defendant relied on the case of; *Industrial & Commercial Development Corporation (ICDC) v Patheon Limited* [2015] eKLR where the Court of Appeal relied on the Turquand's case and stated that a party is entitled to assume that the other party had complied with its internal rules and regulations before entering into consent, taking accounts and making an offer.
94. Further, there is no evidence that the 2<sup>nd</sup> defendant was negligent nor to demonstrate that the actions by the 2<sup>nd</sup> defendant were manifestly or patently negligent. That the court in the case of *BK v JD Patel & another* [2014] eKLR quoted with approval the case of *K & K Amman Limited v Mount Kenya Game Ranch Ltd & 3 others* Nairobi (Milimani) HCCC 6076 of 1993 and stated that to prove professional negligence one had to: -
- “call evidence that the professional conducted himself with less than the competence, diligence and skill expected of an ordinary professional in his field or otherwise persuade the court that the acts or omissions complained of were manifestly or patently negligent.”
95. That in the instant case, the plaintiff's witness PW2, Mr Waigwa, a crop insurance specialist, never alleged that the 2<sup>nd</sup> defendant was negligent, or that it acted without the competence, diligence and skill expected of an ordinary broker in the field, but in fact essentially agreed with what the 2<sup>nd</sup> defendant had done.
96. The 2<sup>nd</sup> defendant stated that, it issued an indemnity notice to the 1<sup>st</sup> defendant as a co-defendant and filed on 12<sup>th</sup> February 2012, over its claim against the 1<sup>st</sup> defendant seeking for indemnity in respect of any sum the 2<sup>nd</sup> defendant may be ordered to pay the plaintiff. Reliance was placed on the cases of *John Kimani Njenga v Margaret Wanjiru Kanyiri & 2 others* [2015] eKLR and *Mariam Fadhili v Samson Maricho Otweyo & 3 others* [2016] eKLR.
97. The 2<sup>nd</sup> defendant beseeched the court to order the 1<sup>st</sup> defendant to indemnify it for any payments that it may pay the plaintiff if found liable. Even then there is no evidence of negligence or failure to exercise reasonable care and skill on its part and therefore the case against it should be dismissed with costs.
98. At the conclusion of the case, I have considered the evidence and find that the following issues have arisen for determination: -
- a. Whether the plaintiff has locus standi to institute the suit;
  - b. Whether the plaintiff and 1<sup>st</sup> defendant entered into a valid contract of insurance
  - c. If the answer to (b) is in the positive, whether there is a breach of that contract and by which party;
  - d. Whether either or both defendants acted negligently in discharge of their respective duties:



- e. Whether the plaintiff is guilty of non-disclosure of material facts
  - f. Whether the prayers sought for in the main suit and counter claim should be granted
  - g. Who will bear the costs of the suit?
99. As regards the first issue, I find that the submissions by the 1<sup>st</sup> defendant on the requirement of the board of directors' resolution before the company can institute a suit is factually correct. However, in the instant matter, the plaintiff filed an application to be allowed to file and produce the board of directors' resolution authorizing the plaintiff to institute the suit herein. The matter was heard on the February 12, 2020 and the same was allowed by the consent of the parties. Therefore, the plaintiff's suit is properly before the court and that rests that issue.
100. Be that as it were, the main issue is whether there was a valid insurance contract between the plaintiff and the 1<sup>st</sup> defendant. I have already analysed in depth the arguments of the parties on the issue and therefore will go straight to the determination of the court on the same. To address the issue, I find that there is no dispute that the 2<sup>nd</sup> defendant acting on the instructions of the plaintiff sourced the 1<sup>st</sup> defendant to provide crop insurance for the plaintiff's wheat. The plaintiff and 2<sup>nd</sup> defendant hold the view that there was cover whereas the 1<sup>st</sup> defendant holds the contrary view.
101. In that regard the issues in contest are inter alia whether
- a. the plaintiff fulfilled the five notes in the quotation issued by the 1<sup>st</sup> defendant;
  - b. re-insurance was a pre-condition for issuance of the cover
  - c. the crop certificates are a cover or part documents required for the cover
  - d. whether by conducting an emergence survey before payment of premium the 1<sup>st</sup> defendant varied note 3 of the subject quotation.
102. However, before I delve into these issues, a brief factual background of the matter relevant to the issue may suffice to shade light on the issue. First and foremost, it is in agreement that the cut -off date for crop insurance in Narok area was April 21, 2011, therefore it was race against time, and that is evidenced by the fact that, it is the plaintiff who was pushing the process.
103. In that regard, the plaintiff's witness Mr Vyas states in his amended statement dated, December 14, 2018, that he contacted Mr Gangla over the anomalies in the data or information collection sheet to discuss the same but there was no response. Furthermore, he contacted him to suggest changes required in the quotation of the 1<sup>st</sup> defendant and there was no response.
104. That eventually he sought Mr Gangla's permission or authority to deal with the 1<sup>st</sup> defendant directly and was introduced to Mr Francis Ngari and Mr Khimasia. Further, as evidenced by the email exchanged between the parties during the period of 4<sup>th</sup> to April 12, 2011, despite the plaintiff's direct communication with employees of the 1<sup>st</sup> defendant, all emails from the 1<sup>st</sup> defendant were directed to the 2<sup>nd</sup> defendant.
105. Furthermore, the defendants did not visit the farm on April 13, 2011 as earlier agreed. From the aforesaid, it seems that, it was only the plaintiff who was racing against time.
106. To revert to the matter, the plaintiff and 2<sup>nd</sup> defendant maintains that all notes to the quotation were complied with whereas 1<sup>st</sup> defendant argues that, note 3 and 5 were not complied with. I note that note 3 required premium be paid before crop emergence survey was done, but the survey was done on 16<sup>th</sup>



April and payments done on April 18, 2011. Therefore, *prima facie* that note was not met. I shall revert to the consequences of non-compliance later. Note 5 was indeed complied with on April 20, 2011.

107. As regards the re-insurance, it is the finding of the court that it was not one of the requirements in the quotation to be fulfilled. issued by the 1st defendant and acted on by the plaintiff. If it was, then there is no evidence by the 1st defendant to prove the same.
108. The other issue relates to crop certificates. The plaintiff relies heavily on the same to argue that upon issuance thereof cover attached, and that they are as good as the motor vehicle certificate of insurance. The plaintiff's argument was supported by the evidence of PW2 Michael Wiagwa, a crop insurance expert.
109. The subject herein of crop insurance is indeed unique as stated by the plaintiff. It is therefore worth sharing the literature on the same especially in view of the fact that this nature of dispute is unprecedented. What then is a crop certificate? A crop certificate, means a document issued by the insurance certifying that the crops to which it applies have met the standards for the class of crop designated.
110. In crop insurance, a crop certificate is a document that serves as evidence of a policy holders coverage and details of their insurance policy. It is typically issued by the insurance company or its authorized agent and provides important information about the policy holder's coverage, such as the type of policy they have, the insured crops and acreage, the policy limits and terms, and the policy period.
111. That information is important because it helps to define the policy holder's rights and obligations under the insurance contract. Additionally, in the event of a claim, the crop certificate may be used to verify the policy holders' coverage and to determine the amount of compensation that is due. For example, if a policy holder experiences crop loss due to the natural disaster, they may need to provide their crop certificate as part of their claim documentation to prove that, they had insurance coverage of the affected crops.
112. Thus, a crop certificate is typically not equivalent to a policy document. A crop certificate is a document that serves as evidence of a policy holder's insurance coverage but it does not provide all the details and terms of the insurance policy.
113. A policy document on the other hand, is the main document that outlines the terms and conditions of the insurance contract between the policy holder and insurance company. The policy document typically includes information about the type of policy, the insured crops and acreage, the policy limits and terms, the premium, and other details relevant to the policy holder's coverage.
114. Therefore, as much as the crop certificate may provide important information, it is not a substitute for the policy document, which provides more comprehensive and detailed picture of the policy holder's insurance coverage.
115. I have ventured into the lengthy write up in view of the fact that, the uptake and penetration of Agriculture Insurance Policy in Kenya, remains less than 1 percent as per the Ag Director Agriculture Policy Research and Regulation at the Ministry of Agriculture, Mr Peter Owoko who is quoted to have said: -

“ That although currently all general insurers are licenced to underwrite agricultural insurance by 2020, there were only eight (8) companies underwriting agriculture insurance showing that the level of Agricultural uptake and penetration is still very low in Kenya.”



116. Mr Owoko stated that, Agricultural insurance is regulated under the *Insurance Act* (cap 487) Laws of Kenya as a sub-class of Miscellaneous Insurance under general insurance and this kind of classification has made it difficult to specifically target interventions towards increasing penetration of agricultural insurance in the country. He further stated: -
- “There is no legislation to specifically support development of agricultural insurance despite its unique nature from produce development, distribution and claim management. This is considered a major disincentive for private insurer to venture into agricultural insurance given its risky nature”
117. In other comparative jurisdiction, for example in the United States Crop Insurance is governed by the *Federal Crop Insurance Act (FCIA)* and *Common Crop Insurance Regulations* (7CFR part 400). The FCIA provides the framework for delivery of federal crop insurance and authorises the USDA’ Risk Management Agency (RMA) to administer the Federal Crop Insurance Program. The common crop insurance regulations specify the rules and regulations that insurance companies must follow when offering or administering crop insurance policies, including provisions related to the issuance of crop insurance policies.
118. The legal provisions of issuance of crop insurance in the United Kingdom are governed by a combination of Insurance contract law and Agricultural law. The terms and conditions of crop insurance policies, including the issuance of policies may be governed by the *Insurance Contracts Act, 1984* and other related insurance legislation. In addition, the issuance of crop insurance may also be subject to regulations and standards established Agricultural law. This may include regulations related to types of crops, that can be insured, the terms and conditions under which the insurance can be offered and other requirements that must be met in order to obtain coverage.
119. Pursuant to the aforesaid, the law relating to crop insurance in Kenya, needs to be developed to provide for *inter alia*, the terms and conditions of engagement between the policy holder and the insurance company, in view of its unique, technical and risky nature and taking into account unlike all other types of insurances the crop insurance is not “a one off event, it is a process”. It may require its own law, or an Act of parliament, Regulations and Rules to regulate it.
120. To revert back to the subject matter herein, I hold that, the issuance of the crop certificate herein per se did not create a contract of insurance between the plaintiff and the 1<sup>st</sup> defendant. Furthermore, it suffices to note that generally, meeting the conditions for the insurance cover does not necessarily amount to the issuance of the cover.
121. An insurance contract is a contract between the policy holder and insurance company and the terms and conditions of the contract must be fulfilled before coverage becomes effective. The conditions for the insurance cover typically include payment of premium, completion of the application process, and fulfilment of any other requirements, specified in the policy such as providing proof of ownership.
122. If these conditions are not met, the insurance company is not obligated to issue the cover, even if the policy holder has met all the other requirements. To the contrary, once the conditions for the issuance of the insurance cover have been met, the insurance company is obligated to issue the cover and provide the policy holders with proof of insurance, such as policy document, or a certificate of insurance.
123. The issue herein is whether the plaintiff fulfilled the five notes attached to the subject quotation. It is not in dispute that, note 1 was fulfilled on April 16, 2011 when the emergence survey was done and premiums paid on April 18, 2011. Note 2 required the farm be mapped using GPS. That was done and there is no dispute to it. Note 3 required that premium be paid before the emergence survey was done.



It was fulfilled in reverse as the survey was done before the premium was paid. Note 4 was fulfilled as conceded by all the parties.

124. As regards note 5, I find that, although the 1<sup>st</sup> defendant argues that, only crop management plan was availed there is no evidence that, the 1<sup>st</sup> defendant at any time upon receipt thereof called for the micronutrients application schedule or gave notice of termination of the relationship (if any) between it and the plaintiff. Therefore, the 1<sup>st</sup> defendant cannot, as argued in their submission, rely on the 2<sup>nd</sup> defendant's "alleged" admission that note 5 was not met.
125. The key question that remains is whether the plaintiff was on cover before the premium was paid as stipulated under note 3. In my considered opinion payment of premiums after the survey was done breached note 3 and therefore it cannot be argued that cover attached by partial fulfilment of note 3 of carrying out the emergence survey. The premium is the consideration for the contract between the parties. On the other part the 1<sup>st</sup> defendant has no clean hands on the issue as it opted to conduct the survey before the premium was paid and similarly breaching note 3.
126. In my considered opinion, a cover cannot have attached merely because an emergence survey inspection was carried out and crop certificates issued. It will be a dangerous precedent to hold that, once certificate is issued, then a contract is created between the parties. Had the premium been paid before April 16, 2011, the logical conclusion would be that, the visit to the farm for emergence survey on April 16, 2011, crystallised into a contract. Consideration in every contract is what places upon the promisor the legal liability to perform the contract.
127. In conclusion on the issue, I decline to hold that, a contract was created between the plaintiff and 1<sup>st</sup> defendant on April 16, 2011, when the crop certificates were issued and before premium was paid.
128. Further the contract between the plaintiff and the 1<sup>st</sup> defendant cannot have been concluded on April 16, 2011, in that the 1<sup>st</sup> defendant continued to engage the plaintiff thereafter, as evidenced by the following emails.
- a. On April 16, 2011; Francis Ngari emphasized to the plaintiff to pay premiums before April 21, 2011, a dead-line for any re-insurer to accept the risk or cover the crop for the area where the crops were grown. That position was confirmed by Mr. Gangla.
- b. An email dated April 19, 2011 from Mr Ngari stating that,
- “we confirm that we can insure the plaintiff’s crops”
- This indicates that, by April 16, 2011, there was no cover.
129. Be that, as it were, it is the 1<sup>st</sup> defendant's submissions that even if all the 5 notes were met, the cover could not attach as there was an additional condition; that cover could only issue once the 1<sup>st</sup> defendant had obtained a re-insurer to share the liability.
130. However, having considered all the arguments and submissions of the parties I find that there was no condition in the relevant quotation that a re-insurer was a prerequisite for the cover to attach. In fact, by the email dated April 18, 2011, sent by Francis Ngari at 1.48pm, to the 2<sup>nd</sup> defendant, he clearly states:
- “attached please find crop certificates in the format agreed with the re-insurer”
131. Furthermore, the first time the 1<sup>st</sup> defendant officially raised the issue was in an email dated; April 21, 2011. In fact, the plaintiff's ability to obtain another insurance company to cover the crops was sealed on April 21, 2011. The 1<sup>st</sup> defendant employee, Mr Francis Ngari is the one who brought that date to



the knowledge of the plaintiff. Therefore, the 1<sup>st</sup> defendant was duly bound to get a re-insurer within the stipulated time. As such the 1<sup>st</sup> defendant's belated effort after April 21, 2011, were unlikely to bear any fruits.

In any case, the responsibility of sourcing for a re-insurer was the 1<sup>st</sup> defendant's.

132. It is therefore the finding of the court that the 1<sup>st</sup> defendant is introducing the issue of re-insurance too late in the day and after the horse has bolted and the strong argument by the 1<sup>st</sup> defendant that no cover would attach without a re-insurer is not tenable.
133. The next issue to consider is whether there was a contract between the plaintiff and 1<sup>st</sup> defendant. Having considered the aforesaid and in view of the fact that, no policy document was issued or executed and fact that the proposal form availed is blank, I find and hold that there was no valid contract between the plaintiff and the 1<sup>st</sup> defendant.
134. The next question is whether the defendants acted negligently in performance of their contractual duties towards the plaintiff or negligently misled the plaintiff to believe it was on cover. The tort of negligent misstatement entails three elements'
  - a. The defendant owed the plaintiff a duty of care;
  - b. The defendant breached that duty of care;
  - c. The breach caused the plaintiff harm/loss
135. Further negligent misstatement relates to a representation of fact, which is carelessly made and is relied on by another party to their disadvantage. Indeed, it is possible to claim for economic loss arising out of negligent misstatements where no contractual or fiduciary relationship exists between the parties. However, a special relationship or sufficient proximity relationship should exist between the parties. A court will not impute a duty of care following informal discussions or during social courtesies.
136. The scope of that special relationship will be defined within the following parameters
  - a. The plaintiff relied on defendant's skill and judgment.
  - b. The person who gave the advise knew or ought to have known that, the other party was relying on him and it was reasonable in the circumstances for the plaintiff to rely on the defendant.
137. Be that as it may, liability for negligent misstatement can be disclaimed if the statement is accompanied by a form of words which makes the intention of disclaimer clear. In *Hedley Byrne v Heller & Partners Limited* [1963] 2 All ER 575 the defendant stated that, the advice was given "without responsibility" and this was held to be effective to negate liability for negligence which would otherwise have arisen. However, it is important that the words chosen for a disclaimer must be express and unambiguous as the court will not be prepared to identify a disclaimer as a matter of inference, (see [\*Box v Midland Bank\* \[1981\] 1 Lloyds LR 434](#)).
138. Damages may be awarded where the representee or plaintiff suffers loss as a result of having been induced to enter into the contract by misrepresentation. The claimant may have a claim for damages.
  - a. Where the misrepresentation was fraudulent
  - b. Where the representation was not fraudulent, but the representor is unable to show that they had reasonable ground to believe the facts stated were true.
  - c. Where the representation was not fraudulent but the court decides in its discretion to award damages in lieu of rescission



139. If the claimant is entitled to rescind the contract, damages can be awarded in lieu thereof. Rescission does not prevent a claim for damages where the misrepresentation also caused loss. It suffices to note that, if negligent misstatement is proved then the claimant may be entitled to “tortious” damages. These are awarded with the aim of placing the claimant party in the position they would have been if the defendant had not made the misrepresentation.
140. Finally, damages can be awarded in lieu of rescission.
141. If breach of contract is proved, then the claimant may be entitled to “contractual” damages, awarded to place the claimant in the position, they would have been if no breach of contract occurred.
142. To revert back to the issue of negligence I find that, there is no dispute the parties engaged each other. The 1<sup>st</sup> defendant issued a quotation which set the process in motion. It was followed by a visit to the farm by the 1<sup>st</sup> defendant and payment of premium by the plaintiff. Then followed an email of Mr Ngari that the crop could be insured and then the debit note issued by the 2<sup>nd</sup> defendant indicating that the policy document was to follow.
143. Furthermore, after the 1<sup>st</sup> defendant’s email of April 21, 2011, that the plaintiff was not on cover correspondence between the parties show there was a blame game between the defendants. The correspondence continued until late June 2011, but the issue was not resolved. In the meantime, the parties attended to mid-season inspection. By August 8, 2011, when the post-harvest and stock verification was due the 1<sup>st</sup> defendant declined to attend.
144. In my considered opinion, the fact that the 1<sup>st</sup> defendant was aware that the plaintiff could not get a cover after April 21, 2011 and continued to engage the plaintiff thereafter and even confirmed that cover could be issue and only raised the re-insurer issue on the eve of deadline, clearly indicates that the 1<sup>st</sup> defendant negligently misled the plaintiff that it was on cover or the crop could be covered.
145. In fact, the issue of re-insurer as stated is an afterthought as Mr Ngari had indicated that,

“ we are forwarding these crop certificates in the format agreed on from our reinsurer”.

Had the 1<sup>st</sup> defendant been careful in its duty of care, it would have been candid from the outset that, it was still seeking for a re-insurer and not called for the premium and would have given the plaintiff adequate time to source for an alternative insurance provider. It is the finding of the court that the 1<sup>st</sup> defendant acted negligently through its various correspondence and conduct to the plaintiff.

146. As regards the 2<sup>nd</sup> defendant the contract between it and the plaintiff is an agency relationship. The 2<sup>nd</sup> defendant being an agent was duty bound inter alia: to observe and execute the plaintiff’s instruction and act in the plaintiff’s interest to an extent that if there is a conflict between its own interest and the interest of the plaintiff then interest of the plaintiff prevails and in so doing the 2<sup>nd</sup> defendant is bound to act with due care and skill.



147. So did the 2<sup>nd</sup> defendant act with care and skill and/or are there any acts on their part that would negate the finding that they acted with care and skill. In that regard I note by an email of April 20, 2011 forwarded to the plaintiff, the 2<sup>nd</sup> defendant states

“we hereby forward an email from APA confirming the cover.” The email from the 1<sup>st</sup> defendant says

“we confirm we can now insure Ndovu Holding Estate for their wheat crop in Olololunga based our inspection” but the 2<sup>nd</sup> defendant re-paraphrased it to read;

“below is an email confirmation of the cover from APA”, that it was processing a risk note. Thereafter the 2<sup>nd</sup> defendant states that, the policy document would follow the risk note. That was never to be. Yet all along the plaintiff had paid the premium to the 2<sup>nd</sup> defendant and the deadline for another alternative insurer was lapsing.

148. The two emails referred above indeed put the plaintiff to rest that crop would be insured. Furthermore, it is not clear when the 2<sup>nd</sup> defendant forwarded the premium to the 1<sup>st</sup> defendant. I have also indicated herein how initially the plaintiff seems to have been a lone ranger as the 2<sup>nd</sup> defendant failed to respond to some of its correspondences. It is my finding that, the 2<sup>nd</sup> defendant did not act with due and skill as it should have ensured the policy document was issued in time.

149. In conclusion, I find both defendants’ jointly and severally liable under the tort of negligent misstatements as pleaded under paragraph 24 and 26 of the amended plaint dated February 23, 2018.

150. I shall now turn to the 1<sup>st</sup> defendant’s counter claim. In my considered opinion, the accumulated years of experience is of individual directors and not the plaintiff, which is a legal entity separate from its members as well articulated in *Salomon v Salomon & Co Ltd* (1895-1899) All ER 33.

151. On the issue of loss and the plaintiff’s history with other insurance companies, I find that, the law is clear he who alleges proves, so if the 1<sup>st</sup> defendant is of the opinion that the plaintiff had suffered losses in the past they needed to give evidence of the same. A due diligence exercise inclusive of the relevant search would have dealt with some of this issues. Even then having held that there was no contract between the plaintiff and the 1<sup>st</sup> defendant, then the issue of non-disclosure of material facts to vitiate it does not arise.

152. The next issue to determine is whether the plaintiff has proved its case. The finding herein is that there was no breach of contract but negligent misstatement is established. The remedies for negligent misrepresentation have been discussed as; damages, rescission or damages in lieu of rescission.

153. The difficult question I have battled with for a long time is that; the plaintiff has not prayed for “damages” at all despite putting in an alternative claim for negligence. Should the court award damages where none is pleaded? This is compounded by the fact that the sum of Kshs 120,291,170. 20, claimed is based on breach of contract. The damages herein are general damages to be assessed by the court.

154. In that regard I note that Court of Appeal in the case of; *David Sironga Ole Tukai v Francis Arap Muge & 2 other* [2014] eKLR, where it states that the court will not award a remedy not requested for. That is the correct position in law.

155. However, I note that, in common law a court may award damages even if they have not been specifically requested for in certain circumstances, for example where there is breach of contract case, the court



may award damages to compensate the injured party for harm suffered as the result of the breach, even if the damages are not specifically requested for in the pleadings.

156. In the UK the court may award damages even if they have not been specifically requested for, although as a general rule a party must plead and prove elements of their claim to recover damages. Therefore, that if damages are not specifically requested a court may still award damages if the evidence present shows harm suffered is compensable.
157. Further, it can be award to compensate the injured party for harm suffered and to make them whole. And so damages may be awarded to the plaintiff to recognize that they suffered a technical injury even if they have not suffered any actual loss or harm.
158. I have distinguished the matter of the Court of Appeal and subject matter in that, the matter in the Court of Appeal involved set time limits that could not be extended by the court, especially if the party to enjoy the benefit of extension, had not sought for it.
159. In addition, I have considered that this case has been in court since October 1, 2011 when it was filed therefore for a period of over ten (10) years. The reasons for the delay can be noted from the record. The question I am posing is that, after waiting for eleven (11) years, and after finding that there was negligence on the part of the defendants, is it in the interest of justice to tell the plaintiff that you are walking home with nothing.
160. Secondly, what is justice? Isn't it a fact that justice must not just be done but must be seen to be done. Will it be justice if the court was to lay its hands aside and say, yes there is negligence but I can't give you anything because your lawyer did not ask for damages. Isn't the test of justice that of a reasonable prudent man who in this case will say justice is done as harm occasioned has been remedied.
161. Further, I hold the opinion that, article 159 of the Constitution implores upon the courts to uphold substantive justice. Based on those I am of the opinion that it will be in the interest of justice if this court awards damages to the plaintiff.
162. That brings me to another area. How does the court assess damages? Assessment of damages involves appraisal of the incurred loss (*damnum emergens*) and lost profit (*lucrum cessans*). This includes valuation of lost profit, measurement of the earnings of which the victim was deprived or will be deprived or measurement of the increase in net worth of which the victim was deprived.
163. The incurred loss includes costs that can be external or internal. Its noteworthy that disputes between companies often uncover issues that must be approached with
- “economic, accounting and financial eye”.
- To appreciate the difficulties in valuation of damages, the key issues are- definition of incurred damages, restoration, different methods of calculating the margin and different valuation techniques.
164. The next question I am posing is this: now that this court has arrived at a decision, that it will award damages, is it in the interest of justice to award this plaintiff damages and yet the defendants have not had an opportunity to address the court on the same. I hold it is in the interest of justice to hear the defendants before I conclude the judgment.
165. It is so ordered.

**DATED AND DELIVERED ON THIS 14<sup>TH</sup> DAY OF FEBRUARY 2023**

**GRACE L NZIOKA**



## JUDGE

### Order

1. Further to the (above) judgment delivered on February 14, 2023, I have considered the submission of the parties on the issue of damages and the plaintiff has maintained that damages payable are as pleaded, being the loss suffered as a result of negligence as pleaded in the amended plaint and/or submissions. Reference and reliance was placed on the submissions dated October 7, 2021 at pages 41 and 42 which states that:

“Therefore, in a nutshell, the plaintiff prays for a sum of Kshs 120,291,170.20. That damages are payable as pleaded.”

2. The defendants maintain that the sum pleaded was under a heading of breach of contract and no general damages are awardable, that if the court were to do the same it will be an exercise in futility. The 2<sup>nd</sup> defendant further submitting that it was ready to return the premium though not pleaded for.
3. In my considered opinion, the calculation which gives rise to a sum of Kshs 120,291,170.20 was based on the contractual relationship allegedly between the parties on the understanding that the plaintiff risk was under cover. That is why the plaintiff is relying on the documents executed in the course of that relationship upon the assessment.
4. The principle “restitution in intergrum” putting the claimant in the same position they would have been if the tort had not been committed, guides the assessment of damages. Damages aim to compensate the claimant based on the fault of the defendant. However, a claimant should not profit from the incident as the compensation systems aim to restore them to the position they would have been if the loss had not occurred. The duty to mitigate means that a claimant must take all reasonable steps to minimized their losses.
5. In final conclusion I order as follows:
  - a) The premium to be refunded to the plaintiff.
  - b) Award of Kshs. 50,000,000 is made as general damages in favour of the plaintiff as against the defendants jointly and severally.
  - c) The interest at court rate shall be payable on that sum for a period of three (3) years taking into account delay in finalizing the matter was not caused by the defendants and shall continue from the date of judgment until payment in full.
  - d) The costs of the suit shall be borne by the defendants, jointly.

6. Those are the orders of the court.

**DATED, DELIVERED AND SIGNED ON 3RD MARCH 2023**

**GRACE L NZIOKA**

**JUDGE**

In the presence of: -

Ms Odwa hb for Mr Nyairo for the plaintiff.

Ms Jan Mohammed SC for the 1<sup>st</sup> defendant.

Mr. Mwihuri for the 2<sup>nd</sup> defendant.

