REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL SUIT NO. 373 OF 2003

BETWEEN

CANNON ASSURANCE (KENYA) LIMITED.......................PLAINTIFF

AND

MOHANSONS FOOD DISTRIBUTORS LIMITED...........DEFENDANT

JUDGMENT

The Claim

1. The plaintiff is an insurance company. Its claim against the defendant set out in the amended plaint dated 28th November 2003 is for Kshs. 6,612,434/= being the total amount of outstanding insurance premiums due and owing from the defendant as at 31st August 2000 and outstanding insurance excess.

2. The outstanding premiums are made up as follows:

DEBIT NOTE	POLICY NO.	RISK DATE	TYPE OF INSURANCE	DEBIT NOTE AMOUNT KSHS.
65562	061/00003/85	01.01.97	MARINE	62,625.00
65331	103/00001/90	01.01.97	ALL RISK	87,883.00
64238	803/1209/96	01.01.97	MOTOR COMMERCIAL	906,243
64465	060/0480/97	20.01.97	MARINE	13,265
65226	060/0494/97	13.03.97	MARINE	15,753
65571	110/0063/90	31.03.97	WORKMAN'S COMPENSATION	2,579
65239	060/0499/97	27.03.97	MARINE	20,827
65724	060/0525/97	02.05.97	MARINE	5,804
66423	101/0039/97	17.06.97	FID. GUARANTEE	6,553

66622	064/0009/97	30.07.97	MARINE	15,753
66770	703/1431/95	12.07.97	MOTOR PRIVATE	36,051
66804	803/1209/96	19.08.97	MOTOR COMMERCIAL	176,388
67618	064/0042/97	15.10.97	MARINE	12,436
68482	063/0033/97	24.12.97	MARINE	5,804
68505	102/0053/90	01.01.98	BURGLARY	150,924
68672	040/0043/90	01.01.98	FIRE INDUSTRIAL	153,480
68794	703/1431/95	01.01.98	MOTOR PRIVATE	267,134
69404	100/0013/85	01.01.98	CASH IN TRANSIT	24,900
69406	111/0048/90	01.01.98	EMP. LIABILITY	8,285
69409	110/0063/90	01.01.98	WORK. COMPENSATION.	28,347
69410	030/0036/85	01.01.98	FIRE DOMESTIC	16,283
69429	052/0007/90	01.01.98	PUBLIC LIABILITY	5,010
69473	046/0001/85	01.01.98	FIRE INDUSTRIAL	24,813
69282	061/0003/85	01.01.98	MARINE	62,625
70009	803/1209/96	01.01.98	MOTOR COMMERCIAL	1,024,244
70154	103/0001/90	01.01.98	ALL RISKS	87,883
68930	042/0043/90	05.02.98	FIRE INDUSTRIAL	4,998
68961	102/0053/90	05.02.98	BURGLARY	5,662
71773	101/0039/97	17.06.98	FID. GUARANTEE	1,017
72032	102/0053/90	01.01.99	BURGLARY	180,612
72033	052/0007/90	01.01.99	PUBLIC LIABILITY	5,010
72034	111/0048/90	01.01.99	EMP. LIABILITY	8,285
72035	110/0063/90	01.01.99	WORK. COMPENSATION	28,347
72036	061/0003/85	01.01.99	MARINE	62,625
72039	042/0043/90	01.01.99	FIRE INDUSTRIAL	158,991
72040	046/0001/85	01.01.99	FIRE INDUSTRIAL	24,813

72030	100/0013/85	01.01.99	CASH IN TRANSIT	24,900
72096	030/0003/85	01.01.99	FIRE DOMESTIC	16,283
72029	103/0001/90	01.01.99	ALL RISKS	87,883
72578	803/1209/96	01.01.99	MOTOR COMMERCIAL	993,222
72663	703/1431/95	12.02.99	MOTOR PRIVATE	243,236
72664	703/1431/95	12.02.99	MOTOR PRIVATE	104,746
74497	102/0001/90	18.11.99	BURGLARY	3,385
74802	046/0001/85	01.01.00	FIRE INDUSTRIAL	26,761
74880	061/0003/85	01.01.00	MARINE	62,625
74864	803/1209/96	01.01.00	MOTOR COMMERCIAL	737,672
74803	042/0043/90	01.01.00	FIRE INDUSTRIAL	135,775
74796	110/0063/90	01.01.00	WORKMAN’S COMPENSATION	39,854
74795	111/0048/90	01.01.00	EMP. LIABILITY	10,586
74849	703/1431/95	01.01.00	MOTOR PRIVATE	79,920
74794	103/0001/90	01.01.00	ALL RISKS	91,565
74793	102/0053/90	01.01.00	BURGLARY	154,290
74792	100/0013/85	01.01.00	CASH IN TRANSIT	28,707
74797	052/0007/90	01.01.00	PUBLIC LIABILITY	5,010
75456	126/0480/98	13.01.00	IMMIGRATION BOND	6,012
			TOTAL	**6,554,684**

3. The plaintiff also claims Kshs. 57,750/= from the defendant being insurance claim excess which is payable under the relative policy in respect of Claim No. 97/08/803/90012 regarding an accident that took place on 7th February 1997 involving the defendant’s motor vehicle registration number KAD 010X.

The Defence

4. In the re-amended defence dated 28th September 2009, the defendant denied the plaintiff’s claim including the particulars pleaded. It also pleaded that Debit Notes Nos. 65562, 65331, 64238, 64465, 65226, 65571, 65239, 65724 and 66423 were time barred under **section 4(2)** of the ***Limitation of Action Act (Chapter 22 of the Laws of Kenya)*** (“the ***LAA***”).

5. The defendant also denied that the plaintiff received any proposal from the defendant to issue any policy of insurance in respect of the amounts claimed or that any insurance policies were issued. In the alternative, the defendant pleaded that the plaintiff’s attempt to enforce payment of the alleged contracts of insurance was illegal and that the contracts were unenforceable by virtue of **section 156(1)** of the ***Insurance Act (Chapter 487 of the Laws of Kenya)***.

The Hearing

6. This matter was initially heard by Gikonyo J. He took down the testimony of Raphael Ochieng (PW 1), an Underwriting Supervisor with the defendant, on 23rd June 2014. I heard the second witness, Gerald Odero Omulo (PW 2), an accountant with the defendant, on 27th January 2020. After the close of the plaintiff’s case, I declined the defendant’s request for adjournment. It closed its case without calling any

witness. Both parties filed written submissions which I shall consider.

7. In his testimony, PW 1, adopted his witness statement. He stated that the plaintiff and the defendant had a long term business relationship and that in fact one of the directors of the defendant was a director of the plaintiff. During the material time, the plaintiff issued motor vehicle, all risk, fire, burglary, goods in transit, consequential loss, money and worker's compensation insurance cover for the defendant. He recalled that one of the directors, Mr Sandeep Singh Kandhari, would give instructions on phone or in writing and due to the parties' relationship, insurance cover would be issued while the paper work would be finalized at a later stage. He stated that in some instances, the paper work would not be completed but the policies would still remain in force. PW 1 produced a bundle of documents including showing the debit notes particularized in the plaint and correspondence to support its claim.

8. PW 2 testified that his work as a Senior Accountant with the plaintiff entailed preparation of accounts. He confirmed that the defendant was a long term client and that due to the defendant's director's position in the plaintiff, they took instructions to cover or renew cover over the phone and the paper work would be finalized at a later stage although sometimes the paper work would not be completed in full but that the cover would remain in force during the cover period. He stated that he was familiar with the defendant's accounts. He explained that the Underwriting Department prepared the Debit/Credit Notes, produced by the IT Department and then forwarded to his department for checking.

9. PW 2 also relied on the documents produced by PW 1. He confirmed that the correspondence between 1996 and 1999 confirmed that the defendant was insured by the plaintiff under various policies and that debit notes were issued when premiums fell due and that despite various demands, the plaintiff failed to pay the debt.

Issues for Determination

10. The parties did not agree on issues for determination but from the pleadings, evidence and submissions, I propose to determine the following issues:

> (a) Whether there was a contract of insurance between the parties on the basis of which the plaintiff issued cover to the defendant for various risks.
>
> (b) Whether the plaintiff can enforce payment of unpaid premiums.
>
> (c) Whether the debit notes Nos. 65562, 65331, 64238, 64465, 65226, 65571, 65239, 65724 and 66423 were time barred under **section 4** of the ***LAA***.
>
> (d) Whether the plaintiff is entitled to Kshs. 6,612,434/= claimed in the plaint or any part thereof or at all together with interest thereon.

11. Before I deal with the issues framed above, I wish to observe that although the defendant filed a defence, it did not call any witnesses thus the oral and documentary evidence of the plaintiff remained uncontroverted by the defendant's evidence. This does not discharge the plaintiff from proving its case, after all the collective effect of **sections 107, 108** and **109** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** is that the plaintiff bears the burden of proving the existence of the facts it relies on. That burden must be discharged on the balance of probabilities for it to succeed in getting judgment.

12. I am guided by what the Court of Appeal stated regarding the failure of the defendant to call witnesses to support its defence in ***Charterhouse Bank Limited (Under Statutory Management) v Frank N. Kamau*** **NRB CA Civil Appeal No. 87 of 2014 [2016] eKLR** as follows:

> *We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendant's failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgement merely because the defendant has not testified.*

13. Even if the defendant does not call any witnesses, it may discredit the plaintiff's case through cross-examination. It is also entitled to defend its case by raising legal grounds which may defeat the plaintiff's claim.

14. As a background to this matter, PW 1 and PW 2 gave an account of the relationship between the plaintiff and the defendant and that it was based on the fact that the defendant's director was also a director of the plaintiff hence the relationship was informal over the transaction period. It was evidenced by debit notes and correspondence which proved that indeed that the parties transacted hence the bare denial of any transaction between the plaintiff and the defendant lacks any basis. The question that remains for resolution is whether the plaintiff proved its case on a balance of probabilities. I now turn to consider the issues for determination.

Whether there was a valid contract of insurance between the parties

15. The defendant defended the suit on the ground that the plaintiff did not produce any policy document to prove that insurance policies were issued to it by the plaintiff. The defendant submitted that it is trite law that an insurance policy, being a contract between the insurer and

the insured, determines the claims which the insurer is legally required to pay in exchange for an initial payment, the premium and the insurer promises to pay for any loss caused by perils covered by the policy.

16. In answer to this contention, the plaintiff submitted that the position at common law is that there is no requirement for insurance agreements to be in any particular form and that an oral agreement for insurance is binding. The plaintiff cited ***Re Norwich Equitable Fire* (1887) 57 LT** where the court held that, *"a contract of insurance comes within the word "policy and there is no statutory or formal document necessary to make a contract of insurance: if a contract of insurance is created by any binding means, that is a "policy" to all intents and purposes."*

17. PW 1 and PW 2 tendered evidence showing that the defendant requested for cover on various dates for various policies, that it issued debit notes from time to time in respect of outstanding premiums, wrote letters requesting for renewal, revision or extension of cover all of which support the plaintiff's case that the policies were indeed issued. Each of the debit notes made reference to specific policies. The plaintiff also provided copies of motor vehicle insurance stickers to prove that the defendant's motor vehicles were duly insured. At no time did the defendant reject the debit notes or indicate that it had not been insured as requested.

18. Without belabouring this issue further, I would adopt the reasoning in ***Jupiter General Insurance Company v Kasanda Cotton Company* [1966] EA 252**. In that case the respondent claimed indemnity under an oral contract of insurance with the appellant for the loss of cash in transit. At the trial a preliminary issue was framed whether the contract between the parties was oral or written. The court held that although no written policy had been delivered to the respondent by the appellant, there was a valid oral insurance contract and that the appellant had accepted to cover the respondent's cash in transit based on the usual terms and condition of such policies issued by the appellant. A similar position obtains in this case where the defendant requested to be covered from time to time and the plaintiff provided cover as evidenced by the debit notes on terms under its usual policies. I therefore find and hold that the plaintiff issued insurance policies to the defendant upon its request.

Whether the plaintiff can enforce payment of premiums

19. The defendant's defence is also based on **section 156(1)** of the ***Insurance Act*** which prior to amendment by the ***Insurance (Amendment) Act No. 11 of 2019***, provided as follows:

> *156(1) No insurer shall assume a risk in Kenya in respect of insurance business unless and until the premium payable thereon is received by him or is guaranteed to be paid by such person in such manner and within such time as may be prescribed, or unless and until a deposit, of a prescribed amount, is made in advance in the prescribed manner.*

20. It is the defendant's argument in the defence that the plaintiff claim for payment of outstanding premiums is unenforceable under the aforesaid provision since the plaintiff is precluded from assuming risk before it has received the premium payable in full. The defendant submitted that payment of a premium is a precondition for the existence of an insurance contract and, as admitted by the plaintiff none was paid in the circumstances, the plaintiff was precluded from assuming risk and as such the insurance policies were contrary to the statute hence the plaintiff could not enforce its claim for outstanding premiums.

21. The defendant relied on several decisions; ***Festus Ogada v Hans Mollin* MSA CA Civil Appeal No. 100 of 2007 [2009] eKLR**, ***Mapis Investments (K) Limited v Kenya Railways Corporation* NRB CA Civil Appeal No. 14 of 2005 [2005] eKLR** and ***Ahmednasir Abdikadir and Co., Advocates v National Bank of Kenya Limited* [2006] eKLR** to submit that the plaintiff was not entitled to any relief on the ground of illegality of the contract and the contract being contrary to express statutory provisions.

22. The plaintiff submitted that the prohibition in **section 156(1)** is in respect of assumption of risk and not creation of a binding contract of insurance between the parties. In its view, the provision avails a defence to the insurer against a claim for indemnity by the insured when it is sued on a contract for which it has not paid any consideration and that it does not deprive the insurer from claiming unpaid premiums. The plaintiff cited several authorities among them ***Municipal Mutual Insurance Limited v Pontefract Corporation* 1 KBD 543**, ***Allanson Njugi v British India General Insurance Co., Ltd* [1965] EA 58**, ***Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Company Limited* [2004] 2 KLR** and ***Mohansons (Kenya) Limited v Cannon Assurance (Kenya) Limited* NRB HCCA No. 17 of 2019 [2019] eKLR** to submit that it is well established that non-payment of premium does not amount to a failure of consideration vitiating a contract of insurance unless the policy itself provides as such.

23. Under **section 156(1)** of the ***Insurance Act*** the insurer would only assume the risk if the premium had been paid and received by him or where the premium has been guaranteed by such person or where a deposit of a prescribed amount is made in advance. The plaintiff's claim for outstanding premiums belies the fact that the plaintiff assumed risk without payment of any premium.

24. I agree with the plaintiff, at least in this case, that **section 156(1)** of the ***Insurance Act*** does not disentitle it from claiming unpaid premiums nor does it state that a contract of insurance entered into by the parties shall become void. I also note unlike the other provisions of **section 156**, **subsection 1** thereof does not lead to or prescribe penal consequences. Further, in ***Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Company Limited* (Supra)**, the Court of Appeal held that the policy of insurance is not invalid merely for non-payment of premiums unless the policy itself so provides. It stated that:

> *Ordinarily, a policy of insurance remains valid once issued and liability attached despite non-payment of premiums, so that non-payment of a premium does not amount to a failure of consideration vitiating the contract of insurance. There is not rule of law to the effect that there cannot be a complete contract of insurance concluded until the premium is paid and the courts will not normally imply a condition that the insurance is not to attach until payment.*

25. It is clear that the defendant took the benefit of valid policies for a period of 3 years. As I pointed earlier, the parties' mode of operation was that the defendant would request and the plaintiff would provide various insurance covers as evidenced by the debit notes and correspondence. The defendant's director was also a director of the plaintiff, he took advantage of that position and the defendant benefitted

from the insurance policies issued by the plaintiff. It cannot now hide under cover of the law using its own conduct in what it states is an illegality to evade its duty to pay the premiums for the benefit it received. It cannot approbate and reprobate. As Lord Reid stated in ***Steadman v Steadman* [1976] AC 536, 540**;

> *If one part to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not be allowed to turn around and assert that the agreement is unenforceable.*

Whether the debit notes were time barred under section 4 of the Limitation of Action.

26. The defendant's case is that the plaintiff's right of action accrued in 1997 when the right to claim premiums was raised through debit notes Nos. 65562, 65331, 64238, 64465, 65226, 65571, 65239, 65724 and 66423. Since the suit was filed in 2003 outside the 6-year limitation period for contracts, the claim to that extent was time barred by **section 4(1)(a)** of the ***LAA***.

27. The plaintiff denied that the claims are time barred. It claimed that the cause of action arose on 10th August 2001 when the plaintiff sent the defendant its last demand for payment. It also stated that prior to filing suit it engaged the defendant in order to reach an amicable settlement. It produced several letters exchanged between the parties and in particular a letter from the defendant dated 10th April 2001 in response to the plaintiff's letter dated 4th April 2001 in which it indicated that the matter was being handled directly by their respective chairmen.

28. The plaintiff submitted that in light of this evidence and the efforts to resolve the debt amicably, the defendant had acknowledged the debt and for purposes of the ***LAA,*** the time started running afresh from the time of acknowledgment of the outstanding premiums. It relied on **section 23** thereof which provides as follows:

> *23. (3) Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment:*
>
> *Provided that a payment of a part of the rent or interest due at any time does not extend the period for claiming the remainder then due, but a payment of interest is treated as a payment in respect of the principal debt.*

29. The plaintiff cited ***Shire v Thabiti Finance Co., Limited* [2002] 1 EA 279** and ***Bush v Stevens* [1963] 1 QB 1** to submit the acknowledgement under **section 23** of the ***LAA*** resulted in not only accrual of a fresh cause of action which meant revival of an otherwise statutorily barred claim but also extension of the limitation period where the acknowledgment was made prior to the expiry of the limitation period.

30. In resolving this issue, the question to answer is when does the cause of action accrue as provided in **section 4(1)(a)** of the ***LAA*** which states:

> *4.(1) The following action may not be brought after the end of six years from the date when the cause of action <u>accrued</u>*
>
> *(a) actions found on contract* [Emphasis mine]

31. In this case, the cause of action accrued when the debit note was raised. The debit note is a demand for payment and the plaintiff was obliged to sue for the debt six years from the date of that demand. I therefore reject the plaintiff's submissions that the cause of action accrued in 2001 when a formal letter of demand was issued to the defendant.

32. As to whether the limitation period was interrupted by acknowledgment of the debt, **section 24(1)** of the ***LAA*** provides that for the acknowledgement to be valid, it must be in writing and signed by the person making it. It is not enough, as the plaintiff suggests, that the parties were in discussion. Such acknowledgment need not be in any format but it must be signed. In ***Telkom Kenya Limited v Kenya Railways* ML HCCC No. 612 of 2016 [2018] eKLR**, Onguto J., expressed the view that:

> *64. I take the view that to amount to an acknowledgment, a document ought to contain an unequivocal recognition and acceptance of the claim being made. A promise to pay makes it even stronger and better but is not necessary. So too, a reference to the exact amount claimed is not mandatory. The essence is to meet the rationale of acknowledgments in reviving or extending limitation periods. Acknowledgments indeed tend to lead to admissions which in essence avoid the prejudice that limitation statutes seek to contain; the prejudice of fading memories and of lost documents or missing witnesses.*

33. I agree with that view and in light thereof I have reviewed the correspondence between the plaintiff and defendant. By the letter dated 4th April 2001, the plaintiff made a demand to the defendant seeking payment of the outstanding premiums. The defendant responded to the letter through its Chief accountant by stating that the matter was being handled by their respective chairmen. These letters do not, by any stretch of imagination, amount to acknowledgments contemplated by **section 24(1)** of the ***LAA***. I therefore find and hold that Debit Notes Nos. 65562, 65331, 64238, 64465, 65226, 65571, 65239, 65724 and 66423 as pleaded by the defendant are time barred. The total amount for these statute barred debit notes is **Kshs. 1,121,532/=.**

Whether the plaintiff is entitled to amount claimed in the plaint

34. The plaintiff's claim is clearly particularized in the plaint. The claim for Kshs. 6,554,684.00 in respect of 55 insurance covers taken and renewed on diverse dates between 1997 and 2000 was supported by debit notes referring to and detailing specific policies issued by the

plaintiff to the defendant and correspondence between the parties. All the documents were produced without any objection from the defendant.

35. The defendant however submitted that the plaintiff failed to substantiate part of its claim. The defendant's counsel referred to a letter dated 16th December 1997 from the plaintiff addressed to the defendant in reference to renewal of policies for 1998 together with an attached schedule. The list shows that the DN No. 69409 for Kshs. 28,347/= and DN 69406 for Kshs. 8,285/= were marked as paid. As regards DN 69404 for Kshs. 24,900/= there is an endorsement stating "awaiting declaration". Counsel pointed to the fact the policy number shown in 01/100/00013/90 yet in the claim it is 100/00013/85 demonstrating that the plaintiff never issued any policies and indeed fabricated some of them. As regards DN No. 70009 for Kshs 1,024,244.00 and DN 68794 for Kshs. 267,134/= the defendant submitted that this did not feature in any of the documents presented by the plaintiff.

36. I have scrutinized the documents presented by the plaintiff carefully. I agree that the DN 69409 and 69406 are endorsed as paid while DN 69404 is endorsed as awaiting declaration. Since the document emanates from the plaintiff, I shall give the defendant credit for those amounts adding up to **Kshs. 61532/=**. Contrary to the defendant's submission, DN No. 70009 for Policy No. 08/903/01209/96 was produced in evidence (P. 28) and was accompanied by a schedule listing 13 schedule covered by the policy. Likewise, DN 68794 for Policy No. 07/703/01431/95 was produced in evidence (p.21) and was supported by certificates of insurance and policy endorsements.

37. The defendant complained that the plaintiff has produced several documents before the court which do not support its claim and are not relevant. I have gone through the documents and they must be seen through the lens of the relationship between the parties. In any case, each policy that was issued as supported by a debit note which confirm the defendant's request for insurance cover and that the cover was indeed provided. The correspondence merely goes to support its case that the parties were in a business relationship.

38. The plaintiff claimed **Kshs. 57,750/=** from the defendant being insurance claim excess which is payable under the relative policy in respect of Claim No. 97/08/803/90012 regarding an accident that took place on 7th February 1997 involving the defendant's motor vehicle registration number KAD 010X. I did not see any evidence of this claim in the documents hence I reject it.

39. Save for the debit notes that I have given the defendant credit and those that are statute barred, I am satisfied that the plaintiff has proved its claim on a balance of probabilities.

Whether the plaintiff is entitled to interest

40. The plaintiff claimed interest on the amount claimed at the, *"bank's rate from 22nd July 2002 to the date of filing suit"* and interest at court rates from the date of the filing suit until payment in full.

41. The plaintiff relied on **section 26** of the ***Civil Procedure Act (Chapter 21 of the Laws of Kenya)*** to submit that the court has discretion to award it interest as it has been kept out of its money as a result of failure to settle premiums. The plaintiff relied on ***Prem Lata v Peter Musa Mbiyu*** **[1965] EA 592** where the court held as follows:

> *In both these cases, the successful party was deprived of the use of goods or money by reason of the wrongful act on the part of the defendant, and in such a case it is clearly right that the party who has been deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest.*

42. **Section 26** aforesaid provides as follows:

> *26.(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.*
>
> *(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.*

43. Under **section 26(1)** aforesaid, the Court has discretion to award and fix the rate of interests to cover two stages: First, the period from the date the suit is filed to the date when the Court gives its judgment and second, the period from the date of the judgment to the date of payment of the sum adjudged due or such earlier date as the Court may, in its discretion fix. As regards the period prior to filing suit, whether interest is due and the rate thereof is determined by substantive law either under the contract or by custom and usage (see ***Gulamhussein v French Somaliland Shipping Company Limited*** **[1959] EA 25** and ***Highway Furniture Mart Limited v The Permanent Secretary & Another*** **EALR [2006] 2 EA 94).**

44. The plaintiff prayed for interest at bank rates applicable to the time before filing suit. Neither the basis nor rate of interest was pleaded. The documents produced by the plaintiff do not show that that the parties agreed on a rate of interest to apply. Likewise, the plaintiff did not plead any custom or usage that implied that a non-payment of outstanding premiums would attract interest or interest at bank rates. I therefore find and hold that the plaintiff has not established a case for the claim of interest prior to filing the claim.

45. As the claim is one for special damages, I do not see why the plaintiff should be denied interest at court rates from the date of filing suit.

Disposition

46. I find and hold that the plaintiff has proved its claim on the balance of probabilities. From the amount of **Kshs. 6,612,434/=** claimed, I deduct **Kshs. 1, 121,532/=** on account of statute barred debit notes, **Kshs. 57,750/=** claim not proved and **Kshs. 61,532/=** for the debit notes that appear to have been paid making a total of **Kshs. 5,371,620/=**. I therefore enter judgment for the plaintiff against the defendant as follows:

(a) **Kshs. 5,371,620/=.**

(b) Interest on (a) at court rates from the date of filing suit, 23rd June 2003, until payment in full.

(c) Costs of this suit.

DATED and DELIVERED at NAIROBI this 2nd day of APRIL 2020.

D. S. MAJANJA

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1** of the ***Civil Procedure Rules*** which requires that all judgments and rulings be pronounced in open court.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Ms Kirimi instructed by Hamilton Harrison and Mathews Advocates for the plaintiff.

Mr Ondego instructed by A. B. Patel and Patel Advocates for the defendant.