



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NAKURU

CIVIL SUIT NO 41 OF 2017

NAKURU POLYPLAST CO. LTD.....1ST PLAINTIFF

VERSUS

MAYFAIR INSURANCE CO.LTD.....1ST DEFENDANT

TEEVE INSURANCE BROKERS LTD.....2ND DEFENDANT

AND

BANK OF BARODA KENYA LTD.....1ST INTERESTED PARTY

RELIANCE METALS.....2ND INTERESTED PARTY

NAKURU PRESS SHOP.....3RD INTERESTED PARTY

JUDGMENT

1. BACKGROUND

2. The plaintiff filed this suit against the defendant seeking

- a) principal sum a kshs.68,550,000,**
- b) special damages of kshs.2,049,000,**
- c) excess damages,**
- d) interest on a, b and c above.**

3. The plaintiff's claim arise from **Fire Insurance Policy Number 1/01/040/1612/2013** procured by the 2nd defendant for the plaintiff for a period of 12 months from 1st October 2015 to 30th September 2016. The insurance policy was procured by the 2nd defendant who acted as agent of 1st defendant.

4. The plaintiff aver that the policy was to cover property in the factory namely computers/electric equipment consisting of power bank, cable capacities, extruder control panel, switch boards, electrical wiring and computer printer all valued at kshs.64,850,000.

5. The plaintiff's claim is that despite notifying the defendant's that its property was gutted and damaged by fire on 31st January 2016, the defendant have not indemnified them. The loss suffered is particularised in paragraph 13 of the plaint.

6. The interested party's claim is loan advanced to the plaintiff and properties of 2nd and 3rd interested parties' property were charged to secure the loan.

7. The 1st defendant filed defence dated 4th August 2017. It avers that upon receiving report from plaintiff, it commissioned an independent investigator who found that the fire was wilful act committed by or with connivance of the plaintiff's; 1st defendant particularized fraud and wilful act and or connivance by plaintiff in paragraph 9 of its defence.

8. The 1st defendant contends that the plaintiff is not entitled to indemnity as it deliberately caused the loss and without prejudice to the foregoing, is far beyond the insured loss and damage.

9. 2nd defendant filed defence dated 1st September 2017 and filed on 27th September 2017. The 2nd defendant stated that it was not privy to agreement between plaintiff and 1st defendant and denied owing any duty to the plaintiff; further that it was not copied letter dated 17th August 2017 from the 1st defendant to the plaintiff and was not privy to matters leading to issuance of the letter. 2nd defendant particulars of breach of contract particularized in paragraph 13 of the plaint and deny contractual relationship with plaintiff save for brokerage contract.

10. The 2nd defendant acknowledged receiving demand letter from plaintiff but denies that it was directed to 2nd defendant.

PLAINTIFF'S EVIDENCE

11. The plaintiff availed six witnesses. PW1 a Branch Manager of Bob Morgan Security Ltd testified that he received request for report from Manager Polyplast. He checked the record and prepared incident report based on the record. He said in respect of the incident they did not receive any alarm activation but their vehicle was luckily near Polyplast and they saw smoke and went there and found doors locked. Control Manager called fire brigade but they were not able to control the fire.

12. On cross-examination by **Mr. Guyo** for the 1st and 2nd defendant, he said he was appointed by the security firm in the year 2018 and the incident occurred in the year 2018 and that they prepared the undated letters he produced while this case was alive at the request of the plaintiff. He said there was an intruder alarm system but there was no alarm sent to the control room. He said the fire destroyed the alarm. On further cross-examination, he said the intruder alarm belong to the client and it is the client who should produce documents to confirm that there was intruder alarm. He said he compiled a report from the documents in the control room but he never produced the documents on ground that he was not asked to produce them. He said they limit their investigations to alarm monitoring and response part but the rest is beyond their control. He said he cannot determine what started the fire and how it started.

13. PW2 a manager of Prinks Security Ltd testified that Rahul from Polyplast asked for a report which he prepared which he photocopied from the Occurrence Book (O.B). He said from the O.B report, there was a guard in one of the godowns who called the office to report that there was smoke from godown of Polyplast. He said the person called the manager who in turn called the owner of the godown. He said there was no one in the godown. He said the work of Prink Security was at the main entrance. He further said they were guarding the whole compound and Polyplast was in the compound and from the record, there was no intrusion to the compound; that no one entered or left the perimeter wall.

14. On cross-examination, PW2 said there was one guard at the main gate and that the guard gave out report in the office. He said he visited the site after several months and at the time, he prepared the report he had not visited the site. He said the guard did not see anybody and they could not tell what caused the fire.

15. PW3 testified that he was employed by Teevee Insurance Brokers as claims person at Nakuru office. He confirmed fire incident was reported by the plaintiff in the year 2016 and they reported to Mayfair Insurance Brokers. He said there were two claims made in relation to the same fire one by plaintiff and another by Nakuru Industries. He said the claim for Nakuru Industries was paid in June 2016 but the plaintiff's claim had not been paid by the time he left employment.

16. On cross-examination, he said the policy of Nakuru Industries related to the landlord and the terms of the two policies were different; he said he does not know why the tenant has not been paid and matters of the landlord are completely separate from these proceedings.

17. On re-examination, he confirmed that Nakuru industries was paid kshs.4,204,201 by Mayfair Insurance on 31st January 2016 in respect to damage to the building occupied as godown.

18. PW4 who was an employee of plaintiff testified that on 29th January 2016 he reported to work at p.m. and left on 30th January 2016 at 8.00 a.m. He said he left the work place in good condition but on 31st January 2016 in the morning, he received a call from a workmate who informed him that the building was on fire. He went there and found fire extinguisher. After 2 weeks, he received a call from a workmate **Paul Kungu** who asked him to meet him. He met the said **Paul** with a person called **John** who introduced himself as from insurance and wanted to interrogate them and record statement.

19. PW4 said he was shown the statement recorded but he did not agree with its content. He said he did not agree that he had been asked to put papers in a container and secondly that he had left work at 1 p.m. He said he left work in the morning. He confirmed that the document has all his identification details. He said he gave him his identity card and introduced himself to him. He said he next saw the statement in 2019 and went to the DCI. He was asked for the original statement but **John** had the original document, he confirmed that the ID number 30580207 recorded in the statement is not his and the signature in the statement is not his.

20. On cross-examination, he said they were 7 people in the night shift of 29th January 2016 and the shift after him was to work from 8 a.m. up to 1 p.m. He said there were raw materials for making paper; that they were half container and that it was possible to tell that it was half after the burn. He said the signature in the statement recorded for him is not his. He said he wrote the introduction. He said the company produces twin ropes and that he is a machine operator. He said that he signed the affidavit in which he complained of the discomfort on 21st May 2019. He however never produced O.B extract to show that he reported to the police. He said statement of **Ronald Cheruiyot** has the same ID as his. He said he has not reported that someone used his ID with the name **Ronald**.

21. On cross examination by interested party, he said there were many raw materials. He said there was no person called **Ronald Cheruiyot** working for plaintiff neither was there a person with ID similar to his.

22. PW5 who was an employee of the plaintiff as machine operator, he testified that he reported for duty on 30th January 2016 at 8.00 a.m. He said they left at 1.00 pm after switching off the machines. On 31st he received a call from a colleague who informed him that the company was burning. On reaching there, he found the fire had been put off but the materials and the machines had been burnt. He was later called by his colleague **Paul Kungu** who informed that there was an insurance person who wanted to ask them questions. He said they went and met a person called **John**. He confirmed that he recorded statement from them. He said he read the statement but did not agree with what was in the statement. He confirmed that the ID number was his.

23. He denied allegation that there were no raw materials neither did he state that business was not doing well, there was no materials nor many workers had been sacked. He denied signature in the statement. He said when he called DCI, he said he required original statement.

24. On cross-examination, he said there were different machines and were working. He said he called **Rahul** to tell him that he had seen a statement, which was not his, and Rahul's **Advocate** asked him to swear an affidavit and swearing the affidavit, Rahul's Advocate called the DCI. He said the materials were pellets used to make plastic ropes; that some material were in the container and others in the store. He said the store was full and excess was in the container.

25. PW6 who was one of the 4 directors of the plaintiff testified that plaintiff was registered as limited liability company. He said he was a manager of the plaintiff at the material time and his role was to oversee production and sale. He said policy number 1/01/040/1612/2013 is in respect to fire and it was prepared by **Teevee Insurance Brokers** for sum assured of kshs.64,850,000 and premium paid was kshs.195,425. Taken in the year 2013 to 2016. He said premium was against assessed value of property kshs.64,850,000. He said renewal advice by Teevee was for the same amount.

26. He further stated that he received a call from security guard informing him that there was fire in the printing section. He rushed to the site and entered with fire department. They notified police and fire brigade called the KPLC to disconnect electricity. He said he informed manager **Teevee Insurance** the same day and the manager visited the scene the next day.

27. PW6 stated that in the claim form they filled, they were requesting for kshs.68.5Million, which reflect the total damage to the factory. He said they quantified as follows:-

- i. Raw materials..... 12M
- ii. Finished goods..... 10M
- iii. Spare parts3M
- iv. Electricity equipment.....5M
- v. Computer & Office equipment.....3M

28. He stated that the claim was not paid on ground that it was an act of arson. He produced report from the county indicating that the warehouse was destroyed by fire. He also produced police abstract to show that they reported the incident to the police. He said the police abstract does not indicate the cause of fire and it quantifies the damage at kshs.68.5Million. He said police have not called him to record statement relating to arson neither has any of the other directors been called.

29. PW6 testified that analytical report dated 18th February 2016 from Ministry of Health indicate that fire accelerators was found to be negative. He said there were raw materials in heater machine called extruder.

30. PW6 said the company was doing well and none of its employees were fired. He said their production was good and they were supplying all over Kenya to major supermarkets. He said they had started supplying Tanzania and their business was facilitated by loan from Bank of Baroda used for raw materials and machinery. He said the plaintiff took loan of kshs.12Million on 27th March 2015 and the bank went to confirm if they had raw materials and goods. He said they were last granted loan of kshs.27,248,344 for raw materials on 18th December 2015.

31. He confirmed that the plaintiff landlord Nakuru Industries' claim was settled. He prayed that the plaintiff's claim be paid.

32. On cross-examination, PW6 said the plaintiff's property insured was kshs.64,850,000 and it means he cannot ask more than the sum. He confirmed that his claim is kshs.68.5Million, which is more, than sum insured for. He agreed that he had inflated the claim and confirms that he is the one who gave the figure to police which is reflected in police abstract and that it is against the terms of policy. He indicated that at page 2 of the document stock in trade is raw materials of kshs.25,000 but he has claimed 22Million, plant machinery 30Million but he has claimed 35Million and Item 2 which is 2.55Million he has claimed 5.5Million. He said they never provided inventory of the materials and spare parts which were in the room at the time of fire because they got burnt. He said the machines were automated but people had to work on shift. He said on weekends, the godown was locked and all employees went home. He said the compound was about 2 acres with 6 godowns 4 adjacent to each other and all the property had a guard at the main gate; that all the godowns were visible and one guard was guarding the whole compound; that there was only one gate to the compound.

33. He testified that the opening for ventilation was done 4 to 5 months before the accident. He said they have not availed to Court documents to confirm that at the time of the accidents they were supplying supermarkets in Kenya and Tanzania. He said statements recorded by his employees were not correct. He said he had 25 to 30 employees at the time. He said he is normally the last to close at the end of the shift. He said after closing on Saturday, the next time they open is Monday.

34. On cross-examination by **Mr. Kisila** for the interested party, he admitted that he is the one who has brought to this suit the interested party **Baroda Bank**. He said the interested party had intended to sell by Auction two properties and that the plaintiff does not own the two properties. He said the properties are owned by the 2nd interested party **Reliance Metal Ltd** and 3rd interested party **Nakuru Press Top Ltd**; that it is the interested parties who charged their property to secure money loaned to the plaintiff. He said the interested parties have not filed a case. He denied that the first property is his and he had nothing to lose if it was sold to recover money owed to the bank. He also confirmed that he is not paying the loan, there is default in payment, and the bank is entitled to attach.

35. He further confirmed receiving letters dated 8th November 2016 and second letter dated 25th November 2016 written by 1st interested party to the plaintiff and formal letter informing him that the bank was about to sell property of guarantors on 10th January 2017. He said he has no claim against the bank. He said he was asking the bank not to sell the property awaiting the outcome of this case. He said he was servicing the loan at the time the premises were burnt and he understands he was required to pay the loan wherever the money came from.

36. On re-examination, PW6 stated there was variation in sum assured and claim because of replacement of machinery and what they indicate was replacement value, he said the reason for insurance refusal to pay was act of arson not because of variance on claim and sum assured. He said there were residue of spare parts burnt; that they were made of plastic.

DEFENCE EVIDENCE

37. Defence availed 8 witnesses. DW1 Claims Manager Mayfair Insurance said the fire incident herein was reported to her. She engaged an expert to obtain evidence, collect documentation and secured all necessary information for them to validate the claim. She said they perused the evidence and concluded that the claim was not accidental and informed the client accordingly. She said the policy has exception to the effect that if there is connivance it is excluded. She said they relied on connivance part in the policy.

38. On cross-examination, she confirmed that the plaintiff was insured by Mayfair Insurance Co. Ltd for fire policy and was paying premiums. She said the claim was not paid because of arson in connivance of the insured. She said at the time they rejected the claim, police were still doing investigations. She confirmed that Mayfair Insurance Co. Ltd paid the owner of the premises under a different contract from the same cause of action.

39. On cross-examination by counsel for the interested party, DW1 said the plaintiff's business was not doing well as shown by plaintiff's statement from **Baroda Bank**, which showed it had debit of Kshs.63 Million.

40. On re-examination, she said they paid the landlord because they had a different cover and had no connection with the fire.

41. DW2 who works with safety surveyors as coordination Nakuru branch testified that on 31st January 2016, at around 8 am, his boss called and informed him that there was fire outbreak at **Nakuru Polyplast Ltd**. He rushed to the scene and found fire extinguishers trying to put off the fire. He said the owner of the premises allowed him to take pictures after introducing himself.

42. DW3 who was an employee for the plaintiff as a machine operator testified that from the year 2015, they started having shortage of materials and there was delay in payment for salary. He said they were not paid in January 2016 and **Mr. Rahul** stopped going to work. He said the shifts had reduced to one; only during the day. He said they used to go to **Rahul's** house for salary but he would threaten them and on 31st January 2016, he told them to go as his vehicle had broken and the next day, is when they saw smoke from the building. He said 3 days before the incident; **Stanford** had been instructed by their employer to expand the opening done on the wall for ventilation. He said the grill, which covered the opening/hole, was not returned.

43. On cross-examination, DW3 said he worked for the plaintiff as machine operator though he never produced any document to prove employment neither did he have anything to show that the hole for ventilation was extended.

44. DW4 who worked as machine operator for the plaintiff saw when he woke up in the morning of 1st January 2016; he saw fire from the factory. He said before the fire incident, work has reduced and there were days they would fail to work. He said his employers 2 vehicles were involved in an accident. He said he told them he was going to check his vehicles and released them to go home on Saturday at 11.00 a.m. He said before the incident, **Rahul** had given instructions for a hole made for ventilation be expanded.

45. On cross-examination, DW4 said he had no document to show that he worked for the plaintiff and to show that his salary delayed. He said the hole for ventilation was widened 3 days before the incident.

46. In re-examination, he said the grill removed from the expanded hole was not replaced.

47. DW5 who worked for plaintiff as machine operator said that he learnt from a colleague that the factory was burning. He said the business had gone down and the number of employees had reduced. They used to burn waste but at the time their employer asked them to leave the waste and they were all over. He said they were later asked to put waste in a container the week before the fire; he said they were nylon papers. He confirmed that a hole meant for ventilation was expanded on instruction of **Rahul** and grill removed was not replaced.

48. On cross examination, he said the waste paper was from production process.

49. DW6 who was an employee of Safety Surveyors testified that they were instructed to investigate the fire incident and that he did the investigation with **John Thitai**. He said **Mr. Rahul** introduced himself as general manager of the plaintiff company; he opened the gate to the premises for them. He said part of the roof had curved in. They interviewed **Rahul** and his former employees; they also collected samples for analysis. He said there is no doubt that the premises were subjected to fire situation. He said they ruled out electrical fault as all electricals had been switched off and there was no activity of cooking. He said based on the residue it was evident that production was bare

minimal; that there was minimal raw materials.

50. DW6 confirmed that there was an opening on the wall and found it peculiar for a running factory to have a hole not attended to leading to an open area outside.

51. On cross-examination, he confirmed that he stated that **Kuria** could not categorically state what caused the fire. He said he went to the premises 4 days after and found that the wall had collapsed but it had not buried the entire premises. He confirmed that remnants were taken to government chemist for fire accelerators like kerosene, petrol and diesel but results were negative. He said on checking with police they found what was recorded was general report that factory had been gutted by fire and they took up investigations. He said he is not aware of anyone charged for arson and his engineer colleague confirmed that there was no power outage.

52. On re-examination, he said police investigators could not have completed investigations in 4 days. He said there is possibility that there could have been invasion through the open hole.

53. DW7 a loss investigator cum adjustor and electrical engineer testified that he was mandated to investigate fire incident of 31st January 2016 at Nakuru Polyplast. He said they used deductive approach to narrow out the source of the fire and find what contents could have caused fire. He said they concluded it was an act of arson linked to insured. Reason he advanced was presence of unattended hole expanded and left exposed a few days before the fire and downward trend of the business. He said security provided by one guard from Prinks Security was not sufficient as he was guarding three godowns in big area of about 2 ½ acres. He gave three reasons for their conclusion being business performance; hole left /exposed and fire concentration, which saw three seats. He said the person who caused the fire must have crept through the hole.

54. On cross-examination, he said he is not a fire expert, he is an engineer but he has attended seminars and trainings on fire. He confirmed that report from Government Chemist is that there was no indication of fire accelerants. He said they also visited county fire department and found that in their report, the cause of fire was not identified and as at the time of filing report, no one had been charged for arson. He said it is only his investigation team, which came up with report that there was arson. He further said they were not given inventory of materials.

55. DW8 who is 2nd defendant's senior claims officer, confirmed that the 2nd defendant was involved in procuring insurance policy on behalf the plaintiff. He confirmed that the cover was for kshs.64,850,000. He confirmed that the amended plaint read kshs.68.55Million and the sum in the amended plaint adds up to kshs.85.5Million. He confirmed there is a discrepancy between what is in the cover and what is in the plaint. He said the insurer may have undervalued the policy and confirmed that liability should not be more than what is covered.

56. On cross-examination, DW8 said the plaintiff approached them; they assessed the cover and proposed Mayfair Insurance to them. He said their arrangements to link the client to insurance company. He said documents from Mayfair Insurance were sent through their office and they explained to the client the nature of the forms they were signing. He said they proceeded to collect premiums on behalf of Mayfair and there was no default in payment by the plaintiff. He confirmed that incident of fire occurred at insured's premises and there were several claims in respect of the same fire incident and that they owned one of the claims. He confirmed that the landlord Nakuru Industries was paid under a different contract.

57. He further testified that change of technology and fluctuation of shilling cannot change the policy; that the sum assured will be the maximum liability the insurer will pay the client. He said as insurance brokers, they did not reject the claim; that they only relayed the information from the insurance to the client and the claim was not paid based on loss adjustment report; that cause of fire is the cause of rejection of the claim.

58. He further confirmed that they did assessment and found there was undervaluation of property and confirmed that undervaluation is fraud on part of the insured but they have not filed any report with the police.

59. On cross examination, he said technological advancement do not affect the cover; that liability of insurance policy cannot exceed what is covered under the policy and fluctuation of dollar cannot change the total amount of cover. He said they did not investigate the fire incident as a broker and there is no legitimate expectation to be paid more than what is covered.

60. DW9 testified that he was instructed to go and confirm presence of fire by Mayfair Insurance Co. Ltd. He said that he called the Nakuru branch manager who went to the scene and took photographs. He visited the scene the next day and met with directors of the company. He made an impression that the fire was huge. He said the roof and walls of the godown on the rear side had collapsed. He carried out analysis and found that the fire was severe. He said he was able to identify where the fire started which they call seats of fire. He said they identified three seats of fire.

61. He further stated that on analysing the cause of fire, he found that it was not accidental reason being that there were three seats of fire instead of one. He said where fire starts it will continue as long as there is oxygen. He said fire would not burn unless there is fuel, oxygen and heat. He said the three seats of fire were toilets, behind marine container and within the container itself. He said the office, which was made of fire and was far still burnt and in that area, the roof did not collapse.

62. He said he ruled out a few possibility of anything that could have caused accidental fire, which include cigarette, cooking, thrash, and electric fault, which could have caused fire. He said **Rahul** told him the container was full with PVC material but he checked and found it negligible. He said the fire was so intense and what **Rahul** told him was a lie. He said he learnt from employees that they had been asked to stash the waste materials in the container and others had spread to the toilet behind the container. He said he identified seat area where the materials had been stashed.

63. DW9 said he checked with plaintiff's bank and found that the plaintiff had arrears of over Kshs.60 Million and plaintiff's cheques were bouncing. DW9 said he asked plaintiff if he could to his suppliers but he declined and he concluded that plaintiff had not purchased

materials.

64. On his qualifications, DW9 said he is a fire and safety manager and specialised member of risk management and a graduate of institute of fire engineers and occupational health and safety with 40 years of experience.

65. He said he estimated the extend of the damage at kshs.32,881,730. He advised the insurance that there is no liability because the plaintiff participated in the cause of fire and should not benefit from it. He said he attached the value in the event that he was to be paid and in the assessment he removed all stock and raw materials because plaintiff didn't have any.

66. On cross-examination, he said he interviewed plaintiff's employees and took samples for forensic examination. He said they also interviewed **Stanford Makokha** who recorded a statement but he refused to sign it.

67. On further cross-examination, he said findings at the police station were that the matter was still under investigation. He confirmed that the samples were subjected to analysis by Government chemist and the results turned out negative. He confirmed that evidence gathered from **Leonard Cheruiyot** by **John Thitai** and **John Kambogo** contributed to the conclusion. He further said he would not have reached a different opinion if what **Leonard Cheruiyot** were different. He said he also considered bank statements to arrive at the conclusion. He said the building is not fitted with motion detectors and the insured did not have security of his own but the landlord provided security from Prinks Company.

68. On re-examination, he said recanting of statement by **Leonard Cheruiyot** does not affect his report. On plaintiff's bank account, he said it is only **Rahul** who could provide the account. He said the plaintiff did not have motion detectors and security firm's control room could not have picked any motions. He said the plaintiff did not have alarm system.

THE JOINT PLAINTIFF, 2ND AND 3RD INTERESTED PARTIES SUBMISSIONS

69. In their joint submissions, the plaintiff, 2nd and 3rd interested party started by giving the background of this case and summary of evidence adduced in court which I have captured above. They submitted that **no evidence was tendered by any person in relation to the 1st interested party's case. The bank did not also avail any witness to testify.**

70. They further submitted that it is important to note that there was an admission on the part of the claims manager the plaintiff's claim was rejected before conclusion of investigations by police, fire department and government chemist. That the evidence tendered was also marked with serious inconsistencies as to who obtained the samples or evidence. Further that the defendant's witnesses did not have documents to support their claims and hearsay evidence was the backbone of the defendants' case as all the witnesses testified as getting information after the fact and pursuant to interviews. That the entire defendant's case was based on a deductive reasoning approach; that there was no direct evidence hence, most of the testimonies tendered were derivative evidence which is the secondary evidence of oral statement. Further that defendant obtained documents without the necessary consent or court orders and submitted that its trite law that illegally obtained evidence is as such inadmissible in trial law; and that Plaintiffs adduced documents to prove that the figure of kshs.68.5Million was the value for replacement.

71. On the burden of proof, the plaintiff quoted **Sections 107 and 108 of the Evidence Act Cap 50 Laws of Kenya** as follows: -

"107 (i) whoever desires any court to give Judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist....." when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

"108 the burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given either side....."

72. And submitted that the Plaintiff has proven her case on a balance of probability and prayed that the Court grant prayers as prayed in the amended plaint; that the plaintiff adduced credible evidence which is sufficient to tilt the case in favour of the Plaintiff on a balance of convenience; that the plaintiff witnesses' respective testimonies collaborated and suggested that there was no justifiable and or cause of the defendants rejecting the Plaintiff's claim based on the fact that there was no arson.

73. On whether there was breach of contract, the plaintiff cited the case of **Prudential Assurance Co. Ltd -Vs- Inland Revenue Commission 1904 KB 658 at 663** where the court held as follows: -

"A contract of insurance then must be a contract for the payment of a sum of money or for some corresponding benefit such as the rebuilding of a house or the repair of a shape to become due on the happening of an event which event must have some amount of uncertainly about it and must be of a character more or less adverse to the interest of the person affecting the insurance".

74. Plaintiff submitted that all the terms of the contracts which required the performance of obligations by the Plaintiff had already been complied with as demonstrated by evidence of PW3, PW 6, DW 1 and DW 8 to the effect that the contract was executed and premiums paid; and further the Plaintiff's landlord was compensated for the same fire incident.

75. Further that the contract of insurance as per **policy no.1/01/040/1612** assumes a twin approach to the same in terms of its nature as it provides as follows: -

“The company agree (subject to the conditions contained herein or endorsed or otherwise expressed hereon which condition shall so far as the nature of terms respectively will permit be deemed to be conditions precedent to the rights of the insured to recover hereunder) that if after payment of the first premium the properly insured described in the schedule or any part of such property be lost, destroyed or damaged by any of the perils specified in the schedule at any time during the period of insurance or of any subsequently period in respect of which the insured shall have paid and the company shall have accepted the premium required for the renewal of this policy, the company will pay to the insured the value of the property at the same time of the happening of its loss or destruction or the amount of such damage or at its option will reinstate or replace such property or any part thereof”

76. That the above would lay a basis as to why the Plaintiff legitimately expected the restoration to the position he was before the fire informing therefore a foundation for the prayer of replacement value of Kshs..68,500,000/= prayed for but the Court is vested with jurisdiction to give appropriate orders to meet the ends of justice.

77. Plaintiff submitted that that the ventilation hole was there throughout even in the final renewal of the policy; that DW8 confirmed that assessment were based on the risks as comprehended by the assessors and that subsequent to their renewal they received all the payments premiums.

78. On fraud Plaintiff quoted **Bullen and Leake of Jacobs Precedent Pleadings 13th Edition** which was quoted with approval in the case of **Wallingford –Vs- Mutual Society (1980) 5 App Case 685 at 697, 701, 709** and in the case of **Garden Neptune Vs Occident (1989) Illoyds Rep 305, 308 Lawrence Vs Lord Notrey 1880 15 App Case 210 at 221** and **Davy –Vs- Gancert 18787 Chd 473 at 489** as follows:-

“Where fraud is intended to be charged there must be a clear and distinct allegation of fraud upon the Pleadings and thought it is not necessary that the word fraud should be used the facts must be stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations and facts circumstances leading to the reasonable inference that fraud was the cause of loss complained of, it is not allowable to leave fraud to be inferred from the facts and as distinctly proved general allegations however strong may be the words in which they are stated are insufficient to an averment of fraud of which any court ought to take notice.”

79. The plaintiff submitted that from testimony of PW1, no intrusion was sensed in the (from evidence and documents tendered) motion sensors within the production premises. b) PW2 no entry and/or exit was established from evidence and documents tendered or seen before or after the fire incident and in failing to prove fraud and connivance no document was tabled to prove the distance from the Plaintiffs premises to the business premises, the defendants procured favorable testimonies from non-employees which was largely hearsay evidence. That the Defendants witness confirmed that the claim was rejected without the final confirmation and conclusion of investigation from competent authorities i.e. police and the fire department. The report prepared and relied on by the defendants also was subject to challenge as the same was gathered by non-experts, the report was a sham and a desperate attempt to clutch at straws aimed at disenfranchising the Plaintiff rights to compensation.

80. On the expert testimony the plaintiff submitted cited the case of **Stephen Kinini Wang’ondu Vs. The Ark Limited [2016] eKLR** where it was held:

“Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for court use being commissioned on any factual matter, technical or otherwise, provided; it is deemed likely to be outside the knowledge and experience of those trying the case, and the court agrees to the evidence being called.

While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account. Four consequences flow from this.

Firstly, expert evidence does not “trump all other evidence”. It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.

Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be “artificially separated” from the rest of the evidence. To do so is a structural failing. A court’s findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.

Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.

Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones.”

81. Plaintiff and the 2nd and 3rd interested parties concluded that the 1st defendant has failed to prove particulars of fraud and connivance and they cannot therefore repudiate the contract.; that the Plaintiff is entitled to compensation on the basis of the replacement value which is kshs.68Million or on the basis kshs.64 Million and urged the court to exercise its discretion to allow the prayers as prayed for in the amended plaint with costs.

DEFENDANTS' SUBMISSIONS

82. The defendant submitted that by the amended defence, they assert that the claim has not been made out and the plaintiff's suit should be dismissed with costs.

83. The defendant's counsel gave summary of facts and submitted that it is not disputed that the plaintiff entered into an insurance contract dated 1st October, 2015 with the 1st defendant under **policy No.1/01/040/1612/2013** to cover for plaintiff's property itemized in the insurance policy for a period of one year from 1st October 2015 to 30th September 2016 for cumulative figure of kshs.64,850,000.

84. That it was established from pleadings and evidence that the plaintiff's property were destroyed by fire on 31st January 2016; that the plaintiff subsequently filed a claim for kshs.68,500,000 rather than kshs.64,850,000 under the policy cover despite liability limit being provided under the policy.

85. The defendants further submitted that upon commissioning investigations, preliminary and final report, the fire was not fortuitous and accidental but suspected act of arson and the investigator advised the liability upon the insurance policy did not attach and subsequently the 1st defendant issued a letter dated 17th August 2016 denying liability for claim under the insurance policy; and plaintiff being aggrieved by the said decision instituted this suit. For kshs.68,550,000 special damages in the sum of kshs.2,049,434, costs and interest.

86. The defendant submitted that it is not in dispute that there was fire on the plaintiff's premises on or about 31st January 2016 but contend that the fire was not accidental as alleged by the plaintiff but was wilful act or connivance of the plaintiff. Plaintiff submitted that it was established in evidence that prior to the fire incident on 31st January 2016, the plaintiff had been experiencing financial difficulties and the plaintiff's **Rahul Maisuria Kumar** had been running overdraft facilities with the 1st interested party; that the employees of the plaintiff also confirmed that the business had been struggling in the months before the fire incident resulting in slowdown in production.

87. Defendants' counsel further submitted that two of the defendant's witnesses testified that the plaintiff's employee had been instructed to create a hole next to one of the extruder machines in the plaintiff's premises purportedly for ventilation and preliminary and final reports of Safety Surveyors Limited concluded the fire incident was not accidental in that the pattern of fire was not spontaneous, a hole had been expended, amount of residue collected from the premises contradicted plaintiff's account and absence of accelerators does not negate the presence of a fire only that it was not accelerated.

88. Defendants submitted that under the insurance law, the insured cannot be compensated for any loss or damage suffered which they deliberately or fraudulently caused.; that actions of the plaintiff created an inference that it deliberately caused the damage for which it seeks compensation and cited the case of **Slattery Vs Mance[1962] Aii 525** where the court held that:

“... the plaintiff cannot recover if he was the person who fired the ship or was a party to the ship being fired...

That it is a well-known principle of insurance that no man can recover for a loss, which he himself deliberately and fraudulently caused. That it is no more than an extension of general principle of insurance law that no man can take advantage of his own wrong.”

89. The defendants submitted that the terms of an insurance policy include the claim conditions which provide that benefit would be forfeited if any damage is caused by wilful act or connivance of the plaintiff; that the condition is in the nature of exclusion clause by which liability under the insurance policy may be avoided. That to the extent that the exclusion clause is unambiguous, this court is obligated to enforce it and cited the English case of **Ailsa Craig Fishing Company Ltd V Malvern Fishing Company Ltd [1983]1 WLR 964** which was cited with approval in the case of **Consolidated Bank of Kenya Limited V Securicor Security Services Kenya Ltd [2013] eKLR** where the court held as follows: -

“The key requirement is that an exemption clause must be clear and unambiguous. If it is clear and unambiguous, the court will, as a general rule, enforce it.”

90. The defendant's submitted that the particulars of wilful act and connivance were established at the trial Court as set out at paragraph 25 of the submissions and under general principles of contract law. Parties are only bound to fulfil obligations to uphold rights that are within the scope of the contract as held in **Silvester Automobiles Limited v Fidelity Shield Insurance Co. Ltd [2014] eKLR** where the court held as follows:-

“The rights of the insured were limited to the terms of the policy and the court would not go outside those terms.”

91. The defendant's further submitted that without prejudice to the foregoing, if shown that there was no wilful act. It is self-evident that the fire was caused by connivance of the plaintiff and connivance is not defined under the insurance policy but in black's law dictionary it is the act of indulging or ignoring another's wrongdoing especially when action should be taken to prevent it; that its further defined as “to knowingly overlook another's wrong doing “or loosely “to conspire”

92. In respect to special damages of kshs.2,049,434 made up of kshs.1,562,514 being rent for storage of burnt machinery and kshs.486,920 being crane hire charges, transport and labour; that despite include the claim in the amended plaint, there are no particulars to show how the expenses were incurred; that generally special damages must be specifically pleaded and particularly proved as held in the case of **Christine Mwigina Akonya V Samuel Kairu Chege [2017]**

93. And special are not to be awarded even if proved in the trial but they were not pleaded as held in the case of **Kenya commercial Bank Vs Katiba Ya Odongo Katiba Valuers.[2002] 2 KLR 419.**

94. Defendant submitted that in this case, particulars of damages were neither pleaded with sufficient particularity neither were they proved at trial. The defendant's submitted that in paragraph 13 of the amended plaint, the particulars of loss and damage add up to kshs.85,000 as held in the case of **Hesbon Onyuro & Another (suing as administrator of Alice Akoth Okongo (Deceased) Vs First Insurance Company Limited [2017] eKLR** under principles of indemnity, the plaintiff is to be put back to condition prior to the fire and such loss and damage being in the nature of special damages, ought to be pleaded, particularized and proved to the required standard. That while prayer of the amended plaint is for principal sum of kshs.68,550,000, this is not made out anywhere in the amended plaint. That there is no explanation for particularization adds up to kshs.85,000,000 in paragraph 13 of the amended plaint.

95. As to whether the plaintiff was in breach of its contractual obligation under insurance cover, the defendants submitted that the plaintiff was in breach of **clause 1 (a) of insurance policy** by failing to take urgent steps to minimise the loss by taking long to reach the scene; further that plaintiff was in breach due to wilful act or connivance and the fact the landlord has been paid for the same fire is immaterial to this suit as the 2 entities were covered under separate entities by the 1st defendant.

1ST INTERESTED PARTY'S SUBMISSIONS

96. The 1st interested started by giving background of this case and submitted that the interested parties were enjoined into this suit vide ruling delivered on 28th November 2018 following an application by the plaintiff. That prior to that, the plaintiff had filed an application dated 19th February 2018 to restrain the bank from selling the suit property in exercise of its power of sale. 1st interested party submitted that it had opposed the said application on the ground that there was no privity of contract between the 1st interested party and the defendants herein.

97. The 1st defendant therefore submits on one issue which is whether the interested party was privy to the contract between plaintiff and defendants.

98. Counsel for the 1st interested party submitted that it is common ground that there exists a contract between the plaintiff and the bank; that the contract which is presented as a legal charge is tripartite in nature to the extent that it has been executed by three parties; who include plaintiff as the borrower, the bank as the charge and the 2nd and 3rd interested parties as the chargors.

99. That there are obligations which flow from the contract for which each party is responsible; for plaintiff and chargors is to pay the loan as per various charge instruments; that the plaintiff has admitted that they could not pay the loan as agreed and therefore defaulted in repayments; that they admitted receiving all demand letters in respect of outstanding amounts but failed to clear the same.

100. That clause 9 and 10 of the charge instruments clearly stipulates that in the event of default, the bank reserve the right to take appropriate action to recover the amount due. The 1st interested party submit that in view of the fact that the contract between the parties is not contested the plaintiff alongside the charger cannot compel this Court to stand in the way of enforcement of the contract and purport to suspend any of its terms as relating to any remedial action taken by either party whenever there is a breach more so if the action is consistent with the terms and conditions of the contract.

101. The 1st interested party submitted that the plaintiff alleged that it failed to meet its obligations under the charges due to the incident that affected its business operation and the plaintiff ought to be indemnified by 1st defendant's but it is their submissions that there is no link between the 1st defendant and the bank.

102. That the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract and cited the case of **Gricultural Finance corporation v Lengetia Ltd & Jack Mwangi** where the court held as follows: -

“As a general rule a contract affects only parties to it, it cannot be enforced against a person who is not a party.”

103. 1st interested party concluded that there is no privity of contact between the plaintiff and the 1st defendant and neither is the 1st defendant privy to the contract between the plaintiff and the bank; and the standoff between the plaintiff and the 1st defendant herein should not be visited upon the 1st interested party are the two contracts herein are mutually exclusive and prayed that the Court allow the 1st interested party to exercise its statutory power of sale since the plaintiff is truly indebted to the bank and the bank continues to suffer irreparable harm due to continued growth of the debt and urge Court to be guided by the case of **Andrew Muriuki Wanjohi Vs Equity Building society & 7 others [2006] eKLR** where the court held that by offering security the charger was equating it for commodity which the charge may dispose off so as to recover his loan together with interest.

ANALYSIS AND DETERMINATION

104. From evidence adduced, there is no dispute that the plaintiff took a fire insurance policy from **Mayfair Insurance Company** through

Tevee Insurance Brokers(2nd defendant). There is also no dispute that the premiums were paid by plaintiff as required and that the plaintiff's premises were torched by fire. The plaintiff's landlord was paid for damage of the premises under a different policy but the plaintiff's claim was not paid on the ground that the plaintiff was in connivance of the fire that damaged its property.

(i) Whether the plaintiff caused the fire, which damaged its property.

105. There is no dispute that the plaintiff's property was destroyed by fire. This was admitted by the defendant and confirmed by report made to police which was proved by occurrence book extract from the police and oral evidence adduced and report made by investigators commissioned by the 1st defendant. I consider the following to be in issue: -

- a. Whether the plaintiff is guilty of wilfully act and connivance.
- b. Whether plaintiff is entitled to indemnity and to what extent.
- c. Whether the interested party should be restrained from exercise power of sale over the plaintiff's property.
- d. Who is to pay costs?

a. Whether the plaintiff is guilty wilfully act and connivance

106. DW9 together with his team which was made up of himself, DW6 and DW7 were mandated to investigate came up with finding that the plaintiff's business was not doing well at the time and plaintiff caused the fire to unjustly benefit from the insurance company. Their evidence was gathered from employees who include PW4 **Leonard Cheruiyot** who later recanted his evidence through affidavit dated 21st may 2019. He denied having been told to put trash in a container. He said he refused to sign statement recorded by insurance agent DW6. He denied the signature in the statement though the ID number is his.

107. PW5 **Geoffrey Kibet Yegon** who was an employee of plaintiff also denied the statement recorded for them by DW6 he denied that there were no raw materials as recorded in the statement. He denied the signature in the statement. He said there were plenty of raw materials in the container and in the store.

108. DW6, DW7 and DW9 all testified that the work had gone down to the extent of reducing to one shift per day and delay in payment of salaries and workers had been laid off; further workers were asked to stash trash in a container and there was an opening to the outside which was done 3 days prior to the fire. All these were however denied by PW4 and PW6 whose statements the insurance investigation team relied on.

109. DW9 further said they established that the plaintiff was in arrears in Baroda Bank and cheques were bouncing and upon piecing up information received, DW9 and his team concluded that the plaintiff caused the fire and should not benefit from the insurance cover.

110. However, DW9 in his evidence confirmed that analysis by Government chemist came back with negative results. That no accelerators, which could be petrol cigarettes or diesel, caused the fire. Investigations by police were still pending. Evidence adduced show that no one has been arrested for the fire. Police have not made a finding of arson on part of the plaintiff or any other party. From the foregoing, I find that there is no conclusive evidence to the effect that the plaintiff caused the fire, which damaged its property.

111. On explanation of the hole which could have been used by an intruder to cause fire in the premises, evidence adduced did not reveal intrusion through the hole which the plaintiff explained was meant for ventilation. On steps taken to mitigate the loss, the omission on part of the plaintiff was not clearly demonstrated by 1st defendant in evidence adduced.

b. Whether plaintiff is entitled to indemnity and to what extent.

112. The defendants further argued that the plaintiff undervalued its property when taking the insurance cover, which is against the insurance policy. It is admitted that the figure they gave police and in the plaint is higher than the insured sum. However, the plaintiff explanation is that the valuation they gave was the value of machinery at the time of fire, which is dictated by advancement in technology, and value of the dollar. My view also is that the insurance has a duty to value the property before issuing the policy as the valuation given by their proposed customer's may not always be correct valuation of the property to be insured. No alternative valuation prior to issuance of the insurance cover has been tendered in evidence. I find the explanation given by plaintiff as satisfactory. There is no demonstration of ill intention on the part of the plaintiff in respect to valuation of the property.

113. DW8 the 2nd defendant's senior claims officer confirmed that the sum assured was kshs.64, 85,000 and liability cannot be over what was covered. The plaintiff cannot therefore be paid the claimed amount of kshs.68,550,000.

114. In view of the fact that there is no prove that the plaintiff is guilty of arson and premium was fully paid as required, I find that the plaintiff is entitled to indemnity to the tune of kshs.64,850,000.

c. Whether the interested party should be restrained from exercising power of sale over the plaintiff's property

115. The plaintiff has not disputed owing the interested money in respect to credit facilities advanced by the interested part. The plaintiff has not disputed the fact that the credit facilities advanced are in arrears and demand and statutory notices for sale issued. I agree with counsel

for the interested party that the interested party is entitled to recover arrears which is admitted to be owing. The instrument of charge in respect to the credit facilities gives the interested party (Bank) powers to sell the chargors (2nd and 3rd interested parties) properties in the event of default. Advancement of the credit facilities is not predicated on business running smoothly but ordinarily, the chargor is at liberty to negotiate restructuring of loan and/or for new terms in the event of any misfortune that negatively affect the running of the business. It was therefore the responsibility of the plaintiff to renegotiate with the bank after the fire incident. No evidence of such a move has been tendered. It would not therefore be proper for the Court to come in between the terms agreed between the plaintiff and the bank and the chargors. From the foregoing, the interested party is at liberty to execute if no agreement to do otherwise is reached between the three parties. Costs to follow the event.

116. FINAL ORDERS

- 1. Judgment is entered for plaintiff against the 1st defendant for kshs.64,850,000.**
- 2. I decline to issue any restraining orders against the interested party.**
- 3. Costs to be paid by the 1st defendant to the plaintiff.**
- 4. Plaintiff to pay costs of this suit to the interested party.**

Judgment dated, signed and delivered via email at Nakuru this 14th day of May, 2020

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RACHEL NGETICH

JUDGE

TO:

Amos Andama Advocates - Counsel for Plaintiff, 2nd and 3rd interested parties

Mr. Cicil Kuyo Advocates - Counsel for 1st and 2nd Defendants

Mr. Kisila Daniel Advocates - Counsel for 1st Interested Party