REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCC NO. 13 OF 2013

ERDEMANN COMPANY (K) LIMITED.....PLAINTIFF

Versus

CANNON ASSURANCE LIMITED.....DEFENDANT

JUDGMENT

1. In the afternoon of 1st November 2011 there was a landslide at the Nairobi Dam which resulted in the damage of structures that had been constructed by Erdemann Company Limited (Erdemann or the Plaintiff) on LR. 209/12108/Kibera. A dispute has arisen as to whether Cannon Assurance Limited (Cannon or the Defendant) is liable to meet the claim resulting from that loss and a Performance Bond given in relation to the contract on construction.

2. Erdemann is a property developer and desirous of developing its property adjacent to the Nairobi Dam, contracted Rosolo Building Company Limited (the Contractor or Rosolo). The works on the property to be developed now known as Seefar Apartments began on 4th July 2011. Through an Insurance policy No.01/02/03309/11, Erdemann took out a Contractor's All Risk Policy (CAR Policy) valid for the period 27th October 2011 to 26th October 2012 with Cannon Assurance. In that Policy Erdemann was named together with the Contractor as the Insured. The total sum insured was Kshs.290, 000,000/- being the Contract price.

3. In addition, Cannon issued Erdemann with a Contractor's Performance Bond (the Bond) dated 28th October 2011 in which Cannon undertook to satisfy and discharge damages sustained by Erdemann as a result of default on the part of the Contractor upto the sum of Kshs.28,000,000/=.

4. It is the case for Erdemann that following the landslide, the embankment of its projects collapsed and it incurred loss. It duly lodged a claim under the Insurance contract. While the settlement of the claim was pending, the Contractor breached the construction contract and was thereafter issued with a default notice. Having failed to comply with the default notice, Erdemann terminated the Contractor's contract through a letter of 6th March 2012. On 30th March 2012, Erdemann lodged a claim with the Defendant under the Performance Bond. Settlement of the claim and the Bond was not forthcoming and on 14th May 2012, Cannon wrote to Erdemann cancelling the Insurance policy and the Performance bond with effect from inception.

5. Erdemann is aggrieved by the said cancellation and avers that it is a breach of the Insurance contract and Performance bond. Erdemann sets out the following as the particulars of breach:-

(a) Unlawful cancellation of the contract and performance bond with no justifiable reason.

(b) Refusal to indemnify under the insurance contract and performance bond.

(c) Advance of invalid reasons for the cancellation.

6. The suit before Court by Erdemann is to force Cannon to indemnify it in respect to losses said to have been incurred as a result of damage by the landslide and the Contractor's default. The damages are enumerated as follows:-

(a) Value of restored works Kshs. 52,185,120.00

(b) Removal of landslide soil from site Kshs.23,475,354.80

(c) Additional preliminaries Kshs.7,566,147.50

(d) Additional professional fees Ksh.9,987,315.00

(e) Compensation for contractor's default Ksh.28,000,000

Total Kshs.121,214,937.30.

7. The Plaintiff seeks a declaration that the cancellation of both the insurance contract and performance bond was invalid. In addition, it prays for judgment for the aggregate sum of Kshs.121,214,937.30 with interest thereon at commercial rates. It also seeks costs of the suit.

8. The claim is defended by Cannon through the statement of defence and counter claim filed on 27th March 2013. The Defence by Cannon is that through misrepresentation, non-disclosure and fraud, Erdemann and the Contractor induced the insurer to issue the CAR Policy and Bond. The particulars of misrepresentation, non-disclosure and fraud have been set out in paragraph 4 of the statement of defence.

9. It is alleged by Cannon that as at the date of the submission of the proposal, being 25th October 2011, the Plaintiff and the Contractor knew or ought to have known that;-

(a) The subsoil on the site was black cotton soil and/or clay and filled ground and that the entire area on which the Nairobi Dam was established was filled ground.

(b) Work had commenced on site on or about 4th July 2011 in which substantial excavation work had been undertaken to provide for a basement and foundation columns for the buildings to be erected on site. The works had commenced without consideration of the soil conditions and any or any adequate safety measures for the stability and protection of the Nairobi Dam and the likely instability caused to the soil upstream by the said works which had reduced the strength of the soil supporting the Nairobi Dam.

(c) That on 20th July 2011, the Water Resources Management Authority (WRMA) had issued a Stop Order upon Erdemann because Erdemann was not observing the right distance of the riparian area for the Nairobi Dam to the western part of the plot and the Ngong River to the southern part of the Plot.

(d) Further excavation continued on the site downstream after July 2011 with no measures taken for the safety and protection of the soil supporting the Nairobi Dam.

(e) There was a leakage to a sewer line that existed between the crest of the Nairobi Dam and the site which was found not later than 11th October 2011 and continued to leak until the collapse of the soil upstream on 1st November 2011.

(f) That the landslide or collapse had begun prior to the date of proposal.

(g) The Plaintiff and the Contractor had failed to disclose that the neighbouring properties would be or was affected by the excavations that had been undertaken. And that underpinning was required to the said property.

10. A theme running through the defence is that being a contract of insurance whose basis is utmost good faith, it was Erdemann's duty (as one of the proposers), to make full disclosure of all material facts known to it and not to conceal any material facts whose design was to induce the insurer to accept the risks which the insurer would not have accepted if all the material facts were known to it. It is alleged that the Plaintiff fraudulently concealed and/or failed to disclose the material facts known to it at the material time while knowing that the proposal was false and untrue and/or reckless, not caring whether it was true or false. The case by Cannon is that Erdemann knew or ought to have known that the collapse was neither unforeseen nor sudden.

11. On another front, Cannon maintains that the loss occurred before it was a risk for which it was liable as there was no policy of insurance in place on or before the premiums were received. The premiums having been paid on 3rd November 2011.

12. Lastly, it is stated by Cannon that it is not liable to indemnify the loss for the following reasons;-

(a) The loss was not caused by a landslide as defined and/or contemplated by the CAR policy as it was neither "unforeseen" nor "sudden".

(b) The loss (if any was suffered by the Plaintiff and/or Rosolo which is categorically denied) was caused by the willful acts and/or willful negligence of the Plaintiff and/or Rosolo and their representatives.

(c) Special exclusions to Section 1 of the CAR Policy applied in that the loss or damage was caused by faulty design in not designing or taking any safety measure for the instability of the soil upstream by carrying out substantial excavation on the site downstream.

(d) Special exclusions to sections 11 applied for the same reason.

(e) Liability was excluded by reason of the Special Condition concerning safety Measures.

13. At the hearing Erdemann called 5 witnesses. For purposes of this judgment the numbering of witnesses differs from the record because Hon. Kariuki J. who took Plaintiff's case referred the witnesses as DW. These witnesses are Hellen Opondo Sawe (PW1), Ze Yun Yang

(PW2), Kaburu Rutere (PW3), Sutinder Jabbal (PW4), Francis Ndegwa Mwangi (PW5) and Peter Kuria (PW6). On the side of Cannon were Nicholas Evans (DW1) and Raphael Ochieng (DW2). At the close of hearing, counsel for the parties filed written submissions. The evidence and submissions are considered in this decision in so far as they relate to the issues that require determination.

14. What are those issues? Through a joint list of agreed issues dated 22nd October 2013, the parties herein identified 10 issues for determination. These are:-

1. (a) Whether the Plaintiff is a limited company duly incorporated in the Republic of Kenya?

(b) Whether the Plaintiff carries on a construction business in Kenya?

(c) Whether the Plaintiff has any insurable interest in the Contractors All Risks Policy Number 01/02/033309/11 ("the said policy") allegedly issued to the Plaintiff by the Defendant as pleaded in paragraph 8 of the Plaint?

2. Did the Plaintiff owe the Defendant a duty to observe utmost good faith to the Defendant in this contract of insurance?

3. (a) Did the Plaintiff fail to disclose to the Defendant the material facts amounting to misrepresentation non-disclosure and fraud pleaded in paragraph 4 of the Defence thereby inducing the Defendant to underwrite the risk by issuing the said Policy and the Performance Bond both on 28th October 2011?

(b) Was the Defendant aware of the matters pleaded in paragraph 3(a) above and is the Defendant estopped from claiming that the Plaintiff is guilty of material non-disclosure?

(c) Was the Defendant obliged to further satisfy itself as to the nature of risk it was undertaking?

4. Was the damage caused by faulty design in designing or taking any safety measure for the instability of the soil upstream by the Plaintiff carrying out substantial excavation on the site downstream with Special Exclusions to Section 1 of the said policy? In any event is the Plaintiff to benefit from its own wrong?

5. Whether the Plaintiff and Rosolo Building Company Limited were covered by the said Policy as at 1st November 2011 before the receipt of the premiums for the said Policy?

6. Whether the Plaintiff suffered a loss that was covered by the said Policy and the Contractor's Performance Bond both dated 28th October 2011 issued by the Defendant?

7. Whether the Defendant was entitled to cancel and/or rescind the said policy and the Contractor's Performance Bond?

8. Whether the Defendant is entitled to a declaration that the said Policy and the Performance Bond both dated 28th October 2011 have been rescinded as pleaded in the counterclaim?

9. Whether the Plaintiff is entitled to a sum of Kshs.122,214,937.30 from the Defendant on account of the Defendant's breach and or cancellation/rescission of the said policy and the performance Bond both dated 28th October 2011.

10. Who is entitled to the costs of this suit?

It is however apparent that issue No. 1 was altogether dropped in the course of hearing while the other issues can be collapsed into thematic areas.

Duty to observe utmost good faith.

15. It is common ground that a fundamental of an insurance contract is that it is a contract of *uberrimae fidei*, one of the utmost good faith. Both parties were happy to cite the decision of Maraga J. (as he then was) in Sita Steel Rolling Mills Limited vs. Jubilee Insurance Co. Limited [2007] eKLR. There his Lordship said this of that legal proposition;-

> "[T]he contract of insurance is perhaps the best illustration of a class of contracts described as *uberrimae fidei*, that is, of the utmost good faith. That being so the potential parties to such contract are bound to volunteer to each other, before the contract is concluded, information that is material. This principle imposes on the proposer or insured the duty to disclose to the insurer, prior to the conclusion of the contract, but only up to that point, all material facts within his knowledge that the latter does not or is not deemed to know".

16. There is imposed on the proposer or insured a high duty, prior to the closure of a contract, to disclose all material facts within his/her knowledge to the insurer which the insurer does not know or is not deemed to know. That duty is only upto the point the contract is concluded. The rationale for the rule is that Insurance being a contract upon speculation, it would be patently unfair to induce an insurer to cover a risk whose full scope has not been disclosed to him.

17. Counsel Mucheru for Erdemann however asks this Court to consider another aspect of this doctrine and cites the following passage from

the same decision (Sita Steel (*supra*));-

> "*There can be no doubt therefore that the contract of insurance is a special one in terms that Lord Mansfield expressed but it is important to remember that the case of Carter – Vs- Boehm in which he formulated those terms involved a contract entered into at a time when communications were poor and insurers were not equipped with means of easily discovering all the information they needed to know by asking the proposer questions*".

Counsel urges the Court to find that the duty to act in utmost good faith does not apply with double standards or bias only to hold the insured as bound by it. The Court is asked to find that even the insurer is under a duty to investigate or inquire prior to issuing cover.

18. The emphasis to be made, in the view of the Court, is that the duty to disclose placed on the proposer is to disclose material facts within his/her knowledge that the insurer does not know or is not deemed to know. The knowledge which the insurer is presumed to have or which it is deemed to have will turn on the ability of the insurer to discover or access that information without imposing on it an investigatory duty. Nevertheless, there is an expectation that an insurer will pose relevant questions which can assist it assess a risk. The questions posed must be sufficiently pointed as to be able to attract answers that can help the insurer make an objective assessment of the risk it is about to assume. But it would be an unduly onerous task for the insurer to investigate each proposal before assuming a risk. That would not make business sense.

Misrepresentation, non-disclosure and fraud?

19. Central to the case of Cannon is that Erdemann and the Contractor induced it into issuing both the CAR Policy and Bond by concealing, misrepresenting or failing to disclose all material facts. That, infact, the inducement was fraudulent. Cannon makes fairly specific allegations that are set out in paragraph 4 of the defence. Worth of noting is that while the allegations set out in the defence are more detailed, they are consistent with the reasons given by Cannon for repudiating the contract in their letter of 14th May 2012 [P Exhibit 31].

20. In that letter Cannon accuses Erdermann of being aware that a landslide was inevitable yet it failed to make the disclosure. Cannon reiterates that the policy it issued was only to cover sudden and unforeseen losses and not those within the knowledge of the insured at inception of the cover. Cannon also argues that the cause of the landslide was a leak to the sewer line which was unresolved even at the inception of the cover on 25th October 2011 and which material information was not disclosed to it by Erdemann. In respect to the Bond, Cannon asserted that as the landslide was imminent it would affect the performance of the project. It was therefore just a matter of time before the performance of the project would be adversely affected.

21. Before turning to examine the validity of the assertions by Cannon, it has to be remembered that what is of critical concern to the Court is that where there has been misrepresentation, non-disclosure or fraudulent concealment then the same must be not only in respect to material facts but also facts which Cannon did not know and was not deemed to know. For that reason the Court will at an opportune point return to the theme of materiality.

22. Before the inception of the Contract, Erdemann and the Contractor were asked to fill a questionnaire and a proposal form (P Exhibit 4). Erdemann was the principal while Rosolo was the named Contractor. Although it is an employee of Rosolo who filled the proposal, Erdemann took responsibility for the answers given (in this regard see the evidence of PW2). In clause 12 of the form questions were posed on the subsoil conditions. To this question the proposer stated the conditions to be rock and gravel with no geological faults existing in the vicinity.

23. Is there evidence that this was a false statement? This Court is asked by Cannon to find evidence that the soil was filled ground or clay in two reports prepared by investigators who were commissioned by them. These are reports by Invespot and Rapid Investigations Services. What is troubling however is that whilst these Reports were produced as part of the bundle of documents by the Defendant, the makers were not called to testify on them. They were not tested and their probative value was therefore watered down. It was the onus of Cannon to prove this aspect of its case. I hold that it did not do enough and I am unable to fault Erdermann as to the accuracy of the answers given on the subsoil conditions.

24. The second aspect is related to a Stop order issued by the Water Resources Management Authority (WRMA) on 20th July 2011. WRMA is a statutory authority set up under the Water Act. Hellen Opondo Sawe (PW1), an officer in WRMA, explained that one of the mandates of WRMA is the conservation of riparian reserves. Nairobi Dam and Ngong River are amongst water bodies whose riparian conservation would be a concern to WRMA.

25. By an order of 20th July 2011 (D Exhibit page 341) WRMA required Erdemann to 'stop further excavation of the property' until the riparians to the Nairobi Dam and the Ngong River were pegged. In a letter of 25th July 2011 (D Exhibit 339-340) that followed the stop order, WRMA explains its action as follows:-

> "*….the stop order had been issued as you were not observing the right distance of the riparian area for the Nairobi Dam to the western part of the plot and the Ngong River to the southern part of the plot*".

26. Erdemann was asked to take the following remedial action:-

> 1. Riparian area of the Nairobi Dam be measured at 22 meters from the highest water mark (WRMA Officers to measure, mark and show you the beacon immediately).
>
> 2. Riparian area for the Ngong River on the southern end of the plot measured at 15m from the highest water mark. (WRMA

Officers to measure, mark and show you the beacons).

3. The damaged part of the dam embankment by you be restored to its original state immediately.

4. The above mentioned development be monitored from this office regularly to ensure compliance with above conditions.

PW1 says that on a site visit sometime in 2015, she was able to observe that the conditions had been observed. The time of visit being 2015 is something to be noted and to which I shall return.

27. The evidence of Mr. Yang (PW2), a director of Erdemann, is that they complied with the order and the riparian area was pegged. That the construction was not on the riparian land. Francis Ndegwa Mwangi (PW4) is a Civil Engineer. He was a consultant Engineer in the project undertaken by Erdemann. He trades under the name Harico Engineering Solutions. He said this of the excavation:-

"*my advise was that excavation was to be far from the dam. The dam was pegged. We started 6m from the plot boundaries….WRMA had stopped work as they had to peg up to the limit. We had not excavated beyond the plot boundaries*".

28. The firm of Architects to the project were Scope Design systems. Mr. Peter Kuria (PW6) of the said firm gave an account in support of PW4. His testimony was,

"*There was no excavation of dam wall. We built 6 m away from the boundary*".

29. That is the evidence that needs to be contrasted with that of Mr. Nick Evans (DW1) who gave evidence for Cannon. In a Report dated 17th March 2015, Mr. Evans gives the following highlights:-

(a) The project was not situated 30 meters from Nairobi dam and that Erdemann in fact excavated part of the dam wall.

(b) The excavation of the dam weakened the dam wall.

(c) The proximate cause of failure was excavation of the dam structure without taking precautions to maintain its stability which made it vulnerable to heavy but not extreme rainfall exacerbated by a leaking sewer.

The report was based on a site visit of 14th December 2011, about 32 days after the landslide.

30. Mr. Evans was cross-examined at length about his evidence. He stood his ground. On being shown a photograph of the site he reacted,

"*The part of the Dam that was not damaged had grass on it. There is a face of soil below the grass. The Contractor had excavated below the line of grass ie. in the dam wall. The grass is not in the area of excavation*".

31. From the competing versions, the Court makes the following observations. Notwithstanding that they were experts employed by Erdermann, the project which started in July 2011 began on the wrong footing. While the experts (PW4 and PW6) would have been expected to respect the riparian reserve to the Nairobi Dam and Ngong River, the Stop order by WRMA was an impeachment to how the project had been commenced. Erdemann has not disputed the veracity of the stop order of 20th July 2011. The letter itself was categorical that Erdemann had breached the riparian area of Nairobi dam and Ngong River. This, the Court finds as a fact.

32. While Erdemann and its witnesses state that they took remedial action, no evidence is produced that remedial action had been taken by the time of the disastrous landslide. In a bid to support its proposition that the breach on the riparian had been reversed, Erdemann produced a letter from WRMA of 17th April 2015 (P Exhibit 2). Yet the value of this letter is somewhat diminished because it was based on a site visit of 13th and 14th April 2015. This was more than 3 years after the landslide. There is no evidence from WRMA or other independent source that as of the date of landslide being 1st November 2011, Erdemman had complied with the conditions of its letter of 25th July 2011.

33. In the absence of sound evidence that Erdemann, who had disrespected the riparian reserve at the inception of the project, had taken remedial action, the evidence by Mr. Evans that the excavation was within the riparian reserve of the Dam takes on some credibility. This Court shall return to this.

34. Finally, Cannon contends that Erdemann failed to disclose that there was a leaking sewer line between the crest of the Dam and the site which leak continued until the time of collapse of the wall on 1st November 2011. The existence of the leaking sewer at the time of the landslide does not seem too controversial. This is notwithstanding the following evidence of Engineer Francis Mwangi (PW4), in his written statement of 24th September, 2014 (which was adopted as his evidence in chief);-

"*5. The landslide was caused by heavy rainfall which caused leakage to a sewer line constructed inside the dam.*

6. The leakage started a week before the landslide. When it started the contractor informed the Nairobi City Council and they came and did some repair and the leakage stopped.

7. After the repairs were carried out, there was no leakage and so we were satisfied that the work was done properly".

This is because in his own letter of 3rd April, 2012 the witness unequivocally stated:-

> "*From the above explanation it is clear that the leakage from the sewer line caused landslide*".

There is admission by the witness of Erdemann that there was a leakage of the sewer at the time of the landslide.

35. And it has to be said that the contractor (an agent of Erdemann) was aware that the leakage had not been resolved by the Council as alleged by PW4) (see the statement of Mr. Owino of Rasolo appearing on the report of Rapid (D Exhibit page 318) in which he says:-

> "*The sewerline was unblocked on the second week of October but the leakage did not stop. We were instructed by NW&S co. ltd to keep a watch for one week and then do a follow up if it persists*
>
> ……
>
> *The problem was not solved since the NW&S co. Ltd said it was a leakage from the joints of the pipes*".

36. While Erdemann concedes the existence of the sewer line in the adjacent plot, its Counsel poses this query, *"a question for this Court to determine is whether the existence of the sewer line in the adjacent plot was a material fact in the circumstances"*.

This is an invitation to the Court to discuss the materiality test to which I now turn.

The materiality Test.

37. Counsel for both sides have proposed that this Court adopts the test of materiality set out by Lord Mustil in Pan Atlantic Insurance co. vs. Pine Top Insurance co. Limited[1994] 3 ALL ER 501 as follows:-

> "Every fact and circumstance, which can possibly influence the mind of a prudent intelligent insurer determining whether he will underwrite the policy at all, or at what premium he will underwrite it, is material…the question of materiality of a representation is not whether the fact stated actually did or possibly could affect the risk but whether it would naturally end to influence the insurer, in his estimate of risk".

This Court is happy to adopt the test as formulated above.

38. Under clause 11 of the proposal, the proposer is required to disclose all special risks. On these Erdermann, ticks off fire/explosion, flood/inundation, landslide/storm/cyclone, blasting. The form provides space for disclosure of "other" risk. On this the proposer leaves a blank.

39. So, was the existence of the sewer on the adjacent land a material fact in the circumstances of this case? Useful answers are provided by the Plaintiff's own Structural Engineer in his letter of 3rd April 2012 (D Exhibit 299). Because of its significance to this matter, it is reproduced in full:-

> The Managing Director
>
> Cunnigham Lindsey
>
> ACK Garden House, 6th Floor
>
> P.O. Box 56973-00200
>
> NAIROBI
>
> Attn: G.M Gatoi
>
> Dear Sir
>
> RE: PROPOSED SEEFAR APARTMENT AT KIBERA HIGHRISE ON PLOT LR NO. 209/12108, NAIROBI
>
> SUBJECT: NAIROBI DAM LAND SLIDE AT KIBERA –MAIN CAUSE OF THE LAND SLIDE.
>
> This letter refers to the matter.
>
> The main cause of this land slide was sewer line that was leaking in the neighbouring plot that was put inside an earth dam which retains the Nairobi Water dam water reservoir. The sewer line had been leaking for quite sometime and the Nairobi Water and Sewerage Company was informed so as to repair the breakage and unblock the sewer line. They came and did some repair which we

believe were not adequate. When short rains started, water from the storm was also leaking into the sewerline and the line could have been overloaded and started leaking again but by the time they arrived the land slide had already started.

The landslide took up to three weeks to cover the whole of our substructure. A slip line could clearly be seen which actually was along the sewerline.

From the above explanation it is clear that the leak from the sewerline caused landslide.

Professionalism

All professional measures were taken during our excavation of the foundations which was done six months before. All approvals were done by the relevant authorities and the actual excavations were done within the marked area which was done by both NEMA and WARMA. All measures had been taken to ensure professional construction was done.

Floods

While the actual cause of land slide was not the floods, we had taken all necessary considerations of the flood cycle of 50 years design period.

Under the period considered no flood had occurred which was beyond the capacity of the designed spillway.

Dam capillarity

Water pipes, sewerline, plant roots, mole tunnels can all cause earth dams to fail. This is due to introduction of capillarity in the earthdam which can eventually cause the dam to fail. This is a perfect case of what happened in this dam failure. The sewerline pipe should not have been constructed in the dam in the first place.

CONCLUSION

As the dam is being repaired it should be taken into consideration that no pipes should be introduce later.

Yours faithfully

Signed

Eng. Francis Mwangi" (*my emphasis)*

40. From that letter the Engineer attributes the main cause of the landslide to a sewer line on the neighbouring plot. Secondly, the sewer was inside the earth dam which retains the Nairobi dam. Thirdly, the sewer line had been leaking for sometime. Again from the letter he makes this important professional opinion:-

> "*Water pipes, sewerline, plant roots, mole tunnels can all cause earth dams to fail. This is due to introduction of capillarity in the earthdam which can eventually cause the dam to fail. This is a perfect case of what happened in this dam failure. The sewerline pipe should not have been constructed in the dam in the first place".*

41. Now from other evidence available, the Contractor (employed by Erdemann) was aware of the leakage from the sewer line embedded inside the dam. This leakage was noticed by Erdemann's Contractor from the 1st week of October (see the statement of Michael Owino a Director of Rosolo in the report of Rapid) and persisted even at the date when the proposal form was filled. The leakage was on an adjacent land. From the evidence of Erdemann's own expert the very existence of a sewer line in a Dam could cause Dam failure. The fact that the sewer line was leaking made the risk even the higher. Perhaps this is the reason why the Contractor had sought the intervention of City Council in repairing the line!

42. There is however an argument by Erdemann that it answered the questions posed in the proposal form as truthfully as it could and if more was expected by the insurer then the insurer ought to have asked more questions and visited the site. This Court does not agree with this proposition because the danger posed by the leaking sewer was apparent or ought to have been apparent to Erdemann, its Contractors and Consultants. The proposal form required the proposers to disclose any other risk other than those specified in the form. Erdemann was duty bound to disclose the risk posed by the leaking sewer as it heightened the potential for a landslide. The proposal form was probing enough and gave opportunity for this disclosure. I am unable to fault Cannon.

Of inducement?

43. The evidence of Cannon's witness was that,

> "*A sewer leak is a material factor that could threaten the site. We expect that a client would disclose this in the questionnaire …..insured obliged to disclose sewer line....under Special risks item 11 – on "other".*

In the written statement of Benjamin Gitau dated 25th March 2013, which was adopted by DW2, he makes the point that had he known a certain set of facts, which included the leaking sewer, he would not have issued either the CAR Policy or the Performance Bond.

44. This Court reaches a decision that there was material non-disclosure that induced the insurer to enter into the contract. Secondly that it is unlikely that any prudent insurer would enter into the contract on the same terms if the insurer would have known that there was a real risk of a landslide from the adjacent dam because a leaking sewer line was embedded in the wall of the Dam. This Court is satisfied that the twin tests of inducement set out in the Pan Atlantic case (*supra*) have been met. There it was said;-

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

45. It turns out that the opinion by the Plaintiffs own experts is that the primary cause of the landslide was the leaking sewer line exacerbated by heavy rainfall as the secondary cause. Whether that be true or that the leaking sewer line was the secondary contributor, the leaking sewer line was a less than significant cause for the landslide. This Court makes this finding even without considering the case for Cannon that the proximate cause was the excavation within the riparian which made the dam vulnerable to the heavy rain and a leaking sewer.

46. For the reasons given, I have to find that Cannon has made out a case that it is entitled to repudiate both the insurance policy and bond. The Court is however obliged to explain why it reaches the decision that Cannon was within its right to avoid even the Bond.

47. The Performance Bond of 28th October 2011 was a promise by Cannon to pay to Erdemann the sum of Kshs. 28,000,000/- in respect to the contract in the event of default by the Contrator. The evidence is that following the landslide the contractor was engaged by Erdemann to carry out emergency repair works and clearing of debris.

48. The Architect of Erdemann, Mr. Kuria (PW6) advised the employer to issue the Notice terminating the contract of the Contractor after the Contractor had failed to rectify its breach. Erdemann issued the Notice of termination on 6th March 2012. On why the Contractor had defaulted, the Architect gave the following evidence,

> "*The insured Contractor from (sic) the sites as he could not cope after mudslide……..we wrote to client to take action as contractor could not rectify what he was to do".*

Emerging from the evidence is that the default on the part of the Contractor was caused by challenges resulting from the landslide.

49. However, Counsel for Erdemann submits that Cannon is liable because all it needed to show was that the Contractor had breached its obligation under the Construction contract and that it was sufficient that the project Architect had certified default.

50. This argument must be weighed against the reasons given by the Insurer for refusing to honour the claim. In the letter of 14th May 2012 Cannon explains that it would not meet the Performance bond as Erdemann had prior knowledge that the landslide was imminent and this would affect the performance of the project. The insurer goes on to state,

> "*It is therefore in bad faith that you approached us for securing in form of a Performance bond for a project which you knew would be affected by a landslide and it was just a matter of time".*

51. In paragraph 9 of the Plaint, the Plaintiff avers that it paid Kshs.703,150/= on consideration for the Performance bond issued to itself by Cannon. PW2 confirms that it was Erdemann that introduced the Contractor to the insurer and that,

> "*The Performance bond was linked to Contractor's performance. The two, policy and bond were interlinked*".

52. The finding of this Court is that the Plaintiff was aware or ought to have been aware of the danger posed by the leaking sewer at the time of the CAR Policy and Performance Bond were issued yet this material fact was not brought to the attention of the insurer. The looming danger turned out to be a true nightmare when the Dam collapsed due to the landslide. The Contractor was unable to cope with the destruction that was caused to the project by the landslide and fell into default. There is therefore a connection between non-performance by the Contractor and the landslide. If the leak to the sewer was an acknowledged danger and the danger it posed was foreseen or ought to have been foreseen, then it would be unjust to ask the insurer to pay up on the terms of the bond upon the default happening. A default which could be foreseen or ought to have been foreseeable. It is for this reason that the Court finds that the insurer is justified to avoid both the Insurance policy and the Performance bond.

Of late payment of premium?

53. I turn to another aspect of the case. As part of its defence, Cannon asserts that there was no policy of insurance because premium had not been paid by the time the loss was suffered. It is common ground that the loss occurred on 1st November 2011 but payment of the premium for both the policy and the bond was duly made on 3rd November 2011. In advancing its argument Cannon relies on section 156 of The Insurance Act and terms of the CAR Policy.

54. On the other hand, Erdemann contends that in the communication of 14th May 2012 in which Cannon purported to cancel both Contracts,

the issue of non-payment of premium was never raised. This is indeed true. Erdemann argues that the issue of non-payment of premium is therefore an afterthought to give further credence to Cannon's attempt to avoid the Contract.

55. In his closing submissions, defence Counsel read the arguments raised by Erdemann as setting up a plea of waiver and/or for estoppel. Counsel then engaged in a discussion of the two doctrines. This in my view was needless because neither of the two pleas would be available to Erdemann. The doctrine of waiver and/or estoppel needed to be specially pleaded or otherwise revealed in pleadings (see Diamond Trust Bank Kenya ltd vs. Said Hamad Shamisi & 2 others [2015] eKLR) where the Court of Appeal stated,

> "*The more compelling reason why estoppel was not applicable in this case is that it must be specially pleaded*".

In the matter before Court neither waiver nor estoppel was pleaded. In answering the issue of non-payment of premium, Erdemann simply pleads as follows in the Reply to defence and counterclaim dated 8th April 2013:-

> "6) Paragraphs 7 and 8 of the Defence and Counterclaim are denied and the Defendant put to strict proof thereof.
>
> 10) Paragraph 13 of the Defence and Counterclaim is denied and the Plaintiff avers that is entitled to rely on the CAR Policy and bond for which valuable consideration was paid to the Defendant and accepted".

In addition the two issues are neither embraced as issues for determination either in the statement of agreed issues or in the course of hearing.

56. This Court proceeds on the premise that Cannon was entitled to take up the defence on non-payment of premium. Cannon relies, inter alia on Section 156(1) of the Act which reads:-

> "(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.

57. Both Counsel for Erdemann and Cannon Assurance ask this Court to approach the issue of non-payment of premium from the proposition set out in Nizar Virani t/a Kisumu Beach Resort vs. Phoenix of East Africa Insurance Company Limited [2004] eKLR and Insurance Company of East Africa vs. Marwa Distributors Limited [2015] eKLR. I agree that the law in this area is well set out in these two decisions and which I recently applied in Liki River Farm Limited vs. Tausi Assurance Co. Ltd [2018] eKLR. This Court observed,

> "In Nizar Virani t/a Kisumu Beach Resort vs. Phoenix of East African Assurance Company Ltd [2009] eKLR, the Court of Appeal endorsed the following passage from MacGillivray & Parkington on Insurance Law;
>
> "*As stated in MacGillivray & Parkington on Insurance Law, 7th Edition at paragraph 851:*
>
> "*Where the risk is not described as running from any specified date, the presumption is that it runs from the date of the policy. The risk may begin to run either before or after the policy is issued. It may run from the date of acceptance of the offer or from the payment of the first premium or from the execution or delivery of the policy. The date when a risk attaches is in each case a matter of construction of the terms of the preliminary agreement or of the policy when executed. There is no principle of law which compels a company to assume a risk as from the date of acceptance or from any other particular date."*
>
> *and on payment of premium at paragraph 861:*
>
> "*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*."

10. The effect of the proposition was clarified by Majanja J. in Insurance Company of East Africa vs. Marwa Distributors Limited [2015] eKLR in which he stated,

> "*In my understanding, the case does not set out a hard and fast rule that failure to pay premium does not invalidate the policy but underpins the general contract principle that parties are bound by the their obligations recorded in the agreement. It means that if the parties do not make provision for the effect of non-payment of the premium, the court will not necessarily imply that the policy is invalid. The effect of non-payment of premium on the policy depends on the intention of the parties expressed in the contract".*

I agree with the observation made by the learned Judge. The true effect of non-payment of premium will therefore have to turn on the terms of the Insurance Contract and the language used".

58. The starting point therefore must be the Insurance Contract itself. Attached to the policy is the following premium payment warranty:-

> "Pursuant to deletion of section 156 subsection (2) of The Insurance Act cap 487, premium is required to be paid on or before the inception/renewal date of the policy. Please note that the company shall only assume risk upon receipt of the full premium. Subject otherwise to the terms and conditions of the Policy". (*my emphasis*)

This warranty clause, as self-declared, is intended to bring the policy in conformity with section 156 of The Insurance Act.

59. The terms of the clause brook no ambiguity. Premium ought to be paid on or before the inception of the policy. And as a way of clarifying the implication of non-payment, the warranty clearly spells out that the insurer shall only assume risk upon receipt of full premium.

60. The evidence is that, although Erdemann had sought to pay the insurance premium through two cheques of Kshs.870,843/= and 900,000/= both of 28.10.2011, the cheques were returned unpaid. For that reason payment was made by RTGS on 3rd November 2011 (D Exhibit page 707). The risk sought to be covered having happened on 1st November 2011, the premium paid about two days later could not enjoin the insured to assume the risk. That is the nature of the contract freely entered by the two parties. This Court cannot re-write it.

61. This Court has made a finding that Cannon is not liable under the CAR Policy or performance bond. However the law requires this Court to state damages, if any, it would have awarded to Erdemann had it proved liability. Easily, the compensation under the Performance contract would be Kshs.28 million as explicitly provided for thereunder. Regarding the other damages, Sutinder Jabbal (PW4), a Quantity Surveyor assessed the costs for restoring the damaged site at Kshs.93,214,937.30. This is the amount claimed in the Plaint. The assessment by the witness was not impeached and I would have made an award for the sum.

62. The outcome is that the Plaintiff's entire claim is dismissed with costs. Judgment is entered in favour of the Defendant as prayed for in the counterclaim of 26th March 2013. However, there shall be no order for costs on the counterclaim as the effort expended in resisting the Plaintiff's claim was all that was needed for the counterclaim to succeed.

Dated, Signed and Delivered in Court at Nairobi this 8th day of February, 2019.

F. TUIYOTT

JUDGE

PRESENT;

Mureithi for Mucheru for Plaintiff

Odago for Mutea for Respondent

Nixon- Court Assistant