



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI COMMERCIAL COURTS**

**COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO. 331 OF 2002**

**JOHN MULWA KANG'AATU.....PLAINTIFF**

**Versus**

**PAN AFRICAN INSURANCE CO. LTD.....DEFENDANT**

**JUDGEMENT**

1. The Plaintiff's Claim is premised on an alleged breach of a Contract of an Insurance and is brought against Pan African Insurance Company Limited (hereinafter the Defendant or Insurance).
2. It is common ground that John Mulwa Kangaatu (hereinafter the Plaintiff or Insured) was at all material times the owner of Motor Registration KAK 064X. And that, vide a Contract of Insurance of 23<sup>rd</sup> December 1998, the said vehicle was comprehensively insured. Under the terms of the Contract, the Insurance was against any loss arising out of the said Policy or other loss related and incidental to the Policy.
3. Arising out of the use of that Motor Vehicle an accident occurred on 24<sup>th</sup> December 1998 involving the said Motor Vehicle and Motor Vehicle Registration No. KAJ 411Q along Kakima Machakos Road at Kali Market. As a result of the said accident, there arose various claims against the Insured one of which was by Josphat Nzioki Manthi who filed Civil Suit No. 235 of 1999 at Kangundo (hereafter the Kangundo suit).
4. It is the Insured's grievance that the said claim was determined against him because the Defendant delayed and/or refused to settle it, this being a blatant breach of the Policy. Following the issuance of a Decree, another Motor Vehicle Registration KAJ 953P belonging to the Insured was attached. The Plaintiff asserts that he notified the Insurer about the attachment whereupon the Insurer asked him to apply for Stay of Execution.
5. The Plaintiff complains that notwithstanding having obtained a Stay Order, the Advocates appointed by the Insurer failed to attend Court with the consequence that the Stay Order lapsed. As a result, the Plaintiff's Motor Vehicle KAJ 953P was sold in a Public Auction. The Plaintiff blames the attachment and subsequent sale on the negligence on the part of the Insurer.
6. In addition the Insured alleges breach of contract on the part of the Insurer and makes out the following particulars:-
  - a) Failure to sufficiently defend the Plaintiff in the Resident Magistrates Suit No.235 of 1999 as provided in the policy, or at all.
  - b) Failure to attend Court in Civil Suit No.235 of 1999 at Kangundo or send representatives to attend to the Civil suit.
  - c) Failure to appoint a competent representative for the Plaintiff as required by the Commercial Vehicle Policy.
  - d) Failure and/or omission to inform the Plaintiff of the progress of the suit /Application thereby causing the loss.
  - e) Failure to indemnify the Plaintiff in good time or at all in order to avoid the loss of his motor vehicle and resultant losses.
7. The loss that the Plaintiff is said to have suffered is under two limbs. First the Plaintiff seeks the replacement value of the auctioned

Motor vehicle which has been put at Ksh.1,069,856. The other Claim is loss of use of the said Motor Vehicle for the period of the policy and which has been worked out at Kshs.4,284,000. In the re-amended further amended Plaint dated 17<sup>th</sup> July, 2015 the Plaintiff seeks judgement for the total sum of Khs. 5,353,836 and interest thereon at commercial rates. As is proverbial, the costs of the suit are requested.

8. Although the Plaintiff's claim had gone through numerous amendments the Insurer elected to defend the matter on the basis of the Statement of Defence dated 16<sup>th</sup> April, 2002 and filed on 19<sup>th</sup> April, 2002.

9. It is asserted on behalf of the Defendant that the Contract of Insurance was subject to terms, conditions and obligations that the Insured was obliged to comply. The Defendant seeks to be exonerated on the ground that the Insured is guilty of breach of some policy conditions which are set out in paragraph 3 of the Defence as follows:-

- a. Engaging in acts and omissions detrimental to the insurance contract.
- b. Failing to notify the Defendant of the filing of the suit in the subordinate Court.
- c. Failing to notify the Defendant of the suit instituted immediately upon being served with summons.
- d. Failing to allow the Defendant to choose Counsel to represent him in Court in the case suit is instituted.
- e. Failing to co-operate or co-operate fully with the Defendant or the Defendant's duly appointed agents and disclose all facts relating to any suit instituted thereof.
- f. Concealment of material facts.

10. In addition the Defendant denies knowledge of the accident which is alleged to have involved Motor Vehicle KAK 064X and the institution of the Kangundo suit. The Insurer states that the suit was never brought to its attention as per the Policy terms and conditions and neither was it served with a Statutory Notice.

11. As well as denying the loss and damage pleaded by the Plaintiff, it is stated that the loss and damage is excessive and exaggerated. That at any rate the Insured is accused of failing to take any steps to mitigate this loss. Moreover, it is the Defendant's case that it is not liable to the Plaintiff's claim.

12. As the Plaintiff was ailing, the parties herein by a consent of 1<sup>st</sup> November 2016, agreed that the Plaintiff's evidence shall be taken by an appointed Commission at his home. The Consent appointed the Deputy Registrar of the High Court at Machakos as the Commissioner. The appointment of Commission would be under the Provisions of Order 28 Rule 1 which reads,

“Any court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the limits of its jurisdiction who is exempted under the Act from attending the court or who is from sickness or infirmity unable to attend it.”

13. The Court record shows that Hon. L. Kaitany, Deputy Registrar, took the evidence of the Plaintiff at his home in Mbooni Location Makueni County on 12<sup>th</sup> February 2017. That evidence and the evidence of one Daniel Musau Muya (PW.2) constituted the evidence of the Plaintiff. The Defendant did not call any evidence. The evidence received by Court shall be discussed in detail in so far as it is relevant in the course of this Decision.

14. Even before setting out the issues for determination and discussing the evidence on record, it is important to disabuse any notion that the Plaintiff is relieved of the burden of proving his case simply because the Defence failed to adduce any evidence. It had been submitted on behalf of the Plaintiff that the evidence it adduced was not rebutted by any evidence to the contrary from the Defence and that its case automatically stood unchallenged. Section 107 of the Evidence Act provides for the burden of proof in the following terms:-

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”.

This has been described as the legal burden which the Court of Appeal discussed in Mbuthia Macharia v. Annah Mutua Ndwiga & another [2017] eKLR, as follows:-

“[15] Just like the learned trial Judge, we are not persuaded the appellant was able to prove the allegations of fraud regarding the transfer of suit premises to the 1st respondent. The Judge alluded to the provisions of **section 107** of the **Evidence Act**, which deals with the burden of proof in any case and aptly stated that it lies with the party who desires any court to give judgment as to any legal right or liability, is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden and we need not repeat, save to emphasize the same principle of law is amplified by the learned authors of the leading Text Book;- **The Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 17, at paras 13 and 14:** describes it thus:

“**The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts**

**and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.**

[16] The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence. In this case, the incidence of both the legal and evidential burden was with the appellant. It was upon the appellant to prove that he did not affix his signature on the transfer of the suit premises in favour of the 1st respondent. The appellant did not adduce any such evidence nor did he call any witness. On the other hand, the 1st respondent discharged her evidential burden by placing before court an affidavit by the appellant in which he had sworn on 24th April, 2004; that he bequeathed to the 1<sup>st</sup> respondent the suit premises and a transfer dated 3rd September 2008 in favour of the 1st respondent which displaced his claim that the 1st respondent had stolen the title as the said transfer was effected after a new title was issued".

15. Whether or not the Defendant adduced any evidence, the Plaintiff nevertheless had a legal burden to prove all the essentials that would enable this Court pass Judgement in his favour. It is for this reason that even cases that proceed on Formal proof and on the evidence only by the Plaintiff may fail.

16. Whilst the Parties proposed separate issues for determination, some overlapped. Considering the Pleadings and the evidence alongside these proposals, I set out the issues which this Court shall determine to be also as follows:-

- (i) Who between the Plaintiff and the Defendant was in breach of the Policy of Insurance?
- (ii) If it is the Defendant, then what loss did the Plaintiff suffer?
- (iii) As a corollary to issue to the above, has the Plaintiff proved the damages sought?
- (iv) What is the appropriate Order as to costs?

17. Both sides thought that one issue that needed to be determined is the objection to the production of certain documents taken up by the Defence in the course of taking of the evidence by the Commissioner. This is a house keeping matter that this Court will deal with at once.

18. During the hearing of the evidence of the Plaintiff, the Defence objected to the production of the following Documents:-

- (i) The Insurance Policy (page 54 of the Plaintiff's B Documents)
- (ii) Traffic proceedings (page 41 of The Plaintiff's Documents)
- (iii) Letter dated 19<sup>th</sup> October 2000, (Page 23 Bundle A of Plaintiff's Documents).
- (iv) Letter dated 31<sup>st</sup> October 2000 (Page 25 Bundle A of Plaintiff's Documents).
- (v) Invoice and receipt (page 34 Bundle B of the Plaintiff's Documents).

The Deputy Registrar dealt with the objections in the same way. She allowed the production of the Documents but noted the objections will be determined by the Trial Judge who would have the jurisdiction in that respect.

19. It would be expected that those objections would be raised before the Judge before the Plaintiff's case had closed. Since the Documents had been admitted subject to the objections, the party to move Court on the objections would be the Objector. In this case the Defendant. The Defendant did not take up the window before the close of the Plaintiff's case and raises them at submission stage. This Court takes a view that it is now too late to raise the objections. Production of Documents is a trial matter to be dealt with in the course of taking evidence. The objections, taken up at submissions, are late. The Court accepts the Documents as produced in evidence.

20. And perhaps I need to say this. This Division of High Court (The Commercial & Admiralty Division, Nairobi) has issued Practice Directions on Case Management for purposes of the expeditious disposal of cases of a Commercial nature. All suits commenced by Plaintiff or Originating Summons and proceeding to hearing in the Division are exempted from Order 11 of The Civil Procedure Rules 2010 (Direction no 1). In its stead the Practice Directions require the holding of a Case Management Conference in which inter alia the Court ascertains the filing of witness statements and Bundles of Documents to be relied on during trial. It is at the Conference that a party should raise any objection to the production of Documents. The rationale being that such objections should be determined before a case is certified ready for hearing so that hearing is seamless once it commences.

21. The Court Record shows that a Case Management Conference was held herein on 8<sup>th</sup> October 2015. But this time, all the Documents now sought to be impeached were part of Bundles filed by the Plaintiff. The Defence raised no objection to their production notwithstanding that they were referred to in the witness statement of the Plaintiff. The Record also shows that it was at that Conference that Hon. Kariuki J. certified this matter as ready for hearing. Although this Court has accepted the production of the Documents for other reasons, I take a view that a Court can properly reject an objection to production of a Document if the objection is not taken up during the Case Management Conference or if a party does not, at the Conference, indicate that it shall be so objecting at the hearing. This is because if no objection is taken or signaled, then a party will assume that no such objection will be taken up during the hearing and proceeds to prepare and prosecute

its case on that assumption.

22. Now, it is common ground that on or about the 23<sup>rd</sup> day of December 1998, the Plaintiff entered into a Contract of Insurance with the Defendant. This is expressly admitted by the Defendant (*see paragraph 3 of The Defence*).

23. Although the Plaintiff did not produce the actual Contract of Insurance, he referred to what he described as a sample of the Contract (P Bundle A pages 54-70). The Plaintiff sought to explain why he did not have the actual policy in cross-examination,

*“I have not produced such a Document in relation to KAK 064X. I have not produced the document showing the terms between me and the Defendant. They have it. We had an agreement with Pan African Insurance. It is with the Insurance”.*

24. Anyhow, because of certain concessions by both sides nothing turns on the non-production of the Policy. One such concession was the admission by the Defence to the following averment in Plaintiff’s Pleadings,

*“on or about 3<sup>rd</sup> November 1998 the Plaintiff entered into a Contract of Insurance with the Defendant (Commercial vehicle Policy) whereby the Defendant was to insure and indemnify the Plaintiff’s Motor Vehicle Registration Number KAK 064X comprehensively against any loss arising out of the said Policy or any other loss related to or incidental to the Policy”.*

25. Another concession is that the insured would have met the claim arising out of the subject accident were it not for the Defendant’s allegation that the Plaintiff was in breach of terms of the Policy in the following manner:-

- (i) Failure by the Plaintiff to inform the Defendant of service of all Summons served upon him and more specifically for Kangundo SRMCC 235 of 1999 from which the Claim arises.
- (ii) Undertaking or interfering with the Defence of the case contrary to the Policy conditions.
- (iii) Failing to co-operate fully with the Defendant’s duly appointed agents.
- (iv) Failing to exercise due care and attention when dealing with this matter exclusively and without the Defendant’s Consent either verbal or written.
- (v) Delaying the due process by failing to disclose all material facts or concealing the material facts contrary to the Insurance Policy.

These allegations were made in the Defence and some are repeated in the Defendant’s submissions.

26. The span of disagreement is therefore considerably reduced and one role of this Court is simply to interrogate whether the Plaintiff is in breach as alleged.

27. The evidence is that the Plaintiff first learnt of the existence of the Kangundo case when his Motor Vehicle was proclaimed on execution of a Decree arising therefrom. This evidence was neither shaken nor rebutted by the Defence. The Plaintiff cannot therefore be faulted for not forwarding Summons on time in respect to the case because he learnt of it when there was already Judgement, a Decree and Execution.

28. The Plaintiff’s further evidence is that he quickly brought this to the attention of the Defendant who in turn asked him to apply for Stay of Execution. And although he had in his evidence in chief, stated that he then prepared and filed some Court papers so as to forestall the consequences of further execution, he denied this under cross-examination. It would seem however that the Documents (Bundle B pages 15-22), if not prepared by the Plaintiff, were at least in his name.

29. The evidence is that by a Notice of appointment dated 18<sup>th</sup> October, 2000 and filed in Court on 25<sup>th</sup> October 2000, the firm of Mohammed Muigai Mboya Advocates came on record on behalf of the Plaintiff. That the said firm was coming on record for the Plaintiff on instructions of the Insurer would be confirmed by the contents of a Letter of 30<sup>th</sup> October, 2000 (P Bundle A page 25 and 26) in which the law firm writes to the Insurer as follows:-

Mrs. Alice Njoroge

Pan Africa Insurance Co. Ltd

Pan Africa House

Kenyatta Avenue

NAIROBI

Dear Madam,

RE: SRMCC NO. 235 OF 1999

We attended Court in Kangundo on 26.10.2000 to argue the application dated 10<sup>th</sup> October 2000 for stay of execution of judgement and for reinstatement of the application for setting aside of judgement dated 28<sup>th</sup> September 2000. The application was opposed, and the ruling is to be issued on 9<sup>th</sup> November 2000.

The temporary stay of execution was extended until the date of the ruling. However, your insured will be unable to get his attached vehicle from the auctioneers because there was no prayer to this effect in this application dated 10<sup>th</sup> October, 2000, in which we were not representing him and he appeared in person. It would appear that even if this application is successful, it does not of itself seek the setting aside of the judgement that led to the attachment of your insured's vehicle, but seeks a reinstatement of an application which must be heard and determined in his favour before your insured can obtain his vehicle.

We will keep you updated of any further progress herein.

Yours faithfully,

FOR: MOHAMMED MUIGAI MBOYA

Signed

SUZANNE MUTHAURA

30. The evidence suggests that the Insurer was happy to take up the conduct of the Kangundo case on behalf of the Plaintiff. No issue was raised in respect to delayed transmission of Summons or of other Court papers. The allegation now made is not founded.

31. Did the Plaintiff interfere with the Defence of the case? It would seem that the Insurer had raised a concern that the Plaintiff was interfering with the case. This is why Crossroads Global Insurance Brokers Ltd may have written to the Plaintiff advising him against doing so. The letter of 13<sup>th</sup> December 2000 (P Bundle A page 21) reads:-

“The Claims Manager

Pan Africa Insurance Co. Ltd

NAIROBI

Dear Madam,

Att: Mrs. Kamande

REF: CLAIM UNDER POLICY NO.010/809/1/007700/97/070 OF 24/12/98 KAK 064X SRMCC NO.235 OF 99

Further to our communication this morning we now enclose a letter from our insured which is self explanatory.

You have stipulated that our insured is interfering with this case and we are now informing you that by copy of this letter advising him to step aside until such a time that the defending lawyers are in a position to have the vehicle released to our insured from the auctioneers.

In the meantime kindly note our insured is continuing to suffer loss of use of this vehicle which might call for a counter claim from him.

Yours faithfully,

For: CROSSROADS GLOBAL INSURANCE BROKERS LTD

*Signed*

WINFRED W. GITONGA

MANAGING DIRECTOR

CC. John Kangaatu – Mohamed Mungai Mboya have complained that you are interfering with this case in Court and we are advising you to set aside forthwith until they are in a position to have the vehicle release to yourselves.” (emphasis add)

32. That said the letter of 31<sup>st</sup> October 2000 (*see paragraph 29above*) confirms that the Advocates of the Insurer are the ones who argued the application dated 10<sup>th</sup> October 2000 for Stay of Execution of the Judgement and for reinstatement of the application for setting aside the Judgement both of which had been filed in the name of the Plaintiff. While the Advocates identify certain weakness in the Application, they do not complain of interference on the part of the Plaintiff.

33. The Defence in the Kangundo matter may have been jinxed because the evidence available is that the application of 10<sup>th</sup> October 2000 was dismissed for want of attendance on the part of Counsel for the Insurer. In an affidavit filed by Anthony Burugu (*P Bundle B page 26 and 26*), who was holding brief for Mohammed Muigai Mboya Advocates, he explains that he failed to attend Court on time due to a Mechanical problem to a Vehicle in which he was travelling to Court.

34. All effort to stop the sale of the Plaintiff's Motor Vehicle failed and so it happened. This Court has not been shown any evidence by the Defendant that the failure of their advocates to stop the sale was attributed to any interference in the conduct of the Defence by the Plaintiff. Further there is no evidence that the Plaintiff did not cooperate with the said Advocates or failed to disclose any material facts to them or the Insurer. In a word this Court is unable to find any breach of Policy by the Plaintiff.

35. On the other hand, once unable to set aside the ex parte Judgement at Kangundo, the Policy obliged the Defendant to pay the Claim. But because they did not do so, the Plaintiff's Motor Vehicle KAJ 953P was sold in execution of the Decree. The Defendant is liable for the loss suffered by the Plaintiff.

36. In respect to Damages, the Plaintiff seeks a replacement value of the sold car at Khs.1,069,836/= and loss of user Khs.4,284,000/=. For the Damages, the Plaintiff called one Daniel Musau Muya (PW2) as a witness. He told Court that he is an Auditor by Profession and holds a CPA 2. It was his further evidence that he had practiced for more than 20 years and had kept Books of Accounts for the Plaintiff. He prepared a Report on the Plaintiff's Income (*P Bundle B page 36-84*). He also prepared Depreciation schedule for Motor Vehicle KAJ 953 P (*P Bundle B page 85*).

37. In submissions made to Court, the Defendant asked the Court to disregard the entire Report because there was doubt as to whether PW2 was indeed an Auditor. Secondly that the Document did not conform to the required Standards set out for Accounting Reporting referred to as the Accounting Principles for Report. Further that the Report failed the test of reliability, verifiability and objectivity. Lastly that it was not certified as a true and accurate reflection of the Accounts as required by The International Financial Reporting Standards (IFRS). Let me consider these challenges.

38. The witness told Court that he is a certified Public Accountant and holds a Practicing No.1558. He also showed to this Court a card as proof that he was the Audit Manager of the firm of Mwenge & Associates. When asked in cross-examination whether he was aware that Registration No.1558 belonged to another Accountant, he responded in the negative. In this regard, it is submitted by Counsel for the Defendant that a Search from the Institute of Certified Public Accountants of Kenya (ICPAK) reveals that the number belongs to one Muchira Joseph Muturi.

39. It must be observed however that the Search which the Defendant seek to rely on was not produced as an exhibit. Neither was Mr. Muturi called to testify. This Court is unable to find any credible challenge to the Professional credentials. The allegation that Registration number 1558 belongs to a person other than the Plaintiff is mere allegation.

40. PW2 informed Court that an Accountant's certificate is a stamp of reliability of information used in accounting. He conceded that this was not attached to his Report. Yet on page 37 of the Bundle he certified the Accounts to be true and correct. I take a view that whether or not the Report is credible does not depend on the Accountant's Certificate but on the contents therein. The Accountant's Certificate as I understand it is issued by the Accountant who prepares the Report and not an independent Accountant. I am not persuaded that the credibility of a Report is enhanced simply because it bears a Certificate of the Accountant who has prepared the Report and it may therefore be fallacious to think that just because an Accountant certifies his own work makes the contents therein more the credible and accurate.

41. On the issue of ownership of Motor Vehicle Reg.KAJ 953P, this really is not contentious as the Insurers' own Advocate in the Kagundo matter acknowledged that the effort in seeking the setting aside of the attachment was to save this vehicle which belonged to the Plaintiff herein. The Auditor cannot therefore be censured for proceeding on the basis that the Plaintiff was indeed the owner.

42. In this evidence PW2 told Court that he prepared the Report on the basis of Documents and information given to him by the Plaintiff in respect to the specific Vehicle. Some of the Primary documents used in the exercise, like the Receipts, were produced in evidence. While the Defendant's Counsel criticizes the credibility of the findings on income, there was no serious attempt in cross-examination to fault those findings other than income from 13<sup>th</sup> September, 2000 onwards.

43. 13<sup>th</sup> September 2000 was of some significance because it was on this day that the Vehicle was attached in execution of The Kangundo matter. It is logical to infer that the vehicle was not engaged in Public Service Transport Business on behalf of the Plaintiff as it was under attachment and in possession of the Auctioneer. The income purportedly earned by the Plaintiff for the period 13<sup>th</sup> September, 2000 to 30<sup>th</sup> September, 2000 is in all probability false and cooked up. That portion of the Report must be ignored.

44. In so far as the other parts of Report have not been faulted, the Court is willing to accept that in the year 2000 the net monthly income of the Plaintiff ranged from Ksh.212,210/-Khs.127,311/=. Taking an appropriate mean of the monthly income, this Court will take the monthly net income generated by the said Motor Vehicle as Kshs.150,000/-. The Court shall revisit this shortly.

45. On depreciation, PW2 applied an annual rate of depreciation at 25% and found the value of the vehicle as at 3<sup>rd</sup> September, 2000 to be Khs. 1,069,936/=. There was evidence that the vehicle itself (without the Body) was sold to the Plaintiff at Kshs.1,765,600/- (*Bundle B page 3-4*). In the Report itself, the Auditor gives the value of the Cabin, Chassis and Registration at Khs.1,840,000/=. This however is not consistent with the evidence of PW1. In addition there is no evidence of the value or cost of the Body which was put at Khs.320,000/=. The only value to work with is therefore Khs.1,765,000. Using this as the value of the vehicle in September 1997 when it was bought and applying a depreciation rate of 25% per annum, I find the value of the vehicle in September 2000 when it was attached to be Khs.744,609.00.

46. Although a valuation by a Professional Motor Vehicle Assessor would have, perhaps, been more credible, the Court is willing to accept the basis upon which the Auditor worked out depreciation because it yields a value which is not too far off the mark of the approximate value

of Kshs.500,000/- placed on the Vehicle by the Auctioneer who attached and eventually sold it.

47. Back to loss of user. On this, the Court is unable to understand the basis for the Plaintiff seeking loss of user of the Motor Vehicle for the period of the Policy. This vehicle was not the one that was under cover. There is no connection between the period of cover and the loss of user. It seems to me that a relevant period of loss could be the period within which it would take for a person exercising reasonable diligence (assuming that he has the means) to buy a replacement. Ordinarily that could be about 3 months. Yet I must bear in mind that the money to replace the vehicle was not made available to the Plaintiff and it has taken the filing of this suit to get some compensation. But on the other hand, the Plaintiff who was under an obligation to mitigate his loss never told Court of what efforts he made in that regard. Weighing one thing against the other I will grant loss of user for 6 months.

48. In the end, I enter Judgement in favour of the Plaintiff against the Defendant for Kshs.1,644,609 (Kshs.900,000 + Kshs.744,609) with interest thereon at Court rates from the date of filing of suit plus costs.

**Dated, Signed and Delivered in Court at Nairobi this 6<sup>th</sup> day of July, 2018.**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Mapesa h/b Ndolo for Plaintiff

Mcasila for Defendant

Nixon - Court Assistant